

# THE GLOBAL ILLICIT TRADE IN TOBACCO: A THREAT TO NATIONAL SECURITY



**“Criminal networks are not only expanding their operations, but they are also diversifying their activities, resulting in a convergence of transnational threats that has evolved to become more complex, volatile, and destabilizing.”**

*— President Barack Obama, Strategy to Combat Transnational Organized Crime*



# **THE GLOBAL ILLICIT TRADE IN TOBACCO: A THREAT TO NATIONAL SECURITY**



# TRAFFICKING IN ILLICIT TOBACCO PRODUCTS IS A GROWING THREAT TO NATIONAL SECURITY

## Cigarette Smuggling:

- Is a low-risk, high-reward criminal activity; traffickers can make millions, with little risk of detection or harsh punishments
- Allows traffickers and their networks to circumvent borders; proceeds can be used to finance insecurity and instability
- Enables corruption and undermines good governance
- Is a lucrative crime for some terrorist groups and a potential revenue source to finance acts of terror
- Facilitates other crimes and provides funding for additional criminal activities, including money laundering, bulk cash smuggling, and the trafficking in humans, weapons, drugs, antiquities, diamonds, and counterfeit goods
- Expands black markets and encourages a convergence between organized crime, terrorist groups, and other threat networks
- Can be transnational, with proceeds earned domestically and sent overseas to finance attacks against U.S. interests, or earned domestically by foreign actors who can operate more easily from within the country
- Deprives governments of tax revenues, causing approximately \$3 to \$7 billion in tax losses annually to individual states and localities<sup>1</sup>
- Undermines government health policy objectives by increasing the use of tobacco products and depriving funds for anti-smoking campaigns and healthcare costs
- Impacts health; may introduce products to consumers that do not meet the health regulations of the destination country, including some with ingredients not fit for human consumption.



## WHY COMBATING CIGARETTE SMUGGLING MATTERS

Like other forms of illicit trade, the illicit trade in tobacco products, commonly referred to as cigarette smuggling, is a growing threat to U.S. national interests. Internationally, it fuels transnational crime, corruption, and terrorism. As it converges with other criminal activities it undermines the rule of law and the licit market economy, and creates greater insecurity and instability in many of today's security "hot spots" around the world. Illicit tobacco provides a significant revenue stream to illicit actors without the high risks and punishments associated with trafficking in narcotics or humans.

**The illicit trade in tobacco products remains a lucrative revenue stream for many criminal actors and illicit networks. It deprives governments of billions in tax revenues while funding illicit activity. The trade is often both domestic and international in scope, requiring cooperation between local, state, federal, and international entities to combat it.**

This guide provides practical information on the illicit trade in tobacco and how the United States Government combats this through law enforcement, diplomatic efforts, and other initiatives.

### What Is Illicit Tobacco?

**Illicit tobacco is the trade in tobacco products that are illegally manufactured, distributed, or sold.** As defined by the U.S. Family Smoking Prevention and Tobacco Control Act, the term "illicit trade" means "any practice or conduct prohibited by law which relates to production, shipment, receipt, possession, distribution, sale, or purchase of tobacco products including any practice or conduct intended to facilitate such activity."

Some tobacco products are never legal in the U.S. market, including illegally manufactured and smuggled tobacco. Other tobacco products are diverted from the supply chain in the legal market to the black market before all the appropriate Federal, state, and local excise taxes and fees are collected.



**Cigarette smuggling, trafficking in contraband cigarettes, and tobacco diversion are common names for this type of illicit trade.**

Illicit actors deal in several types of tobacco, such as contraband cigarettes, counterfeit products, illicit or cheap whites, gray market cigarettes, and loose tobacco. While all types of tobacco products can be trafficked, cigarettes are the most common tobacco product found on domestic and international black markets.

## **OPERATION BLACK POSEIDON (INTERPOL)**

***Operation Black Poseidon*** targeted the illicit tobacco trade in Eastern Europe and led to the discovery of a complete covert cigarette production factory in Sumy, Ukraine which was hidden in an underground complex. The manufacturing capacity of the production line is estimated to be between 100,000-125,000 individual packs of cigarettes per day. Seizures included machinery used for manufacturing, 30 tons of cut tobacco, 350,000 of ready-to-sell individual cigarettes packs with an estimated value of USD 560,000, 1.5 million counterfeit excise stamps, and vehicles.

Source: INTERPOL

## Common Forms of Illicit Tobacco

**Contraband:** Under U.S. criminal law, refers to large quantities of cigarettes that do not bear required state or local tax stamps.

**Counterfeit:** Under U.S. criminal and health laws, refers to tobacco products with unauthorized trademarks or trade names.

**Cheap Whites:** Also known as “illicit whites,” these are cigarettes legally produced in one jurisdiction for the sole purpose of being exported and illegally sold in a jurisdiction where they have no legitimate market. These cigarettes may not meet the health and manufacturing regulations of the destination country, or any applicable duties and taxes have been evaded.

**Gray Market:** Tobacco products are produced by a legitimate manufacturer for consumption in one jurisdiction, but along the supply chain the product has been diverted to another jurisdiction. Diversions frequently occur in Free Trade Zones (FTZ) with the tobacco manufacturer often unaware that its product has been diverted.

**Loose Tobacco:** A term applied to tobacco that is often used for cigarettes. Loose tobacco may be used to illegally manufacture cigarettes or other tobacco products, such as roll-your-own tobacco, without payment of tax. Illicit loose tobacco can be misbranded or adulterated and may not meet regulatory standards.

Criminals will use any means possible to smuggle cigarettes, with traffickers hiding illicit tobacco in vehicles, hollowed out logs, luggage, boats, tires, etc. Bootlegging, a common term for this type of smuggling scheme, is the purchase of cigarettes and their transport from a low-tax or no-tax jurisdiction for resale in a higher tax jurisdiction without the appropriate taxes being paid. These schemes can be simplistic and involve cartons of cigarettes or complex operations with warehouses full of illicit tobacco products.

Large-scale smuggling operations are common and involve commercial size consignments of tobacco products. The cigarettes tend to be moved by 40-foot shipping containers and may or may not include a cover load, such as household materials, toys, furniture, textiles, charcoal, timber, and even legal cigarettes. FTZ can facilitate large-scale smuggling operations with cigarettes entering the FTZ and repacked and/or given duplicate container numbers to hide the illegal nature of the shipment.

## **CIGARETTE SMUGGLING IS NOT A VICTIMLESS CRIME**

The illicit trafficking of tobacco is a multibillion-dollar business today. It fuels organized crime and corruption, robs governments of needed tax money, helps expand the global illegal economy, and assists some terrorists by financing their operations. According to the Financial Action Task Force (FATF), “Large-scale organized smuggling likely accounts for the vast majority of cigarettes smuggled globally.”<sup>2</sup> Often, illicit tobacco is trafficked through the same routes as drugs, weapons, and other illicit forms of trade.

Trafficking in illicit tobacco is not a victimless crime. When cigarettes and tobacco products are smuggled into a jurisdiction, the lost tax revenue means that governments cannot pay for health and education programs, government services, and the law enforcement efforts required to combat this crime and the criminals behind the smuggling schemes. Often, the products do not meet the various health regulations, and are in violation of numerous other laws and regulations.

**Consumers, retail outlets, manufacturers, and governments all are harmed by the illicit trade in tobacco products.**

**When consumers purchase illicit tobacco they undermine their own security.**

## **NATIONAL SECURITY HARMS: COMBATING ILLICIT TOBACCO**

**Cigarettes are one of the most smuggled ‘legal’ products in the world, and cigarette smuggling is a form of transnational organized crime (TOC).** Moreover, the illicit trade in tobacco, including cigarettes, has been linked to the financing of terrorist organizations. In some cases, smugglers deal in cigarettes and other illicit commodities, such as drugs, weapons, bulk cash smuggling, stolen antiquities, diamonds, and counterfeit goods. In most cases, the criminals also engage in identity theft, money laundering, and bulk cash smuggling to either continue their illicit enterprises, or to use their illegal profits.

TOC poses a significant and growing threat to national and international security, with potentially dire implications for public safety, public

health, democratic institutions, and economic stability across the globe. Not only are criminal networks expanding through the trafficking in illicit tobacco products, but they also are diversifying their activities, resulting in the convergence of previously-distinct threats that have potentially explosive and destabilizing effects.

*Operation Royal Charm* and *Operation Smoking Dragon* are operations that highlight the convergence of illicit markets and national security issues directly related to the United States. Other cases have shown specific links between cigarette smuggling and terrorist organizations, such as the Irish Republican Army (IRA), the Kurdistan Workers' Party (PKK), and Hizballah. Mokhtar Belmokhtar – a former Al-Qa'ida operative and Islamic Maghreb (AQIM) senior commander and the founder of the Signed-in-Blood Battalion – is known as “Mr. Marlboro” because of his involvement in cigarette smuggling as a means to raise funds for his terrorist organization.

### **For decades, cigarette smuggling has been a sizeable and dependable revenue stream for organized crime.**

Estimates for the annual state and local U.S. tax loss caused by the illicit trade in tobacco products range from \$2.95 to \$6.92 billion.<sup>3</sup> For the European Union, proceeds from the illicit trade in tobacco products range from €7.8 and €10.5 billion annually.<sup>4</sup> The most recent estimate of the global tax lost, conducted in 2006, estimates the tax loss due to the black market between \$40-50 billion annually, with illicit actors often the beneficiary.<sup>5</sup>

On July 25, 2011, the White House released its *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security*. By carefully following strategic and emerging markets for indicators of criminal interest, the United States has the ability to detect, disrupt, and reduce the economic power of TOCs. To do so, the United States works with international partners to disrupt and dismantle crime-state alliances; raises awareness to alert businesses that may be unwitting facilitators for criminal enterprises; and continues to develop appropriate safeguards to protect the legitimate flow of trade and investment. By targeting criminal assets, the United States and its allies can markedly reduce the profitability, growth, and evolution of TOC networks.

## U.S. EFFORTS TO COMBAT ILLICIT TOBACCO

The United States' effort to combat illicit tobacco involves local, state, and Federal agencies. The Federal government has numerous regulatory and law enforcement entities that combat illicit tobacco. In addition to their law enforcement and regulatory functions, many entities provide training to domestic and foreign government officials, and raise awareness through participation in national and international events and conferences.

### Department of State

- Places combating transnational organized crime and corruption internationally among its top foreign policy and national security priorities.
- Advocates for countering illicit trade in tobacco products, TOC, and corruption as the United States Government representative in international forums, including the Conferences of the Parties to the World Health Organization Framework Convention on Tobacco Control; United Nations Convention Against Corruption (UNCAC); and the United Nations Convention Against Transnational Organized Crime (UNTOC).
- Partners with intergovernmental agencies, such as the Organisation for Economic Co-operation and Development (OECD) and INTERPOL, to combat the illicit trade in tobacco products.
- Partners with other U.S. Federal agencies and foreign partners to increase information sharing and capacity building abroad.
- Forms public/private partnerships with parties interested in combating the trade of illicit tobacco products.
- Through the Bureau of Diplomatic Security, the Department's security and law enforcement division conducts investigations to help defend the United States from terrorists, drug traffickers, members of organized criminal groups, and others who seek to harm the United States and its interests.
- Agency Contact: Bureau of International Narcotics and Law Enforcement Affairs (INL), Office of Anti-Crime Programs (INL-C-TeamLeads@state.gov)

## Department of Homeland Security, U.S. Customs and Border Protection (CBP)

- CBP is the unified border agency within the Department of Homeland Security charged with the management, control, and protection of our nation's borders at and between the official ports of entry.
- Charged with keeping terrorists and terrorist weapons out of the country while enforcing hundreds of U.S. laws.
- Responsible for conducting law enforcement activities and operating at and between United States ports of entry to combat the trafficking of illicit tobacco products imported into and exported from the United States.
- Collects the Federal excise tax on imported tobacco products along with customs duties and fees as part of its customs revenue functions.
- Agency Contact: Commercial Targeting & Enforcement ([commercialanalysis@cbp.dhs.gov](mailto:commercialanalysis@cbp.dhs.gov))

## Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI)

- ICE HSI is the investigative arm of the Department of Homeland Security and is a vital U.S. asset in combating criminal organizations illegally exploiting America's travel, trade, financial and immigration systems. ICE HSI has broad legal authority to enforce a diverse array of federal statutes.
- ICE HSI leverages this authority to investigate all types of cross-border criminal activity, including illicit tobacco violations and related trade fraud and financial crimes. ICE HSI uses a versatile approach to conducting its operations to achieve the best results for the nation and its people.
- The National Intellectual Property Rights Coordination Center (IPR Center), a division of ICE HSI, operates as a joint task-force

organization led by HSI and consisting of 23 partner agencies – including 19 U.S. agencies and 4 international agencies. This task-force structure enables the IPR Center to effectively leverage the resources, skills and authorities of each partner agency and provide a comprehensive response to traditional customs fraud and the trafficking of various types of contraband, including tobacco products.



## OPERATION SMOKEOUT (ICE/HSI)

In 2011, over a three month period, U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) led an investigation at New York's John F. Kennedy airport called **Operation Smokeout**. The operation resulted in criminal charges, and the seizure of more than 4,000 cartons of untaxed cigarettes, 22,000 untaxed cigars and nearly \$400,000 in cash and property. Tobacco products seized entered the United States via international mail or with passengers arriving from China, South Korea, Pakistan, Uzbekistan, Haiti, and Guyana. The cigarettes were destined for New York City streets, evading local, state, and federal taxes and duties. ICE/HSI was joined in this investigation by Customs and Border Protection (CBP), U.S. Postal Inspection Service, the Queens District Attorney's office, the Port Authority Police, and the New York State Department of Taxation and Finance.

Source: ICE/HSI



- The IPR Center’s Trade Enforcement Unit (TEU) manages the Tobacco Program, providing program oversight, technical expertise, training, and reference materials to ICE HSI special agents and intelligence analysts, as well as coordinating with state and local law enforcement, other Federal agencies and international governments on illicit tobacco investigations and related enforcement actions.
- These investigations include the alleged smuggling of cigarettes (counterfeit or genuine) into the United States, in-bond diversion, domestic interstate trafficking of tobacco, the smuggling or transshipment of cigarettes into foreign countries in violation of U.S. law, and international money laundering investigations where one of the underlying crimes is customs fraud, such as smuggling goods into the United States.
- To report violations of illicit tobacco crimes to the National IPR Coordination Center: <https://www.iprcenter.gov/referral/>
- Agency Contact: National Intellectual Property Rights Coordination Center ([www.iprcenter.gov](http://www.iprcenter.gov)), HSI Trade Enforcement Unit ([HSITradeEnforcementUnit@ice.dhs.gov](mailto:HSITradeEnforcementUnit@ice.dhs.gov))

## Food and Drug Administration (FDA)

- The Family Smoking Prevention and Tobacco Control Act, commonly referred to as the Tobacco Control Act, gives FDA the authority to regulate the manufacture, distribution, and marketing of tobacco products to protect public health. This includes the prevention of illicit trade in tobacco products through regulations concerning recordkeeping for tracking and tracing legally produced products and records inspection. FDA is the agency notified when a manufacturer or distributor has knowledge that the product has left the legitimate supply chain.
- In 2011, the FDA Office of Criminal Investigations created the Tobacco Enforcement program, which is now the lead referral agency for misbranded, adulterated, and counterfeit tobacco enforcement under the authority of the U.S. Food, Drug, and Cosmetic Act.
- Agency Contact: Office of Criminal Investigations ([tobacco.crime@fda.hhs.gov](mailto:tobacco.crime@fda.hhs.gov)).

## OPERATIONS SMOKING DRAGON AND ROYAL CHARM (FBI)

*Operations Smoking Dragon and Royal Charm* were multi-year operations conducted in the United States. They were led by the Federal Bureau of Investigation (FBI) in cooperation with numerous American and Canadian law enforcement agencies. ***Smoking Dragon*** was primarily conducted on the west coast of the United States, while ***Royal Charm*** was conducted on the east coast. Smugglers shipped approximately \$40 million worth of counterfeit cigarettes and other illegal commodities into the United States from China and North Korea. Smugglers also shipped ecstasy, methamphetamines, counterfeit pharmaceuticals, millions of dollars in “supernotes” (highly deceptive counterfeit U.S. currency), and Chinese military-grade weapons, including the QW-2 surface-to-air missiles.

The operations led to the indictment of 87 individuals from the United States, Canada, China, and Taiwan. Most of the defendants pled guilty or were convicted, one of whom was convicted under a 2004 anti-terrorism statute that outlawed the importation of missile systems designed to destroy aircrafts.

The route ran from China directly to United States ports, such as the Port of Newark in New Jersey and ports located in Los Angeles and Long Beach, California. Once the goods reached U.S. shores, they were distributed throughout the United States and Canada. False bills of lading for toys, rattan furniture, wicker baskets, and other goods were used as an attempt to conceal the cargo inside 40-foot shipping containers which included counterfeit cigarettes, goods, and currency, as well as drugs and weapons.



These operations were not the only cases linked to North Korea. From 2002 to 2005, counterfeit Marlboro® cigarettes, originating from North Korea, were detected in 1,300 incidents within U.S. jurisdiction.

During this same time period, the U.S. Department of Justice, the U.S. Secret Service, IRS, and other U.S. law enforcement agencies investigated a group engaged with North Korea to manufacture and distribute counterfeit Marlboro® cigarettes. During the investigation, these individuals provided agents with counterfeit pharmaceuticals and “supernotes” manufactured in North Korea and smuggled through China. This case culminated in the arrest and conviction of three individuals for criminal conspiracy, smuggling, distribution of counterfeit cigarettes, conspiracy to distribute U.S. securities, and money laundering.

In addition to the FBI, the U.S. Secret Service; the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); U.S. Immigration and Customs Enforcement (ICE) and Department of Homeland Security’s U.S. Customs and Border Protection (CBP); the Royal Canadian Mounted Police; the U.S. Postal Inspection Service; the Department of Labor’s Inspector General, and several state and local law enforcement agencies contributed to the investigation.

Source: FBI and the U.S. Department of Justice

## Department of Justice, Federal Bureau of Investigation (FBI)

- Combats transnational/national criminal organizations and enterprises.
- As an intelligence-driven and a threat-focused national security organization with both intelligence and law enforcement responsibilities, the mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to Federal, state, municipal, and international agencies and partners.
- The FBI combats crime through its 56 field offices located in major cities throughout the United States, approximately 360 smaller offices called resident agencies in cities and towns across the nation, and more than 60 international offices called legal attachés in U.S. Embassies worldwide.
- Supports Federal, state, local, and international investigations and training requests through multi-agency partnerships, national law enforcement partnerships, international partnerships, partnerships with Federal agencies and organizations, and public/private partnerships.
- Investigates contraband tobacco cases, especially those linked to terrorism, threat financing, and organized crime – within the United States and abroad.
- The FBI has jurisdiction over the illicit trade in tobacco products through numerous statutes, including but not limited to: Racketeer Influenced and Corrupt Organizations (RICO) violations; theft from interstate shipments; the transportation, sale, or receipt of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting; trafficking in counterfeit labels; money laundering; and interference with commerce by threats or violence.
- Agency Contact: SSA Eric B. Ives (eric.ives@ic.fbi.gov)

## Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)

- Seeks to reduce violent crime, reduce contraband cigarette trafficking activity, divest criminal and terrorist organizations of monies derived from illicit tobacco, and significantly reduce revenue losses to states.
- Works with other Federal, state, local, and international law enforcement and revenue agencies.
- Focuses on reducing the trafficking of contraband tobacco products, preventing the encroachment of organized crime into legal tobacco industries, combating organized criminal groups and gangs, deploying tobacco trafficking investigating group leads, coordinating with partners, and expanding contraband cigarette trafficking training programs.
- ATF's primary jurisdiction over the black market in tobacco products is derived from the Contraband Cigarette Trafficking Act and the Prevent All Cigarette Trafficking Act.
- ATF also investigates violations of counterfeit tax stamps, RICO violations, money laundering, mail and wire fraud, and the distribution of illegally imported cigarettes.
- Agency Contact: Mr. Joseph Fox (Joseph.A.Fox@usdoj.gov)

## Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)

- Responsible for administering the provisions of the Internal Revenue Code of 1986 that impose Federal excise taxes on tobacco products and cigarette papers and tubes, and establish a comprehensive civil and criminal framework to protect the revenue. Among other issues, TTB investigates illegal production, under-reporting of production, smuggling or unlawful importation, and diversion of domestic tobacco products intended for export.
- Works to combat illicit trade by a variety of means, including background checks on potential permit-holders, regular audits and investigations of existing industry members, and risk models to identify the greatest risk of non-compliance.



- Collaborates with foreign counterpart tax administrators to share information and best practices in tobacco excise tax administration and enforcement. Areas of possible technical assistance include setting up an auditing system and permitting regime, as well as conducting investigations.
- Represents the United States Government at international fora, including the Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control.
- Conducts tobacco investigations with other Federal and state agencies.
- Agency Contact: International Affairs Division (IAD@ttb.gov) or Intelligence Division (IndustryAnalyst.Tobacco@ttb.gov)

## Department of the Treasury, Internal Revenue Service – Criminal Investigation (IRS-CI)

- Administers and enforces U.S. tax laws, but also investigates money laundering, Bank Secrecy Act violations, terrorist financing, and other financial crimes.
- Field office personnel work with other Federal, state, and local law enforcement and revenue agencies to investigate cigarette smuggling cases.
- Within the IRS Headquarters International Operations, Narcotics, and Counter Terrorism office, IRS-CI supports illicit tobacco investigations through agency coordination and uncovering the financial flows of the proceeds and profits of TOC groups and terrorist financing operations which threaten national security.
- Agency Contact: Mrs. Karen Gaughan (Karen.Gaughan@ci.irs.gov)

## LEGAL FRAMEWORKS TO FIGHT ILLICIT TOBACCO

Within the United States, the main Federal laws that address illicit tobacco are the Internal Revenue Code of 1986<sup>6</sup>, the Jenkins Act<sup>7</sup>, the Contraband Cigarette Trafficking Act<sup>8</sup>, the Prevent All Cigarette Trafficking Act<sup>9</sup>, and the Family Smoking Prevention and Tobacco Control Act<sup>10</sup>. In addition, Federal law enforcement can use several related laws against illicit tobacco traffickers that fall under Commerce and Trade (Title 15)<sup>11</sup> and Crimes and Criminal Procedure (Title 18)<sup>12</sup> sections of the U.S. Code, such as those related to counterfeit tax stamps, RICO, money laundering, mail fraud, and wire fraud. In addition, individual states have their own laws concerning the illicit trade in tobacco products.

The international community has several treaties and agreements in place that assist nations combating the illicit trade in tobacco products. This includes:

- The United Nations Convention on Transnational Organized Crime<sup>13</sup>
- The International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)<sup>14</sup>
- The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>15</sup>
- The World Health Organization's Framework Convention on Tobacco Control (FCTC)<sup>16</sup> and the corresponding Protocol to Eliminate Illicit Trade in Tobacco Products<sup>17</sup>. While the United States is not a party to the FCTC or its Protocol, United States' practice is consistent with the requirements imposed on parties to the FCTC.

## INTERNATIONAL EFFORTS AND COOPERATION

Partnerships and international cooperation are essential to effectively combating illicit tobacco and TOC. The United States works with several public and private partners to combat the illicit tobacco trade.

## INTERPOL

- Combats the illicit cigarette trade through training, operational support, information exchanges, and public awareness campaigns.
- Works to identify, disrupt, and dismantle the transnational organized criminal networks behind the illicit tobacco trade.
- Dedicates analysts to combat illicit tobacco via INTERPOL's *Trafficking in Illicit Goods and Counterfeiting* program.
- Through a global campaign, *Turn Back Crime*, highlights the dangers of organized crime and its effect on our day-to-day lives through various forms of illicit trade, including the illicit trade in tobacco products.
- Provides guidance for policy-makers and law enforcement authorities on the effective implementation of key international instruments and legal frameworks for illicit tobacco through their handbook, *Countering Illicit Trade in Tobacco Products: A guide for Policy-Makers*, available at: <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance/Legal-publications>

## The European Anti-Fraud Office/Office de Lutte Anti-Fraude (OLAF) and the European Commission

- Works in close cooperation with national law enforcement agencies and customs services both inside and outside the European Union (EU) to prevent, detect, investigate, and collect evidence so that evaded duties can be recovered and perpetrators prosecuted.
- Implements a strategy to fight cigarette smuggling and other forms of the illicit trade in tobacco.
- Partners with the United States to combat the illicit trade in tobacco. For example, the U.S. Department of Justice and U.S. Immigration and Customs Enforcement partnered with OLAF in an illicit tobacco case that spanned sixteen countries and led to the seizure of 43 million cigarettes.



## Europol

- Collects and disseminates criminal intelligence and provides operational support and analysis to its EU Member States.
- Implements “Focal Point SMOKE” at the request of Member States to address tobacco smuggling, given their significant tax losses.
- Provides detailed operational analysis, including social networks, and predicts potential trafficking routes for illicit tobacco shipments.
- Collaborates with the U.S. law enforcement agencies, including through the assignment of Federal law enforcement agents to “Focal Point SMOKE.”

## World Customs Organization (WCO)

- An independent international organization whose mission is to enhance the effectiveness and efficiency of customs administrations. The United States is one of 180 countries that participate in the WCO and has Federal law enforcement agents detailed to the WCO.
- In 2013, the WCO launched *Operation Gryphon*, the first global customs operation focused on the illicit trade in tobacco, which involved 93 national customs administrations. Seizures included genuine branded cigarettes, counterfeit cigarettes, and brands associated with the illicit “cheap whites” category of cigarettes. The largest quantities of illegal cigarettes were transported in sea containers, trains or trucks, with smaller amounts from cars, air passengers’ luggage, and postal shipments. *Operation Gryphon* confirmed that FTZ also play an important role in the illicit smuggling of cigarettes and that those shipments are often destined for conflict areas such as Afghanistan and Syria.

## The Organisation for Economic Co-operation and Development (OECD) Task Force on Charting Illicit Trade

- The OECD is an international organization that works with governments to understand what drives economic, social, and environmental change, and provides a forum in which governments can collaborate on key issues and seek solutions to common challenges. The United States is a founding member.
- The Task Force on Charting Illicit Trade, a part of the OECD High Level Risk Forum, is chaired by the United States and coordinates international expertise in the quantification and mapping of the illegal economy. It aims to provide a fuller understanding of the connections between different forms of illicit activities so governments may enact policies to counter these threats and increase the economic and societal resilience to these threats. Illicit tobacco is one of the Task Force's subgroups. The Task Force brings together illicit tobacco experts from the government, academia, and the private sector to measure, map, and identify new threats and continuing threats related to the trade in illicit tobacco.

### **NON-GOVERNMENTAL INITIATIVES**

Industry and academia both play a critical role in combating illicit tobacco. Academia conducts research on a variety of aspects of the illicit trade in tobacco. Industry assists law enforcement by authenticating products, providing training, and providing information to assist governments and law enforcement.

# AL QAEDA MISSILE LEADS TO DISCOVERY OF LARGE SCALE CIGARETTE SMUGGLING RING

In September 2013, Garda Síochána (Irish National Police) seized nearly one million individual plain-packaging packs of cigarettes, when the Asia Cosco, a cargo ship, docked in Ireland. This illicit shipment, estimated to be worth \$55,370,000, was uncovered when al Qaeda operatives launched two rockets at the vessel as it sailed along Egypt's Suez Canal. The rockets caused a fire, which required authorities to board the vessel and inspect damaged containers. Upon detection, the ship's owners notified INTERPOL. Authorities monitored the shipment for the remainder of its voyage, which ended in Ireland.

The illicit cigarettes were manufactured in Vietnam for the purpose of retail distribution in Ireland. Couriers were sent to Asia to purchase the cigarettes, priced at 20 cents per pack. The shipment's transit ports were in the Netherlands and Singapore. People associated with this seizure included an unidentified millionaire from County Louth, Ireland who set up a complicated corporate structure including multiple layers of bogus companies and bank accounts. Allegedly this individual became wealthy by supplying massive amounts of illicit cigarettes to the United Kingdom and Irish markets and to two men with alleged ties to the IRA.

Source: INTERPOL

## ENDNOTES

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- 3 Reuter and Majmudar (2015), p 4-20.
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- 5 Framework Convention Alliance, How big was the illicit trade problem in 2006? pg 1. Available at: <http://www.ftc.org/images/stories/2007/fca-2007-cop-illicit-trade-how-big-in-2006-en.pdf>
- 6 Internal Revenue Code, 26 USC Ch. 52: Tobacco Products and Cigarette Papers and Tubes. Available at <http://uscode.house.gov/view.xhtml?path=/prelim@title26/subtitleE/chapter52&edition=prelim>
- 7 Jenkins Act (15 U.S.C. 375 – 378). Available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title15/pdf/USCODE-2011-title15-chap10A-sec375.pdf>
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- 9 The Prevent All Cigarette Trafficking Act of 2009, commonly referred to as The PACT Act. Available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ154/pdf/PLAW-111publ154.pdf>. The PACT Act of 2009, amends the Jenkins Act (15 U.S.C. 375-378) and (CCTA 18 U.S.C. 2341-2346)
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- 11 Title 15, Commerce and Trade. Available at <http://uscode.house.gov/browse/prelim@title15&edition=prelim>
- 12 Title 18, Crimes and Criminal Procedure. Available at <http://uscode.house.gov/browse/prelim@title18&edition=prelim>
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FATF



FATF REPORT

# Illicit Tobacco Trade

June 2012





FINANCIAL ACTION TASK FORCE

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

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## 1. EXECUTIVE SUMMARY

1. The Financial Action Task Force (FATF) Plenary met in Mexico City, during June 2011. It was at said Plenary where a proposal to conduct typology research work into money laundering and terror financing to be associated with the Illicit Trade in Tobacco (ITT) was accepted.

2. March of 2011 also saw the OECD launch the “Oslo Dialogue” with the aim of promoting a whole of government approach to the tackling of financial crimes and illicit flows. This has been augmented by the G20 calling for strengthened inter-agency cooperation to fight illicit activities as well as the FATF adding tax crimes to the list of predicate offences.

3. The proponents of the typology stated that the illicit tobacco trade was prone to money laundering. Trade was considered to be cash intensive and profitable whilst being accompanied by low levels of risk posed to the criminal groupings (in terms of detection, seizures, penalties, criminal procedure) contributing towards the manifestation of the related illicit activities. Key areas of concern included:

- a) Loss of revenue to the fiscal authorities.
- b) The use of the illicitly generated proceeds (*i.e.*, to fund other crimes or the financing of terror).
- c) The ability to distinguish between illicit activities as undertaken by licit and illicit players in the tobacco sector.
- d) To identify the extent that governments enforcement agencies prioritise the addressing of illicit trade in tobacco when compared to other crimes.

4. It was furthermore mentioned that the project was to augment work already conducted by the FATF, which included *Trade Based Money Laundering* (June 2006), *Laundering the Proceeds of VAT Carousel Fraud* (February 2007), *ML Vulnerabilities in Free Trade Zones* (February 2010) as well as the then recently published *Global ML/TF Threat Assessment* (June 2010).

5. The identified key objectives were:

- a) To determine the extent of the Money Laundering and Terror Financing (ML/TF) vulnerabilities associated with illicit trade in tobacco at a global, regional and domestic level.
- b) To identify relevant case studies and determine trends and patterns from a global, regional and domestic perspective.
- c) To identify possible indicators which may assist financial and non financial institutions in developing mechanisms to identify, report and counter smuggling activities and the misuse of trade practices.
- d) To assist jurisdictions and FATF-Style Regional Bodies (FSRBs) in knowledge building and the identification of harms, drivers and measures associated with the illicit trade in tobacco.



- e) To enhance the efforts aimed at curbing ML and TF associated with the illicit trade in tobacco.

6. This document provides a synopsis of the nature and extent of the ML/TF risks currently associated with the illicit trade in tobacco. It contains an overview of the problem statement and the data provided, as well as an analysis of the predicate offences, extent of associated money laundering and terror financing activities coupled lastly to the various jurisdictional enforcement responses to the curbing of this specific phenomenon.

7. The typology also attempts to highlight the primary reasons for the prevalence of ITT and should by no means be regarded as an exhaustive reflection of the subject. It must be borne in mind that jurisdictional approaches will differ in accordance to whether their territories can be characterised as a country of origin, transit or destination for illicitly traded tobacco as well as the related laundered proceeds thereof. This to a large extent is also characterised by jurisdictions health and related taxation policies as well as the differing approaches to the criminalisation of the predicate offences and the resulting money laundering, which ultimately impacts on organised crime groups (OCGs) responses thereto.

8. It can be stated that the international nature of ITT requires a global response. This once again, as with other typologies underscores the importance of international cooperation and the sharing of information. This should be done through (and not be limited to) active participation within and across a multitude of international forums such as the OECD, the FATF, the WCO, Interpol as well as amongst taxation authorities. Efforts should furthermore also be undertaken to incorporate inputs from organs of civil society.

9. Nationally, governments could guide reporting institutions on how to identify funds emanating from ITT. This can naturally emanate predominantly from within the law enforcement and customs environments. The setting up of centralised databases can also assist in identifying transnational organised crime groupings, their primary role players, their financiers and beneficiaries.

10. The purpose of this document is to therefore highlight the vulnerabilities that the ITT and related ranging predicate offences pose to the manifestation of money laundering and financing of terror. It highlights the nature of the predicate offence, the resulting money laundering as well as the propensity or appetite to investigate lastly mentioned. The typology also indicated the approaches as followed amongst enforcement agencies with special emphasis placed on customs authorities, law enforcement, financial intelligence units (FIUs) and lastly taxation authorities.

## 2. MONEY LAUNDERING, TERROR FINANCING AND THE ILLICIT TRADE IN TOBACCO

11. Various studies concur that the illicit trade in tobacco accounts for a significant percentage of the global cigarette market. The revenues generated by this are estimated to amount to tens of billions of dollars. These revenues are usually hidden from taxation regimes and may also be used to fund other forms of crime and terror. The illicit trade in tobacco (ITT) therefore generates significant amounts of criminal proceeds, arising from both the trade itself and associated customs and tax offences.

12. A corollary affect is the increase in tobacco related illnesses and deaths because of the availability of cheap or counterfeit cigarettes. This has serious implications for the provision of appropriate health and welfare services to support an increase in consumption, of which the financial issues are exacerbated with a linked fall in tax revenues.

### A. THE NEED FOR THE TYPOLOGY

13. Various FATF members are exposed to the risks posed by the illicit trade in tobacco. These risks manifest along the value chain, from the growing of raw tobacco, to national and international distribution, through to the final point of sale, whether it be in the formal or informal sectors. Extensive market penetration, coupled with cash intensive trade highlights the need for a typology evaluating the risk from ITT, especially in understanding how and where the criminal proceeds are laundered. Key areas of concern include:

- a) The percentage of lost government revenues due to evaded taxes and customs duties.
- b) Identifying the nature and extent of the risks posed by illicit tobacco trade in comparison to enforcement actions taken to curb the phenomenon.
- c) The final destination and purpose of aggregated illicit funds.
- d) The methodologies used to launder these illicit funds and the potential to uncover new mechanisms specific to ITT, and
- e) A need to better understand the totality of ITT criminal finances, including opportunities for disruptive activity targeting perceived or identified financial pinch points (such as during the laundering of street cash following sales of illicit tobacco products).

### B. SCOPE

14. The FATF Working Group on Typologies (WGTYP) is mandated to identify new threats and vulnerabilities as well as to conduct research into money laundering and terrorist financing techniques, with an emphasis on differentiating between the predicate offence and associated money laundering. The report aims to:

- a) Define the illicit trade in tobacco, including the supply chain associated with the different types of smuggling.
- b) Determine and assess the extent of the money laundering and terror financing (ML/TF) vulnerabilities associated with the illicit trade in tobacco and illustrate this via case studies provided by key contributors.
- c) Identifying possible indicators to assist financial and non-financial institutions in uncovering, reporting and countering smuggling activities, the misuse of trade practices and money laundering or terrorist finance techniques.

15. In line with guidance given in the FATF Global ML/TF Threat Assessment, this will inform and assist jurisdictions and FATF Style Regional Bodies (FSRBs) in knowledge building as well as the identification of the harms, drivers and measures associated with the illicit tobacco trade.

### C. METHODOLOGY

16. The research methodology included the development of a questionnaire sent to FATF member countries as well as FSRBs. The development of the typology was limited to evaluating the following research propositions:

- a) Illicit trade in tobacco is a significant predicate offence to money laundering.
- b) The proceeds of illicit trade in tobacco are used to fund terror.
- c) Law Enforcement regards the effect of the illicit trade in tobacco as insignificant when compared to trade in other forms of contraband.
- d) FIU suspicious transaction reports (STRs) will be insignificant in terms of identifying illicit trade in tobacco as predicate to ML or TF.
- e) Despite the threat of civil or criminal investigations and disruption, ITT represents a good opportunity for Organised Crime Groups and / or Terror Groups to generate large sums of criminal profit.
- f) The proceeds of illicit trade in tobacco is either laundered or used to fund other crimes or terror.
- g) The use of trade in tobacco is significant within the trade based money laundering typology.
- h) High taxes on tobacco stimulate illicit trade in tobacco.

17. A typologies workshop was also held with inputs received from various participants. These inputs are incorporated into the typology. It must however be noted that the primary theme to emerge from the workshop focused primarily on the predicate offence with information sourced from the returned questionnaires providing the bulk in terms of addressing money laundering and or terror financing to be associated with the phenomenon. Other sources of information used were accepted academic studies as well as pieces of information from various other accepted open sources.



### 3. AN OVERVIEW OF THE ILLICIT TRADE IN TOBACCO

#### DEFINITION OF THE ILLICIT TRADE IN TOBACCO AND THE HIGH-LEVEL RISKS ASSOCIATED WITH IT:

18. The illicit trading of tobacco products is the supply, distribution and sale of smuggled genuine, counterfeit<sup>1</sup> or cheap white<sup>2</sup> tobacco products. In generic non-commodity specific terms, it works on the following principle – there is a financial incentive to source a product in a lower-priced market and transport, distribute and sell it in a higher-priced market. This can include international movements or within countries that allow for intra-community price differentials. Illicit trade in tobacco is made up of various activities. Smuggling is conducted for one or both of the following reasons: to avoid excise taxes, and to evade rules prohibiting the sale of such goods. Merriman defines smuggling as the evasion of excise taxes on goods by circumvention of border controls.<sup>3</sup>

19. The sophistication and complexity of the smuggling depends upon the size and ambition of the groups involved and the nature of the commodity. For example, some Organised Crime Groups (OCGs) will manage all aspects of the production process, from sourcing raw tobacco product, through to developing specific tobacco packaging that will generate suitable market interest and / or appear legitimate if counterfeit product. Others will rely on the work of key facilitators, often based overseas, who engage with smaller legitimate tobacco manufacturers in sourcing the tobacco goods and associated packaging. The OCG then agrees a distribution route with the facilitator and agrees risk mitigation mechanisms to ensure successful delivery. Certain groups simply exploit lower cross-border<sup>4</sup> prices of genuine tobacco products and smuggle them to their chosen destination for sale.

20. Whatever the size and scale of the smuggling operation, the illicit trade in tobacco has crosscutting implications for governments, private businesses, law enforcement agencies, healthcare providers and the public, both smokers and non-smokers alike. The most tangible of these implications, financial or otherwise, are:

- a) Deprivation of tax revenues, which can mean increases in other tax instruments to support a shortfall and / or the cutting of other public expenditure to ensure budgets, are managed within available funding profiles.

<sup>1</sup> A product which is an identical copy of a branded product and packaging that is manufactured by parties that do not have the relevant intellectual property rights authorising them to manufacture such branded products. These products are illicit at the point of production because they have been manufactured without the authorisation of the legal brand owner.

<sup>2</sup> Cheap whites are factory made cigarettes produced with the approval of a licensing authority in that jurisdiction. These are sometimes known as illicit whites but this is an incorrect term as they are produced legally.

<sup>3</sup> Merriman, D (n.d.).

<sup>4</sup> While there is a legitimate market for cross border trade, it is exploited by organised crime groups or individuals when the volumes exceed agreed personal allowance limits and / or the volume would be considered for commercial use.

- b) If the perceived threat from smuggling is large enough, pressure on law enforcement to focus a percentage of available resources to interdict contraband, which can have implications for deployments against other border priorities and / or criminal activities.
- c) A disproportionate impact on health services, such as reducing the provision of health care to treat other non-tobacco related / causal conditions, further exacerbated if the country also suffers a reduction in tax revenues.
- d) Legitimate manufacturers who produce licensed tobacco products struggle to compete in an economy suffering an influx of cheap or counterfeit tobacco products. This has consequences for those frameworks aimed at regulating legitimate manufacturers (such as a reduction in tax receipts) and the overall attractiveness of a jurisdiction to associated trade.

21. Tobacco smuggling is attractive to criminals (or opportunists), for several reasons, including the generation of large sums of money for criminal reinvestment or funding lavish lifestyles, and the perception of lesser punitive sanctions or penalties if caught smuggling. The subsequent sections explore the different types of smuggling methodologies, including an assessment of the supply chains of each method.

## DEFINING THE SUPPLY CHAIN AND SMUGGLING METHODOLOGIES:

22. A supply chain means the transformation of raw materials and components into a finished product, including any subsequent transportation and storage before distribution to the end customer. Although tobacco smuggling is an illicit activity, much of its supply chain is predicated on legitimate commodity movements, including people, technology, information and resources involved in moving and storing the products from the supplier (complicit or not) to the customer. Each methodology will include different supply chain requirements, which are further differentiated depending on the size, scale and sophistication of the smuggling activity. Organised Crime Groups (OCGs) or opportunist smugglers will add in their own variations depending on a number of factors. These factors include:

- a) Mitigating the risk of detection at source, in transit or at point of sale, as this affects criminal profit margins. For example, monies set aside to pay off corrupt officials or the purchase of counter-surveillance equipment at storage or distribution points. Smaller groups or individuals will have a different attitude towards risk of detection and adapt their supply chain mechanisms accordingly.
- b) The volume and type of the commodity they intend to smuggle. For example, packaged cigarettes require different logistical mechanisms than raw product or hand-rolling tobacco (HRT), while larger quantities of packaged cigarettes will place a different emphasis again on distribution and storage supply chain requirements.
- c) The relative maturity of the individuals or groups involved in the smuggling. Experience may determine the level of sophistication they employ to smuggle goods into the identified jurisdiction. Less well established groups or individuals might sacrifice volume smuggled in an effort to mitigate risk of detection, while still making a

profit for reinvestment. As they become established, they may move from one particular distribution methodology for reasons of cost, increased volume or risk mitigation.

23. The supply chain of the illicit trade in tobacco, shows similarities with legitimate commodity importation. Each element of the supply chain (manufacturers, warehouse storage, transport, sale to the public) will carry a particular risk (financial or otherwise), which the smugglers evaluate and determine the best methodology to suit their needs.

#### **BOOTLEGGING:**

24. This involves the purchase of cigarettes or other tobacco products in relatively smaller quantities than would be associated with OCGs, but would still exceed limits set by customs regulations. Typically, bootleggers operate individually or in small groups whose membership is known and tightly managed. Compared to large-scale smuggling, bootleggers' methodologies are often less sophisticated, determined by whether it is opportunistic or market driven.

25. The smugglers purchase products either in low-tax jurisdictions or at duty-free or similar outlets (*i.e.*, cross-border ferry crossings or hypermarkets etc). The smuggler will transport the goods into the high-tax jurisdiction and sell them on an ad-hoc basis (opportunist) or deliver to an agreed customer, such as a wholesaler or other tobacco retail outlet. Typically, those involved in bootlegging use specially modified delivery vans or trucks, which include compartments to store the goods and evade customs detection. If foot passengers, they may also rely on the volume of passenger traffic to evade detection, storing the tobacco goods in their luggage<sup>5</sup>.

26. This will also affect the frequency of smuggling activity, with those involved in bootlegging controlling much of the acquisition, transportation and distribution of the product. To avoid attracting the attention of law enforcement or justify travelling modes, bootleggers often manufacture elaborate and seemingly legitimate travel patterns to acquire the goods.

27. The relative maturity of bootleggers will also influence their attitude to supply chain risk and mitigation tactics, and by extension, their resilience to interdiction. That said, compared with large-scale smuggling, it is unlikely that bootleggers could absorb constant interdiction by enforcement agencies. Instead, they will often rely on the seemingly smaller scale of their smuggling activities to avoid detection.

#### **LARGE-SCALE SMUGGLING:**

28. Large-scale smuggling involves the acquisition and transportation of commercially sized consignments of tobacco products. Depending on the nature of the smuggling, one group or series of interconnected groups will take responsibility for the subsequent inland distribution and sale of the products; otherwise, distinct individuals (with relationships based on provision of service) manage elements of the supply chain demands. Large-scale organised smuggling likely accounts for the vast majority of cigarettes smuggled globally.

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<sup>5</sup> Joossens, *et al.* (2000).

29. While the greatest scope for profit generation is in jurisdictions with high taxation rates, this is not the only determinant. The smugglers will operate wherever there is scope to undercut a legitimate market and generate a suitable profit against their initial outlay. There is also anecdotal evidence to suggest OCGs involved in large-scale smuggling are territorial and will sell tobacco product(s) in their own jurisdiction.

30. While there are regional and market-level differences, several characteristics are common in large-scale smuggling operations:

- a) Historically, prior to the control of genuine product supply chains, large-scale smuggling involved international brands, produced by the large multinational tobacco companies, because of the familiarity of the products and the ease in selling them.<sup>6</sup> However, recent operational activity has shown an increase in the smuggling of cheap whites, counterfeit goods and even counterfeit cheap white tobacco products due to the relative success of supply chain controls.
- b) Secondly, large-scale smuggling takes advantage of the 'in transit' system developed to facilitate international trade. This system allows for the temporary suspension of customs duties, excise taxes, and VAT payable on goods originating from and / or destined for a third country, while in transit across the territory of a defined customs area. For example, cigarettes exported from the United States that are destined for North Africa will enter Belgium while en-route. Once in Belgium, the smugglers transported the cigarettes via the European road network to Spain, and then shipped to North Africa. As long as confirmation is given of re-exporting the goods, no tax liability is generated while the cigarettes are in transit.
- c) Thirdly, large-scale cigarette smuggling can involve multiple individuals or gangs who will facilitate the transportation of the goods. Depending on the type of goods and the method of transport, these transactions can happen over a short period with the value of the product increasing as it nears the final point of distribution or sale. The likelihood or risk of detection also affects the price of the goods.
- d) Finally, large-scale smuggling requires a good local distribution network, which can involve middle market distributors who may supply their own customers with the product and made available at an agreed distribution point or similar (sometimes referred to as a slaughter point). Otherwise, the importing OCG is involved in widespread street selling, allowing for the quick and effective sale of the smuggled cigarettes.<sup>7</sup>

31. Naturally, the supply chain for large-scale smuggling is longer and more sophisticated than that associated with bootlegging or opportunist smuggling, although this means a commensurate rise in the risk of infiltration from law enforcement or rival crime gangs. Whereas the bootlegger or opportunist smuggler is inclined to retain complete control over their product, OCGs tend to relinquish this responsibility to others; due to the significant volumes of goods smuggled, and

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<sup>6</sup> Barford, M.F. (1993).

<sup>7</sup> Joosens, *et al.* (2000).

complexity of transportation and warehousing methods employed. Therefore, operating methods mitigate liabilities over safe delivery and accountability for any financial losses in the event of product seizure before reaching its final destination.

32. Those engaged in large-scale smuggling tend to use storage facilities in locales close to the point of importation or within the final jurisdiction. Not only does this allow the OCG control over access to these sites, it also builds resilience into their smuggling models as they can stock pile goods to offset the risk of detection, counter attacks from rival OCGs, and develop a more flexible response to evade frontier enforcement capabilities. While OCGs loathe losing loads to interdiction, unlike bootleggers or opportunistic smugglers, their business models will build in an acceptable level of loss.

33. Large-scale smuggling usually involves the transportation of volumes in excess of one million cigarettes per consignment, rather than an aggregated figure. Large-scale smugglers purchase master cases, which contains 10 000 cigarettes broken down into 50 cartons, which are 10 packets of 20 cigarettes. Buying in such large volume allows for the negotiation of purchase price for the initial importer and the middle market receiver.

34. Although smugglers will have an end destination for their tobacco product(s), some OCGs are willing to realise part of their consignment en-route or will 'sell' complete loads to other crime groups close to or around the point of final importation. Thus, the secondary OCG takes responsibility (and accountability) for transporting the goods into the final destination. The original owners will then re-purchase the goods at a higher price but still within suitable tolerances for them to generate a significant profit in country.

## THE ECONOMICS OF TOBACCO SMUGGLING

### PRODUCT PRICE:

35. As mentioned above, a variety of jurisdictions, produce cheap whites, with a large concentration of manufacturers in the United Arab Emirates free trade zones, but also in Malaysia, South Africa and Eastern Europe. Manufacturers in the UAE will sell a master case of cheap white cigarettes (10 000 cigarettes) for as little as 35 USD.

36. Counterfeit products operate under a different pricing structure because of the additional distance the goods have to travel, the illegal nature of the goods and the fact they sell for close to the recommended retail price in an effort to 'prove' they are genuine. On average, a master case of counterfeited cigarettes can cost between 140 and 150 USD, and a 50g pouch of counterfeited HRT costs between 7 and 8 USD at the point of production.

37. The price of genuine tobacco products is dependent on the retail price in the country of purchase, or if the smuggler abuses lower duty or duty free markets, such as cross-border ferry crossings. The product price rises as it is nears the final point of sale, reflecting an increase in risk of detection and associated costs of transportation and storage. The following is just one example of a smuggling methodology used by an OCG and involves the importation of cheap whites into the UK.

**Box 1: Case study – Pricing model of large scale smuggled tobacco***Pricing Model*

A UK-based OCG, via its overseas purchaser, arranges to buy 1 000 master cases from an independent tobacco manufacturer for 35 USD each. This appears legitimate to any law enforcement agencies based in the country of production. The overseas purchaser will arrange to sell the 1 000 master cases to a key EU-based transport facilitator for 65 USD a master case. At this stage any relevant customs documentation may correctly list the goods as cigarettes. Although the financial responsibility for safe transportation of the goods reverts to the EU facilitator, the OCG retains 'ownership' of the goods.

Once safely deposited into a near-continent based warehouse controlled by the UK-based OCG (who now takes formal ownership of the goods and any associated risks), the EU facilitator will receive, on average, 600 EUR per master case, a percentage of which represents the risk the facilitator took in delivering the product. Any related customs documentation is altered so the goods are listed as a less suspicious commodity.

Upon successfully importing the goods into the UK, the OCG will sell them to their UK middle market suppliers for 700 EUR to 1 100 EUR a master case, depending on the quantity ordered and the brand requested. The OCG retains accountability for any losses until the goods reach the agreed distribution point. At the point of sale, the cigarettes will sell for anything between three and four GBP, which appears to be an 'acceptable' price to the consumer for buying illicit cigarettes.

If the middle market distributor purchased a mastercase for 700 EUR (approx 560 GBP) and sells all 500 packets of 20 cigarettes for 3 GBP, they will make a profit of just under 1 000 GBP when subtracting the cost of purchase. However, this doesn't take into account any other associated costs which can affect the profit margin.

*Source: United Kingdom*

38. Putting the illicit tobacco trade into context, Table 1 shows the price and tax burden of a pack of 20 cigarettes in eight of the 27 EU Members states, representing the four most and least expensive jurisdictions. As the table indicates, bootleggers or organised smugglers can make significant profit (and by extension a tax loss experienced by the government) from purchasing genuine duty-paid cigarettes in Estonia, transporting them to any of the four most expensive jurisdictions and sell them for a discounted price.

**Table 1: The price and tax burden of 20 cigarettes in the premium cigarette price category in eight of the 27 EU Member States.**

Country	RRP per 20 cigarettes			Tax burden per 20 cigarettes			Tax Incidence
	GBP	EUR	USD	GBP	EUR	USD	
Ireland	7.41	9.27	11.62	5.82	7.28	9.13	79%
UK	6.95	8.69	10.89	5.40	6.75	8.47	78%
Sweden	5.71	7.14	8.95	3.95	4.94	6.19	69%
France	5.12	6.40	8.03	4.09	5.12	6.41	80%
Bulgaria	2.65	3.31	4.15	2.08	2.60	3.26	79%
Lithuania	2.41	3.01	3.77	1.78	2.23	2.79	74%
Hungary	2.40	3.00	3.76	1.88	2.35	2.95	78%
Estonia	2.38	2.97	3.73	1.85	2.31	2.90	78%

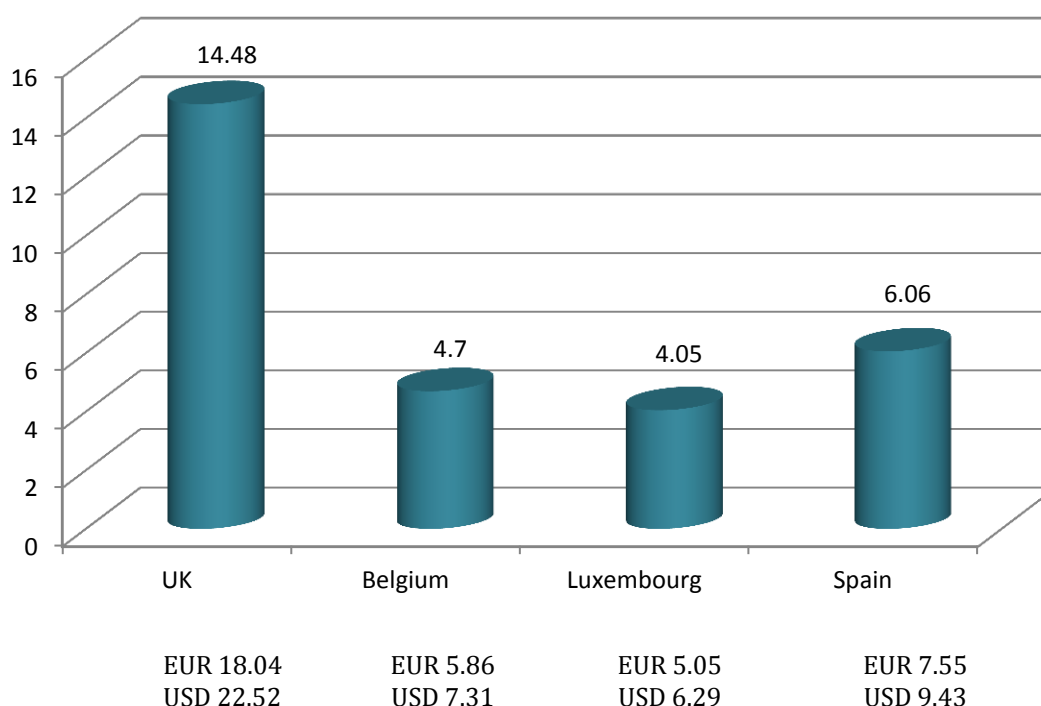
*Source: The Tobacco Manufacturers' Association website*

39. Figure 1 shows selected EU price differentials for 50g hand-rolling tobacco pouches, reinforcing the UK's position as an attractive jurisdiction for the smuggling of genuine and smuggled HRT product.

40. The price of the smuggled goods is dependent on several issues, including the brand, *i.e.*, whether it is a cheap white or a counterfeited genuine product, the evaluation of law enforcement capability and the existence of a reliable internal distribution market. Smugglers will test different brands and prices to find a balance that maximises market penetration and profit generation. As a rule of thumb, the distributors sell the products for between 50% and 75% of the recommended retail price of genuine tobacco products. However, as mentioned above, wherever there is scope for a smuggler to undercut an existing market, they will transport goods into the jurisdiction and determine a suitable price based on their experience in gaining market penetration and the cost of legitimate products.



Figure 1: Hand-rolling tobacco price differentials of selected EU countries April 2011 (in GBP)



**TRANSPORTATION & STORAGE COSTS:**

41. This is dependent on the nature of the product smuggled and the money available. Large-scale smuggling requires more money set aside to cover transport and storage costs than required by opportunist smuggling or bootlegging. The main methodologies for all types of smuggling are:

- a) Via container shipped from point of production either directly to point of consolidation for in-country wholesale or retail distribution or via other ports to disguise their origin and / or secondary distribution. Containers can hold up to 10 million cigarettes in total, but OCGs can reduce the overall volume by smuggling the products within legitimate cover loads.
- b) Roll on / Roll off (Ro-Ro) freight traffic, sometimes used in collaboration with sea-shipped containers. A twenty-foot trailer can hold 475 master cases, which is approximately 4.75 million cigarettes. OCGs may operate haulage companies directly or financially incentivise otherwise legitimate haulage companies to transport shipments to the final point of sale. The costs associated with the use of these businesses, including payments paid to the drivers are not well known. For example, in two separate UK investigations involving Ro-Ro, one driver received GBP 1 500 per successful crossing, while another OCG was paying its drivers up to GBP 10 000 to ensure successful transportation.
- c) Fast parcel / airfreight of smuggled goods and transport packaging material associated with tobacco products, such as HRT pouches and even the raw tobacco product itself.



As with the other methodologies, smugglers incorrectly describe loads to frustrate law enforcement intervention.

- d) The abuse of cross-border shopping by vehicle or foot traffic, which can mean the overall volume is less than large-scale smuggling, but with a still noticeable impact on a country's tax receipts from the importation of non-duty paid genuine product. However, certain OCGs realise the potential from infiltrating the bootlegging market and exploit these cross-border opportunities. For example, coach loads of seemingly legitimate holidaymakers working on behalf of a crime group will travel to a jurisdiction where the price of genuine product is low and bulk buy. This gives the OCGs a stock of genuine product to sell, with the monies generated covering the costs of the method but still delivering a healthy profit.

42. It is likely large-scale smugglers will employ a combination of methods to spread the risk of detection. By having a flexible transportation model, it allows them to manage more effectively spikes in demand from customers as well as maintain a strong grip on costs.

43. Not all smuggling methodologies lend themselves to the acquisition of warehousing or storage facilities, but when used; they provide the OCGs with resilience in the face of a possible increase in the efforts of investigating agencies. When transporting illicit cigarettes to the UK, several OCGs own and manage 'super warehouses' in various near continent jurisdictions such as France, Belgium and the Netherlands. This allows them to stockpile goods in the event of an increase in enforcement authority at border locations or seizures of commodity inland.

#### ILLICIT DISTRIBUTION POINTS & CASH COLLATION

44. Many OCGs transport larger consignments to distribution points only known to them and their customers. Here the load is split down and sold to middle market suppliers. These distribution points change on a regular basis, with the location determined as close to importation date as possible to frustrate law enforcement intervention opportunities. There is no fixed typology for the type of location favoured. It can be a rented plot on an industrial estate, housed within a self-storage facility or if a smaller load, kept in a lock-up or garage.

45. Depending on the reliability of middle market buyers, the smugglers can generate at these illicit distribution points, which is either collated offsite before the OCGs launder the proceeds or is immediately returned overseas, often via a cash courier or using concealments in a vehicle. Again, there is no fixed typology to identify cash remittance methodologies but it represents a tangible risk to the smugglers until used to a) pay for any future loads or b) the criminal profit is laundered.

#### THE IMPACT OF THE ILLICIT TRADE IN TOBACCO

46. The illicit trade in tobacco affects governments, private business, labour and society. The most visible of said consequences are:

- a) Governments deprived of tax revenue, which necessitates increases in other tax instruments to deliver mandated public expenditure programmes. A general decrease in tax compliance and expected revenues undermines the tax system as a whole.

- b) The potential promotion of criminality and corruption within government, which can coincide with an increase in tolerance of criminality, which in turn encourages and attracts national and international organised crime groups or opportunistic smugglers.
- c) The severe affect on consumer health and healthcare provision, especially where tobacco products do not comply with minimum health requirements.
- d) Difficulties for legal tobacco manufacturers to compete openly and fairly, which undermines regulatory regimes aimed at governing the legitimate industry.

47. Joossens, *et al.* (2000) sight the following as consequences of unabated illicit trading in tobacco.

- a) Smuggled cigarettes compete with legal cigarettes. The two implications are an increase in cigarette consumption and an artificial impact on cigarette pricing. This can be lowered to secure the legitimate market but is affected by government commitments to tackle cigarette consumption. Moreover, the presence of smuggled cigarettes can put legitimate retailers at a competitive disadvantage, leading some to be less compliant with tobacco-control laws than they would be in the absence of competition from a black market.
- b) A black market in cigarettes can undermine efforts to limit youth access to tobacco products and other approaches to reducing overall availability of these products. While tobacco retailers may comply with national or local policies prohibiting the sale of tobacco products to underage persons and otherwise limit availability, it is much less likely that vendors of smuggled cigarettes will comply with these policies.
- c) The potential profits associated with large-scale cigarette smuggling create incentives for organised crime networks to develop, bringing with them a number of problems. Cigarette smuggling can be a relatively low-risk source of revenues for these networks, and then used to support more high-risk activities. In addition, the growth of these networks can increase the general level of corruption in a country, both among its citizens who purchase cigarettes in the black market and among public officials who facilitate black market activities.

48. The aforementioned is very difficult to measure, both for the illicit economy as a whole but also in the case of measuring the effect of illicit trading in one commodity. This has consequences for developing suitable metrics to quantify the associated money laundering.

#### **APPROACHES TO THE DEVELOPMENT OF A MEASUREMENT TOOL**

49. It is not the purpose of this document to provide a measurement tool to test the prevalence of the illicit trade in tobacco. A short synopsis of a tool as designed by Merriman is provided to indicate that approaches do exist and that further study may identify the prevalence of money laundering associated with quantified illicitly traded tobacco.

50. Reliable quantitative measures of tobacco smuggling can enhance tobacco control policy. Baseline measurements of tobacco use and tax avoidance and evasion can develop, upon which policies are then established. Further measurements can provide appropriate benchmarks to ensure

the implementation, review, and improvement of such policies. In addition, sound measurements of the association between changes in tobacco control policies and changes in smuggling can prove the success of these policies.

51. Estimating the true nature of smuggling is challenging because it is an illegal and hidden activity. A number of useful and reliable methods to measure smuggling are available, but each method has limitations. When time and resources permit, it is best to use several different methods in order to cross-validate estimates minimizing any methodological objections.

52. This tool offers five methods to measure tobacco smuggling. The methods are ranked, with the first requiring the least technical and statistical sophistication and the last requiring the greatest level of technical complexity and statistical inference:

- a) Observe the producers and ask the experts for smuggling data.
- b) Observe smokers directly and ask them about their methods of obtaining tobacco.
- c) Monitor and analyze data on the export and import of tobacco.
- d) Compare the sale of tobacco with estimated consumption of tobacco by using household surveys.
- e) Compare the sale of tobacco with estimated consumption of tobacco by using a mathematical formula and economic inference.

53. Following the development of indicative figures quantifying the illicit trade in tobacco, domestic and international agencies can work together to determine the volume and value of associated money laundering. This type of complementary statistical analysis can support a step-change in investigative response, moving agencies away from a solely commodity seizure based response to a more holistic position of targeting both the commodity and the associated business model, including efforts at laundering criminal cash. The next section evaluates existing investigative responses in more detail.

## THE OPPORTUNITIES FOR AN IMPROVED INVESTIGATIVE RESPONSE

54. According to the foreword to the World Customs Organisation's 2010 Customs and Tobacco report, the WCO had "witnessed an unparalleled growth in the illicit trade of tobacco products over recent years" recognising a need for countries to step up their efforts to tackle this problem. The report also stated "that where goods are highly taxed, easily portable and penalties remain relatively light for smuggling, trans-national criminal organisations will take advantage of any weaknesses in customs, revenue or other border controls to amass profits".<sup>8</sup>

55. With such a commodity intensive crime type, the default setting is to seize as much of the product before it reaches the middle market suppliers / point of sale, supported by a criminal investigation aimed at tackling the smugglers. Depending on the capability of the investigating agency, it establishes a parallel financial investigation seeking to recover assets bought or associated with the criminal proceeds.

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<sup>8</sup> WCO (2011).

56. For relatively inexperienced or low-volume smugglers, such an approach can seriously undermine their ability to establish a foothold in the market. They do not have time to build up additional stock in the event of product seizures, nor will they have the ability to change their smuggling methodology. It is likely they have invested their own start up capital and are reliant on the sale of several smuggled loads before they can realistically absorb the financial losses associated with a seizure. They may also use relatively simple mechanisms to launder the proceeds of their crime and the acquisition of property and other assets takes place in their home jurisdiction. As such, asset denial or recovery can have a serious impact on their ability to continue smuggling and disrupt their seemingly legitimate life.

57. As assessed above, those involved in large-scale smuggling will adopt risk mitigation strategies to offset any potential financial and commodity losses via law enforcement interdiction. This includes 'losing' loads to investigating agencies to frustrate anti smuggling / investigation capability in the knowledge that they have subsequent loads en-route or passing through the point of entry at the same time. Law enforcement authorities may also use upstream interdiction tactics, though from a financial perspective tobacco products will not have acquired the value that generates substantial criminal profit. Given the propensity of OCGs to purchase assets overseas or use complex mechanisms to launder the profits from their criminality, it can be extremely difficult to dismantle the more sophisticated crime groups without international cooperation.

58. What is required is an improved understanding of the business models underpinning tobacco smuggling. Whilst each jurisdiction may have discrete ITT methodologies, mapping economic models against generic supply chain models will enhance enforcement opportunities and impact on the ITT using concurrent financial, frontier and inland intervention activities.

59. The growing threat from the ITT requires greater sharing of acquired knowledge and understanding of criminal activity and financial business models to improve enforcement impact at domestic and international levels. The international nature of the ITT demands a global response that includes tackling the financial dimensions of the trade and recovering illicitly derived assets.

## 4. THE JURISDICTIONAL APPROACH TOWARDS THE ILLICIT TRADE IN TOBACCO

60. The purpose of this chapter is to provide an overview of the various jurisdictional approaches towards the criminalisation of the illicit trade in tobacco. The body of information was obtained from the jurisdictions via responses to a questionnaire. (Refer to the list of respondents in Chapter 5, Table 2.) The focus of the questionnaire was to place emphasis on the criminalisation of ITT as well as other types of offences which may be associated with ITT. Consideration was also lastly given to possible penalties or remedies at the disposal of the said jurisdictions.

### A. THE CRIMINALISATION OF THE ILLICIT TRADE IN TOBACCO (ITT) AND POSSIBLE ALTERNATIVE OFFENCES

61. The vast majority of respondents indicated that the ITT is a criminal offence. An aspect that was however clear is that the definitions of what would constitute the ITT differed between jurisdictions. The penalties associated with these acts were in some cases also dependant on the volume and or value of illicitly traded tobacco.

62. Jurisdictions therefore stated that ITT was a criminal offence but then also indicated that transgressions could be found within the criminal, customs, tax crimes and trademark modalities. The core themes being smuggling, evasion of customs duties and tax, tax fraud and the violation of monopoly law. Respondent 5 indicated that the illicit production of tobacco for instance was also an offence. Respondent 6 also made reference to the trading of counterfeit goods.

63. Respondent 15 however indicated that ITT is not a criminal offence and that charges related to it would be importation offences under customs legislation or legal proceedings derived from trademark infringements.

64. **Conclusions:** The following is therefore of importance:

- a) Most Jurisdictions do see the ITT as a criminal offence. This does not however imply that they would see it as a predicate offence to ML.
- b) Other associated offences include tax crimes and transgressions within the trademark environment.
- c) The ITT can therefore be associated with tax offences which have then also been accepted as a predicate offence to Money Laundering.

### B. PENALTIES TO BE ASSOCIATED WITH CONVICTIONS REGARDING ITT

65. The following significant responses are provided:

- a) Respondent 3: “There are various instruments for recourse that are provided by the country’s legislation for contraventions related to the illicit trade in tobacco products. These include, but are not limited to the Customs and Excise Act, 91 of 1964, the Tobacco Products Control Act, 83 of 1993 and the Financial Intelligence Centre Act, 38

of 2001, as well as the Value Added Tax Act, 89 of 1991 and Criminal Procedure Act, 51 of 1997. The identified contravention determines the legal instrument that will be applicable. Fines and sentences differ from case to case. Some of the suspects were apprehended on more than one occasion with the equivalent of a USD 2 500 fine and or 3 years imprisonment, suspended for five years (In this case 13800 sticks were being traded). The revenue service has also raised schedules on manufacturers and distributors for the diversion of cigarettes. Non-compliance with section 3 and (3) A of the Counterfeit Goods Act ( Act 37 of 1997 ) as amended constitutes a criminal offence in accordance with section 7(3) of the act and any person found guilty of such an offence shall on conviction be liable to a fine not exceeding the equivalent of USD 120 000. With respect to the Customs and Excise Act (as amended) the omission of the stamp is regarded as an offence in terms of section 80(1) and any person found guilty shall be liable on conviction of a fine not exceeding the equivalent of USD 2500 or treble the value of the goods.

- b) Respondent 4 indicated:
- i) For smuggling: from two to eight years or four to eight years of imprisonment depending on the circumstances and;
  - ii) For evasion (tax fraud): from two to six years or three years and six months to nine years of imprisonment.
  - iii) For counterfeit transgressions: one to six years of imprisonment (when official stamps are involved); or three months to two years of imprisonment (when trademarks are involved).
- c) Respondent 5 indicated that penalties are up to the twofold of the evaded duties. In case of commercial perpetration up to the threefold of the evaded duties, as well as in criminal and in administrative procedures. In addition criminal courts can apply imprisonment of up to two years (in case of commercial perpetration up to three years). In cases of qualified tax fraud, imprisonment of up to ten years is applicable. Administrative panels can apply additional imprisonment up to three months. All illicit traded tobacco has to be confiscated. If confiscation is not possible (*i.e.*, it has been consummated), perpetrators are then also charged with a compensation penalty.
- d) Respondent 8 indicated that a penalty of up to five years imprisonment or a monetary fine can be imposed for tax evasion. In particularly serious cases, a penalty of between six months and ten years imprisonment shall be imposed. A case shall generally be deemed to be particularly serious where the perpetrator deliberately understates taxes on a large scale or derives unwarranted tax advantages, abuses his authority or position as a public official, solicits the assistance of a public official who abuses his authority or position, repeatedly understates taxes or derives unwarranted tax advantages by using falsified or forged documents, or as a member of a group formed for the purpose of repeatedly committing acts, understates turnover taxes or excise duties or derives unwarranted turnover tax or excise duty advantages. Whoever evades import or export duties on a commercial basis or who illegally imports, exports or transports goods on a commercial basis in contravention of monopoly regulations

shall be subject to imprisonment from six months up to ten years. In less serious cases, the penalty shall be imprisonment for up to five years or a monetary fine.

- e) Respondent 9 interestingly states that tobacco smuggling is considered a crime when the amount of product dealt is more than ten Kilos. It is normally punished by imprisonment (from two to five years) and a financial sanction of 5 EUR per grams. The punishment increases (from three to seven years) in relation to particular conditions. Heavier penalties are provided when the offence is committed by criminal organisations (imprisonment that can go from a minimum of three years to a maximum of eight years).
- f) Respondent 13 states in a similar vein that no person shall sell, offer for sale or have in their possession a tobacco product unless it is stamped (duties/taxes paid) Dual offence: Indictment: min fine to the max fine or max of five years in jail or both (fine & jail) Summary conviction: min fine to a max of USD 500 000 or up to 18 months in jail or both (fine & jail) Min fine: USD 0.17 x number of cigarettes Max fine: USD 0.255 x number of cigarettes.

66. **Conclusions:** It is therefore clear that a wide array of penalties is at the disposal of law enforcement entities. These penalties range from transgressions in terms of tax evasion and fraud, customs duty/excise evasion and fraud, smuggling etc. The nature of penalties imposed range from varying periods of incarceration and fines dependant on other factors such as relations to organised crime as well as the volume and or weight of the illicitly traded product. Of importance however was to then determine whether money laundering charges and convictions could be associated with the aforementioned.

### C. MONEY LAUNDERING INDICTMENTS TO BE ASSOCIATED WITH CHARGES RELATING TO THE ILLICIT TRADE IN TOBACCO

67. Of the 18 responses received only 6 respondents indicated that they could relate money laundering cases to the illicit trade in tobacco. A total of three successfully prosecuted cases were claimed by three separate jurisdictions with one jurisdiction stating that “Of the 157 tobacco cases adopted for criminal investigation during 2010 – 2011, 22 also included ML as a secondary regime. These operations are still live and no charging decisions have yet been finalised”.

68. **Conclusions:** It is therefore clear that authorities are convicting perpetrators of ITT on varying offences but that ML is very seldomly included in the charge sheet. The question that then remained was what the relation would be between terror financing and the ITT.

### D. INDICTMENTS ASSOCIATED WITH THE ILLICIT TRADE IN TOBACCO CAN BE LINKED TO TERRORIST ORGANISATIONS

69. Only one possible indictment related to ITT and terror financing could be sighted out of the possible 18 respondents.



## E. OTHER CRIMINAL ACTIVITY TO BE LINKED/ASSOCIATED WITH THE ILLICIT TRADE IN TOBACCO

70. In essence an array of other crimes could also be associated with ITT. These once again included the normal tax and customs offences which were then also indicative of the illicit trade in other commodities or contraband.

71. Respondent 11 for instance indicated that intelligence suggested that there continues to be some crossover between tobacco fraud and the following:

- a) MTIC (Missing Trader Intra-Community) fraud by criminals known to the said jurisdictions customs and revenue service.
- b) Secondly, alcohol excise fraud was also prevalent with intelligence indicating that some Organised Crime Groups involved in tobacco fraud are also involved in illicit alcohol shipments. Furthermore some hauliers used by Organised Crime Groups for tobacco smuggling are also used for alcohol smuggling.
- c) Oils excise fraud – “we have seen intelligence indicating that some Organised Crime Groups involved in tobacco fraud associated with illicit oils movements”.
- d) Drugs – we have seen intelligence indicating that some Organised Crime Groups involved in tobacco fraud are involved in drug smuggling.
- e) Money Laundering – criminally complicit haulage companies have been known to act as cash couriers on behalf of the Organised Crime Groups, aiding their efforts to launder / transfer the proceeds.
- f) There is also strong evidence and intelligence linking criminally complicit MSBs (including hawaladars) with the laundering of monies generated by tobacco smuggling.

## F. CONCLUSIONS

72. The primary focus to be determined from this specific section of the questionnaire was to obtain a broad view on how jurisdictions approach ITT. The primary trend to emerge was that jurisdictions tended to investigate and prosecute on the predicate offence with little to suggest an emphasis on pursuing money laundering and or terror financing cases to be associated with the illicit trade in tobacco. It is possible that this might occur where perpetrators are known to be involved in organised crime. The tax and customs offences are also sighted to be investigated in isolation. A more detailed overview is however supplied in the following chapters.



## 5. THE MODUS OPERANDI PERTAINING TO THE PREDICATE OFFENCE

73. The purpose of this chapter is to provide an overview of how various jurisdictions view the Illicit Trade in Tobacco as a predicate offence. It is important for contextual purposes to provide a description of the respondents. The differentiating factors are:

- Status in terms of FATF membership.
- Member of observer organisations to the FATF.
- Geographic location.

74. The aforementioned can therefore be displayed as follows:

Table 2: **Respondent List**

Serial No	Country	Membership of FATF and other	Observer organisations to FATF	Location
1.	Japan	FATF APG MONEYVAL <sup>1</sup> EAG <sup>1</sup>	AfDB, AsDB, Egmont Group, EBRD, IADB, IAIS, IMF, Interpol, IOSCO, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Asia
2.	Hong Kong	FATF APG	AsDB, Egmont Group, IAIS, IMF, IOSCO, OGBS, WCO	Asia
3.	South Africa	FATF ESAAMLG	AfDB, Egmont Group, Commonwealth Secretariat, IAIS, IMF, IOSCO, Interpol, UN, World Bank, WCO	Africa
4.	Argentina	FATF GAFISUD	AfDB, Egmont Group, IADB, IAIS, IOSCO, IMF, Interpol, OAS, UN, World Bank, WCO	South America
5.	Austria	FATF	AfDB, AsDB, Egmont Group, EBRD, ECB, Europol, IADB, IAIS, IMF, IOSCO, Interpol, OECD, UN, World Bank, WCO	Europe
6.	Belgium	FATF	AfDB, AsDB, Egmont Group, EBRD, Europol, ECB, IADB, IAIS, IMF, IOSCO, Interpol, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe
7.	France	FATF APG <sup>1</sup> CFATF <sup>2</sup> EAG <sup>1</sup> GAFISUD <sup>1</sup>	AfDB, AsDB, EBRD, Egmont Group, Europol, ECB, IADB, IAIS, IMF, IOSCO, Interpol, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe
8.	Germany	FATF EAG <sup>1</sup>	AfDB, AsDB, EBRD, Egmont Group, Europol, ECB, IADB, IAIS, IMF, IOSCO, Interpol, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe
9.	Italy	FATF EAG <sup>1</sup>	AfDB, AsDB, EBRD, Egmont Group, Europol, ECB, IADB, IAIS, IMF, IOSCO, Interpol, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe
10.	Switzerland	FATF	AfDB, AsDB, EBRD, IADB, IOSCO, Egmont Group, IAIS, IMF, Interpol, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe

Table 2: **Respondent List**

Serial No	Country	Membership of FATF and other	Observer organisations to FATF	Location
11.	United Kingdom	FATF APG <sup>1</sup> CFATF <sup>2</sup> EAG <sup>1</sup> ESAAMLG <sup>2</sup>	AfDB, AsDB, EBRD, Egmont Group, Commonwealth Secretariat, Europol, ECB, IADB, IAIS, IMF, Interpol, IOSCO, OAS <sup>1</sup> , OECD, UN, World Bank, WCO	Europe
12.	United States	FATF APG CFATF <sup>2</sup> MONEYVAL <sup>1</sup> EAG <sup>1</sup> ESAAMLG <sup>2</sup> GAFISUD <sup>1</sup>	AfDB, AsDB, EBRD, IADB, IOSCO, Egmont Group, IAIS, IMF, Interpol, OAS, OECD, UN, World Bank, WCO	North America
13.	Canada	FATF APG CFATF <sup>2</sup> MONEYVAL <sup>1</sup>	AfDB, AsDB, Egmont Group, Commonwealth Secretariat, IADB, IAIS, IMF, Interpol, OAS, UN, World Bank, WCO	North America
14.	Vietnam	APG		Asia
15.	Anguilla	CFATF		Caribbean
16.	Belize	CFATF		Caribbean
17.	Macao	APG		Asia
18.	Singapore	FATF APG	AsDB, Egmont Group, Commonwealth Secretariat, IAIS, IMF, IOSCO, Interpol, OGBS, UN, World Bank, WCO	Asia

1. Observer
2. Co-operating and Supporting Nations

75. 14 of the 18 respondents are member countries to the FATF. The four remaining respondents are members of FATF Associate member countries. Seven of the respondents are from Europe with two respondents representing North America, one representing Africa and one representing South America with five respondents from Asia and two respondents from Central America.

76. The chapter and the relevant questions are to be addressed in terms of geographic location. The purpose being to determine whether specific trends can be ascribed to certain regions.

## **A. PRIMARY ROLE-PLAYERS ASSOCIATED WITH THE ILLICIT TRADE IN TOBACCO (I.E., DOMESTIC VS. FOREIGN ROLE-PLAYERS)**

77. **Asia.** Answers obtained from jurisdictions were not substantial enough to provide a trend. The primary theme being that both domestic and foreign role-players have been involved.

78. **Africa.** Respondent 3 indicated that both domestic and foreign role players play a major role in the illegal manufacturing, importation and distribution of illicit tobacco with undocumented immigrants, and asylum seekers also recently being seen to form part of the specific transportation and distribution of the illicit product.

**Box 2: Case study –ITT cross border cash movement and money laundering**

Company Y was an established legitimate registered producer of cigarettes. In an effort to improve competitiveness said company mixed imported products with locally manufactured products. These products were then distributed in the host country at a discounted rate. The money that was obtained through the evasion of taxes was then used to further capitalize the company. Company Y also “round-tripped” their products back into the host country and proceeded to sell it locally as well. Duties were furthermore evaded by making use of bond to bond mechanisms. Company Y in the process of investigation admitted to importing close on 50 containers of cigarettes over an extracted period of time. Funds were moved offshore using various Special Purpose Vehicles. The matter was investigated by Tax Authorities with an assessment plus penalties raised to the value of USD 4 million.

*Source: South Africa*

79. **Europe.** EU countries indicated that domestic and foreign role-players were involved but that the majority of foreign role players were also nationals. Respondent 9 however indicated the involvement of East European nationals.

**Box 3: Case study – Operation ‘Desert Tree’**

On 27 October 2009, as part of a Multi Agency Operation, Irish Customs Officers seized:

- a total of 120 304 000 contraband cigarettes;
- the general cargo vessel MV Anne Scan;
- 200 tons of Copra animal feed;
- three articulated vehicles; and
- a quantity of cash (approximately EUR 30 000)

Following an operation at Greenore Port, Co Louth and the surrounding area. The operation was supported by the Irish Air Corps, Irish Naval Service, An Garda Siochana (Police), HMRC, PSNI and the European Fraud Office (OLAF).

The vessel MV Anne Scan, IMO 9145126, The Philippines, on 15 September 2009 with a declared cargo of 1 490 bags of animal feed, the port of destination being Greenore, Co Louth, Ireland. The vessel was monitored on the high seas en route to Greenore Port, arriving at 0600 on Monday 26 October 2009. Surveillance of the vessel was maintained over a period of time.

Following the discharge of part of the cargo from the vessel on Tuesday 27 October 2009 onto awaiting trucks, which were allowed onwards to their place of offloading, the Multi Agency Task Force moved in and raided several premises in the Co Louth area, in addition to mounting an operation on the vessel.

**Investigation**

Documents uplifted and enquiries conducted during the course of the subsequent investigations have revealed that the vessel was chartered for one direct voyage from The Philippines to Ireland.

The Irish based importer provided all cargoes (cigarettes and copra) and various packaging material to the warehouse in advance of shipping to Ireland. He supervised the stuffing of cigarettes and copra in jumbo bags until completion of loading the outbound vessel.

The individual gave strict and specific instructions to change the descriptions of the goods and the vessel's final destination as Vietnam and the cargo as animal feeds 'in order to protect the cargo against piracy during the voyage'.

He paid the haulage firm in cash (USD) for rental of the warehouse, charter of the vessel, stevedoring, consolidation of jumbo bags and other related expenses. (The cash payment for the charter of the vessel alone amounted to USD 540 000.)

**Track and Tracing of the cigarettes**

The brands and quantities of cigarettes seized were Palace (99 431 000), Chelsea (13 240 000) and a mixture of other genuine brands.

The Imperial Tobacco branded products have been confirmed as genuine product, which was sold by Imperial Tobacco, UK to a bond store in India, which later shipped them to The Philippines. While the Palace and Chelsea branded cigarettes were traced as being shipped by Silver Eagle Manufacturing Tobacco Company, Cavite to the consolidation warehouse in The Philippines.

**Conclusions**

- Various jurisdictions were involved. India to Philippines to Ireland using Vietnam on the papers as final point of destination.
- Multiple nationalities were involved.
- Use of cash (EUR 540 000) for payment which was most likely not declared at ports of exit and entry or use of front companies.
- Key themes would have been tax and duties evasion, fraud (false declarations in terms of final destiny and type of commodity)
- Success was achieved through sound sharing of information and amongst multiple local and foreign law enforcement agencies.

*Source: United Kingdom*

80. **America.** Respondent 12 indicated that the primary international source of counterfeit tobacco products originated from China. Domestically, Indian reservations, importers, and duty free stores have been a source of untaxed tobacco products illegally into the commerce of the respondent's economical areas. A trend highlighted by the respondent was the use of the Internet to sell and purchase tobacco products. Mail and express consignment facilities were also being used

more often, instead of the traditional cargo container, to ship illicit tobacco products in small amounts which fall under prosecutorial guidelines in many jurisdictions.

**Box 4: Case study – Cigarette smuggling and protection fees**

In 2002, the European Community (EC) filed suit against an American tobacco company alleging money laundering activities surrounding cigarette smuggling. According to the complaint, the company violated the trade embargo with Iraq and paid the PKK a fee for every container that moved across the Kurdish region of Turkey during the 1990's. The cigarettes were smuggled from Turkey, through the northern border of Iraq, and into two PKK controlled areas of Iraq. The profits were suspected of funding the terrorist activities of the PKK and other terrorist organisations operating in Northern Iraq. Ironically, whereas the group controlled the flow of contraband cigarettes into Iraq during the 1990s, they now control the flood of counterfeit cigarettes streaming out of Iraq.

*Source: United States*

81. **Conclusions:** The answers and case study provided confirms the transnational nature to be ascribed to the illicit trade in tobacco.

- a) All respondents indicated that tobacco tended to originate from beyond their borders. That would be because their tax rates probably act as an incentive for outside role players to offset their illicit products within their higher duty jurisdiction.
- b) Little support could be found for products being produced and sold within jurisdiction only. Risk is limited by producing the tobacco products for export and then offsetting the product whilst evading the duties and income taxes due in both respective jurisdictions.
- c) Various different role players facilitate the value chain of the illicit trade.
- d) Investigations and enforcement actions were successful due to multiple foreign and domestic agency interaction.

## **B. THE FACILITATION OF ILLICIT TRADE IN TOBACCO.**

82. The key themes to emerge from this section would also have to relate to question 1 insofar as the methodology utilised by smugglers.

83. **Asia.** Respondent one's answer was indicative that the illicit trade in tobacco is mainly approached from a single passenger perspective as methods of concealment was equated to crew members or airlines and ships make use of private luggage to store said contraband. Respondent two indicated the use of cross border vehicles and pedestrian crossings. The extent hereof is however not known.

### Box 5: Case study – Facilitation of illicit trade

In 2008, Customs smashed an illicit-cigarette syndicate which was involved in delivering illicit cigarettes to street-level peddlers scattered all over the territory in Hong Kong for local consumption.

The syndicate head had never physically taken part in the distribution of illicit cigarettes. He hired culprits to do the illegal business and controlled them behind the scene. He made use of eight bank accounts (of his sister and wife) to deal with the proceeds of crime.

The total proceeds derived from illicit-trade in tobacco for the period January 2006 to November 2008 amounted to approximately HKD 114 million. The whole syndicate was rolled up in 2008. A total of 17 persons, including the syndicate head and his family members, were arrested with a total seizure of over 10 million sticks of illicit cigarettes.

The three core members of the syndicate and 14 peddlers were charged with money laundering offence(s) and/or forged trade mark offence(s). They were subsequently convicted and sentenced to imprisonment with 5.5 years being the maximum. Assets to the value of HKD 9.18 million were restrained for subsequent confiscation proceedings.

*Source: Hong Kong, China*

84. **Africa.** Respondent three indicated that cigarettes had in the past been found in trucks (false apartments in tankers and containers), falsely declared in containers, in commercial vehicles, hidden in passenger vehicles, planes, passenger trains, goods trains, border pedestrian crossings and carried across the border by persons (mules). Up to 200 mules at a given time and place can handle more than 1000 Master cases that are carried over the border per night at a single crossing point. The conclusion to be made is that ITT is rife and that diversified methods of distribution are being used.

85. **Europe.** All forms of transportation were sighted by the various respondents. Respondent five stated that as a transit country for trade with neighbouring countries (Such as France, United Kingdom, Germany, The Netherlands) and in accordance with the type of vehicles identified in the national police database (non-representative sample) the goods were transported by road (cars, lorries) and by sea. The port of Antwerp was sighted as an important gateway to Western Europe, especially for unloading containers with Chinese cigarettes. There are also sea links (and railway links) to the United Kingdom. Respondent 11 sighted that counterfeit and illicit white cigarettes in large quantities is primarily smuggled into the Jurisdiction via container or Roll-on Roll-off transport. Genuine cigarettes are predominantly smuggled by passengers and in passenger/small commercial vehicles - often via abuse of cross border shopping limits. It was lastly also mentioned that substantial quantities of counterfeit and loose tobacco are also smuggled via postal packets.

86. **America.** Respondent 12 indicated that ITT is facilitated predominantly through cargo vessels as well as mail and couriers as was also expressed by respondent 11. Respondent 13 mentioned that a significant amount of domestic grown tobacco originating from its jurisdiction could be making its way to illicit manufacturers but the cheaper costs of foreign tobacco from bordering jurisdictions have been intercepted whilst attempts were being made to smuggle the

contraband across borders to manufacturing sites. Container trucks, vehicles, boats appear to be the most common methodology and certainly mis-descriptions and even under-evaluation of shipments have been reported and were done for the purpose of avoiding detection at border crossings. It was also stated that illicit tobacco entered the respondent's jurisdiction primarily through tractor-trailer shipments, marine container shipments, commercial courier and postal shipments and by passengers in the air and highway modes. Respondent four also indicated that the land modality (77%) was regarded the predominant method.

87. **Conclusions:** Various methods were sighted to smuggle the illicit goods. Land, Sea and air modalities were used or combinations thereof. Methods sighted included:

- Use of trucks with or without false compartments.
- Use of commercial vehicles
- Use of passenger vehicles
- Planes
- Cargo Vessels
- Passenger and goods trains
- Mules
- Roll on roll off transport
- Abuse of cross border shopping limits
- Postal packets
- False declarations
- Under valuation

### C. THE FINANCING OF ILLICIT TRADE

88. The purpose of this section is to determine whether the established illicit enterprises are run in isolation and or whether the criminal enterprises are vertically and or horizontally integrated or disintegrated. This is dependent on the size and level of development of the enterprise. The money flows are then indicative of this and may determine the propensity for ML to occur from said predicate offences.

89. **Asia.** Respondent two indicated as much "It is believed that perpetrators obtained start up capital from selling of illicit cigarettes at street level beginning with a small scale of operation. Crime proceeds obtained from small scale ITT operations were then used to buy more illicit cigarettes again and to finance/support the subsequent illicit cigarette business".

90. **Africa.** Respondent three's reply was indicative of more sophisticated networks at play within said respondent's jurisdiction. "Various models are possible here. Most of the illicit trade in tobacco involves the purchasing of manufactured products from the neighbouring countries. Therefore the origin of the finance could be from any source possible. Regarding the illicit trade in undeclared production, cigarettes meant for export and not exported, again the origin of the finance



could be from any source. Sometimes the tobacco products form part of the barter system whereby another illicit product is provided to the supplier”.

91. **Europe.** Responses from the European based respondents indicated the use of fronting, cash based businesses as well as commingling with other forms of contraband. Respondent six indicated that: “Apart from legitimate businesses that buy loads of cigarettes with their (illegal) proceeds we find that companies in financial trouble (transporters) are often approached. “Black” money is injected into the company to keep it going but in return the company is later used to import illegal products. The manager of the company in trouble acts as a front man, initially sometimes without his knowledge”.

92. Respondent 11 recently commissioned a project to evaluate its knowledge of the criminal finances associated with large-scale tobacco smuggling. The project is however still in its infancy with the respective body responsible for said project having committed to feeding the findings into the FATF typology. It was however noted that in one large-scale cheap white smuggling operation, alcohol fraud was used to acquire the necessary seed capital allowing for diversification into tobacco smuggling. The costs of production, sourcing raw tobacco and labour are kept low by working with a tobacco broker overseas who engages with manufacturers based in Free Trade Zones.

93. **America.** Respondents 12 and 13 once again highlighted the involvement of organised crime with respondent 13 specifically referring to “Organised Crime networks which have had smuggling networks in place since the early days if tobacco smuggling dating to the late 1980’s. Many smaller players have seen themselves pushed out of the way or risk repercussions from these networks that then tended to simply consume the smaller groups into their own ranks”. It would be interesting to determine what responsibilities these smaller players then had to take on as part of the bigger enterprise *i.e.*, selling of the existing project or sharing of profits from own operations, etc.

94. **Conclusions:** Various methodologies came to the fore.

- Seed capital obtained from small scale sales which are accompanied by a systematic increase in size of the illicit trade.
- Bigger role players absorbing smaller role players within the OCG environment
- The maturity cycles as applied to normal business operations are applicable within this realm as well *i.e.*, introduction, growth, maturity and decline phases.
- Commingling of funds and or products with linkages between the proceeds of illegal alcohol then used for trade in illicit tobacco to eventual bartering for drugs. **Remark.** The ITT then either having its own value chain or making up a part of a more sophisticated/diversified product range.

## D. ORIGINS OF ILLICIT TOBACCO

95. It must be noted that only 12 out of the 18 respondents provided information pertaining to where they perceived the illicit tobacco to originate from. The sample is therefore not regarded as representative



enough to warrant serious consideration at this stage. It can however be stated at a rudimentary level that 17 countries were sighted as possible points of origin with China and Dubai being the most sighted. Only two respondents highlighted that illicit tobacco was sourced domestically.

#### Box 6: Case study – Origins of illicit tobacco

In 2009 a smuggling organisation was identified by the Austrian customs investigation service which was responsible for smuggling of about 540 million sticks of cigarettes in the period from 2003 to 2009. The cigarettes were concealed in containers from China behind legal cover loads.

The consignments were customs cleared in Germany, Netherlands, Belgium and Austria. All consignees were given only addresses at various tax consultants but no real business addresses. The companies were all run by the same person who used fake identities for each separate company. After each seizure the concerned company name was not used anymore and all documents were destroyed.

*Source: Austria*

## E. POINTS OF SALE

96. The purpose of this section is to determine the destination (*i.e.*, country, province, city, reservation etc in the case of countries used as transit) for illicit tobacco as well as the nature of the final point of sale per jurisdiction. The answers obtained varied.

97. From a destination perspective most respondents indicated that the illicit tobacco was destined for local consumption within the jurisdiction. Some respondent's answers also indicated that their jurisdictions could also be utilised for transit purposes to other more profitable jurisdictions with the reason being the utilisation of infrastructure which match the smugglers modus operandi. Respondent 6 for instance indicated that transit goods are usually destined for the United Kingdom or France. Respondent 8 indicated that tobacco was predominantly destined for local consumption but were identified as transit goods usually destined for the United Kingdom as well.

98. Respondents 11 and 18 provided more information related to the nature of the point of sale. Localities identified included local pubs, clubs and other centres of the community; alongside legitimate products in small retailers; at local markets and car boot sales; via 'tab' houses and 'international' shops. More rudimentary points of sale listed were tobacco usually sold by peddlers discreetly along streets and alleys.

#### Box 7: Case study – *Modus Operandi* on methods and point of sale, counterfeit cigars

A joint investigation conducted by Federal, State, and local authorities identified two subjects engaged in the counterfeiting of Swisher Sweet cigars. While executing a search warrant, unrelated to the cigarette counterfeiting offense, at the residence of Subject 2, handwritten notes referencing counterfeit cigars were discovered. Surveillances were initiated on both subjects which determined that Subject 2 was receiving cigars (legally) from India, and Subject 1 was receiving counterfeit Swisher Sweet labels from the People's Republic of China. Both items were married into a

counterfeit Swisher Sweet Cigar then sold at convenience stores throughout three southern states. Controlled purchases of counterfeit cigars were conducted utilizing a confidential informant and sufficient evidence was developed to obtain two state-issued search warrants that were executed at the residences of Subject 1, resulting in the seizure of approximately 50 000 counterfeit cigars. Subject 1 and Subject 2 were subsequently indicted for conspiracy and trafficking in counterfeit goods (18 USC 371 and 2320). Both subjects pled guilty to all charges. Subject 1 was sentenced to 12 months incarceration and ordered to pay USD 6 000 in restitution and Subject 2 was sentenced to 18 months incarceration and ordered to pay USD 6 000 restitution.

Source: United States

**Box 8: Case study – Terror financing**

The Real IRA has flooded Ireland with contraband cigarettes and imported counterfeit versions of popular brands and cigarette smuggling has emerged as a top funding source for the organisation. The combined IRA groups have reaped an estimated USD 100 million in proceeds from cigarette smuggling over a five-year period.

Source: United States

**F. PRICE COMPARISONS OF LEGAL AND ILLICIT TOBACCO**

**Table 3: A price comparison between legitimate and illicit tobacco (USD, per pack of 20 sticks)**

Region	Respondent	Price Legitimate	Price Illicit	Difference
<b>Asia</b>	1	1	1	0
	2	6.40	3.30	3.10
	14	1	1	0.00
	17	1	1	0.00
	18	9.30	3.90	<b>5.40</b>
<b>Africa</b>	3	3.50	1.20	2.30
<b>Europe</b>	5	4.60	3.20	1.40
	6	1	1	0.00
	7	6.90	5.15	1.75
	8	5.79	2.57	3.22
	9	1.00	0.80	0.20
	10	1	1	0.00

**Table 3: A price comparison between legitimate and illicit tobacco  
(USD, per pack of 20 sticks)**

Region	Respondent	Price Legitimate	Price Illicit	Difference
	11	10.00	6.17	<b>3.83</b>
<b>America's</b>	12	5.00	4.00	1.00
	13	9.00	1.00	<b>8.00</b>
	14	1.72	0.83	0.89

1. No information

## 6. THE MODUS OPERANDI PERTAINING TO THE LAUNDERING OF THE PROCEEDS OF ILLICITLY TRADED TOBACCO

99. The previous chapter provided an overview of the modus operandi followed in terms of the predicate offences to be associated with the illicit trade in tobacco. An estimation of the finances involved was provided which then also underscores the need for perpetrators to launder said proceeds.

100. The questions asked, which if answered, should provide a broad overview of whether money laundering is firstly, associated with ITT and secondly, whether differing techniques might have been identified which could be regarded as unique to this specific commodity. The said questions were:

- a) Question 1: How do perpetrators of illicit trade in tobacco launder the proceeds thereof and or finance terrorism?
- b) Question 2: What aggregated amount (total as per cases per year since 2005) has been laundered or used to finance terror?
- c) Question 3: Which acts of terror can directly be associated with the proceeds that stem from the illicit trade in tobacco?

### A. METHODS UTILISED TO LAUNDER THE PROCEEDS ASSOCIATED WITH ITT

101. The answers obtained indicated the extent of the ITT as defined by the varying respondents and their respective law enforcement agencies.

102. **Africa.** Respondent 3 indicated that most of the proceeds associated with ITT were illegally moved to offshore accounts. It was sighted that there were known cases of couriers whose purpose it was to move money to these accounts. These suspects specialised in this function and are said to smuggle the money using private jets and yachts. Some of the operations are run by foreigners who simply move the money to the countries of origin using front companies. Sometimes the money is washed through legitimate operations and consumed locally.

103. **Europe.** Respondent 6 indicated that foreign currency was changed at well-known exchange offices in one of its major centres. An increase in oversight has resulted in “messengers” changing money into small denominations to avoid any suspicion. Money remittance transactions were carried out using well known money remittance agencies. When they were found out as part of a banking investigation messengers were used. It has also been mentioned that money is transported in cash to the final destination. The use of money remitters were also highlighted by respondent 7. Respondent 11 showed that the nature of ML was determined by the scale and size of the smuggling operation. Perpetrators will use a variety of methods to launder their proceeds. It was also mentioned that they will use, hawaladars, cash couriers (either individuals or their continued use of complicit haulage companies), money service businesses and the international banking system. It was also mentioned that no evidence could be found to link the proceeds of ITT with the financing of

terror. The primary theme was that money was used to improve and maintain lifestyles of the perpetrators.

104. **America.** Respondent 12 indicated that the perpetrators involved in the illicit tobacco trade use similar methods to launder the proceeds of their illegal activities as in other criminal schemes. Some of these methods include bulk cash smuggling of currency out of the US and exploitation of the US and international banking systems. Furthermore, they are also known to launder proceeds of their illegal activities through complex trade based money laundering schemes and engage in terrorist financing.

**Box 9: Case study – Contraband cigarettes, money laundering and wire fraud**

In 2004, 10 people were arrested and charged with possession and distribution of contraband cigarettes, wire fraud and money laundering as part of a scheme to smuggle more than USD 2 million in cigarettes bought in Virginia to New York. One subject was arrested in Detroit and found with hundreds of thousands of dollars in wire transfer receipts showing payments to people associated with Hezbollah.

*Source: United States*

**Box 10: Case study – use of money transmitters**

*Company X and Company Y*

A multi-agency Federal investigation revealed that Company X was operating as an illegal money transmitting business. The investigation revealed that Company X was involved in the illegal transfer of monies from the U.S. to Pakistan without the proper State of Illinois Transmitter of Money Act (TOMA) license and registration in violation of 18 USC 1960, illegal money transmitting business. Subject 1 was listed as the registered agent/president for Company X and was the primary signer on all the financial accounts associated with Company X.

Company Y was incorporated at the same address as Company X. The president was listed as Subject 2 and is the brother of Subject 1. The secretary of Company Y was listed as Subject 3 and is the son of Subject 1. Company Y registered with FINCEN in March 2005 and received a license from the Illinois Department of Financial and Professional Regulation in March 2005 as a money service business.

Investigative analysis of financial records revealed that Company X transferred in excess of USD 5 994 502 to Pakistan without a license. Analysis further revealed that Company X structured approximately USD 3 954 136 into several domestic bank accounts.

An undercover operation successfully transferred a total of USD 100 200 represented to be proceeds from the sale of counterfeit cigarettes to an unwitting recipient in Karachi, Pakistan through Company Y. Subject 1 conducted each of these transactions with the undercover and wilfully structured USD 97 000 in order to avoid filing a Currency Transaction Report (CTR). Two of these undercover transactions were conducted at the residence of Subject 1.

As a result of the investigation, Subject 1 was indicted on 35 counts of structuring in violation of 31

USC 5324 and 18 USC section 2, and subsequently pled guilty to money laundering in violation of 18 USC 1956 and was sentenced to two years probation.

*Source: United States*

**Box 11: Case study – Money laundering stemming from ITT (Counterfeits)**

*Cigarette smuggling*

This investigation targeted a cigarette smuggling and distribution organisation operating in the North-eastern United States. The organisation obtained and sold genuine/counterfeit and taxed/untaxed cigarettes to convenience stores in the North-eastern United States. The proceeds from this organisation were believed to be laundered through various methods including, including bulk cash smuggling.

Federal Authorities seized approximately USD 61 625 in US Currency from an individual associated with the target (TARGET 1) of the investigation. This seizure was the result of an enforcement action initiated from a communication between the individual and his associates (TARGET 1 and a third individual) regarding the purchase of 30 master cases of un-taxed cigarettes, valued at approximately USD 63 000. Pursuant to a consent search, approximately USD 61 625 was discovered in the vehicle the first individual was operating. The first individual did not claim ownership of the currency, but provided incriminating statements as to his involvement in the purchase and transportation of stolen merchandise and untaxed cigarettes. The currency was seized and was administratively forfeited.

*Source: United States*

105. Respondent 13 gave a substantial account of ML to be associated with ITT. The illicit tobacco trade use all the standard methods of money laundering, from the use of cash to purchase goods, property and deposit to the accounts of financial institutions, to the use of professionals such as lawyers and accountants when organised crime groups are involved. It has been noted that illicit tobacco funds have been moved between first nations communities using the “bulk cash smuggling method”. It should also be noted that several first nations communities are found on and covering the border between the United States and Canada. This allows illicit funds to be moved between the two countries in these regions.

106. In reviewing over 40 ML/TF FIU case disclosures linked to illicit trade in tobacco, several money laundering methods were identified, including:

- **Commingling** by mixing illicit revenues with the revenues of a non-profit organisation, cigarette manufacturers, auto parts businesses, pizza parlour businesses, frozen food companies, financial services, cigarette wholesale distributors, construction companies, transportation companies, private casinos and bars/night clubs.
- **Smurfing** consists of several cash deposits by members of the same group.

- **Structuring**, which involves numerous transactions (deposits, withdrawals, transfers), or a number of people, or high volumes of small transactions, or numerous accounts to fall below the reporting threshold at banks and money service businesses (MSBs). Currency exchange transactions at MSBs.
- **Use of nominees or 3rd parties** (including family members) to deposit cash or cheques into accounts then transfer the funds to a beneficiary account all to obscure the identity of persons controlling the illicit funds.
- **Use of lawyers and/or accountants** as professional intermediaries in the movement of funds. Used both to obscure the identity of the person controlling the illicit funds and the source of funds.
- **Complex movement** of funds to hide the origin of funds. For example, cash deposits made at one institution and issuing cheques to be deposited at a third institution and (again) issuing cheques payable to third parties.
- **Refining at casinos** by exchanging USD 20 dollar bills into USD 100 at casinos. As well as purchasing casino chips with no gaming activities, then requesting monetary instruments (ex: casino cheques).
- **Purchase of real estate property** to invest illicit proceeds in high-value negotiable goods in order to obscure their source.
- **Investment in various entities**
- **EFTs to beneficiaries**
- **EFTs to individuals/entities linked to terrorist organisations**

## B. AGGREGATED AMOUNTS (TOTAL AS PER CASES PER YEAR SINCE 2005) TO BE ASSOCIATED WITH ML/TF

107. Only two of the 18 respondents provided an answer to this question. Lacking data makes it therefore unfeasible to provide answers to this question.

## C. ACTS OF TERROR OR TERROR FINANCING TO BE ASSOCIATED WITH ITT

108. Phony cigarette tax stamps were found in apartments used by the perpetrators in the 1993 bombing of the World Trade Centre in New York.

### Box 12: Case study – Acts of terror and the financing thereof to be associated with ITT

#### *Terrorist Financing and Cigarette Smuggling*

Subject was born in Lebanon, moved to the United States illegally in 1992 and lived there by virtue of three sham marriages to US citizens until his arrest on 21 July 2000. Subject, along with two of his brothers and 22 others, were indicted and convicted of providing material support to Hezbollah, cigarette smuggling, money laundering, conspiracy, racketeering, and immigration fraud. His guilty

verdicts rendered by the jury were upheld by the Supreme Court of the United States.

Subject was a student and member of Hezbollah as a youth in his home country and moved to the United States on a Hezbollah-driven mission. He accomplished his mission by creating a criminal enterprise which smuggled more than USD 8 million worth of cigarettes from North Carolina to Michigan with profits sent to Hezbollah in Lebanon. He purchased businesses in the U.S. and preached radical Muslim fundamentalism as he led a clandestine terrorist cell in Charlotte, North Carolina and raised funds for the cause through cigarette smuggling.

During his imprisonment and while awaiting trial, he ordered the murder of the prosecuting attorney and the bombing of Charlotte's federal courthouse. The 2002 trial was the first in the country of a federal "material support to a designated terrorist organisation" charge. The investigation and prosecution involved law enforcement cooperation at every level: state, federal, and international, involving the substantial assistance of Canadian intelligence officials.

The case was investigated by agents and officers of the Federal Bureau of Investigation, Alcohol, Tobacco, and Firearms, Department of Homeland Security-ICE/Homeland Security Investigations, US Citizenship and Immigration Services, IRS Criminal Investigations, the Charlotte-Mecklenburg Police Department, and the Iredell County, N.C. Sheriff's Office. These law enforcement agencies received substantial assistance from the Canadian Security Intelligence Service and the Royal Canadian Mounted Police.

*Source: United States*



## 7. A RESPONSE FROM LAW ENFORCEMENT AND SUPPORTING AGENCIES

109. Preceding chapters have shown the nature and extent of the illicit tobacco trade is voluminous, intricate and has far-reaching consequences across varying illicit value chains. Those engaged in the trade operate across various jurisdictions and perform multiple functions in the growing, production, supplying and distribution of the product.

110. The purpose of this chapter is to highlight the response to the illicit tobacco trade by differing agencies across the globe. This will not only encompass the actions of governments within the varying jurisdictions but also highlight the extent and / or lack of cooperation amongst these bodies to curb the phenomenon. Four primary agencies were identified as the most relevant bodies involved in the counter illicit tobacco trade environment. They are:

- a) Customs Services
- b) Financial Intelligence Units/Centres
- c) Relevant Law Enforcement (*i.e.*, Police Services, Federal agencies etc)
- d) Taxation Authorities

111. The chapter is to highlight similarities in approaches to better determine what could be considered best practices regarding operational and intelligence best practice, with special emphasis on the inclusion of money laundering as an offence.

### A. CUSTOMS AUTHORITIES

112. The overarching themes emerging from the responses of Customs Authorities are:

- a) A disconnect between the investigation of the predicate offence and any associated money laundering investigation(s). Many of the Customs Authorities do not have the capability or authority to undertake a ML investigation and if a cross-agency platform is not in place, the focus remains on the predicate customs or tax offences.
- b) The importance of information collection and sharing, nationally and internationally, to effectively develop strategies to respond to the threat. While many of the Respondents collect relevant trade data, their answers do not confirm to what extent this is analysed and trends or patterns are identified.

113. On such matters, the World Customs Organisation (WCO) has an important role to play in facilitating dialogue between international partners. While several Respondents identified the WCO as a key partner, it noted in its Customs and Tobacco Reports for 2008, 2009 and 2010, and not all countries were returning data to the Customs Enforcement Network (CEN) database, which can compromise the ability to quantify the illicit tobacco trade. This data is vital in providing an accurate picture of the national and international risk that the ITT presents, as well as identifying possible developments or new methodologies with any associated money laundering.

114. In recognising the risk from the illicit tobacco trade, the WCO states that “...tobacco and cigarette smuggling remains a global problem, which continues to increase in spite of Governments’ enforcement strategies.” In tackling the problem, the WCO notes “...that many countries are the targets of cigarette smuggling so enhanced multi-agency cooperation at the national level is urgently needed. The WCO has been working with other regional and international organisations in an attempt to identify the best possible enforcement strategies to counter this problem, including joint Customs enforcement projects.”

115. The following is a summation of answers as received from the various respondents.

**CUSTOMS AND THE CONDUCTING PREDICATE AND MONEY LAUNDERING OFFENCES RELATED TO THE ITT**

116. Table 4 captures the variety of approaches used in tackling the illicit trade in tobacco and related money laundering investigations. Many of the respondents included additional narrative clarifying the approach within that jurisdiction, which has been included to provide context for the subsequent analysis of the data.

**Table 4: ITT and Customs jurisdictional approaches**

Resp. No	Do Customs investigate ITT	Do Customs investigate money laundering	Description
1.	Yes	No	Money laundering investigations are conducted by the police agency.
2.	Yes	Yes	
3.	No	No	No, the Customs Border Management (CBM) division through the Customs Border Control Unit (CBCU) conducts interventions on illicit trade in tobacco. The Revenue authority, of which CBM is a division, has an investigating arm in the National Investigations unit within the Enforcement division, which conducts the appropriate investigations. CBM conducts interventions including all the follow-ups that pertain to those specific interventions. The CBM's function is to handle the customs contraventions. The cases on this trade are investigated within the Enforcement division; however investigations into money laundering are handled by the police (commercial crimes).
4.	N/A	No	The responsibility for money laundering rests with the FIU.
5.	Yes	No	The matter is reported to the FIU.
6.	Yes	No	
7.	Yes	Yes	The Customs Investigations Directorate and the National Judicial Customs Department conducts investigations into tobacco smuggling. For money laundering cases, Customs works in conjunction with other financial investigation services.
8.	Yes	Yes	Next to the Customs Investigation Service also other Customs divisions, mainly responsible for checking/controlling the trafficking of persons and goods, carry out investigations
9.	No	No	Collected information is forwarded to other law enforcement agencies for the development of the investigations.

Table 4: ITT and Customs jurisdictional approaches

Resp. No	Do Customs investigate ITT	Do Customs investigate money laundering	Description
10.	Yes	No	
11.	Yes	Yes	Revenue & Customs has operational responsibility for investigating tobacco smuggling. If its Criminal Investigation directorate has adopted the case, a financial investigator is appointed to develop the appropriate confiscation investigation, which may include money laundering offences. If the investigation is civil in nature, there is no confiscation or money laundering investigation conducted in tandem.
12.	Yes	Yes	A separate investigative agency has The Customs authority and is responsible for enforcing customs laws within the respective jurisdiction, and conducting investigations related to tobacco smuggling. These investigations include, but are not limited to, the domestic and international smuggling of cigarettes; counterfeit or genuine, trafficking in counterfeit cigarettes; trafficking in stolen cigarettes; smuggling of cigarettes in violation of embargoes; and international money laundering investigations where one of the underlying crimes is tobacco-related.
13.	Yes	No	In this case, the Customs authorities work closely with police with initial information stemming from customs.
14.	Yes	N/A	
15.	No	N/A	Customs is represented on the country's Money Laundering Reporting Authority.
17.	Yes	No	Customs would conduct investigation into the illicit tobacco trade, but if criminal activity is involved the case would be passed to the Judiciary Police. The authority to investigate money laundering activities, including trade related offences, is vested with the Anti-Money Laundering Division of the Judiciary Police
18.	Yes	NA	Offences with suspected money laundering links are referred to the Commercial Affairs Department for further investigations
19.	Yes	Yes	There is a government institution which in is charge of tackling money laundering, so these cases are referred to this agency (MASAK). Customs inspectors can be assigned to conduct some aspects of a money laundering investigations on behalf of MASAK.
20.	Yes	No	
21.	Yes	No	Investigations into money laundering is referred to NAM POL
22.	Yes	No	

117. **Conclusions:** The majority of Customs authorities can investigate any customs offences related to the ITT. However, only around half of these authorities would also conduct a money laundering investigation, with the remaining respondents referring the matter to other agencies, such as the Police, the Financial Intelligence Unit (FIU) or a specified anti-money laundering agency. In such circumstances, it is possible that cases suitable for money laundering investigation are not pursued, due to jurisdiction and enforcement limitations of the Customs authority concerned. In such cases, unless detections are referred for financial investigation elsewhere only predicate

customs or taxation offences are likely to be pursued. This may be indicative of the lack of money laundering investigations associated with the illicit tobacco trade.

118. The following case study highlights a typical investigation into the predicate offence, which also included a money laundering angle. It also reinforces the need for international agreement in tackling the risks posed by the illicit tobacco trade.

**Box 13: Case study – Press release, customs related investigations**

The United States Attorney for the Southern District of Florida and the Special Agent in Charge, U.S. Immigration and Customs Enforcement (ICE), Office of Investigations, announced that an individual was arraigned on an indictment returned by a federal grand jury in Miami yesterday. The charges were conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. § 1349, mail fraud in violation of 18 U.S.C. § 1341, and smuggling goods out of the United States in violation of 18 U.S.C. § 554. The individual was released pending trial on bond on February 20, 2009.

According to the indictment and an affidavit filed with the complaint, the investigation revealed that an organisation smuggling cigarettes out of the Port of Miami operated out of Spain, the United Kingdom, Ireland and Florida. The individual indicted ran the Miami portion of the operation, arranging for the purchase of hundreds of cases of cigarettes from Panama and the transportation of those cigarettes into the Port of Miami.

They then arranged for the purchase of other cargo, such as wood flooring and building insulation material, for use as cover loads to conceal the cigarettes, which were re-packed with the cover load material. False bills of lading were prepared that only declared the cover load material and were subsequently presented to the shipping companies and overseas customs services. No duties or taxes were paid on the cigarettes.

Information contained in the affidavit linked the defendant to two separate occasions consignments of approximately 13.3 million cigarettes shipped to Ireland and the United Kingdom respectively. Based upon the false bills of lading, custom duties and taxes paid on these shipments were approximately, USD 2 900 and USD 2 500, respectively. The true customs duties and taxes that should have been paid on these shipments were USD 2.1 million each.

The Attorney for the Southern District of Florida thanked Immigration and Customs Enforcement, Office of Investigations, and OLAF for their outstanding joint working on this case. Extensive assistance was provided by law enforcement agencies from Ireland, the UK, Germany and Spain as well as the U.S. Department of Justice, Organized Crime and Racketeering Section, Criminal Division.<sup>1</sup>

1. *Related court documents and information may be found on the website of the District Court for the Southern District of Florida at <http://www.flsd.uscourts.gov> or on <http://pacer.flsd.uscourts.gov>.*

*Source: OLAF (2009)*

119. The following section is to determine whether any mechanisms were put in place to ensure a cross-cutting approach in tackling both the predicate customs offences and any related financial / money laundering investigations.

## CUSTOMS PARTICIPATION IN JOINT FINANCIAL INVESTIGATION/MONEY LAUNDERING TASK TEAMS

120. Only six of the 22 respondents indicated its Customs authorities do not take part in any form of joint financial investigations.

121. Respondent 8's Customs Investigation Service is part of a series of Joint Financial Investigation Groups, established in 1992. Within the Federal Criminal Police Office and the Bureaus of Criminal Investigation, were established specialised departments for financial investigations, where customs officials and the police work together as Joint Financial Investigation Groups.

122. Respondent 18 indicated that although there is no formal task force, relevant agencies including the Customs and the Commercial Affairs Department, have conducted joint and parallel money laundering investigations.

123. Exploring these differing approaches further, the following section sought to determine what impediments (if any) Customs authorities experienced in conducting investigations into the illicit tobacco trade.

## IMPEDIMENTS ENCOUNTERED WHEN CONDUCTING INVESTIGATIONS

124. Only seven respondents replied making it difficult to extrapolate these as the main common difficulties experienced. However, for those who did reply, two primary themes emerged:

- a) Jurisdictions can struggle with the deployment of resources in tackling all risk areas.
- b) There is a need for better cooperation and coordination between jurisdictions.

125. The following feedback from Respondent 11 captures the breadth of the issues articulated by the other six respondents:

- a) Difficulties in aligning available resources at mutually convenient times to execute operational strategies that cover the range of risk areas associated with the illicit tobacco trade.
- b) Sharing relevant intelligence and information because of legislative difficulties for domestic and international matters.
- c) Difficulties with IT systems hampering effective information sharing or more importantly extraction and evaluation.
- d) For operations with an international dimension, it can be difficult to tackle the illicit tobacco market upstream, particularly if no offence has actually been committed in the source country (e.g. manufacture of cheap whites / purchase of genuine brands).

126. **Conclusion:** While the investigation of tobacco offences and any parallel money laundering offences occurs as standard, capturing strategic and tactical intelligence is critical to develop a more holistic understanding of the risks of the illicit tobacco trade and enhance the operational impact.

## INFORMATION COLLECTION, ANALYSIS AND MANAGEMENT

127. All but seven of the respondents collected customs data, including the details in the question asked. Many will also seek additional information from a wide variety of other sources, including national and local police forces, immigration and border control authorities, enforcement agencies in neighbouring countries, the tobacco industry, health providers and health policy makers. This gives the Customs authorities an extremely broad information base to work from and supports enforcement activity geared to predicate customs and tax offences. In some cases, it may help Customs authorities quantify the financial risks attributable to the illicit tobacco trade.

128. This breadth of information is best illustrated by Respondent 12, which detailed the customs information it collects: “framework of fields that assist which are entry number, entry type, surety number, bond type, port of entry, entry date, importing carrier, mode of transport, country of origin, import date, export date, bill of lading/air waybill number, manufacturer ID, exporting country, immediate transportation number and date, missing documents, foreign port of loading, port of unloading, location of goods, consignee number, importer number, ultimate consignee name and address, importer name and address, description of merchandise, HTS number, gross weight/manifest quantity, net quantity in HTS units, entered value, charges, relationship, HTS rate, duty tax, broker/filer (name, address, telephone number, and number)”

129. However, several respondents identified opportunities to widen the breadth of information collected. For example, Respondent 11 “engages with the key Tobacco Manufacturers who are undertaking their own efforts in analysing and quantifying the risk from the illicit tobacco trade”. Respondent 21 does not currently carry out trade-based analysis but “a risk management section about the illicit tobacco trade has been created and such analysis will be done in the near future”.

130. As noted, a small number of respondents indicated that no information is collected, but it would be disingenuous to draw too many inferences. For example, is it reflective of the extent of illicit tobacco trading in the jurisdiction or its importance against other crime types? Alternatively, was it too difficult for the respondents to research the information from their Customs authorities? Initially Respondent 1 answered, “No information” when asked to describe information collected but was able to confirm in the following question “based on customs information regarding shipped goods, analysis is being conducted in order to crack down on illegal export/import”. Respondent 14 left the question regarding information collected blank but confirmed in the following question that analysis of trade information took place with the information collected from the Police agency and the market control agency.

131. When the captured trade data is analysed, just over half of the Respondents noted that illicit tobacco goods were usually trans-shipped. Some respondents like Respondent 5 listed generic routes – “East/southeast to Rotterdam, United Kingdom and France”, while others like Respondent 3 gave more precise routes, suggesting it is both a point of distribution and a nexus point for smuggling into neighbouring countries:

- UAE (Dubai) – South Africa,
- UAE (Dubai) – Namibia – South Africa,
- UAE (Dubai) – Namibia- Angola – Botswana/Namibia – South Africa,

- China – South Africa
- China- Namibia-South Africa- Zambia
- Zimbabwe – South Africa – Mozambique...”

132. However, not all Respondents provided data on the origin or destination of suspected loads of illicit tobacco products so the answers are indicators rather than trends. Dubai was noted as a key jurisdiction for the production and distribution of cheap white cigarettes, while China was linked heavily to the production of counterfeit cigarette products. Some respondents also identified production sites in Eastern Europe and the Far East.

133. Unsurprisingly, nexus points were spread across the globe. Due to the fluid nature of the criminality, it is difficult to pinpoint specific jurisdictions because as soon as the smugglers perceive an increased risk in detection or other instability factor, they will identify a new methodology or nexus point limiting the disruption to their supply chain. The receiving countries were predominately in Western Europe, with the United Kingdom and Republic of Ireland featuring in a number of responses.

### SHARING OF INFORMATION

134. The majority of the respondents provided positive feedback, mentioning a wide array of local and international bodies as potential sources of information. These International bodies included; the World Customs Organisation (WCO), Europol, Interpol, SECI Centre, OLAF the European Anti-Fraud Office as well as other countries’ customs and law enforcement agencies.

135. Another positive element is the liaison with national and overseas Financial Intelligence Units (FIUs). The nature of the requests are dependent on the extent of the investigation and trends and patterns which may be unique to specific jurisdictions, but overall it confirms the value of such Units in supporting predicate and money laundering investigations. Some of the responses about sourcing information were:

- a) “If required, Customs seeks information from the FIU for information on Suspicious Transaction Reports, Police for criminal records, Immigration Department for passenger movement records, Inland Revenue Department for tax returns and Company Registry for company records, etc. Information will also be sought from overseas LEAs. Requests for information from overseas FIUs on STRs will be routed through the local FIU. Information on the modus operandi of illicit cigarette syndicate(s), persons and companies, shipment and bank records etc, would typically form part of the requests for information”.
- b) Respondent 8 highlighted existing structures within the WCO domain. “Gathering information from internal partners results already logically from the organisational structure of the Customs investigation service. In the framework of mutual legal assistance treaty in criminal and administrative matters the authorities also receives information from international partners. The information gathered from international partners during investigations depends on the needs of the investigators. Apart from that, international partners forward case independent information which is usually shipment data.”



- c) Respondent 11 identified a number of information requests depending on the scope and scale of the investigation, including the assessment of risk to revenue:
- i) The location of tobacco production or if unknown, the jurisdiction(s) where the goods are exported to for onward transportation.
  - ii) The key individuals involved in the various aspects of the smuggling operation.
  - iii) Financial intelligence including how the goods are purchased and any other costs generated in smuggling the goods into the jurisdiction – *i.e.*, distribution, storage, security / risk management.
  - iv) The methodologies used to launder the profit generated from the sale of the smuggled goods and the jurisdictions used as money laundering nexus points and final destination.
  - v) The location of any assets associated with known individuals and the opportunities of collaborative asset recovery / denial work.”

136. Several of the Customs authorities have officers deployed in foreign jurisdictions to aid operational work and promote international intelligence sharing. Respondent 11 has a network of Fiscal Crime Liaison Officers (FCLOs) based in a number of jurisdictions across the world and they receive tasking about supporting operational activity or building and developing intelligence or relationships with law enforcement partners about key assigned matters, including tobacco smuggling. These overseas law enforcement partners have also provided support with overseas surveillance and assisted with controlled deliveries. The service also contributes to international forums such as the WCO, OLAF and ASEM.

137. Respondent 13’s reply should be noted due to the different perspective to illicit tobacco trade in its country “While we are a participant with the World Health Organisation’s (WHO) Framework Convention on the Tobacco Controls (FCTC), most domestic issues pertaining to illicit tobacco are unique in nature to our jurisdiction with the occasional tie to another countries who may source precursors but overall very little international interactions”

138. The following case study illustrates the importance of international cooperation and information sharing in targeting and interdicting against a sophisticated organised crime groups with links to counterfeit cigarette smuggling in the US, France and Belgium. It also highlights the value that international bodies such as OLAF have in facilitating dialogue between overseas investigative agencies.

**Box 14: Case study – Multiple jurisdiction case of ML to be associated with ITT**

**Case Barrie**

On 28 September 2005, Customs in Antwerp harbour carried out administrative verification on container no. TEXU 534506-7 arrived on 22 September 2005. Some aspects particularly drew customs officers’ attention.

- The title of the bill of lading: « Delivery bamboo articles



- The Origin: China – Destination: Belgium
- Final destination: Rue de Brabant in 1030 Brussels, in the neighbourhood well known for counterfeiting of all sorts of goods. On this suspicious ground, customs decided to put in place a controlled delivery.

A truck loaded with the container left Antwerp harbour in the direction of Brussels. However, instead of going directly to Rue de Brabant, the truck went to Chaussée de Ninove at 1070 Brussels after having picked up one Alpha Mamadu BARRIE.

The address was found to be that a company called SHURGARD SELF STORAGE. Customs officers stopped and controlled the truck and the container. Instead of bamboo items, the container was loaded with 9 800 000 counterfeit cigarettes Marlboro red. It also appeared from the controlled delivery that the cigarettes boxes were sealed with a false tax seal. A quick estimation was made with the container then holding tobacco amounting to a fraud of about EUR 2 million. Customs informed the Brussels prosecutor's office at the end of the preliminary verifications and the Federal judicial police (Economic and financial crime unit) continued to investigate the case.

## The Investigation

### *The 1st Phase*

When under arrest, the conveyor, Alpha BARRIE, carried EUR 1 150 and 3 mobile phones (even though he had no other income other than social revenue). He had committed similar acts in 2004, for which he had been indicted and expected the trial. He also had 3 rental contracts between SHURGARD SELF STORAGE and a so called Mahmood BARRY (the phone number on the contract was actually BARRIE's number).

Then BARRIE's car was searched and the following goods and documents were found:

- Another rental contract at SHURGARD SELF STORAGE used the name Mahmood BARRY;
- A bedroom's (magnetic) card at SHERATON Brussels.

We asked Alpha BARRIE why Mahmood BARRY rented storage at SHURGARD SELF STORAGE. Alpha BARRIE explained that Mahmood BARRY's ID card was given to him by a person called "Mr. UNIT" for the renting several boxes at SHURGARD SELF STORAGE. He declared that he did not remember why he was asked to rent these boxes for Mr UNIT. We carried out a search at Alpha BARRIE's. There a business card TUNG CHUN FAI INTERNATIONAL – TONY LAM was seized. Alpha BARRIE declared that Mr UNIT is actually Mr. Tony LAM (from Asia). Alpha BARRIE also said that he needs to contact Tony LAM; he dials a specific mobile phone number. He knows that when he is in Belgium, Mr. LAM drives a grey BMW. He said that Mr. LAM has already been with him at the SHURGARD's boxes in Brussels.

We were then informed that a second container could be linked to the container seized on 28 September 2005 and was to be delivered in Mechelen. This second container is linked to Mamadou Bailo SOW. It comes from verifications that Sow is known from French Justice and that Alpha BARRIE is involved in another legal cases in Belgium (BARRIE I in 2004).

The link between the two containers was the beneficiary company mentioned on the bills of lading

namely FIMIDRA. Customs officers indicated that this company could be linked to seven more containers. According to the customs data base, the manager of FIMIDRA was also involved in another company named EUROPEAN CAR with a further two containers to be linked to lastly mentioned company.

This amounted to a total of 9 containers inbound from China, including the 2 seized on 28 September 2005. A quick evaluation indicated that a total of about 100 million smuggled cigarettes have been imported into the target country and that this represented a fraud of more or less €16 million. Customs furthermore confirmed the participation of: BARRY Alphonse, SOW Mamadou, and VERSTREPEN Stéphanie.

The origin of the counterfeit cigarettes was obtained from Chinese authorities through the assistance of OLAF (European anti-fraud office). EUROPOL also indicated that SOW, BARRIE Salam and SANI Lassana were furthermore involved in criminal proceedings in France. SANI Lassana was indicted for money laundering in Belgium EUR 285 000.

During the investigation (2006), Mahmood BARRY was involved in another case of counterfeit perfumes and cigarettes. The investigating magistrate required OLAF's assistance. OLAF informed us that another container had been seized in Shanghai on 9 September 2005. It contained 9 750 000 cigarettes for the company FIMIDRA in Brussels.

Through contacts with the US authorities, OLAF learned that a person named LAM Wei Tung had been arrested in Arizona. He had contacted a Belgium national named Corinne THISSEN from prison. Further investigations revealed that LAM was involved in an additional 2 cases in the US, in Arizona & California. To summarise:

1. The investigation that revealed that an organised group was involved in the smuggling of counterfeit cigarettes. Its financial impact was regarded as significant.
2. The indicted persons were involved in 9 related criminal proceedings.
3. To be more effective, research/investigation was streamed in 8 points of focus.
4. A total of 11 containers could be linked with the company FIMIDRA (and/or its managers). This observation was made on the basis of the bills of lading.
5. FIMIDRA was found to be a shell company owned by BARRIE Salam since 2005.
6. This company would be the beneficiary of the container seized in Shanghai on 9 September 2005.
7. To purchase FIMIDRA, BARRIE Salam received financial and technical support from CHASSEUR (stepfather of Corinne THISSEN), SANI and CEUPPENS.

#### *The 2nd Phase*

2nd issue / trail for the investigation focused on the rental contracts and taking account of the fraudulent use of an identity card. A copy of the video surveillance of SHURGARD was seized. We found out that on 27 September 2005, in the evening, an African person driving a metallic grey car arrived. Here he met SHURGARD and inspected the premises with SHURGARD showing the capacity of the storage area. Alpha BARRIE was provided with a document that proved the rental of storage

boxes. This document was found in his vehicle when searched. Once the administrative arrangements were made, Alpha BARRIE joined back an Asian who was then identified as LAM Wei Tung. BARRIE proceeded to show to LAM the boxes he just rented. BARRIE and LAM left the storage area together. LAM goes back to BARRIE's car. BARRIE confirms the rental of the boxes. Then they leave together with Alpha BARRIE's grey car.

#### *The 3d Phase*

3rd issue / trail for the investigation: WAREHOUSE IN MECHELEN: concerning the 2nd container (dated 28 September 2005), the bill of lading indicated some elements similar to those of the container seized at the SHURGARD. On this ground, the warehouses Mechelen were searched. The 2nd container was found and seized. The security seals were on the floor and rental contracts were found that demonstrated links with 5 containers which had been loaded with smuggled goods. In Mechelen (at least 3 containers), it was established that BARRY Alphonse and VERSTREPEN Stéphanie with a third unidentified person rented the warehouses using false identity.

#### *The 4th Phase*

4th issue / trail for the investigation: TRANSPORTS MAGEMAR: on the basis of elements of proof found during the search and statements, we found that 4 containers were directly related to CHASSEUR, BARRIE Alpha, BARRIE Salam and LAM Wei Tung.

#### *The 5th Phase*

5th issue / trail for the investigation: SHERATON HOTEL: A hotel magnetic key was seized in Alpha BARRIE's car. It was a card from the SHERATON in Brussels. On this ground, the hotel was requested to communicate the dates and identity of the person who paid for the room. It was KITTY Jie Fan, LAM Wei Tung's wife. The dates match with the dates of arrival of 4 containers.

#### *The 6th Phase*

6th issue / trail for the investigation: in FRANCE: two French cases were reviewed. These cases related to 7 containers. The bills of lading show the same features than those targeted in Belgium. It was found that the scheme used the same modus operandi in France as in Belgium, *i.e.*:

- China Belgium France
- Similar Bills of lading
- Involvement of FIMIDRA (company)
- Involvement of SOW – BARRIE Salam – BIDANESSY Séta – LAM Wei Tung

We learnt that

- LAM bought a house in France for EUR 586 000 in 2003;
- He had several issues with customs authorities concerning cash transportation while entering in the UK, France and Senegal. When we returned from France, we verified whether LAM had similar issues in Belgium. In 2003, he did not declared USD 350 000 and EUR 900 000 while arriving at Brussels airport. He declared to the customs officers that he needed large amount of cash for his business in Africa.

*The 7th Phase*

7th issue / trail for the investigation: while executing a mutual legal assistance in conjunction with OLAF (EU anti-fraud office) in the US, contact was made with US law enforcement agents – ICE in Arizona. Information was shared with respect to a consignment of counterfeit shoes. In that case LAM had been convicted to 30 months custody. Investigators also met with ICE officials California. They also gave us access to their information concerning the trafficking of counterfeit shoes and cigarettes. The information confirmed the active participation of Corinne THISSEN, CHASSEUR's stepdaughter, in the trafficking in counterfeit cigarettes with LAM Wei Tung. It also appeared that LAM had a problem concerning a declaration of cash at JFK airport in 2006 (USD 131 000).

*The 8th Phase*

8th issue / trail for the investigation: EUROPEAN CAR: 2 containers could be linked to the company EUROPEAN CAR. CEUPPENS, Alpha BARRIE and CHASSEUR were involved in taking over this second shell company. The company was to be used as FIMIDRA had become too exposed and was by then well-known to Belgian Judicial Authorities. One of the two last containers was related to Alphonse BARRY and contained counterfeit cigarettes 'BENSON & HEDGES' (more probably for the UK black market).

**Investigative Findings**

At the end of these investigations, the investigating magistrate kept the following offences :

- Forgery and use of forged documents;
- Criminal organisation;
- Money laundering;
- Counterfeiting of goods;
- Offences to the Customs and excise legislation.

On this basis, LAM Wei Tung was extradited in July 2009 from the US to Belgium where an arrest warrant had been issued against him.

In April 2010 the criminal organisation trial started. The court decided as follows:

- LAM Wei Tung as head of the criminal organisation;
- CHASSEUR Roger member of the organisation;
- Company FIMIDRA as member of the organisation;
- BARRIE Alpha & BARRY Alphonse as members;
- CEUPPENS Daniel & BARRIE Salam as architects of the fraud scheme.

In total, cumulated penalties were established as follow:

- 19 years and 4 months of imprisonment;
- Confiscation of 2 containers + 2 cars + EUR 1 561 154;

- Criminal fines: EUR 435 500;
- Tax fines: EUR 62 474 594.

*Source: Belgium*

139. **Conclusions:** It is apparent that Customs authorities capture or can access a huge library of information, which could support a robust analysis of the risks to their jurisdiction. A key issue is the extent to which information management systems supports existing investigative work and identifies new risk areas, with appropriate analysis of the data to support the development of strategies and policies to help combat the illicit tobacco trade. The issue of data extraction and analysis is explored in more detail in the following section.

### UTILISATION OF DATABASES

140. The majority of Respondents hold databases, which contain customs information based on data entered on custom declaration forms. Respondent 7 has a searchable database that “contains the details of the import and the export declarations of the last three years”; however, no other respondents confirmed how far back they kept records on their own databases.

141. Just under half of the respondents confirmed they were able to cross-reference this information with other government databases. For example Respondent 11 indicated that while “no specific intelligence database is held even though we do hold details of goods and seizures, whenever the service commences an investigation into an individual or Organised Crime Group a number of basic intelligence checks are completed. These checks scan across a variety of intelligence databases, including the FIU, Companies House, credit reference agencies, the Police National Computer and any relevant customs owned databases to evaluate our previous dealings (if any) with the suspected individuals.”

142. However, access to such wide-ranging data is not without its difficulties, Respondent 13 highlighted the issue of access to sensitive information and the need to obtain the correct permissions; “personal or industry documents can only be obtained through a judicial authorisation if we are conducting a criminal investigation as not all information can be feely shared.”

143. **Conclusions:** The responses reconfirmed several of the issues raised when the Customs authorities were asked about the impediments to successful illicit tobacco trade investigations. It is clear that more needs doing internationally to piece together a global intelligence picture about the continued and expanding threat from the illicit tobacco trade.

### INDICATORS AND RED FLAGS OF ML AND OR TERROR FINANCING TO EMANATE FROM ILLICIT TRADE IN TOBACCO

144. Very few Respondents completed this question. Of those that did, three Respondents were able to list some indicators of money laundering or terror financing emanating from the illicit tobacco trade. Two respondents stated that there was “no relation to such activity to date”. The indicators and red flags included:

- a) Deposit of a large amount of cash in bank accounts.
- b) Abnormal and frequent bank transactions without legitimate business reason(s).
- c) Payments to unrelated third parties via:
  - i) Cash.
  - ii) Wire transfers.
  - iii) Checks, bank drafts or postal money orders from unrelated third parties,
- d) False reporting: such as commodity misclassification, commodity over-valuation or under-valuation.
- e) Carousel transactions: the repeated importation and exportation of the same high-value commodity,
- f) Commodities being traded do not match the business involved,
- g) Unusual shipping routes or transshipment points,
- h) Packaging inconsistent with commodity or shipping method.
- i) Double-invoicing

## B. LAW ENFORCEMENT

145. The following section follows the same train of thought as covered under customs. The purpose for the differentiation is to determine the differences in approaches in terms of the investigation of ML and or TF to emanate from ITT when compared amongst jurisdictions and their respective agencies tasked with conducting the investigation as well as determining whether certain best practices can be ascribed to differing models.

146. The first differentiator lies with which department has the mandate to conduct the ML investigation. In certain cases as mentioned above, the customs authorities have the mandate to conduct the ML investigation. The opposite model as mentioned implies that customs authorities provide relevant information to law enforcement to pursue money laundering investigations.

147. It should therefore be noted that some of the answers provided in this section will be the inverse of the aforementioned but that focus is to be placed on law enforcement's approach as opposed to looking solely at the role of customs. The following section will therefore aim to highlight this.

### THE NUMBER OF ML/TF CASES/INVESTIGATIONS TO STEM FROM THE ILLICIT TRADE IN TOBACCO SINCE 2006

148. From a money laundering perspective, respondents indicated internal difficulties in terms of linking amounts/volumes of tobacco seized as a result of investigations to possible funds laundered that could be associated with the predicate offence. Herewith some of the responses:

- a) Respondent 6 indicated that "Money laundering is an autonomous offence. As a result we cannot determine the exact nature of the predicate offence from the money



laundering reports registered in the national police database. When examining the details of the investigations we received (and when the quantities of goods were provided) we found that the cases investigated by the police related to intensive trade of illicit cigarettes (between 1.4 to 8 million cigarettes in each case). In these cases cigarettes were transported and imported. The quantities found at local points of sale are much smaller (several hundred packets). We do not have any information on the laundered amounts”.

- b) Respondent 11 indicated that it “does not keep complete records on the amount and volume of tobacco involved in its adopted criminal investigations. Often, as the extent of the smuggling is unknown, making inferences on the number of cigarettes seized is likely to under-estimate the amount and volume of tobacco involved in the investigations. This measurement problem also applies to accurately assessing the scale and scope of associated money laundering. However, as part of the aforementioned project into the criminal finances of tobacco smuggling, it is an area in which the relevant service wishes to expand its understanding.

149. **Conclusions:** Cigarettes are a legal commodity that can be transported and sold on the open market making it simple to establish a supply source, distribution channels, and move in large quantities. It is a low risk, high profit enterprise that entices traditional criminal traffickers to move into more lucrative and dangerous criminal enterprises such as money laundering, arms dealing, and drug trafficking. Law enforcement investigations have directly linked those involved in the illicit tobacco trade to terrorist organisations who are looking for a high-profit, low-risk way to finance their operations.

## LAW ENFORCEMENT AND THE CONDUCTING OF INVESTIGATIONS INTO ILLICIT TRADE IN TOBACCO AND MONEY LAUNDERING

150. Perhaps of the most pertinent reasons for lacking ML cases to stem from ITT was provided by respondent 6. “The police carry out reactive investigations, mostly based on international requests (sic) but also based on local information (identification of retailers), or based on disclosures to the jurisdictions FIU or based on complaints of manufacturers. Apart from investigations launched on the basis of a report by the FIU *we do not automatically open money laundering files. This is not appropriate when the goods have already been seized and when the financial flows have already been identified.* Investigation into the assets suffices to secure the seizure and confiscation of the illicit assets. *Opening a section on the financial aspect or money laundering complicates the procedure.* The Public Prosecutor can decide to open a money laundering investigation when appropriate. This investigation is then carried out by the economic and financial department of the federal police.

151. Respondent 11 also indicated that financial investigators are assigned to cases but that the decision to add ML as a charge was dependant on a case by case basis. This was done in conjunction with the prosecution service and dependant on the evaluation of the strength of the generated evidence.

152. Respondent 12’s respective agency covers the aforementioned as said agency has the responsibility of enforcing customs laws within the jurisdiction, and conducting investigations related to tobacco smuggling. These investigations include, but are not limited to, the domestic and

international smuggling of cigarettes; counterfeit or genuine, trafficking in counterfeit cigarettes; trafficking in stolen cigarettes; smuggling of cigarettes in violation of embargoes; and international money laundering investigations where one of the underlying crimes is tobacco-related.

## LAW ENFORCEMENT AND THE CONDUCT OF JOINT FINANCIAL INVESTIGATIONS

153. Only three respondents provided answers to this question. The primary theme being that inter departmental work groups had been established to address AML/CFT. No indication was however given where ITT was seen as a separate commodity to warrant intergovernmental arrangements for this specific commodity.

154. Respondent 9 indicated that the Guardia di Finanza is the main law enforcement agency involved into investigation on tobacco smuggling. At the same time, the Guardia di Finanza has the charge of investigative development of STR's also and has the knowledge to carry out financial investigation in general. For these reasons Guardia di Finanza is able to ensure investigation on all the aspects related to tobacco smuggling, keeping contacts, when it is necessary, with the FIU and any other authority which may be interested into investigation carried out. If suitable, it may commence a separate ML investigation into a complicit business (*e.g.* a MSB) outside of the predicate investigation into tobacco smuggling.

155. Respondent 12 indicated that the Joint Terrorism Task Force (JTTF)) serves as a centralised, coordinated entity for law enforcement information or investigation of suspected or real terrorist activities, including terrorist financing. The JTTF uses the concept of enhancing communication, coordination and cooperation between federal, state, and local government agencies representing the intelligence, law enforcement, defence, diplomatic, public safety, transportation and homeland security communities by providing a point of fusion for terrorism intelligence to identify disrupt and dismantle any potential terrorist threat.

### Box 15: Case study – ITT and linkage to TF and ML

Cigarette Smuggling, Money Laundering, Firearms, and Conspiracy

In 2009, the Joint Terrorism Task Force investigated a subject who smuggled 20 000 cartons of cigarettes and profited the USD 1.38 margin between Tennessee's USD 0.62 tax and Michigan's USD 2 tax. His Knoxville to Detroit operation reportedly cost Tennessee and Michigan more than USD 500 000 in tax revenue. During the course of the investigation, a wiretap caught the subject recruiting for Al-Qaeda and discussing blowing up a shopping centre. In 2010, the subject pled guilty to 16 counts including firearms, conspiracy, cigarette smuggling, and money laundering.

*Source: United States*

156. Respondent 13 indicated that the Judiciary Police is a member of the interdepartmental Anti-money laundering working group which comprises government agencies in charge of judicial, supervisory, law enforcement and FIU responsibilities. The working group meet every quarter to discuss recent trends in money laundering/terrorist financing, exchange views and ideas on that



and initiate necessary actions in relation to AML/CFT. However, the AML working group by itself has no investigative power, and such investigation could only be conducted by the Judiciary Police under the guidance of the Public Prosecution Office.

157. **Conclusion:** It should therefore be noted that cooperation amongst law enforcement is important and that this extends beyond internal engagements. The following section then serves to identify other impediments to the investigation of ITT.

#### IMPEDIMENTS ENCOUNTERED WHEN CONDUCTING INVESTIGATIONS?

158. Once again only three responses were received from which any deduction could be made. It is possible that this could extend into other areas of investigative endeavour and includes:

- a) Borders often slow down such investigations. Customs can act based on a “request for mutual assistance”.
- b) Some countries are not very cooperative.
- c) Finalised investigations show that the interest of foreign partners largely depends on their own interest in an investigation.
- d) Illicit Tobacco is one of many substantive offences related to proceeds of crime and money laundering investigations. The financial crime units have to prioritize on what investigations to undertake and illicit tobacco is not always at the top.
- e) Respondent 18 stated that in cases involving foreign predicate offences, while they have been proactive in commencing domestic money laundering investigations, were reliant on foreign counterparts to be forthcoming with evidence in a timely manner. When this is not done, or if the foreign country decides to enter into plea bargains with the suspects, said respondent would not be able to take further action.

#### THE USE OF CORPORATE STRUCTURES BY CRIMINAL SYNDICATES TO SMUGGLE TOBACCO AS WELL AS LAUNDER THE PROCEEDS OF THE ILLICIT TRADE IN TOBACCO

159. This section aims to provide an overview of multiple jurisdictions identification of specific methods utilised by perpetrators to launder the proceeds of ITT. Three respondents provided a detailed overview of methods utilised by groupings.

- a) Respondent 6 “Our investigations have identified various structures: The use of companies managed by a front man. The goods are sent to these companies and used to set up the lease of warehouses. The front man is usually unaware of the procedure used. The use of fictitious buyers with fake invoices and CMRs. The use of companies in financial trouble. Using payment in kind money is injected into this company. This easy money is attractive to the managers of these ailing companies and once they are caught up in this system they cannot get out. Managers of legitimate businesses use dirty money to purchase loads of cigarettes and finance the trade. The profits are channelled abroad using money remittance or cash couriers and invested in foreign property. Furthermore, transport companies allow cigarettes to be hidden in the cargos of legitimate products.

- b) Respondent 11 indicated the following “This is an area the responsible agency is investigating as part of the aforementioned project into the criminal finances associated with tobacco smuggling. There is operational intelligence to suggest Organised Crime Groups (OCGs) will establish seemingly legitimate import/export companies involved in bulk consumer goods, which act as suitable cover loads to support the illicit tobacco trade. For ML, the OCGs may own or become involved with criminally complicit Money Service Businesses, which provides an element of legitimacy in handling consistent volumes of cash. There is limited intelligence to suggest the involvement of offshore companies. The responsible agency is hoping to improve its understanding of how prevalent this methodology is in supporting the ML of funds generated by the trade of illicit tobacco products. In one large-scale operation, the overseas cheap white tobacco purchaser and distributor is linked to non-tobacco related companies in the UAE, Singapore, Malaysia and Greece. It is suspected these businesses provide a legitimate front for global import / export of goods acting as cover loads for smuggled cheap whites. This type of methodology is repeated by other OCGs but should not be considered as the prevalent MO. OCGs have proved flexible and fluid in setting up other corporate structures to support smuggling and the associated money laundering.”
- c) Respondent 13 stated that it is difficult to say with accuracy whether credit companies or banks are permitting the use of debit machines within retail outlets that sell illicit products then in a sense they could be facilitating illicit sales. However in many instances they would probably be totally unaware of where and to what end their services are being used to sell illegal tobacco products. It was sighted that corporate structures could be used depending upon the sophistication of the organisation. At the least corporations could be used for nominee ownership, banking, and tax evasion, within criminal organisations they could hire professionals to set up corporate structures to layer and then integrate the illegal funds in money laundering schemes. Based on FIU’s analysis of numerous cases related to illicit tobacco, the following types companies were either subjects of investigations or ordered/benefited from financial transactions, including international wire transfers:
- Cigarette suppliers/manufacturers/ distributors
  - Real estate companies
  - Auto dealerships/repairs/parts
  - Construction/landscaping companies
  - Financial services
  - Import/export or trading companies
  - Restaurants/bars
  - Non-profit organisations
  - Transportation companies
  - Pawn shops

## CONCLUSIONS

160. The information as provided by the respondents once again indicates that law enforcement agencies do investigate Organised Crime activities to be associated with ITT but very few examples were cited where ML was also investigated. In the Customs section strong emphasis was placed on the fact that Customs hand over potential money laundering cases or financial investigations to be associated with ITT. It is however clear that very few of these cases are investigated from a money laundering perspective.

## C. FINANCIAL INTELLIGENCE UNITS

161. In the previous sections it became clear that FIU's play a pivotal role in the coordination or facilitation of information sharing amongst law enforcement agencies. The following section therefore provides an overview of how FIU's interact with other agencies as well as assess money laundering and terror financing to be associated with the illicit trade in tobacco.

### SUSPICIOUS TRANSACTION REPORTING TO BE ASSOCIATED WITH ITT

162. The responses varied with countries focused on ITT once again providing a more detailed response. Not all jurisdictions could place a financial value on said STR's. Some jurisdictions also provided an overview of how their respective reporting regimes function. Certain jurisdictions also highlighted which other jurisdictions could be linked to their domestic smuggling aspects.

163. Respondent 3 indicated that for the required reporting period a total of 245 STR's had been received. The figures had increased drastically from six STR's received in 2007 to 43, 57, 95 and 44 for the respective years 2008-2011. Financial values were not included.

164. Respondent 11 indicated its reporting institutions are not required to identify suspected predicate offences and in many cases will not be aware of the predicate offence. This means that many reports are received on suspicious activity that has taken place without knowledge or suspicion that the money or arrangement relates to illicit tobacco trade. Some reporters, however, may suspect this crime is taking place and indicate this in their SARs.

- a) Since January 2006 said jurisdiction identified: 953 SARs containing the word "tobacco": 68 SARs containing "tobacco" and "smuggling" 793 containing the XXF2XX glossary code (this glossary code refers to Excise Fraud, of which tobacco forms only a part).
- b) Domestic: All SARs are made available to law enforcement via a nationwide database.
- c) International: Due to information recording methods, reliable statistics (specific to illicit tobacco trade) is not available.

165. Respondent 13 in turn indicated that its FIU had between 2007 to 2011, disclosed 59 money laundering cases linked to illicitly traded tobacco. These disclosures were sent to domestic and international law enforcement and intelligence agencies. Nine of the cases actually originated from a suspicious transaction report (STR) received by the FIU's reporting entities. Of the 59 disclosures, a total of 48 cases contained at least one STR linked to an individual or entity under investigation.

(i) & (ii): All STRs combined for cases related to illicit trade in tobacco totalled to 377 reports. (iii): The total monetary amount indicated in the 377 reports came to USD 40 821 493.70.

166. Respondent 18 declared that its respective FIU had from 2006 to 2010, received 21 Suspicious Transaction Reports (STRs) relating to illicit tobacco trade. Of the 21 abovementioned STRs, 9 STRs were detected which disclosed possible offences of illicit trade in tobacco and these were referred to domestic and international authorities.

167. **Conclusion:** It is therefore clear that various jurisdictions do have STR's associated with ITT. It is disconcerting to note that several of these STR's cannot be linked to subsequent ML law enforcement investigations. This could be reflective of the method used to obtain information for the purposes of developing this typology or be indicative of STR's related to ITT not being converted to ML investigations.

### THE FIU AS PART OF A JOINT FINANCIAL INVESTIGATION/MONEY LAUNDERING TASK FORCE

168. Previous sections highlighted the role FIU's play in conjunction with other law enforcement agencies. This section aims to highlight the specific role played by FIU's in terms of countering ML or TF to stem from the illicit trade in tobacco. Invariably the role of the FIU is dependent on whether it has investigative and or administrative capacities.

169. The majority of the respondents indicated that they do not take actively part in joint financial investigations but do however disseminate information to other law enforcement and Customs agencies. Respondent 13 provided a sound summation of the aforementioned *i.e.*, their respective FIU is an administrative FIU and does not conduct investigations. However, law enforcement and other government institutions or agencies are able to provide voluntary information to the FIU. If, on the basis of analysis and assessment, the FIU has reasonable grounds to suspect that designated information would be relevant to investigation or prosecution of money laundering or terrorist activity financing offences, the FIU must disclose the information to the appropriate domestic disclosure recipient. The FIU may also disclose internationally to an equivalent agency when there is an MOU in place.

170. **Conclusion:** FIU's seem to act predominantly as investigative support function and as conduit in terms of obtaining and distributing relevant information. The FIU's therefore are not necessarily part of a task team but through their functioning can support existing task teams. Indications were that STR or SAR's had been obtained and forwarded. Difficulties will however be experienced to link said reports to successfully concluded ML investigations to stem from ITT.

### IMPEDIMENTS ENCOUNTERED WHEN CONDUCTING INTELLIGENCE GATHERING

171. All respondents indicated that there were no impediments in terms gathering intelligence and day to day functioning. Respondent 13 did however indicate that its FIU is one of many key players in its jurisdictions anti-money laundering/terrorist financing regime. The Centre provides disclosures of tactical financial intelligence to its disclosure recipients as described above. The FIU also shares its strategic intelligence products with domestic and international partners.

172. In terms of intelligence gathering, it is important for administrative FIUs (especially) to have access to as many law enforcement databases as possible. For example, in these types of cases, having access to customs and intelligence files on suspected smugglers would assist analysis greatly.

### THE RELATIONSHIP BETWEEN FIU'S AND CUSTOMS AGENCIES

173. This section relates specifically to the relationship between FIU's and customs agencies. The purpose was to highlight the ability to report and receive information relating specifically to ITT. The majority of respondent's inputs were in the positive.

174. Custom agencies can receive financial information from the FIU under the following circumstances: (1) Referrals: Where STRO's analysis detects possible offences under Customs purview, STRO will disseminate the analysis results to Customs; and (2) Screenings with STRO: STRO allows domestic agencies, including Customs, to conduct screenings against the STRO database.

175. Respondent 13s Border Agency can receive financial information from the FIU. There is a dual threshold that applies as explained below. The FIU is able to disclose to the agency if the Centre, on the basis of its analysis and assessment, has reasonable grounds to suspect that the designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence AND If the Centre determines that the information is relevant to: An Offence of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the agency and investigating or prosecuting an offence of smuggling or attempting to smuggle goods subject to duties or an offence related to the importation of goods that are prohibited, controlled or regulated under the Customs Act.

176. Respondent 6 specifically stated that where the notification contains information regarding the laundering of money derived from an offence related to serious and organised fiscal fraud setting in motion complex mechanisms or using procedures with an international dimension, or from an offence within the competence of the Customs and Excise Administration, the FIU shall inform the Minister of Finance of this notification.

177. **Conclusion:** It is clear that many FIUs do provide the information to Customs authorities. The challenge would be to determine whether said customs agencies then red flag suspects and or identify the potential to forward said information or work in conjunction with law enforcement agencies.

### THE SHARING OF FINANCIAL INTELLIGENCE (FIU TO FIU, FIU TO LEA ETC)

178. This section was to then also highlight the importance of sharing of information across borders as opposed to within jurisdictions only. Unfortunately the answers provided were not indicative of significant international sharing of information on the illicit trade in tobacco.

#### Box 16: Case study – FIU and the sharing of information

The case was triggered from a suspicious transaction report (STR) filed by a financial institution describing unusual large cash deposits conducted into a joint personal account held by Individual A

and Individual B. The STR revealed that Individual A is employed by Entity X

Over a period of 6 years, approximately 120 large cash transaction reports involving the two individuals were reported to FIU. In an article published in a local newspaper, it was stated that Entity X, a construction company, was used as front company by an organised crime group to smuggle tobacco products between Canada and the United States. Under the Canadian excise tax law, the owner of the company was sentenced to pay a large fine.

Entity X was also identified in the media as part of company consortium linked to suspected drug trafficking and organised crime.

### **Comment**

In this case, FIU was able to link an article in a local newspaper with financial transactions conducted by Individual A and Individual B. The case also shed light on money laundering methods used by cigarettes smugglers. Money from cigarette smuggling was given to the front company's employee to be deposited into his personal account.

*Source: Canada*

### **Box 17: Case study – ITT ML between the UK and Belgium**

In the past transactions mainly consisted of changing GBP (and to a lesser extent SCP and NIEP) into EUR that could be linked to tobacco smuggling between Belgium and the United Kingdom. Since 2007 the transactions have mainly been cash deposits followed by cash withdrawals. In several files the accounts of Belgian companies selling tobacco were credited by cash deposits followed by cash withdrawals.

Information from the special tax inspectorate – Fraud scheme information service the list of suppliers of these companies showed that the tobacco was purchased without being declared. Given the discrepancy between the amounts listed for the purchase compared to the amounts sold we can conclude that some of the purchased goods were resold without being declared.

Due to the large amounts it is beyond doubt that the actual nature of the business transactions involved paying excise duties in the United Kingdom, which are considerably higher than the excise duties applicable in Belgium. EUR were purchased using GBP which are the proceeds of fraudulent tobacco sale in the United Kingdom for which excise duties and VAT in the United Kingdom were not paid. The EUR were used to supply smuggling networks with purchases that are supposedly carried out by individuals.

This money laundering is also detrimental to the financial interests of the European Communities because by not paying excise duties in the United Kingdom the fraudsters also do not pay the applicable VAT and 10% of this amount goes to the budget of the European Union.

Typologies related to the individuals involved. Some of the individuals involved in these transactions are British nationals. They either lived in the United Kingdom or in Belgium. Often they have already committed this kind of illegal activity or drug trafficking or state that they change currencies to purchase cigarettes or tobacco in Belgium. They changed EUR at exchange offices but



also at bank branches in the Belgian coastal region. Over time CTIF-CFI has found that money launderers moved their activities to Brussels to avoid any suspicions. Transactions were also split among various people as to not arouse suspicions.

Other files involved Belgian nationals that could be linked to the United Kingdom; they were lorry drivers who often travelled in the United Kingdom. CTIF-CFI forwarded several files linked to illicit trade in tobacco to the judicial authorities. Links with the United Kingdom were identified in these files. The excise duties in the United Kingdom are considerably higher than those in Belgium. In these files British nationals changed considerable amounts of GBP, SCP and IEP into EUR. Some of them lived in Belgium and CTIF-CFI's analysis showed that they could be linked to the United Kingdom. Many of them were lorry drivers who often travelled in the United Kingdom. Several individuals involved in these files were given prison terms. Nationals of Central and Eastern European countries that were not linked to Belgium in any way were also often involved in this kind of trafficking. Several nationals of Central and Eastern European countries repeatedly went to the same exchange office in Brussels to change GBP into EUR. Several thousand EUR were changed into EUR in a few months' time. These individuals were not officially registered in Belgium and did not have any professional links to our country. They were known to the police for illicit tobacco trade. The GBP changed in Belgium were probably proceeds of this illicit trade, which were laundered by purchasing these EUR.

*Source: Belgium*

#### D. TAXATION AUTHORITIES

179. The concluding government stakeholder to be addressed is taxation authorities. Of importance to note is that various jurisdictions ascribe differing responsibilities to their taxation authorities and are therefore not always comparable when viewed from a law enforcement functionality perspective.

- a) Firstly, some revenue services are a combination of Inland Revenue and Customs Services. It is therefore possible that differing responsibilities and mandates will come to the fore where combined services are utilised.
- b) Secondly, cognisance should also be taken regarding the various jurisdictions approach in terms of whether tax crimes are considered a predicate offence to ML or not and or whether the illicit trade in tobacco is viewed as a taxation offence.

180. If one were to assume that tobacco smuggling and the accompanying false declaration occurs for the purposes of tax (duty) evasion, and that said jurisdiction does not consider tax crime a predicate offence to Money Laundering, one could then conclude that the possible money laundering to stem from the illicit trade in tobacco will possibly not receive the same impetus when viewed from an investigative perspective when say perhaps that as perpetrated by a drug smuggler or smuggling ring. The following section will centre more on the differing approaches as followed by the responding jurisdictions, the identified successes, weaknesses, shortcomings as well as the affected standards.

**TAXATION AUTHORITIES: THE CONDUCT OF INVESTIGATIONS INTO THE ILLICIT TRADE IN TOBACCO AND MONEY LAUNDERING.**

181. Respondent 2 stated that the Field Audit and Investigation Unit of the Inland Revenue Department (“IRD”) is responsible for conducting field audits and investigations on businesses and individuals with a view to combating tax evasion and avoidance. The IRD does not differentiate transactions involving illicit trade in tobacco and/or other types of arrangements which have led to tax evasion or avoidance. IRD does not conduct money laundering investigation for the reason mentioned above. Money laundering investigations will be investigated by Customs, Police and the Independent Commission Against Corruption respectively

182. Respondent 3 stated that it sees the Illicit Trade in tobacco as a significant problem and that a national project has been registered relating to high risk entities within the tobacco industry. It is not the mandate of the Tax/Customs Authority to conduct investigations into money laundering. These investigations are referred to the Assets Forfeiture Unit (AFU) under the National Prosecuting Authority (NPA) as well as the Financial Intelligence Centre (FIC).

183. Respondent 11 stated that its Tax Authority conducts criminal and civil investigations into the illicit trade in tobacco.

184. Respondent 12 has a specific agency charged with this responsibility and has the primary jurisdiction of collecting the domestic Federal tobacco excise tax, as well as enforcing other related provisions of the Internal Revenue Code. In enforcing this jurisdiction, the agency works to target individuals and companies that are wilfully seeking to avoid excise taxes, defraud the Federal government and participate in illegal activities. Some examples of illegal activity investigated by the agency includes: the evasion of FET on manufactured tobacco products; illegal manufacture of tobacco products; smuggling of tobacco products into the United States without payment of FET; and the diversion and non-payment of tax on tobacco products which were held by wholesalers and distributors when a subsequent FET Floor Stocks tax became due. Agency auditors and investigators are able to detect money laundering and other financial fraud schemes while conducting their audits. However, the agency currently does not have a permanent criminal enforcement component. Under special appropriations that expired September 30, 2011, the agency was appropriated funding for use towards the “hiring training and equipping of special agents” to conduct criminal investigations. Under this authority, the agency negotiated and signed an Interagency Agreement with the Internal Revenue Service (IRS) in which the IRS provided criminal investigation services to the agency. This partnership proved to be very successful. The investigations conducted by the Special Agents assigned to the agency included money laundering as one of the related offences. The agency has requested funding to permanently continue a criminal enforcement program, however; until such time as additional monies are received, the agency must again look to other law enforcement agencies, including the Criminal Investigative Division at IRS, to accept and conduct any new criminal related investigations on behalf of the agency.

185. Respondent 13 indicated that vast steps have been taken to enable said investigations. The agency has in the past conducted both civil audits and criminal investigations into the illicit tobacco trade. Under its special enforcement program, it audits criminals engaged in this sector. The agency



will conduct investigations into this sector when it suspects tax evasion and/or tax fraud. The recent changes (July 2010) to the jurisdictions Criminal Code has seen tax evasion become a designated offence to money laundering. As such, the agency and its investigative component can conduct its own investigations into ML aspects of these cases.

186. In contrast respondent 17 indicated that its Tax Authority does not conduct any investigations regarding illicit trade in tobacco, but audits would be done for taxation purpose. The Tax Authority does not conduct the money laundering aspect of the investigation. Judiciary Police is the government agency vested with the power to conduct money laundering investigations. Respondent 18 responded similarly insofar as that there are no specific programmes by the tax authority to target the illicit trade of tobacco. Investigations on criminal activities with financial implications such as money laundering of criminal proceeds are handled by other agencies with tax offences then also not currently being a predicate offence for money laundering.

187. **Conclusions:** The following primary themes were identified:

- a) Some jurisdictions allow for tax evasion (as derived from the smuggling or illicit trade) and the Money Laundering associated with it to be investigated by the tax authorities. The statistics were provided however reveal that very few Money Laundering cases have been investigated within these jurisdictions even where they have the mandate to do as such. The emphasis thus remaining with the investigation of the predicate offence.
- b) Some jurisdictions indicated that they are responsible for investigating the tax evasion offences but that the ML offence investigation is referred to another law enforcement agency. No statistics were provided to indicate the number of cases provided as well as the success rate when viewed from a prosecution perspective.
- c) One respondent indicated that it does not conduct any form of investigation into ITT as well as ML investigations with a last respondent indicating that its customs authority is responsible for investigating the ITT and local law enforcement investigating the ML offence. Once again no corresponding statistics were provided.
- d) It can therefore ultimately be summated that the responses indicate that the majority of tax authorities do not single out ITT as a significant tax evasion offence and that very few of the authorities conduct ML investigations or refer possible ML investigations to stem from ITT to law enforcement.

#### **TAXATION AUTHORITIES: STATISTICS ON THE NUMBER OF ILLICIT TRADE IN TOBACCO, RELATED TAX EVASION CASES AND THE MONEY LAUNDERING TO STEM FROM IT.**

188. The answers here are dependent on whether the tax authority is responsible for tax evasion investigations to stem from the illicit trade in tobacco as well as whether said authority differentiates and maintains databases or statistics in terms of the origin of the investigated cases of tax evasion. Only four of the respondent's replies were indicative of this.

189. Respondent 3 has registered a project which focuses solely on tax evasion offences to stem from the illicit trade in tobacco. The tax authority can be described as a combined customs and Inland Revenue service. Multiple tax entities related to the illicit trade in tobacco have been

identified with the various remedies at the authorities' disposal being used to counter the illicit value chain to be associated with the groupings activities. This includes search and seizures as well as the raising of tax assessments across various tax types. The total tax liabilities regarding only four of the investigated entities is in excess of USD 45 million. No money laundering cases have been associated with the project.

190. Respondent 11's response was indicative of a similar approach. The tax authority is also a combined agency of Inland Revenue and customs. In its response it is noted that following any successful prosecution, the said agency, will seek to recover the proceeds of an individual's involvement in unlawful conduct. As the jurisdiction operates a value-based confiscation system, this is not necessarily linked to the recovery of assets. However, where possible Financial Investigators will assess an appropriate benefit figure to deny the individual access to or ownership of legitimate and illicitly obtained assets. If prosecution has not been successful or is unlikely to succeed, the agency will evaluate the opportunities it has to mount a civil investigation into the individual(s) with the aim of recovering (at the very least) monies owed to the fiscal authorities.

191. Respondent 12 has a dedicated agency responsible for the collection of excise taxes on tobacco products, and for eliminating or preventing tax evasion and other criminal conduct in regard to regulated tobacco commodities. Tobacco manufacturers and importers, among other entities must obtain a permit from the said agency in order to operate. They also must comply with recordkeeping and tax payment requirements under local legislation. Violations of the Internal Revenue Code with the intent to evade excise taxes may result in a civil fraud penalty or criminal prosecution. Over the past 5 years, the agency has had 47 tobacco cases involving tax evasion. Ten of these cases are current criminal cases that are still under open investigation, 14 are still open audits/investigations, 4 were resolved with no further action and 19 of these cases were resolved administratively through adverse action. Adverse action can include: offers in compromise (OIC), basic permit suspension or the voluntary surrender of a basic permit by an industry member. The 19 adverse action cases were resolved via the following manner: The total tax liability estimated for the 10 criminal cases is estimated to be USD 13 161 995, although since the investigations are ongoing, this amount could turn out to be significantly higher. Further, there are likely to be as yet unidentified money laundering charges that will stem from these cases. The 23 cases that were resolved administratively had no monies associated with them. Three other cases that were settled totalled USD 5 million.

192. The reply from respondent 13 also indicated successes to be had should tax authorities utilise their specific mandates. The specific Revenue Agency has worked alongside its Ministry of Finance to tackle the illicit tobacco trade from both a civil liability and a tax evasion point of view. In around 2005 the Agency and the specific jurisdiction entered into a Joint Forces Operation (JFO) that saw referrals from the jurisdiction to the Agencies Special Enforcement Program (SEP). Those cases that had indications of possible tax evasion were referred from the SEP to the Criminal Investigations Program (CIP). There were a total of 4 cases that were referred to the CIP in the past five years, with two resulting in convictions. The other two cases were eventually aborted.

193. **Conclusions:** The following primary themes were identified:

- a) Given the nature of how taxation authorities operate (*i.e.*, the differing mandates and jurisdictional approaches) information and lacking statistics obtained indicates that

taxation authorities do not focus on the Money Laundering offence per se and tend to focus more on the tax evasion offences.

- b) Furthermore, very little indication was obtained that taxation authorities differentiate between where the illicit income had been derived from. This then meaning that the ITT is not differentiated from other forms of illicit income generation.

## TAXATION AUTHORITIES: IMPEDIMENTS ENCOUNTERED

194. It is well known that tax legislation is strict in terms of governing the obtaining and sharing of tax payer information. One of the drawbacks would for instance be the provision of information under civil or administrative auspices which is then subjected to scrutiny by criminal investigators. This and related aspects has been discussed at length within the FATF realm. There are however certain jurisdictions that have relaxed impediments to the aforementioned which have in turn assisted significantly in the countering of organised crime and related activities.

195. Respondent 13's reply is indicative of the aforementioned. The respective revenue authority has a long standing policy and legal obligation to respect the confidentiality provisions of both the Income Tax Act and the Excise Tax Act. This applies to all aspects of the compliance cycle, be it during the intelligence gathering stage or the actual investigation or audit. However, when seeking information from other law enforcement authorities, for the most part the provisions have not significantly limited the agency in its intelligence gathering activities. It is worth noting that data houses in certain police databases is not available to Special Enforcement Program (SEP) auditors and therefore, SEP intelligence gathering of this nature must be relied on through liaison with law enforcement. Once the information is with the agency, the provisions are, however, more restrictive pertaining to disclosures from the agency. In general, the agency cannot share information related to case specifics with external partners. The agency is impeded by legislation in some respects as Section 241 of the Income Tax Act and Section 295 of the Excise Tax Act (GST/HST) restrict the agency's ability to provide external partners with compliance action case specific details that would assist in gaining a better understanding of the characteristics and details of potential tax evasion cases.

196. Respondent 3 indicated that its legislation is applied in the same vein. The tax and customs legislation prohibits the sharing of tax and customs information in terms of section 4 of the Income Tax/Customs and Excise Act. However, if a matter is registered with the National Prosecuting Authority (NPA) in terms of the Prevention of Organised Crime Act (POCA) this legislation supersedes the secrecy provisions in the Tax and Customs legislation allowing for the sharing of information. The Financial Intelligence Centre Act also supersedes the secrecy provisions insofar as placing a reporting obligation (in the form of a suspicious transaction report) on the revenue authority where money laundering is suspected. In recent times the working relations between the various law enforcement structures have improved due to joint prioritisation of investigations.

197. Respondent 12 also mirrors the two prior respondent's approaches. The respective agency experiences several impediments in its attempts to collect intelligence. The agency for instance does not have access to several criminal history databases, and must look to other sources and databases to fulfil its mission of granting permits, as well as to detect and investigate tax evasion. Another primary roadblock to information sharing is the inability of the agency to share tax

information with other law enforcement agencies, which precludes said agency from releasing any information about a taxpayer that was obtained via a tax return or from return information (return information includes a taxpayer's identity and the nature, source, or amount of their income, payments, receipts, deductions, exemptions, credits, assets, liabilities, etc). Although there are exceptions to the non-disclosure provision, the procedures that allow for information to be shared can be arduous and too restrictive. The agency holds some information that would benefit other law enforcement and taxing agencies and vice versa, however without the ability to freely share information in a timely manner among agencies, it is difficult to collect intelligence that portrays the complete picture. We note that the STOP Act S.1706, a bill recently reintroduced in Congress to reduce tobacco smuggling, removes some of the restrictions by allowing information sharing with designated state, federal, and international law enforcement and tax agencies.

198. **Conclusions:** It is therefore clear that these similarities create an environment which could be regarded as conducive towards the illicit trade in tobacco to occur. This lack in ability to share information emanates from law enforcement and from the taxation authorities. It could therefore be argued that the inability to share information pertaining to crimes that are committed predominantly within the taxation and customs domain can be considered as conducive for illicit trade to occur.

199. The primary cause would be the decrease in the risk of detection coupled with lacking criminal procedure and money laundering convictions to stem from the illicit trade.

200. Secondly, not all taxation authorities have investigative powers pertaining to these offences which if seen in the context of lack in sharing of information creates a void from detection, investigation and successful prosecution.

#### Box 18: Case study – operation 'Samhna'

A multi agency operation, code named 'Samhna', headed up by Revenue's Customs Service, is currently underway in Greenore Port, Co Louth, and surrounding area.

The operation, targeting the suspected criminal activities of an organised crime group operating both north and south of the border, involved the surveillance of a general cargo vessel M/V Anne Scan, which sailed from the Philippines on 15/09/2009 for Greenore Port, arriving at approximately 0600 hours on Monday, 26/10/2009, carrying a cargo declared as 'animal feed'. Officers kept the vessel under surveillance, as they suspected that a large consignment of contraband cigarettes was concealed within the cargo.

Following the discharge of part of the cargo from the vessel earlier this morning onto awaiting trucks, which were allowed onwards to the importer's premises, the multi agency task force, involving Officers of Revenues Customs Service and An Garda Síochána, moved in and raided several premises in the Co. Louth area, in addition to mounting an operation on the vessel itself. A large consignment of contraband cigarettes has been confirmed, estimated to be in excess of 120 million cigarettes with a retail value of about EUR50m and a potential revenue at risk of approximately EUR40 million. Several persons have been arrested at various locations by the Gardai for questioning.

The operation in the Republic of Ireland involved Officers of Revenue's Customs Service, An Garda

Siochana, The Criminal Assets Bureau, the Irish Naval Service and Air Corps and in Northern Ireland, Officers of HM Revenue & Customs and the PSNI. In addition the European Anti-Fraud Office (OLAF), which was also involved, will co-ordinate the international enquiries which will form part of the follow-up investigations. It is estimated that in excess of 150 Officers from the various Agencies participated in the field in today's operation.

Two of the vessels that supported the operation were Revenue's Customs cutter RCC Faire and the Navy vessel LE Niamh. Hailing the operation as a great success, Revenue Commissioner Liam Irwin said: *"The success of this operation is a credit to the close working arrangements and cooperation between the various law enforcement agencies both nationally and internationally. Criminals have no respect for national borders and international cooperation is now more essential than ever for law enforcement agencies. This is a shining example of a multi-national, multi-agency response to criminal activity and all the agencies involved should be commended for the part they played in this successful operation"*. Garda Commissioner, Fachtina Murphy said: *"This is a significant strike against organised crime. The success of the operation illustrates the results and benefits that flow from close interagency cooperation. I want to pay tribute to both our colleagues in Revenue Customs Service and my own members of An Garda Síochána who were involved in this morning's operation. Their hard work and dedication helps us to secure a safer community for everyone."*

Defence Forces Chief of Staff, Lieutenant General Dermot Earley congratulated "this joint action by the Revenue Customs Service, Garda Síochána and our LE Niamh which proves the need for this joint co-operation yet again. I know there is a lot of hard work to follow behind the scenes and the Defence Forces will continue to assist in every way it can".

*Source: Irish Tax and Customs (2009)*

## TAX AUTHORITIES: ALTERNATIVE METHODS OF INVESTIGATION

201. This section is to highlight the propensity for tax authorities to offset the negative effects of the aforementioned through the establishment of task teams and the utilisation of a collaborative approach. Once again this differs from jurisdiction to jurisdiction.

202. Unfortunately no significant answers were obtained. The absence of responses could be interpreted as such that collaborative approaches are not being followed to offset the limitations as posed by the ability to share information.

203. **Conclusions:** It is however known that within the taxation arena great effort is being placed on the enhancement of the ability to share information. In the case of taxation authorities that follow an Inland Revenue approach only the utilisation of DTA's with other member countries can assist in obtaining information which may help to curb transnational smuggling. Jurisdictions following a combined approach (*i.e.*, Customs and Revenue Service) can take further advantage of Mutual Administrative Agreements between Customs Authorities.

**TAXATION AUTHORITIES: AWARENESS TRAINING ON INVESTIGATING OR REPORTING ML TO STEM FROM ITT**

204. The responses received indicated that very little emphasis has been placed on Money Laundering stemming from the illicit trade in tobacco or the tax evasion to be associated with it. The following section then serves to provide an overview of the emphasis that taxation authorities place as a whole on ML investigations and whether this would impact on the ability to associate ITT with ML and TF. This facility will be dependent on whether investigations are conducted internally, are outsourced or performed by other law enforcement agencies. Only five responses were received which all indicate a degree of ML awareness programmes to fully fledged courses. Not one of the respondents indicated whether this was performed with specific reference to the ITT.

**TAXATION AUTHORITIES: PREVALENT FORMS OF TAX EVASION TO BE ASSOCIATED WITH THE ILLICIT TRADE IN TOBACCO**

205. Respondent 12 stated that a prevalent form of tax evasion associated with the illicit trade in tobacco is the interstate movement of tobacco products from lower taxed jurisdictions to higher taxed ones. It is estimated that states lose several billions of dollars annually to this type of tax evasion. Under the authority of the Contraband Cigarette Trafficking Act (CCTA), and in conjunction with various state agencies, ATF investigates this form of tax evasion. Federal tax dollars are also at stake, and in terms of TTB jurisdiction, diversion schemes vary widely and change in response to targeted enforcement efforts. Schemes include:

- a) The illicit manufacture of product,
- b) Diversion of “exported” and non-tax paid product, and;
- c) Smuggling or misclassification of imported product to evade tax.
- d) Another major source of tobacco diversion is the illicit manufacture and sale of tobacco products.

**Box 19: Case study – Tax investigations**

Retailers legally sold tobacco duty free to the reservations of Canadian Natives who then sold to store owners who used ‘runners’ to deliver the goods to various store owners for resale. Once the tobacco leaves the reserve for sale, it attracts duty and none were paid in these cases.

They both were cases where the Province of Ontario Tobacco Tax investigators performed surveillance and executed the search warrants on the cases. The CIP then obtained the records via a Provincial Offences Act application. The investigations were then conducted via a net worth using both the evidence seized from the province as well as those obtained from 3rd parties via production orders.

*Source: Canada*



**Box 20: Case study – ITT, tax evasion and terror financing**

*Study: Material support to terrorism and cigarette smuggling*

In 2002, The Lackawanna Six were identified as an Al-Qaeda Sleeper Cell, living in Lackawanna, NY, USA. They reportedly travelled to Afghanistan in April and May 2001 to join in Islamic jihad and receive military training at the Al Farooq training camp run by al-Qaeda; met with Osama bin Laden; and are believed to have been encouraged to go to Afghanistan by two American veteran mujahidin. They were indicted on two counts of providing material support to terrorism.

In 2004, another subject also of Lackawanna, New York, was convicted of money laundering and cigarette smuggling. An investigation revealed that this subject and more than a dozen co-defendants smuggled millions of cartons of untaxed cigarettes purchased from a Seneca Indian Nation wholesaler and sold them for huge profits in Michigan and in New York.

The operation cost the states millions in lost tax revenue. The members of the Lackawanna Six said that this subject had given them USD 14 000 which they used to travel to the training camp in Afghanistan.

*Source: United States*

**CONCLUSIONS**

206. Questions posed focused on whether taxation authorities have the mandate to conduct investigations into ITT and if so whether resulting ML will also be investigated within the realm. Of importance was also to determine whether tax authorities differentiated between tax evasion offences to be derived from ITT as opposed to other predicate offences which may hold tax implications. Questions were also posed in terms of impediments experienced where tax authorities have the mandate to conduct ITT investigations and whether other remedies are sought should such impediments arise. Lastly, taxation authorities had to indicate whether ML investigations forms part of their training curriculum and overall assess how important it is for taxation authorities to link money laundering with tax evasion as predicate offence as arising from the ITT.

## 8. FINAL REMARKS: MONEY LAUNDERING, TERROR FINANCING AND THE ILLICIT TRADE IN TOBACCO

207. The illicit trade in tobacco accounts for a significant amount of illicitly generated proceeds. These proceeds then emanate not only from the illicit trade in tobacco but also tax and customs offences to be associated with it.

208. The concern that was sighted was that very few Money Laundering or Terror Financing cases could be associated with the Illicit Trade in Tobacco (ITT). The primary purpose of the typology was to determine whether different modus operandi could be ascribed to this specific commodity as well as whether authorities responses to the countering of the predicate offence as well as the associated ML and TF to stem from it, differed from endeavours with respect to other illicitly traded products such as drugs.

209. The purposes of this chapter is to therefore provide an overview of the various conclusions reached as well as ascertain the veracity of the identified research propositions.

### A. CHAPTER 3: AN OVERVIEW OF THE ILLICIT TRADE IN TOBACCO

210. A review of existing literature on the subject provided an overview of the nature and extent of ITT. The implications to arise from unabated smuggling activities were:

- a) Deprivation of tax revenues to governments.
- b) Redirection of limited government resources to address illicit activities associated with this specific commodity.
- c) A disproportionate effect and impact on health services. This is exacerbated by decreases in tax revenue and simultaneously fuels debate to increase taxes on the specific commodity which in turns stimulates the incentive to increase smuggling activities.
- d) Legitimate brand holders struggle to compete in and against an unfairly created market.

211. The chapter then also provided explanations with respect to differing forms of smuggling to be associated with the product, *i.e.*, bootlegging and/or large scale smuggling. Of importance was also to note the section pertaining to the economics of tobacco smuggling. Here emphasis was placed on the product price and how the price rises as the product moves along the illicit value chain, the effects of transportation and storage costs as well as the nature of illicit distribution points and cash collation. It is only at the lastly mentioned aspect that the propensity for ML to occur was sighted. The tangible risk and vulnerability being the difficulty experienced in identifying a fixed typology to identify cash remitters for instance.

212. Reviewed literature also indicated that a primary difficulty experienced in countering ITT lays in an inability to measure or quantify the extent of this form of illicit trade. A section was devoted to the different measurement tools that governments can employ to assist in policy making.



A lacking coordinated response will, however, continue to hamper the curbing of the phenomenon at a global and national level. This was also cited in the last section that focused on opportunities for an improved investigative response. Here the WCO report states that “where goods are highly taxed, easily portable and penalties remain relatively light for smuggling, transnational criminal organisations will take advantage of any weaknesses in customs, revenue or other border controls to amass profits”.<sup>9</sup>

213. The countering of ITT requires a greater sharing of acquired knowledge and understanding of criminal activity and financial business models if enforcement impact is to be improved at domestic and international levels. The international nature of the ITT demands a global response that includes tackling the financial dimensions of the trade and recovering illicitly derived assets.

## B. CHAPTER 3: THE JURISDICTIONAL APPROACHES

214. Of importance here was to obtain a broad overview of responding countries approaches to ITT. The primary conclusions were:

- a) Most Jurisdictions do see ITT as a criminal offence. This does not, however, imply that they would see or link it as a predicate offence to ML.
- b) Other associated offences include tax crimes and transgressions within the trademark environment.
- c) The ITT is associated with tax offences which have then also been accepted by the FATF as a predicate offence to Money Laundering.
- d) A wide array of penalties is at the disposal of law enforcement entities. These penalties range from transgressions in terms of:
  - i) Tax evasion and fraud, customs duty/excise evasion and fraud, smuggling etc.
  - ii) The nature of penalties imposed. These range from varying periods of incarceration and fines dependant on other factors such as relations to organised crime as well as the volume and or weight of the illicitly traded product.
- e) It became clear that authorities are convicting perpetrators of ITT on varying offences but that ML is very seldom included in the charge sheet.

215. The primary trend to emerge from this chapter is that jurisdictions tend to predominantly investigate and prosecute on the predicate offence only and that very few money laundering and or terror financing cases could be associated with the illicit trade in tobacco.

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<sup>9</sup> WCO (2011).

## C. CHAPTER 4: THE MODUS OPERANDI PERTAINING TO THE PREDICATE OFFENCE

216. This section confirmed the extent of the predicate offence. At first, a summary of the various jurisdictions international bodies' membership was provided. It was clear that most of the jurisdictions belonged to the same bodies but that approaches in terms of addressing ITT differed.

217. In terms of the location of the primary role players involved with ITT it was found that all respondents indicated that tobacco tended to originate from beyond their borders. That would be because their tax rates probably act as an incentive for outside role players to offset their illicit products within their higher duty jurisdiction. Modest support could be found for products being produced and sold within single jurisdictions only. Where investigations had proven to be successful it was due to multiple foreign and domestic agency interaction.

218. The methods identified with the smuggling of illicit goods as sighted were:

- Use of trucks with or without false compartments.
- Use of commercial vehicles
- Use of passenger vehicles
- Planes
- Cargo Vessels
- Passenger and goods trains
- Mules
- Roll on roll off transport
- Abuse of cross border shopping limits
- Postal packets
- False declarations
- Under valuation

219. Various methodologies came to the fore regarding the financing of ITT. This included seed capital obtained from small scale sales which were accompanied by a systematic increase in size of the illicit trade. Also noted was that bigger role players absorbed smaller role players within the OCG environment. Further, maturity cycles as applied to normal business operations were also found to be applicable within this realm *i.e.*, introduction, growth, maturity and decline phases. Of importance was the identification of commingling of funds and or products with linkages between the proceeds of illegal alcohol then used for trade in illicit tobacco, to the eventual bartering for drugs. The ITT then either having its own value chain or making up a part of a more sophisticated/diversified product range.

220. Four case studies were also provided that indicated varying levels of illicit enterprise operations as well as the differing investigative responses. The following chapter then focused on the modus operandi pertaining to the money laundering to be associated with ITT.

## D. CHAPTER 5: THE MODUS OPERANDI PERTAINING TO THE MONEY LAUNDERING AND TERROR FINANCING TO BE ASSOCIATED WITH ITT

221. For all purposes this chapter was to be the most important as the responses was supposed to provide an indication of how jurisdictions have linked ML to ITT. The primary methods as sighted was as with other typologies dependant on the levels (nature and size) of operations, the technological and infrastructural tools at the launderers disposal as well as the nature of methods of payment to be associated with the product. This included:

- a) The use of cash couriers.
- b) Cash couriers using private jets and yachts as methods for transportation of the cash.
- c) Bulk cash smuggling
- d) Money remittance transactions
- e) Cash spent on additions to life styles of the perpetrators and therefore subject to self laundering or not laundering the proceeds at all.
- f) Commingling, smurfing, use of professional service providers, casinos and real estate purchases.

222. Four case studies were provided to indicate the actual manifestation of the aforementioned. It can however not be stated that the MO pertaining to ML and TF differed significantly from other typologies. Of importance to note are the amounts involved and the low levels of reporting pertaining to the ML or TF. The next chapter therefore focused on the law enforcement response.

## E. CHAPTER 6: THE RESPONSE FROM LAW ENFORCEMENT AND SUPPORTING AGENCIES

223. This chapter focused on the responses from customs, law enforcement, FIUs and taxation authorities.

### CUSTOMS

224. The following key themes emerged from the responses from Customs Agencies:

- a) A disconnect was identified between the investigation of the predicate offence and any associated money laundering investigation(s). Many of the Customs Authorities do not have the capability to undertake a ML investigation and if a cross-agency platform is not in place, the focus remains on the predicate customs or tax offences.
- b) The importance of information collection and sharing, nationally and internationally, which helps develop strategies to respond to the threat. While many of the Respondents collect relevant trade data, their answers do not confirm to what extent this is analysed and trends or patterns identified.

225. The majority of respondents have capability within their Customs authorities to investigate any customs offences perpetrated by tobacco smugglers. However, only around half of these same authorities would also conduct a money laundering investigation, with the remaining respondents

referring the matter to other agencies, such as the Police, the FIU or a specified anti-money laundering agency. In such circumstances, it is possible that cases that could be pursued as money laundering investigations are not due to jurisdiction and enforcement limitations of the Customs Authority concerned. In such cases unless detections are referred for financial investigation elsewhere only predicate customs or taxation offences are likely to be pursued. This may be regarded as the reason for the lack of money laundering investigations associated with the illicit tobacco trade.

226. It is apparent that Customs authorities capture or can access a huge library of information, which could support a robust analysis of the risks to their jurisdiction. A key issue is the extent to which information management systems supports existing investigative work and identifies new risk areas, with appropriate analysis of the data to support the development of strategies and policies to help combat the illicit tobacco trade.

## **LAW ENFORCEMENT**

227. The information as provided by the respondents once again indicates that law enforcement agencies do investigate organised crime activities to be associated with ITT but very few examples were cited where ML was also investigated. In the Customs section strong emphasis was placed on the fact that Customs hand over potential money laundering cases or financial investigations to be associated with ITT. It is however clear that very few of these cases are investigated from a money laundering perspective.

## **FIUS**

228. Various jurisdictions demonstrated that they do have STR's associated with ITT. It was disconcerting to note that several of these STR's cannot be linked to subsequent ML law enforcement investigations. This could be reflective of the method used to obtain information for the purposes of developing this typology or be indicative of STR's related to ITT not being converted to ML investigations.

229. FIU's seem to act in a predominant investigative support function and act as a conduit in terms of obtaining and distributing relevant information. The FIU's therefore are not necessarily part of a task team but through their functioning can support existing task teams. Indications were that STR or SAR's had been obtained and forwarded. As mentioned difficulties are experienced to link reports to successfully concluded ML investigations to stem from ITT.

230. Little information was obtained to indicate that FIU's shared STR's related to ITT. This was disconcerting given the fact that ITT is an offence which occurs in multiple jurisdictions. This could be as result of very few customs authorities or taxation authorities reporting STR's to their respective FIU's. This is a clear area where greater strides can be made.

## **TAXATION AUTHORITIES**

231. Some jurisdictions allow for tax evasion (as derived from the smuggling or illicit trade) and the Money Laundering associated with it to be investigated by the tax authorities. The statistics where provided however revealed that very few Money Laundering cases have been investigated

within these jurisdictions even where they have the mandate to do as such. The emphasis once again remaining with the investigation of the predicate offence.

232. Some jurisdictions indicated that they are responsible for investigating the tax evasion offences but that the ML offence investigation is referred to law enforcement agencies. No statistics were provided to indicate the number of cases provided as well as the success rate when viewed from a prosecution perspective.

233. It can therefore ultimately be summated that the responses indicate that the majority of tax authorities do not single out ITT as a significant tax evasion offence and that very few of the authorities conduct ML investigations or refer possible ML investigations to stem from ITT to law enforcement.

234. The inability to share information pertaining to crimes that are committed predominantly within the taxation and customs domain can almost be considered as an incentive to trade illicitly.

- a) The primary cause would be the decrease in the risk of detection coupled to lacking criminal procedure and money laundering convictions to stem from the illicit trade.
- b) Secondly, not all taxation authorities have investigative powers pertaining to these offences which if seen in the context of lack in sharing of information creates a void from detection, investigation and successful prosecution.

## F. THE RESEARCH PROPOSALS

235. Below follows the initially posed research proposals with the resulting findings.

236. Illicit trade in tobacco is a significant predicate offence to money laundering.

- a) ITT can be considered a significant predicate offence if one takes the values of smuggled tobacco into account.
- b) Lacking money laundering cases to stem from this could however be regarded as indicative that Law Enforcement can either not establish the connection with the smuggling activity and resulting money laundering investigations, or that other predicate offences enjoy preference where ML cases are pursued.
- a) A second predicate offence to be linked with ITT is the tax evasion offence. The FATF has recently added this specific offence as a predicate offence. This study however found it difficult to link the specific income derived from ITT with evaded taxes and resulting money laundering cases.

237. The proceeds of illicit trade in tobacco are used to fund terror.

- a) Case studies were provided where linkages could be made between ITT and individuals and organisations identified to be involved with terror activities.
- b) Some of these individuals established cigarette smuggling rings where the proceeds were derived for the purposes of providing material support to identified terror organisations.

- c) Limited examples were however cited to indicate that ITT could specifically be linked to TF when viewed from a multinational/jurisdictional perspective. This deduction is made due to responses only being received from one jurisdiction. It is however acknowledged that ITT can pose a significant vulnerability to generate proceeds in support of terror organisations. This is based on:
  - i) Relatively low risks of detection of the smuggling activity.
  - ii) Relatively low likelihood in linking the smuggling activity to terror organisations or suspects.

238. Law Enforcement regards the effect of the illicit trade in tobacco as insignificant when compared to trade in other forms of contraband. Responses obtained did not confirm or refute this proposition. Subjective information does however indicate that lacking coordination between the various law enforcement agencies does show a degree of less importance being placed on ITT as for instance levels of cooperation, which coincides with drug smuggling and offenders. This can therefore be considered an area for further study.

239. FIU STRs will be insignificant in terms of identifying illicit trade in tobacco as predicate to ML or TF.

- a) Some jurisdictions were able to provide STRs based on ITT. This was not significant when compared to other predicate offences.
- b) A possible explanation for this would be that government reporting institutions are not reporting suspicious or falsely declared proceeds or the suspected tax evasion to their respective FIU's.
- c) This also provides some difficulty in linking suspected offenders to other forms of organised crime or previous suspicions pertaining to ML and TF.
- d) Institutions with reporting obligations have difficulty in identifying suspicious transactions linked to ITT. This is due to the absence of clear indicators to assist in identifying proceeds from ITT. The requirement would therefore be to provide these indicators and allow internal systems to cross verify said information against third party data. It is foreseen that this problem can also be experienced within other typologies.

240. Despite the threat of civil or criminal investigations and disruption, ITT represents a good opportunity for Organised Crime Groups and / or Terror Groups to generate large sums of criminal profit.

- a) Academic study reveals that tens of billions of dollars of illicit proceeds are generated through ITT. This is augmented by figures as provided by the WCO. Limited prosecutions where viewed from a worldwide perspective therefore confirms that an environment exists which may be regarded as conducive for ITT to occur.
- b) There were specific jurisdictions whose responses indicated that where ITT was considered serious that strong linkages could be proven with OCG's, that it involved highly organised international role-players, and that where subsequent ML or TF was pursued, significant sentences had been handed down

241. The proceeds of ITT is either laundered or used to fund other crimes and or terror.
- a) Obtained information suggests that where OCG's or individuals were identified to be involved with ITT that jurisdictions tended to focus more on prosecuting the predicate offence.
  - b) Lacking prosecution and convictions within this domain would therefore suggest that:
    - i) OCG's or criminals do not launder the proceeds of ITT of fund terror, or;
    - ii) Jurisdictions low conviction rates should not be regarded as the primary indicator whether ITT can be linked to ML and TF.
242. The use of trade in tobacco is significant within the trade based money laundering typology.
- a) Information obtained was not significant enough to confirm or refute the proposition.
  - b) It was however noted that the high taxes on tobacco products could act as a deterrent to TBML.
  - c) The inverse is also true where tobacco products could be traded in low tax areas as a TBML methodology. One jurisdiction sited an example of this.
243. High taxes on tobacco stimulate illicit trade in tobacco. Most jurisdictions as well as academic research confirmed that high taxes acts as one of the incentives for illicit trade in tobacco to occur.

## G. FINAL CONCLUSION

244. The aforementioned coupled with low detection rates, low levels of prosecution for offenders, easy payment of fines (pre determined financial risk), lacking cooperation, coordination and information sharing at national and international levels as well as the lacking of a common strategic impetus at said levels, all act as factors to be regarded as conducive towards ITT and resulting ML and TF to occur.

245. The converse is also true. This is insofar as that where jurisdictions have chosen to pursue ITT and associated ML and TF to stem from it, great successes have been attained. Several of the case studies provided attests to this and can act as an incentive for the FATF to highlight more prominent responses were viewed from a jurisdictional perspective. This is especially so with respect to government agency reporting obligations as well as closer cooperation with international bodies where requested.

246. It is trusted that this document will highlight the need to enhance international cooperation and recognize the illicit trade in tobacco as a significant global money laundering and terror financing threat. Future challenges include the identification of financial pinch points, enhancing ML investigations as well as providing improved standardised data to member countries to assist in the shaping of strategic and tactical responses to the Illicit Trade in Tobacco.



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TOBACCO PRODUCTS  
A GUIDE FOR POLICY-MAKERS**



*Legal Handbook Series*





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## Foreword

Illicit trade in tobacco products (ITTP) is a global occurrence, affecting all regions and countries. It holds an allure for criminals to engage in it as tobacco products are light, small, easy to transport and to conceal. Tobacco is one of the most smuggled commodities in the world, allowing offenders to amass huge profits. Further, penalties are often not sufficient to act as a deterrent.

Illicit trade in tobacco products has negative and harmful consequences for countries at many levels. It affects consumers' health, reduces States' budgets, creates unfair competition for legitimate businesses, and feeds organized criminal groups who channel the profits obtained into other illegal activities.

This handbook aims to offer the first comprehensive legal analysis of the international legal framework against the ITTP. It provides guidance to policy-makers and law enforcement authorities on the implementation of key international instruments in the field, with an emphasis on the new Protocol to Eliminate Illicit Trade in Tobacco Products.

The ITTP holds many challenges for governments. One of the biggest is the involvement of organized criminal networks which employ increasingly sophisticated and varied methods to counterfeit and smuggle products. INTERPOL recognizes this as a growing issue threatening the security of States. A joint and coordinated effort is needed to find and implement lasting solutions to this multi-faceted problem.

**Joël Sollier**

**General Counsel, INTERPOL**





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## Introduction

According to some estimates, the total illicit cigarette trade accounts for 11.6% (657 billion cigarettes) of all cigarette consumption worldwide<sup>1</sup>. The detrimental impact of the illicit trade in tobacco products (ITTP) on the economic and social fabric of society is severe. The economic harm experienced by governments is great, with revenue losses estimated at between US\$40 to \$50 billion a year by way of smuggled cigarettes<sup>2</sup>. The ITTP results in significant loss of revenue for governments, means legitimate businesses lose trade, threatens public safety when illegally obtained profits are channeled to support organized crime and sometimes even terrorism and undermines public health strategies. Given that tobacco products are highly taxed goods, easy to transport and disguise, and laws and penalties addressing the criminal activities involved are relatively low, ITTP poses a high profit to low risk ratio and for this reason is appealing.

This handbook will examine the phenomenon of the ITTP in terms of its emergence over the course of the last few decades, current characteristics, historical precedents, typical forms and legislative and law enforcement responses. The intention is to offer rigorous and critical analysis as well as to provide States with legal options, best practice principles and practical information needed to design and implement anti-ITTP policies and strategies.

This handbook is comprised of two parts.

The **first part** provides a **general overview of the phenomenon**, analyzing how illicit trade in tobacco products manifests itself, its geographical reach and the involvement of organized crime and some terrorist organizations.

The **second part** explores the **current international legal framework** which could be utilized by governments to combat the ITTP, drawing attention to two specific groups of international conventions: cross-sectoral criminal justice treaties and sector-specific treaties. This part specifically examines the recently adopted Protocol to Eliminate Illicit Trade in Tobacco Products (Tobacco Protocol). It provides detailed guidance and policy recommendations for its implementation.

The appendices contain some practical tools, including: a contact list of relevant organizations, a country assessment checklist aiming to assist in the implementation of the Tobacco Protocol by identifying legislative and institutional gaps in domestic legal systems; and a table outlining national legislation across various legal areas including criminal codes, customs legislation, trademark legislation and specific tobacco legislation regarding licensing and marking requirements and the seizure and destruction of illicit goods. This table of national legislation is designed as a comparative tool for countries to understand how other jurisdictions have treated the same issue and to assess where improvement and/or change is required to meet the requirements of the Tobacco Protocol.

This handbook is also **available online** through the Legal Assistance pages of INTERPOL's website, at <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance>.





## Countering illicit trade in tobacco products: key issues and challenges

- Estimates from 84 countries around the world suggest that the **illicit cigarette trade** accounts for 11.6% of cigarette consumption being illicit, equaling 657 billion cigarettes a year.
- The **loss of tax revenue** from cigarette smuggling in the EU was 12.5 billion euros in 2012.
- Illicit tobacco products include genuine smuggled products, counterfeit tobacco products and illicit whites. These illicit products are traded clandestinely through **bootlegging** and large-scale **smuggling**.
- Any response to the ITTP requires the **active and coordinated involvement of a number of different stakeholders**, including: customs authorities, tax authorities, law enforcement, government policy makers, health departments, consumer protection and trade departments, consumers, and the private sector.
- Given the **global nature and complexity of the phenomenon**, solutions to treat the issue must be global in nature and fundamentally aim at international cooperation and the harmonization of laws and regulations in the area of illicit trade beyond borders.
- The **international legal framework relevant to fighting ITTP** is made up of a number of instruments which, although they were not specifically conceived to address ITTP, do provide important mechanisms, from a criminal justice perspective, by **addressing factors enabling ITTP**. Key international treaties in this regard are the **United Nations Convention against Transnational Organized Crime (UNTOC)** and the **United Nations Convention against Corruption (UNCAC)**.
- States may use **UNTOC** to combat ITTP: i) where one or more offences set forth by UNTOC itself (participation in an organized criminal group, corruption, laundering of proceeds of crime and obstruction of justice) have been committed as part of the ITTP by an **organized criminal group acting transnationally**; or ii) where engagement in ITTP is established as a **“serious offence”** domestically, i.e. in order to fall within the scope of UNTOC, an offence of counterfeiting/smuggling cigarettes would need to be a criminal offence with a penalty of at least four years imprisonment.
- States may use **UNCAC** provisions as **corruption is a fundamental element and facilitator of ITTP**. Bribery can be resorted to at different phases of the tobacco supply chain. For example, bribes can be offered to customs officials to permit the cross-border movement of smuggled cigarettes. When counterfeiting operations are involved, bribes might be given to law enforcement officials to allow the operation of an illegal manufacturing facility. Corruption can also play a role in the process of obtaining various types of permits and licenses from national authorities.

- UNCAC applies regardless of the involvement of an organized criminal group. It can thus be utilized to support criminal proceedings against individuals acting by themselves, or groups that do not fulfil the requirements of an “organized criminal group” set forth in UNTOC.
- The **Protocol to Eliminate Illicit Trade in Tobacco Products (Tobacco Protocol)** is the first international legal instrument entirely dedicated to preventing and combatting the ITTP. While it contains key and innovative provisions, once it enters into force the Tobacco Protocol will require significant effort on the part of States parties to ensure its effective implementation.
- One of the key challenges will be the implementation of **supply chain control provisions**. Under Part III of the Tobacco Protocol, States are to establish control mechanisms covering many aspects of the supply chain. A major **regulatory system** will need to be established. As part of it, certain obligations will have to be imposed on licensees, such as **due diligence**, and **record keeping/reporting requirements**.
- A fundamental requirement of the Tobacco Protocol relating to the control of the supply chain is the establishment of a **national track and trace system**, which will then connect to a global track and trace regime. The purpose of the national track and trace system is to assist law enforcement with the identification of the point of diversion of genuine products.
- The **global track and trace regime** will be a point of information deposit and sharing by States parties to the Protocol. It will allow States to interact and exchange information with a view to **cooperating on illicit consignments** destined for their territory, or to be able to **identify routes** taken by those involved in organizing the illicit trade activity. The global regime will depend on the political will of States parties to share information with each other through a global information sharing focal point to be established.
- A major aspect of the Tobacco Protocol is the list of **unlawful conduct** left to States parties to criminalize or treat as administrative offences. In this regard, States need to be aware of their **parallel obligations under other international treaties** which mandate the criminalization of certain conduct. For example, Parties to the Protocol who are also Parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) should note that wilful trademark counterfeiting committed on a “commercial scale” will have to be criminalized. Under UNTOC and UNCAC, conducts such as obstruction of justice, money laundering, bribery of officials etc. are to be criminalized.
- The gravity of the offences will need to be determined in order to allocate **appropriate penalties** to those unlawful conducts that are administrative offences and those that are criminalized. Penalties imposed will need to act as a deterrent.
- The deterrent effect of penalties is to be accompanied by measures to ensure the **confiscation of proceeds of crime**. As the Tobacco Protocol is silent on the need for Parties to adopt a legal framework allowing them to permanently deprive offenders of their illicit

gains, policy makers are recommended to look beyond the Protocol. Good starting bases are UNTOC and UNCAC which contain extensive provisions in this area.

- Part V of the Protocol deals with international cooperation. Detailed provisions on extradition and mutual legal assistance are found, in almost identical terms, in the UNTOC. At the same time, for its implementation/application, Part V of the Protocol requires that the unlawful conducts set forth in the Tobacco Protocol be established as criminal offences. To the extent that Parties decide not to criminalize them, key provisions of Part V of the Tobacco Protocol may remain inapplicable.
- Any globally sound implementation strategy against the ITTP will have to consider the interplay between, as a minimum, all the above-mentioned international instruments. These should be read, understood and applied as a “package”. Also, designing an implementation strategy for one treaty will have direct consequences on the implementation of the others. For instance, States that have already implemented UNTOC will most likely find it easier to implement the Tobacco Protocol as this latter instrument draws heavily on provisions contained in UNTOC. Further, States that are planning to ratify/implement UNTOC should seriously consider engaging in the parallel, or at least closely coordinated, ratification/implementation of the Tobacco Protocol, as much legislative change to be made under the framework of the former will almost automatically benefit the latter.



Part I

ILLICIT TRADE IN TOBACCO PRODUCTS:  
UNDERSTANDING THE PHENOMENON



# 1. Understanding the phenomenon

## 1.1. Overview

The international tobacco market has a twofold nature comprised of a legitimate and illegitimate component. The form of the illicit and licit markets varies depending on the cultural, social and economic conditions of the market across countries and regions. The global reach of the legitimate tobacco market also means that the illicit tobacco trade has global reach, and certainly, ITTP is a problem for most countries.

The ITTP manifests itself in four major ways: 1) bootlegging; 2) large-scale smuggling; 3) counterfeiting; and 4) illicit whites (*see table 1*). The ITTP is a complicated issue, involving a number of different stakeholders, including: customs authorities, tax authorities, law enforcement, government policy makers, health departments, consumer protection and trade departments, consumers, and the private sector.

### Box 1: Drivers of cigarette smuggling

The ITTP is the result of classic demand and supply.

#### Demand

- Smokers want cheaper products.
- Smokers want specific products unavailable in the domestic market or priced higher.

#### Supply

- Illegal and some legal tobacco manufacturers looking for an increase in market share, sales and profits.
- Tobacco manufacturers seeking to penetrate new markets.
- Criminals taking advantage of tax differentials.
- Criminals taking advantage of the type of product, i.e. cigarettes are light and portable.

#### Facilitators

- Criminal networks.
- Corruption and bribery of public officials.
- Money laundering.
- Weak government enforcement capacity.
- Inadequate legislation and sanctions.
- Unbalanced fiscal policy.
- Public tolerance.

### Box 2: ITTP Facts

- Estimates from 84 countries around the world illustrates that the illicit cigarette trade accounts for 11.6% of cigarette consumption being illicit, equaling 657 billion cigarettes a year (Statistics taken from *PPACTE Industry and Market Response*, Luk Joossens, August 2011).
- About 1 in every 10 cigarettes smoked in 2011 was illicit, meaning revenue losses to governments of US\$40 to \$50 billion a year (Euromonitor).
- The loss of tax revenue from cigarette smuggling in the EU was 12.5 billion euros in 2012 (KPMG Project STAR).
- 190 billion counterfeit cigarettes are produced in China each year (WCO).
- The ITTP represents a burgeoning, multibillion dollar business, and this is not surprising given that it is the world's most smuggled legal substance (Tobacco Underground).
- "Illicit trade in cigarettes is the biggest illegal trade in a legal product in terms of value and second only to illegal drugs in terms of revenue generated by smugglers" (Euromonitor International 2012).

All continents/regions have had major struggles with ITTP: Europe, Eastern Europe, North America, South America, Middle East, Asia, Africa, and Australia. The problems vary and include ITTP issues within the region between neighboring countries; and between countries known for being source countries of certain types of illicit tobacco products, such as counterfeits or illicit whites, and other regions (*see section 1.7, "The geographical reach of the ITTP"*).

Given the global nature and complexity of the phenomenon, solutions to treat the issue must be global in nature and fundamentally aim at international cooperation and the harmonization of laws and regulations in the area of illicit trade beyond borders.

## 1.2. Terminology and definitions

Defining the types of activities that fall within the scope of illicit trade in tobacco products is essential for a thorough treatment of the issue and to create workable solutions. Illicit trade is **not** limited to smuggling, and is conceptually much broader. Specific activities that form the ITTP are enumerated in table 1, and terminology and definitions that have been deliberated in an international forum are given. The definitions of *illicit trade* and *tobacco products* are both derived from the World Health Organization’s *Protocol to Eliminate Illicit Trade in Tobacco Products*, article 1(6) and 1(13) respectively. It is important to note that the discourse on the ITTP focuses more on the illicit trade in cigarettes as opposed to other tobacco products, such as cigars, chewing tobacco, role-your-own and make-your-own cigarettes.

ITTP activities are more expansive than for other products as they contain certain activity specific to tobacco, specifically the illicit white phenomenon. When defining the different types of illicit trade, the most relevant characteristics are the origin of the tobacco products (are they produced legally, illegally and/or secretly stored) and their destination (are they intended for domestic or cross-border consumption).

*Table 1: Terminology and definitions<sup>3</sup>*

TERM	DEFINITION
<b>Illicit trade</b>	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.
<b>Tobacco products</b>	Products entirely or partly made of leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing.
<b>Smuggling</b>	The illegal trade across borders of genuine or illicitly manufactured products without the payment of applicable taxes or duties.
<b>Small-Scale Smuggling / Bootlegging</b>	An illegal activity where individuals or small groups purchase tobacco products from low tax jurisdictions, usually duty paid, in amounts that exceed customs regulations, for resale in high tax jurisdictions, to exploit tax differentials between neighboring countries. Bootlegging normally occurs over shorter distances with lesser quantities of cigarettes.
<b>Large-Scale Smuggling</b>	Large-scale smuggling of tobacco products involves the illegal trade of large consignments of cigarettes and other tobacco products, without the payment of applicable taxes and duties and conducted by criminal networks, across borders. Goods (either genuine or counterfeit) are diverted from legal trade channels, in breach of import or export laws.
<b>Contraband</b>	Smuggled genuine tobacco products that are illegally traded.
<b>Counterfeit tobacco products</b>	Fake tobacco products that are manufactured illicitly carrying or imitating the trademark of a particular product without the agreement of the trademark’s owner.
<b>Cheap/Illicit Whites</b>	New cigarette brands (generally with registered trade brands) produced legally in one jurisdiction but produced intentionally for smuggling into other countries where there is no prior legal market for them. Tax possibly paid in production country, but rarely. Products are lawfully exported from the production country and tax will not be paid in the destination country.



<b>Loose leaf tobacco / Chop-Chop</b>	Unbranded tobacco products sold as loose or cut/shredded leaf of tobacco, consumed in roll-your-own or in empty cigarette tubes.
<b>Baggies</b>	Unbranded tobacco sold illegally in the form of loose cigarettes in clear, plastic re-sealable bags.
<b>Illegal Manufacturing</b>	The production of tobacco products contrary to law, including counterfeit tobacco production, and undeclared production. These products can be sold on the domestic market or smuggled into another jurisdiction.
<b>Tax Avoidance</b>	Legal activities engaged in with the intention of paying less or no taxes.
<b>Tax Evasion</b>	Illegal activities engaged in with the intention of paying less or no taxes.
<b>Grey Market Products / Parallel Imports</b>	Branded goods imported into a market and sold without the consent of the trademark owner in that market.

### 1.3. Large-scale organized cigarette smuggling

Over the course of the last 20 years the large-scale smuggling of genuine cigarettes (contraband) of well-known brands was the predominant type of illicit trade. This type of smuggling involved:

- Large consignments of genuine cigarettes exported either legally or without the owing duties and taxes being paid.
- These consignments would transit via a number of countries.
- Before arriving at the nominated destination country, these shipments of tobacco products would be diverted from legal international trade, somehow “disappearing” in transit and into the contraband market.

In certain markets, cigarettes manufactured for domestic use would be exported to another country (most often a neighboring country) where there was no prior market for them, and would then be smuggled back into the country of manufacture using documentation indicating that the goods are not cigarettes for the purpose of tax avoidance. Canada is a good example of this, as cigarettes made for the Canadian domestic market were exported to New York, where there was no market for them (American consumers smoked American brands) and were then smuggled back into Canada evading taxes owed. Another example is the UK which had a massive ITTP problem some years ago, where UK Customs and Excise estimated the illicit cigarette market to be 21% in the year 2000. Certain cigarette brands were exported in large quantities to countries where the intended market was unclear, then re-entered the UK market by way of large-scale smuggling. Other regions were not untouched by this phenomenon, such as Europe, Asia and South America, where countries in these regions were either source countries of the illicit product, transit or destination countries (*see section 1.7, “The geographical reach of the ITTP”*).

The methodology utilized by some tobacco manufacturers was either to declare export to a market known to have poor controls in place, or to a ‘free zone’ where no customs controls operate, or to engage in undeclared production (the production of genuine tobacco products in excess of what a particular market consumes. The oversupply into a market is not intended for that market but is used to supply the black market in the region).

**Box 3: Goods in transit**

Goods in transit are those that are moving between their place of origin and their final destination. In between these points they pass through what are called ‘transit States’.

Transshipment is the transfer of goods whereby the mode of transport of the goods is changed during the transfer, for example from ship transport to road transport.

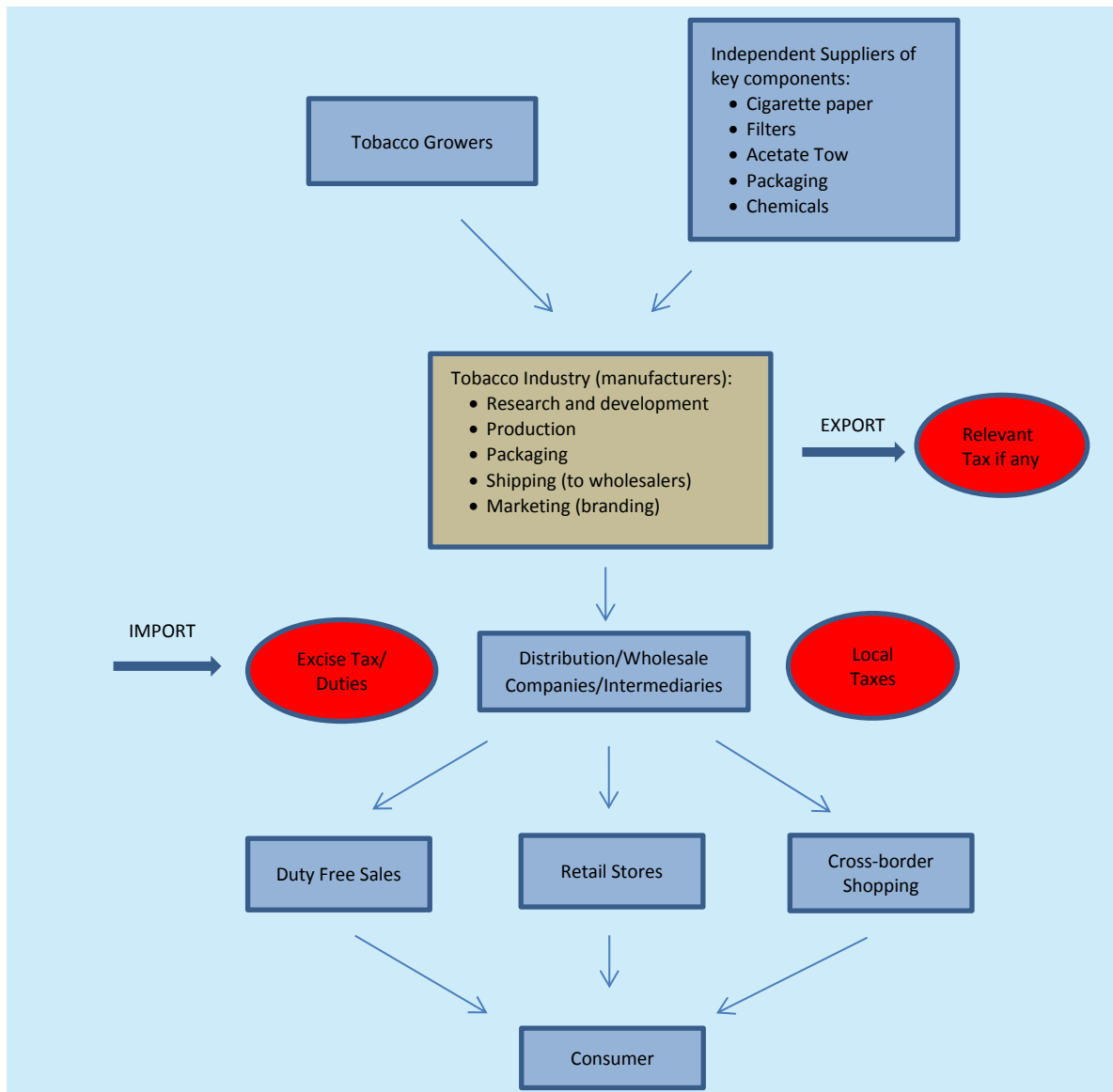
***The In-Transit Regime***

A facilitating factor in large-scale cigarette smuggling is the in-transit regime, where duties and taxes are temporarily suspended for goods in transit. Smuggled goods will transit a number of countries (being imported and exported through many different locations), over a short period of time, before “getting lost” in transit, and arriving at their intended destination country (not the country declared as the final destination of the goods). This occurs in order to hinder the identification of the owner of the goods, and interrupts the tracking and tracing of the goods within the transit regime. During transit, unofficial traders are able to purchase the goods and remove them from the legitimate supply chain.

**1.4. How is the illicit business conducted?**

Control of the **legal** supply chain is vital for efforts aimed at combatting illicit trade. Having adequate controls in place will mean easier identification of the source of the problem and any weak links involved. These weak links could be a number of things including: (1) theft (from warehouses and storage facilities or during transit etc., by tobacco industry employees or unrelated third parties); and (2) the direct or indirect involvement of some companies within the tobacco industry in the smuggling activity (including the diversion of genuine products, or undeclared production), or the overproduction of cigarettes for a particular legal market made explicitly for smuggling etc. The figure below demonstrates that the legal supply chain is controlled to a great extent by the tobacco industry, from sourcing the raw tobacco, to manufacturing, to distribution at the first customer level, and sometimes at second and third customer levels. Regulating the legal supply chain will help expose illicit activities in the ITTP.

Figure 1: Legal supply chain

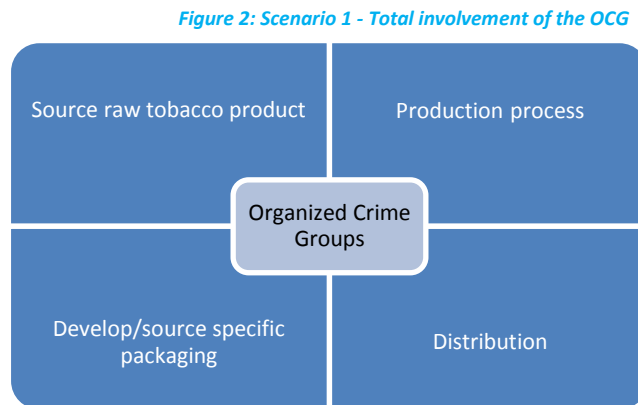


### 1.5. Modi operandi of the smuggler

Both genuine and counterfeit products rely on large-scale smuggling to achieve distribution via illicit trade. The sophistication and complexity of this activity will depend on the size and ambition of the smuggling/illicit trade and the organized groups involved (see section 1.8, “*Involvement of transnational organized crime in the ITTP*”). When defining the different types of illicit trade, the most relevant characteristics are origin (whether legal, illegal and/or kept secretly) and destination (whether domestic or cross border). There are different scenarios to consider.

### 1.5.1. Scenario 1

The first scenario is where the organized crime group (OCG) is involved in **all** aspects of the process as shown in figure 2.



### 1.5.2. Scenario 2

Another scenario is where organized crime groups use persons who act as **intermediaries**. These intermediaries are crucial to the process and:

- Source the tobacco products by engaging directly with the manufacturers;
- Liaise with the organized crime group to determine the trade routes to be used; and
- Negotiate risk mitigation mechanisms to ensure successful delivery.

There are a number of factors upon which the smuggling methodology relies (the following list is non-exhaustive):

- The international trade in tobacco products, predominantly cigarettes, suffers from a general lack of enforcement by States.
- Goods in transit are afforded certain protection to facilitate trade. The **in transit regime** (where customs' duties, excise and value-added taxes are temporarily suspended for goods destined for a third country) means that tobacco products *en route* from their country of origin to their final destination may be bought by unofficial traders.
- Free trade zones allow for manufacture, storage and assembly of products right before distribution. Free trade zones are often outside the jurisdiction of customs authorities, and are operated by Investment authorities. Customs authorities therefore apply their controls outside the zone and not over the zone (*see section 4.3.9, "Free zones and international transit (art. 12)"*).

- Perception in some countries that offences are not seen as serious and thus penalties are not a deterrent from engaging in smuggling activity. Essentially, this is a HIGH profit, LOW risk activity.
- Transporting costs and other associated costs are small when compared to the significant profits generated by ITTP.
- Corruption of officials.
- Probability of checks on containers carried out by customs authorities, which varies across jurisdictions. Customs physically check a very small percentage of containers passing through their jurisdiction when compared to the flow of trade and the huge amount of goods entering and exiting ports daily.
- False information placed on customs documentation, such as incorrectly listing the type of goods in the container, the amount of tax to be paid, and a false origin/destination of the goods.

### 1.5.3. Scenario 3

Another smuggling method is where legitimate tobacco products marked for export are legally exported, and then eventually smuggled back into the country of origin for sale on the black market. More often than not, many of these cigarettes are smuggled to third countries with around 10% making their way back to the country of origin.

The **modes of transport** used include ports (smuggled in shipping containers), air transport, road vehicle transport and postal transport and services.

In Europe the large-scale smuggling of well-known brands has decreased substantially over the last 10 years, with concerted efforts made by Governments to target and expose tobacco industry involvement in illicit trade (*see box 28, “The cooperation agreements between the EU and the tobacco industry”*), and to regulate the industry more stringently. However, other types of illicit trade have increased, such as illicit manufacturing, including counterfeiting and the proliferation of illicit whites. Of course large-scale smuggling is still utilized to achieve distribution of illicitly manufactured goods such as counterfeit cigarettes and illicit whites.

#### Box 4: Some factors facilitating/ contributing to illicit trade

- Ease and cost of smuggling tobacco in a country;
- Presence and level of development of organized crime networks;
- Presence of informal distribution networks;
- Tax levels on cigarettes in a country;
- Chances of offenders being brought to justice
- Type and level of applicable penalties;
- The overall level of corruption.

## 1.6. From large-scale smuggling to counterfeits and illicit whites

While historically, the ITTP consisted predominantly of large-scale smuggling of genuine cigarettes of well-known brands, in recent years this has greatly reduced and has been supplemented by steady growth in the smuggling and sale of **illicit whites** and **counterfeit cigarettes**, widening the scope of illicit trade (see table 1).

### 1.6.1. Counterfeit cigarettes

This category of the ITTP has been facilitated by the development of new technology. Counterfeiting depends on the ready availability of technology to manufacture tobacco products, and to copy packaging and labels, and even the tax stamps placed on cigarette packets. Sophisticated equipment is available to counterfeiters and the financial return is worth the initial investment in the counterfeiting venture which is made back within a matter of weeks.

Counterfeit goods create unfair competition for legitimate businesses and their trafficking deprives governments of revenues.

Well known source countries for counterfeit production are China, Vietnam, North Korea, Iran, Iraq, United Arab Emirates, Paraguay, Uruguay, Belarus, Poland, Romania, Russia, the Czech Republic and Spain<sup>4</sup>.

### 1.6.2. Illicit whites

Illicit whites are ‘new brands’ of cigarettes which are created by the manufacturer, including with registered trade-marks, but with no intended legitimate market. These brands are produced legally in a country (their manufacture is in accordance with national legislation) and the location of these factories is well known to authorities. However, the cigarettes are not intended for the domestic market, but are produced with the sole intention of smuggling into other markets under the guise of legitimate exports. In most cases, product and export is both lawful and follows the requirements of national laws, however, the relevant authorities do not take an active interest in the products post-export and as such manufacture and export are not subject to any intervention.

#### Box 5: Illicit whites in the EU

*“Consumption of illicit white brands increased by 3% to 16 billion sticks in 2012, representing over 24% of total counterfeit and contraband volumes in the EU”.*

*Source: KPMG Project Star 2012*

As manufacturers of illicit whites are able to operate legally within a country, they have fairly sophisticated facilities where they are able to produce cigarettes of a higher quality than counterfeits. They can also avoid the litigation associated with counterfeiting activity.

There are no import statistics to quantify the volumes of “new” brands as they have been smuggled to markets and as such fall outside normal customs reporting processes. Illicit whites will also be unlikely to possess the labeling, packaging, or health warning requirements and other marks, like tax stamps, which are required in the market into which they are smuggled. Domestically, they are either taxed for local consumption or untaxed for export, and they are sold to first customers, without

establishing the legitimacy of the customer, who can then trade the products on the black market without paying the requisite duties owing.

The largest illicit white brands in the EU are Jin Ling, Classic and American Legend. Other brands also grew in popularity including Fest, Gold Mount, Minsk, Premier, Fast, Raquel, Ducal, Marble, CK, Kiss, Nz, Austin, GR, Magnat and Queen<sup>5</sup>. Jet and Hero are large brands in the Asian market.

Well-known source countries of illicit whites are Belarus, Vietnam, Indonesia, Philippines, India, Cambodia, Paraguay, Ukraine, Russia, UAE, Kenya and a number of free trade zones<sup>6</sup>.

### 1.7. The geographical reach of the ITTP

The ITTP is a global phenomenon and occurs in all regions and in all countries to some extent, whether they be developed or developing economically. The ITTP situation varies from country to country according to the taxation, legislative, regulatory and political environment of the country. Further, the situation may differ according to whether a country is involved in growing or production, or is a transport hub, or has poor border controls, or has either very high or very low taxation rates. As a result, different countries have different roles to play and manage.

When we refer to **source countries** we refer to countries from which illicit tobacco products originate, **destination countries** being countries for which the goods are intended, and **transit countries** being countries through which the goods pass on the way to their intended destination (*see figure 3*).

#### Box 6: The Transcrime Factbooks on Illicit Trade in Tobacco Products

These publications provide detailed analyses of the ITTP and its relationship with the legal market across varying countries and regions. Currently there are Factbooks on the UK, Italy, Ireland, Poland and Germany.

*Source: Transcrime*  
*Available language: English*  
*Link: <http://www.transcrime.it/en/transcrime-pubblicazioni/>*

If we look at destination countries, there are certain features by which some countries are targets for the sale of illicit tobacco products. These include, inter alia:

- Consumer acceptance of illegal products/cheaper products;
- Consumer inability to recognize illegal products;
- Comparative to neighboring countries, the tax rate is higher;
- Tobacco retail price, relative to income in the country and its distribution, is high (signaling a high tax tobacco taxation policy);
- Low level of law enforcement control on ITTP; and
- Inadequate legislation regarding smuggling, organized crime, intellectual property, confiscation of proceeds of crime, seizure and destruction, and low associated penalties.

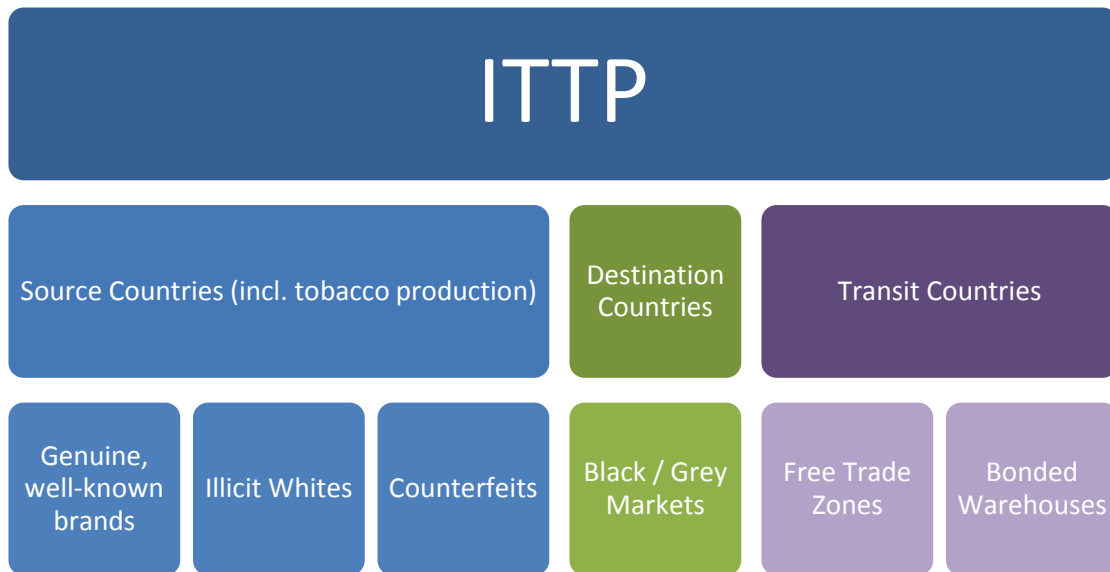


Figure 3: Source, destination and transit countries

### 1.7.1. Phantom Markets

Some countries such as Moldova, Latvia, Luxemburg, Russia, Afghanistan, and Andorra have been noted on export documents by manufacturers as final destinations. They are, however, referred to as “phantom markets” as these countries do not have sufficient demand for tobacco products to prove that the amount supplied was intended for the legitimate market. Interestingly, nominating phantom markets with relatively small populations as the final destination on export documents means that declared export levels would supply men, women and children with huge quantities of cigarettes individually. Thus, the oversupply of cigarettes to phantom markets signals the intention to introduce them into the black market in a neighboring country or in the region.

### 1.7.2. Europe

Europe is an interesting region with varying issues when it comes to the ITTP. If we look at Eastern and Western Europe, some assertions can be made based on studies conducted on ITTP by various entities<sup>7</sup>. Western Europe is more often than not the destination market, and Eastern Europe a source of illicit tobacco products, along with other source countries such as China and Paraguay. Western European countries such as the UK, France, Germany, Italy and Spain, have had serious problems with ITTP in the past and have managed over the course of the last 10 years to significantly reduce ITTP in their respective markets through targeted programmes and action (see box 7, “Case study: The UK’s Tackling Tobacco Strategy 2000”).

Eastern European countries, such as Russia, Ukraine and Montenegro are known to be producing illicit whites and counterfeit cigarettes which are destined for Western European markets.

Additionally, there are some countries which fit a number of categories. A good example is **Poland, which is a destination, source and transit country, and a transit country for tobacco products intended for Western Europe**<sup>8</sup>. The reason for this is its geographical positioning, sharing borders with Russia, Lithuania, Belarus, Ukraine, Slovakia, Czech Republic, and Germany and with coastline



along the Baltic Sea. Poland is the primary producer of finished tobacco products in Europe and the third largest finished tobacco product exporter worldwide<sup>9</sup>, after Germany and the Netherlands. Its Eastern European neighbors' cigarette prices are lower than Poland's, creating a demand for illicit whites produced by these same neighbors. Illicit whites and counterfeits produced by Poland's neighbors and intended for Western Europe, transit through Poland.

### Box 7: Case study: The UK's Tackling Tobacco Strategy 2000

The UK, along with Italy and Spain, had the largest incidence of illicit tobacco trade in Europe in the late 1990's and early 2000's. Within 10 years all three countries significantly reduced their percentage of illicit cigarette trade through effective policies and strategies. While the UK's market share of illicit tobacco is still above average compared to other EU member states, its Tackling Tobacco Smuggling Strategy is comprehensive. The illicit cigarette market reduced from 21% to 11% since 2000, and from 61% to 49% for hand-rolling tobacco over the same period.

Since the Strategy was first introduced in 2000, the size of the illicit cigarette market has almost halved itself in the UK with more than 20 billion cigarettes and over 2,700 tonnes of hand-rolling tobacco seized by Her Majesty's Revenue and Customs (HMRC). Importantly, there have been more than 3300 criminal prosecutions for tobacco offences from the year 2000 to date.

The current key objectives, introduced in April 2011, of the Strategy are:

- Targeting and disrupting the organized criminal gangs behind the fraud with the view that **prosecution** remains the most powerful sanction to tackle it;
- Seizing greater volumes of illicit product to undermine the economics of the fraud. Seizing sufficient volumes will take the profit out of the crime and remove the incentive to engage in it;
- Taking hard-hitting action against offenders to deter and punish those involved in the fraud;
- Reduce the availability of genuine tobacco products for fraud, through supply chain control, targeting duty free sales, and reducing minimum indicative levels for EU travellers;
- Decreasing demand for illicit tobacco products;
- Collaborating with overseas partners and international organizations: working with the industry.

Working with manufacturers is a key part of the strategy and signed Memoranda of Understanding (MOU) between the government and the main tobacco manufacturers were entered into in 2001 and enhanced in 2006, and required tobacco manufacturers to:

- Sell their tobacco products in brands and amounts consistent with legitimate demand in the export market;
- Respond to requests following significant seizures of their product to identify the production and movement history of the consignment; and
- Cease supplying customers where they fail to demonstrate effective product control.

Legislation complemented the existing MOUs imposing obligations on manufacturers and penalizing them for failure to comply, through hefty fines. Other civil and criminal sanctions available include seizure of goods, vehicles/vessels and possible non restoration, cash and confiscation of assets under proceeds of crime legislation, criminal prosecutions with imprisonment penalty of up to 6 months, financial wrong-doing penalties of up to 100% of the duties owed, fines of up to £5000 for selling illicit tobacco not bearing UK duty paid fiscal markings, prohibition on sale of tobacco products for up to 6 months, travel restrictions on repeat tobacco smugglers, and civil action including winding-up orders and bankruptcy.

The current UK tobacco market consists of genuine UK and non-UK brands of cigarettes, hand-rolling tobacco, counterfeits, and increasingly, illicit whites. The MOUs attempted to take steps against counterfeits as well by requiring manufacturers to take action against suspected trademark infringements where there was a reasonable prospect of success.

In April 2008, the UK Border Agency (UKBA) was launched. Currently HMRC and the UKBA work together on the joint implementation of the strategy.

**Source:** HMRC & UKBA "Tackling Tobacco Smuggling - Building our Success: A renewed strategy for HM Revenue & Customs and the UK Border Agency", April 2011

**Link:** [http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_MiscellaneousReports&propertyType=document&columns=1&id=HMCE\\_PROD1\\_031246](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_MiscellaneousReports&propertyType=document&columns=1&id=HMCE_PROD1_031246)

### 1.7.3. South America

When comparing regions, Latin America has the *highest* average level of illicit trade penetration in the world<sup>10</sup>. The tri-border area where Brazil, Paraguay and Argentina meet is at the core of much illicit trading activity. The ITTP in this region is fueled by the geographical, political, economic and legislative situation of each of these countries, facilitating illicit trade activity in drugs, arms and cigarettes. Other issues include corruption, porous borders, difficult terrain and geographical positioning, organized crime prevalence in the region, inadequate legislation, weak law enforcement and weak sanctions<sup>11</sup>.

#### Box 8: Flow of contraband

“The flow of Paraguayan contraband cigarettes to Brazil is 20-30 billion sticks annually. In contrast, legal exports to Brazil are zero.”

*Source: Tobacco Underground, International Consortium of Investigative Journalists, 2009*

The ITTP operates in multiple ways in this region, depending upon the countries involved, their own penetration by illicit trade, and their tobacco policies.

Brazil is a large exporting market for cigarettes and exports primarily to Paraguay and to Belgium. Whereas once Brazil was a major producer of tobacco and tobacco products, and tobacco played a major role in the Brazilian economy, in the late 90’s Brazil adopted significant tobacco control measures, recognizing the health implications of tobacco use. This shift saw Brazil become a major exporter for tobacco products in the region. Even though this reduced the consumption rate in Brazil of legitimate tobacco products, this did not account for the consumption of illicit tobacco products. If Paraguay’s import information is examined alongside Brazil’s export information, one can see the absorption of Brazil’s late 80’s consumption levels moving across to Paraguay around the same period. Importantly, Brazil is currently the largest consumer of illicit products in South America<sup>12</sup>.

The illicit trade in Brazil manifests itself through:

- The diversion of Paraguayan imports back into Brazil;
- The undeclared production of tobacco products in Brazil; or
- The alleged export of tobacco products to Paraguay which were never actually exported, in order to evade tobacco taxes.

The sudden large increase in Paraguayan consumption in the late 90’s points to the diversion of imported product from Paraguay into other South American countries and particularly back into Brazil. This is evidenced when analyzing Paraguay’s high importation levels which amount to huge consumption levels for each individual, including children, unless otherwise explained by smuggling<sup>13</sup>.

Paraguay itself hosts a massive illicit industry, a product of its history. In 1999, Brazil tried to counter the rampant increase in illicit tobacco consumption by levying a 150% tax on exports. In response, multi-national tobacco companies increased construction of manufacturing facilities in Paraguay, circumventing Brazil’s export tax. Today, Paraguay manufactures more than 2600 cheap cigarette brands, all registered with the Ministry of Industry and Commerce. However, the majority of these brands are not sold in the domestic market but are found in Brazil, Argentina, Uruguay and Bolivia, making Paraguay a major manufacturer of illicit whites. Paraguayan cigarettes are now becoming well known around the world, being cheaper to manufacture than Chinese cigarettes and of superior quality<sup>14</sup>.

#### 1.7.4. Asia Pacific

The Asia Pacific region also battles with ITTP issues, ranging from the production and distribution of counterfeits and illicit whites, to being recipients of illicit products. China, North Korea, Philippines and Vietnam are known sources for illicit cigarettes. Taiwan and Hong Kong (China) are destination countries for ITTP<sup>15</sup>. Singapore, as the world's busiest port and free zone, is a regional and global transit point for ITTP.

In Asia, the counterfeiting problem is the most pervasive ITTP issue. China is still the largest source country for counterfeit cigarettes in the world, estimated at manufacturing 190 billion counterfeit cigarettes annually<sup>16</sup> as well as being the largest consumer of tobacco products (one third of the world's smokers are Chinese<sup>17</sup>). Within its own borders, China has to contend with enforcing the law in areas resisting such control. This is particularly evident in Yunxiao in the Fujian Province, and in the Guangdong Province where the majority of counterfeit cigarettes are manufactured. The illicitly manufactured cigarettes are then exported from the major Chinese ports of Xiamen, Guangzhou, Shanghai and Shenzhen. Illicit factories are hidden in the hills and underground<sup>18</sup>. Attempts by police to fight illicit trade are often met with violence and armed resistance. The Chinese State Tobacco Monopoly Administration (STMA), the relevant authority in China for tobacco control, does not shy away from its responsibility in curbing the illicit trade, though the situation has yet to change. China also has some of the world's toughest laws when it comes to illicit trade, including long terms of imprisonment and hefty fines for offenders<sup>19</sup>.

While Paraguayan illicit whites have a market mostly in South America, Chinese counterfeits are found in markets around the world, as well as serving a domestic market in China.

Australia's illicit trade problem stems more from the large-scale smuggling of loose leaf tobacco into Australia, coming from Indonesia and Malaysia. This situation is unique to the Australian tobacco environment<sup>20</sup>.

#### 1.7.5. Middle East and Africa

Middle East and Africa are interesting regions which include source, destination and transit countries of genuine and counterfeit products and illicit whites. Many countries in Northern Africa provide transit for goods intended for the Middle East, and north African countries are destination countries for goods originating in the Middle East.

Given some major political crises in these regions, it comes as no surprise that countries that once did not suffer a significant problem with ITTP now have a major issue. The increase of ITTP in these countries can be tied to political upheaval, or more accurately the demise of political structures and governance. Egypt is a key source of contraband for North Africa now, whereas a few years ago the illicit tobacco problem was minute. The same applies to Libya, once a well-regulated market, and now a key destination country for illicit goods originating from the UAE<sup>21</sup>.

For the Middle East, Iran and the UAE are known sources of illicit whites production. The UAE is also known as a manufacturing source of illicit cigarettes (counterfeits and illicit whites) and a transiting

and transshipment source<sup>22</sup>. The presence of free trade zones, particularly the Jebel Ali Free Zone in Dubai, accounts for the ease of manufacturing illicit tobacco products and their dissemination into the region<sup>23</sup>.

Eastern and Southern Africa are not exempt from sharing the ITTP burden. They are both regions in Africa where illicit tobacco products are destined. Zimbabwe is the source of much trafficking of illicit cigarettes into Eastern and Southern Africa, as well as counterfeits originating from China, and illicit whites from Asia, the Middle East and Eastern Europe<sup>24</sup>.

## 1.8. Involvement of transnational organized crime in the ITTP

As far as the ITTP undermines public health strategies and creates unfair competition for legitimate businesses, a greater cause for concern is where it threatens public safety by allowing organized crime groups controlling illicit trade activity to be established or to be sustained. These groups, in turn, are able to direct illegally obtained profits towards supporting other serious organized crime activity. In fact, for its success, illicit trade relies significantly on organized crime and organized crime group involvement, to the detriment of the national security interests of countries.

### Box 9: The big business of transnational organized crime

Transnational organized crime was estimated, in 2009, to turnover profits of **USD 870 billion**, amounting to 1.5 % of the global GDP.

This estimation is significantly large even though it is not based on local organized crime that does not cross States' borders.

To put this estimation in perspective, the figure is more than six times the amount of money used for official development assistance for 2009, and equals approximately 7% of the value of global merchandise export.

Source: UNODC Fact Sheet on "Transnational Organized Crime – the Globalized Illegal Economy" 2012



### Box 10: Further reading on the ITTP phenomenon

Framework Convention Alliance, *How Big was the Global Illicit Tobacco Trade Problem in 2006?*, Prepared for the Second Session of the Conference of the Parties to the WHO FCTC, June 30 – July 6, 2007, Bangkok, Thailand.

Link: <http://www.fctc.org/publications/fact-sheets/illicit-trade/55-how-big-was-the-global-illicit-tobacco-trade-problem-in-2006>

Allen, Elizabeth, 'The Illicit Trade in Tobacco Products and How to Tackle It', International Tax and Investment Centre Publication, Second Edition, 2013.

Link: <http://www.iticnet.org/images/The%20Illicit%20Trade%20in%20Tobacco%20Products%20and%20How%20to%20Tackle%20It%20-%20Second%20Edition2.pdf>

KPMG Project Star 2012.

Link: [http://www.pmi.com/eng/media\\_center/media\\_kit/documents/project\\_star\\_2012\\_final\\_report.pdf](http://www.pmi.com/eng/media_center/media_kit/documents/project_star_2012_final_report.pdf)

Joossens, Luk & Raw, Martin, "From Cigarette Smuggling to Illicit Tobacco Trade", *Tobacco Control*, 2012: 21: 230-234.

Link: <http://tobaccocontrol.bmj.com/content/21/2/230.long>

Shafey, o., Cokkinides, V., Cavalcante, T.M., Teixeira, M., Vianna, C., Thun, M., "Case Studies in International Tobacco Surveillance: Cigarette Smuggling in Brazil", *Tobacco Control*, 2002: 11: 215-219.

Link: <http://tobaccocontrol.bmj.com/content/11/3/215.full#xref-ref-2-1>

### 1.8.1. ITTP requires organization

When examining the ITTP from the perspective of the varying types of criminal conducts involved, it is clear that it requires organization at a complex level to achieve success, i.e. to transport goods clandestinely and transnationally from one jurisdiction to another. This would necessarily involve individuals coordinating the business of the illicit trade, from the first venture to continued involvement after methods have proven successful and enabled the earning of significant profits.

The number of players involved in the illicit trade venture, all of whom perform some necessary function, the variety of expertise necessary to realize the illicit trade activity (e.g. those responsible for sourcing the technology, the manufacture of the products, the movement of the goods and routing, the distribution channels etc.), the planning required, the connections between individuals based in different regions and countries, all demonstrate that ITTP requires significant and complex organization.

The call to this criminality is quite simply that it is a **high profit, low risk** activity. Pre-established OCGs who deal in other commodities (drugs and arms etc.) and wish to fund their ventures are thus drawn by the ITTP. For example, the Italian Mafia has been involved in this trade since the early or middle of the twentieth century<sup>25</sup>.

### 1.8.2. The composition of the organized crime group today

Today, we appear to be at cross-roads with regards to how organized crime groups are viewed and defined. Traditional-type OCGs are not the only OCGs involved in ITTP. In fact, the groups involved in ITTP today are mostly hybrid groups, or networks of smaller OCGs interacting to achieve the material/financial benefit of the group as a whole. The larger group can also include single actors responsible for a specific role in the venture. What is important is the relationships and links between all the players (the network), and not whether the larger group is a traditional mafia by definition or not. Determining the links between players and mapping the structure of the groups involved is be vital in dismantling the operating networks.

Overall, there is an understanding that the groups operating today involved in serious crime:

- Are fluid/flexible;
- Are less integrated criminal structures of a network type (loosely structured);
- Are informal;
- Have undefined membership;
- Collaborate for their own mutual benefit;
- Have no clear boundaries; and
- Sometimes lack primary criminal objectives.

At a more practical level, however, legislators, policy makers, judges and prosecutors still operate under the impression that the organized crime group is a traditional “mafia” style group, centrally

controlled with a hierarchical structure, with a defined membership, clear boundaries, and operating with clear objectives in mind for their financial benefit. These outmoded stereotypes make it difficult to enact proper policies and laws to effectively put an end to an organized crime group's ability to engage in criminal activity for its financial/material benefit.

### 1.8.3. Engagement in a range of criminal conduct

It is significant to note that those engaging in illicit trade often deal in a range of commodities, not just one type. Also, they will necessarily have to engage in other criminalities to achieve success in the primary criminal venture, such as money laundering, bribery, fraud etc. Some offenders are content to stick to ITTP which provides a healthy profit, without the associated risk. Others use easy funds acquired from ITTP to fund other illicit trade activity requiring a greater financial and risk investment on their part.

In support of this argument, one can examine the network of organized crime groups engaged in various criminality (trafficking in other commodities, corruption, money laundering). Logically, routes for smuggling can stay the same even where commodities vary or trusted "colleagues" would be able to be utilized to smuggle other commodities where they have proved successful and trustworthy in the past. Putting the informal supply chain in place requires work, but once accomplished can be reused. Groups do not necessarily have to change their composition where they may change the commodity in which they deal, though of course they will have to account for increased risk where the goods smuggled carry greater penalties if caught.



#### Box 11: Further reading on organized crime

UNODC FACTS, "Transnational Organized Crime – the Globalized Illegal Economy", 2012.

**Link:** [http://www.unodc.org/documents/toc/factsheets/TOC12\\_fs\\_general\\_EN\\_HIRES.pdf](http://www.unodc.org/documents/toc/factsheets/TOC12_fs_general_EN_HIRES.pdf)

Desroches, F., "The Use of Organized Crime and Conspiracy Laws in the Investigation and Prosecution of Criminal Organizations", *Policing*, Volume 7, Number 4, February 2013, pp. 401–410

**Link:** <http://policing.oxfordjournals.org/>

Ayling, J., "Criminalising Organisations: Towards Deliberative Lawmaking", *LAW & POLICY*, Vol. 33, No. 2, April 2011

## 1.9. Involvement of terrorist groups in the ITTP

Given the high profit to low risk ratio involved in ITTP, organized crime groups, and even terrorists, are attracted by the ITTP to fund their other illicit activities, like drug, arms, human trafficking and of course, ultimately terrorist activities.

If one considers the advantages for terrorist organizations to engage in organized crime and the profits to be made, the links between transnational organized crime groups and terrorists can be drawn to some extent. The advantages of such collaboration, and the list is non-exhaustive, are as follows:

### Box 12: WCO Illicit Trade Report

“Commercial Fraud not only causes significant financial damage to the government’s budget and the economic stability/competitiveness of compliant traders, it may also be a source to finance terrorist or other criminal activities. Trafficking in cigarettes is, next to trafficking in drugs, assumed to be one of main sources to fund terrorist activities in the sub-Saharan region where criminals involved in this trafficking closely cooperate with regional terrorist groups.”

*Source: World Customs Illicit Trade Report 2012.*

*Link: <http://www.wcoomd.org/en/media/newsroom/2013/june/~media/WCO/Public/Global/PDF/Topics/Enforcement%20and%20Compliance/Activities%20and%20Programmes/Illicit%20Trade%20Report%202012/WCO%20REPORT%202013%20-%20BR.ashx>*

- Allows mutual interests to be exploited;
- Allows appropriate tactics to be shared;
- Capitalizing on increased capacities;
- Access to resources and knowledge;
- Access to pre-established organizational infrastructure and enhancing the same; and
- Expanded geographical reach.

In understanding the motivations of terrorist organizations who engage in organized crime, one must also keep in mind the complexity of drawing distinctions at times between terrorist organizations and organized criminal groups.

Historically there has been a clear separation between the two groups and their range of activity, their reach, and their motivations. This is perhaps no longer the case and the distinctions that once existed have now become increasingly blurred. Now organizational crime groups and terrorist groups are evolving, converging, transforming, or altering their ideological motivations and organizational compositions and the two once distinct groups have become similar. Belmokhtar, for example, was heavily criticized by Al-Qaeda in the Islamic Maghreb (AQIM), when he was part of their group, for being too focused on the financial benefits and less on the religious and political ideologies of the group. For this he was dismissed from the group. He then began his own terrorist organization, Katibat El-Moulathamoune (the Signed-In-Blood Battalion), and continued his engagement in illicit trade activity (see box 13, “Case study: Mokhtar BELMOKHTAR”).



Some experts also consider that groups such as AQIM and other Al-Qaeda inspired groups (e.g. Movement for Unity and Jihad in West Africa) are better described as “the instigators of the past decade's upsurge in regional criminality rather than as a united 'franchise' in pursuit of Islamist goals”<sup>26</sup>. This is demonstrated by the long involvement of such groups in criminal activity in the West African region, particularly in the smuggling activity of varying commodities.

Other cases involving cigarette smuggling to fund extremist activity involve the funding of the Real IRA through ITTP. Professor Louise Shelley, renowned for her work on criminal and civil cases in US courts, has studied this topic in depth. She highlights that the illicit trade in cigarettes generated significant profits for organizations listed as terrorist organizations in US<sup>27</sup>. One such case, outlined the prosecution of a Hezbollah cell operating out of Charlotte, North Carolina. This cell trafficked cigarettes from North Carolina to Michigan profiting from the tax differentials between the two States. It was found that profits obtained from the cigarette trafficking was sent to members of Hezbollah back in Lebanon<sup>28</sup>.

There are various international taskforces currently undertaking projects to establish the nexus between the two on a solid evidentiary basis, such as the Organization for Economic Cooperation and Development's (OECD) Taskforce on Charting Illicit Trade and the World Economic Forum's Global Agenda Council on Illicit Trade.

**Box 13: Case study: Mokhtar BELMOKHTAR**

It is alleged that Mokhtar Belmokhtar (AKA Mr. Marlboro) and his group Katibat el-Moulathamoune (the Masked Brigade) was responsible for the terrorist attack on 16 January 2013, against the international Tiguentourine gas plant in Aménas, Algeria, where more than 800 people were taken hostage and 41 foreign national workers were killed. Belmokhtar also claimed responsibility for a terrorist attack on 23 May 2013, against a French-owned uranium mine in Arlit, Niger, as well as a military base 150 miles away in Agadez, which were attacked by suicide bombers and truck bombs.

In 2003, he kidnapped 33 European tourists which he then ransomed, the money allowing him to establish a complex trading business throughout Saharan Africa. Belmokhtar used the ancient salt route also used by the Tuareg tribesmen to transport goods from the continent's west coast through to Timbuktu in Mali, and across Niger before arriving in the Algerian south. He secured close links with the Tuareg tribesmen through marriages to the daughters of four of their most prominent families, and made big profits for AQIM, the Algeria-based terrorist organization he was part of at the time, through smuggled cigarettes, arms, drugs and people, charging protection fees to the smugglers. He is also known throughout the Sahara as “Mr Marlboro”, due to running massive cigarette smuggling operations in the Sahel region.

Currently, INTERPOL has issued two red notices (international arrest warrants) against Belmokhtar, one requested by Canada and the other Algeria. Canadian authorities charged him with and convicted him in absentia of taking two of their citizens hostage for the benefit of, or, at the direction of or in association with a terrorist group. Algerian authorities charged him with and found him guilty of, amongst a myriad of offences, creation, management and organization of a terrorist group with a view to spreading terror among the population, possession and use of illegal ammunitions and explosives, kidnapping for obtaining a ransom, terrorist attacks against State security and murder and aggravated theft.

Belmokhtar (QI.B.136.03) was listed on the UN's 1267 Committee's Al-Qaida Sanctions List on 11 November 2003 pursuant to paragraphs 1 and 2 of resolution 1390 (2002) as being associated with Al-Qaida, Usama bin Laden or the Taliban for “participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf, or in support of” and “recruiting for” the Organization of Al-Qaida in the Islamic Maghreb (AQIM) (QE.T.14.01). Under its summary of reasons for his listing the UN Security Council provides additional information stating that “Mokhtar Belmokhtar is a former Algerian soldier with experience in training camps in Afghanistan. He is the longest serving active group leader and is the head of the southern zone for Katibat el Moulathamoune, a part of the Organization of Al-Qaida in the Islamic Maghreb (AQIM) (QE.T.14.01). His family connections with local tribes allow the group to capitalize on criminal opportunities in the southern Maghreb, such as smuggling, to finance terrorism.”

*Source: UN's 1267 Committee's Al-Qaida Sanctions list*

*Links: <http://www.un.org/sc/committees/1267/NSQI13603E.shtml>  
<http://www.un.org/sc/committees/1267/pdf/AQList.pdf>*



**Box 14: UNODC Digest of Terrorist Cases**

The United Nations *Digest of Terrorist Cases* has dedicated Chapter IV to the Relationship between terrorism and other forms of crime. It specifically looks at terrorism and corruption, narcotics trafficking and organized crime.

**Source:** UNODC

**Available languages:** Arabic, Chinese, English, French, Russian, Spanish.

**Link:**<https://www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html>

At the national level, the US is one of a number of countries that has established links between cigarette smuggling and the financing of terrorism. The US Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) claims that organized criminal groups, including those with ties to terrorist organizations are engaged in illegal trafficking in alcohol and tobacco products, including counterfeit tobacco products.

In a press release, "Cigarette Smuggling – States lose millions in tax revenue", dated 18 March 2008, the ATF discusses two successful tobacco diversion investigations which resulted in convictions for material support to a terrorist organization (Hezbollah in both cases)<sup>29</sup>. One of these cases relating to Mohammed Hammoud is discussed below (see box 15, "Case study: United States v Mohamad Hammoud").

**Box 15: Case study: United States v Mohamad Hammoud**

The first large-scale cigarette trafficking case tied to terrorism was prosecuted in North Carolina, USA, in 2002. Mohamad Youssef Hammoud, born in Lebanon, along with two of his brothers and 22 others, were indicted in 2000 in a U.S. District Court in the Western District of North Carolina on numerous criminal counts which included the charge of providing material support to a designated foreign terrorist organization, Hezbollah.

From April to June 2002, Hammoud and one of his brothers, Chawki Hammoud, were tried before a federal jury in Charlotte. At trial, both were convicted of providing material support to Hezbollah, and on numerous other criminal counts, including conspiracy, cigarette smuggling, money laundering, racketeering, and immigration fraud. The guilty verdicts were delivered by the jury at the end of the five-week trial on June 21, 2002, after three days of deliberation.

On February 28, 2003, trial Judge Graham C. Mullen sentenced Mohamad Hammoud to 155 years in prison, which he later appealed, and through a three-year appeal process which ultimately carried the case to the U.S. Supreme Court, the U.S. Fourth Circuit Court of Appeals upheld all convictions however vacated Justice Mullen's original sentence. The Appeals Court remanded the case back to the U.S. District Court for the Western District of North Carolina for reconsideration of the original sentence. The resentencing hearing was held in order to give Mohamad Hammoud and the government the opportunity to argue a variance in U.S. sentencing guidelines.

According to the court record, Mohamad Hammoud led a cigarette smuggling organization which was responsible for the illegal smuggling of over \$8 million worth of cigarettes from North Carolina to Michigan during the late 1990s. The group took advantage of the fact that Michigan imposes a tax of \$7.50 per carton of cigarettes, while the North Carolina tax is only 50¢. It is estimated that the conspiracy involved a quantity of cigarettes valued at roughly \$7.5 million and that the state of Michigan was deprived of \$3 million in tax revenues. Testimony and trial evidence showed that some of the profits from the cigarette sales were sent to Hezbollah in Lebanon by Hammoud. The 2002 trial was the first in the country of a federal "material support to a designated terrorist organization" charge.

In January 2011, Mohamad Hammoud was resentenced to 30 years in the terrorism financing case. In 2012, Hammoud again appealed to the United States Court of Appeals for the Fourth Circuit which, having found no reversible error, on June 21, 2012, affirmed the judgment of the District Court. Hammoud was initially sentenced to 155 years in prison, which after appeal was reduced to 30 years.

Approximately 50 defendants tied to the operations faced charges ranging from cigarette smuggling and money laundering to material support of terrorists. Evidence presented found that the clandestine operations made millions of dollars, some of which was traced back to Hezbollah leaders in Lebanon.

**Source:** UN's 1267 Committee's Al-Qaeda Sanctions list

**Link:** <http://www.un.org/sc/committees/1267/pdf/AQList.pdf>



#### Box 16: Further reading on ITTP and the connection with terrorism

Chatham House reports on terrorism in the West African Region

**Link:** <http://www.chathamhouse.org/>

The Jamestown Foundation's publications on Islamist militants in North Africa

**Link:** <http://www.jamestown.org>

Maarten van Dijck, "The Link between the Financing of Terrorism and Cigarette Smuggling: What Evidence is There?", HUMSEC Journal, Issue 1, June 2007

**Link:** <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=110401>

Unpublished judgment from the United States District Court for the Western District of North Carolina, decided 21 June 2012 (appeal)

**Link:** <http://www.ca4.uscourts.gov/Opinions/Unpublished/114164.U.pdf>

See also:

U.S. Immigration and Customs Enforcement, News Release of January 27th 2011.

**Link:** <http://www.ice.gov/news/releases/1101/110127charlotte.htm>

United States v. Hammoud, United States District Court for the Western District of North Carolina 381 F.3d 316 (4th Cir. 2004)

**Link:** <http://www.ca4.uscourts.gov/Opinions/Published/034253.P.pdf>

United States v. Hammoud, United States Court of Appeals for the Fourth Circuit, No. 11-4164.

**Link:** <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca4-11-04164/pdf/USCOURTS-ca4-11-04164-0.pdf>

John Rollins & Liana Sun Wyler, "Terrorism and Transnational Crime: Foreign Policy Issues for Congress", Congressional Research Service, 11 June 2013.

**Link:** <http://www.fas.org/sgp/crs/terror/R41004.pdf>

Shelley, L., Melzer, S., "The Nexus of Organized Crime and Terrorism: Two Case Studies in Cigarette Smuggling", *International Journal of Comparative and Applied Criminal Justice*, Spring 2008, Vol. 32, No. 1.

**Link:** [http://tracc.gmu.edu/pdfs/publications/illicit\\_trade\\_publications/Shelley\\_Melzer.pdf](http://tracc.gmu.edu/pdfs/publications/illicit_trade_publications/Shelley_Melzer.pdf)

Part II  
THE INTERNATIONAL LEGAL FRAMEWORK



## 2. The international legal framework

### 2.1. Overview

Illicit trade in tobacco products:

- Is a **multi-faceted phenomenon**, including various activities as have been enumerated in table 1 (smuggling, counterfeiting, diversion of genuine and counterfeit tobacco products, and illicit whites);
- Is **transnational** in nature; and
- Involves a **multiplicity of jurisdictions** (countries of origin, transit and destination).

As such there is an increased necessity for international cooperation to help come to terms with the issues involved and to implement effective strategies to tackle the problem.

A number of multilateral legal instruments, whether sector-specific treaties or overarching criminal law treaties, can be used to address illicit trade. Countries have supported the adoption of these treaties, which have resulted in the creation of international standards and the harmonization of national laws in their respective sectors and subject areas.

Careful analysis of the international legal framework dealing with illicit trade across sectors and across criminalities demonstrates the **interconnection between international treaties** covering various aspects of illicit trade and promotes a treatment of the issue which is all-inclusive and targeted at the primary illicit trade-related offence (in this case the ITTP) as well as its predicate crimes.

Knowing and understanding the international legal framework is vital in any discussion of how to combat the ITTP, not only because it offers solutions that when used together can be quite effective, but also on a more basic level. Indeed, it:

- Gives a **common understanding of concepts** on an international platform;
- Creates **minimum standards**; and
- Requires the **harmonization of national legislation**, creating channels for international cooperation.

The international legal framework relevant to fighting ITTP is made up of various legal instruments. Any sound implementation strategy will have to take all these instruments into account as a “package”. Designing an implementation strategy for one treaty will have direct consequences on the implementation of other treaties. For instance, States that have already implemented the United Nations Convention against Transnational Organized Crime (UNTOC) will most likely find it easier to implement the Tobacco Protocol as this latter draws heavily on provisions contained in UNTOC. Further, States that are planning to ratify/implement UNTOC should seriously consider engaging in the parallel or at least closely coordinated ratification/implementation of the Tobacco Protocol, as much legislative change to be made under the framework of the former will almost automatically benefit the latter.

Table 2 lists the most relevant multilateral legal instruments that should be considered (if and when they enter into force for each individual country) to treat illicit trade in tobacco products. Each one will be analyzed in turn to provide a more complete picture of what the instrument covers and how it can be utilized to address the ITTP, either in isolation or in connection with other treaties.

Table 2: International legal framework to use for ITTP	
<b>Cross-sectoral criminal justice treaties</b>	United Nations Convention on Transnational Organized Crime, 2000
	United Nations Convention Against Corruption, 2003
	United Nations Convention for the Suppression of the Financing of Terrorism, 1999
<b>Treaties on the protection of intellectual property</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
<b>Sector-specific treaties</b>	Framework Convention on Tobacco Control, 2003
	Protocol to Eliminate Illicit Trade in Tobacco Products, 2012

## 2.2. Cross-sectoral criminal justice treaties

When criminals engage in ITTP, they do not just engage in this conduct solely but engage in many related criminal/illicit conducts to facilitate the offence, such as:

- **Bribery** (e.g. cigarette smugglers may bribe customs officials to ensure consignments pass customs controls);
- **Money laundering** (this is necessary for proceeds of crime to be used by criminals);
- **Corruption** (accepting or offering bribes, abusing a position of power to allow illicit cigarettes to enter a jurisdiction without the necessary checks, assisting groups in forging documents, or issuing clearance documents for a criminal group in return for a financial benefit etc.);
- **Participating in an organized criminal group** (organized crime groups may be responsible for specific cigarette smuggling activity); and
- **Obstruction of justice** (Members of a criminal group may intimidate witnesses, threaten judges, etc. in order to evade the consequences of justice).

Further, the proceeds derived from engaging in the ITTP may be used by some criminals to finance terrorist organizations and terrorist activities (*see section 1.9, “Involvement of terrorist groups in the ITTP”*).

A number of international treaties exist that provide the legal framework for addressing such conducts. These are referred to as **cross-sectoral criminal justice treaties**. Although they were not specifically conceived to address ITTP, they do provide important mechanisms to tackle the ITTP from a criminal justice perspective. The key features of these treaties are:

- An obligation to **criminalize certain conduct**;
- **Expanded jurisdiction** for domestic courts;
- Obligations to **freeze and confiscate** instrumentalities and proceeds of crime; and
- **Legal bases** and mechanisms to facilitate **international cooperation**, especially through extradition and mutual legal assistance.

This section will focus on the **United Nations Convention against Transnational Organized Crime (UNTOC)**, the **United Nations Convention against Corruption (UNCAC)** and the **International Convention for the Suppression of the Financing of Terrorism**, as these appear to be the three most important and globally applicable criminal justice treaties with direct relevance in the context of the ITTP.



## Box 17: The criminal justice approach: the added value of regional and bilateral instruments

Several provisions of UNTOC and UNCAC directly recognize the importance of States parties cooperating in criminal matters through **regional and bilateral instruments**

For example, in the anti-corruption area, a number of treaties are in force at the **regional level**. To name but a few:

### African Union

- African Union Convention on Preventing and Combating Corruption, 2003

*Link to the text of the treaty:* <http://www.au.int/en/content/african-union-convention-preventing-and-combating-corruption>

### Council of Europe

- Criminal Law Convention on Corruption, 1999

*Link to the text of the treaty:* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=173>

- Additional Protocol to the Criminal Law Convention on Corruption, 2003

*Link to the text of the treaty:* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=191>

- Civil Law Convention on Corruption

*Link to the text of the treaty:* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=174>

- Model Code of Conduct for Public Officials\*
- Agreement Establishing the Group of States against Corruption\*
- Twenty Guiding Principles for the Fight against Corruption \*
- Council of the European Union framework decision on combating corruption in the private sector\*

### Economic Community of West African States (ECOWAS)

- Economic Community of West African States Protocol on the Fight against Corruption\*
- Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security\*

### European Union

- Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union\*
- Convention on the protection of the European Communities' financial interests\*
- Protocol to the Convention on the protection of the European Communities' financial interests\*
- Second Protocol to the Convention on the protection of the European Communities' financial interests\*

### Organization of American States

- Inter-American Convention against Corruption, 1996

*Link to the text of the treaty:* <http://www.oas.org/juridico/english/treaties/b-58.html>

### Organisation for Economic Co-operation and Development (OECD)

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 2003

*Link to the text of the treaty:* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=191>

- Revised Recommendation of the Council of the Organization for Economic Cooperation and Development on Combating Bribery in International Business Transactions\*

### Southern African Development Community (SADC)

- Southern African Development Community Protocol against Corruption\*

*\*Link to the text of these treaties: "Compendium of International Instruments against Corruption", at [http://www.unodc.org/documents/corruption/publications\\_compendium\\_e.pdf](http://www.unodc.org/documents/corruption/publications_compendium_e.pdf)*

Whereas these instruments have a narrower, geographically-limited scope of application than UNCAC, they can offer alternative cooperation channels and solutions that are tailor-made to the characteristics and dynamics of specific regions.

In addition, an important role is played by **bilateral treaties**, which often deal with the general relationship between two countries in the area of law enforcement cooperation, extradition and mutual legal assistance. These instruments normally cover the most serious offences set forth in the legislation of both States. It is up to policy-makers and practitioners in each State to make an inventory of all bilateral instruments in criminal matters in force and assess, on a case by case basis, whether investigations and proceedings in illicit trade related conducts can benefit from their application.



### 2.2.1. United Nations Convention on Transnational Organized Crime (UNTOC)

One of the most important cross-sectoral criminal justice treaties that provides a means of combatting the ITTP is the United Nations Convention on Transnational Organized Crime (UNTOC). As already mentioned, OCGs are becoming more and more involved in the ITTP. This necessitates the implementation of an effective and robust international legal framework to address the criminal law aspects of the problem. In this respect, UNTOC is a key convention for developing this legal framework and is indeed a primary element of it.

UNTOC is the first globally applicable instrument aimed at repressing the phenomenon of organized crime on a transnational scale in its most diverse manifestations. While previous international instruments in criminal matters adopted in the UN context, such as the 1988 Drug Convention, focus on the need to suppress specific conducts, UNTOC seeks to deal with **organized crime understood as a “process”,** or “method” for the commission of crimes.

The specificity of UNTOC lies in the identification of the structure and dimensions acquired by modern OCGs as the true element of dangerousness and having set up a strategy aimed at hitting them at the root. Such an approach explains the applicability of UNTOC to an indefinite number of offences defined as **“serious crimes”**. These are identified in art. 2(b) with reference to the fact that they are punishable with a maximum deprivation of liberty of at least four years or a more serious penalty.

Besides “serious crimes”, UNTOC applies to the “prevention, investigation and prosecution” of:

- Offences established by the Convention, notably:
  - Participation in an organized crime group (art. 5);
  - Laundering of proceeds of crime (art. 6);
  - Corruption (art. 8); and
  - Obstruction of justice (art. 23).
- Conditions for the applicability of UNTOC are that:
  - The offence is **transnational** in nature; and
  - An **organized criminal group** is involved.

#### United Nations Convention against Transnational Organized Crime

**Adopted:** 15 November 2000

**Opened for signature:** 12 December 2000-12 December 2002

**Entry into force:** 29 September 2003

**Status:** *Signatories:* 147 *Parties:* 179

**Latest accession:** Thailand, 17 October 2013

**Depositary:** Secretary-General of the United Nations

**Link to the text of the Treaty and its Protocols:**  
<http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>

**Link to the current status of the Treaty:**  
[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en)

(As of June 2014)

The phrase “transnational in nature” is interpreted broadly to cover crimes that are:

- Committed and/or prepared, planned, directed or controlled in more than one State party;
- Committed in one State but have substantial effects in another; and
- Committed in one State but involving an organized criminal group in another (art. 3.2).

The Convention defines an “organized criminal group” as:

- A structured group of three or more persons;
- Existing for a certain period;
- Acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the convention; and
- In order to obtain, directly or indirectly, a financial or other material benefit (art. 2(a)).

The definition of an “organized criminal group” provided by UNTOC does not define what type of “structure” applies to the group, thus appearing to recognize that those criminal groups involved are dynamic, adaptable, opportunistic, and sometimes of a temporary nature, taking into account the range of serious crimes engaged in by these groups as well as their fluidity. This is important as it will allow prosecutors to meet evidentiary burdens associated with proving the elements of the charge.

Neither transnationality nor involvement of an organized criminal group must be made elements of these offences in domestic law (art. 34.2). This means that alleged offenders can be prosecuted for counterfeiting/smuggling cigarettes, laundering proceeds of those offences, etc., without the need for the prosecution to prove that the offence was transnational in nature and involved an OCG. However, in order to rely on the mutual legal assistance (MLA) provisions of UNTOC, States parties will have to show on the basis of “reasonable grounds” that an OCG acting transnationally is indeed involved.

Crucially, States will be able to use UNTOC to combat the ITTP:

- Where one or more offences established by UNTOC itself have been committed as part of the ITTP; or
- Where engagement in the ITTP is established as a serious criminal offence domestically, i.e. in order to fall within the scope of UNTOC, an offence of counterfeiting/smuggling cigarettes would need to be a criminal offence with a penalty of at least four years imprisonment.

#### Box 18: UNTOC highlights

- Extends its scope of application to all “serious crimes” committed by organized criminal groups acting transnationally (art. 3).
- Describes the constituent elements of four basic conducts which States parties are required to criminalize.
- Outlines a broad legal framework for the identification, tracing, freezing and confiscation of **instrumentalities and proceeds of crime** (art. 12).
- Requires States parties to hold **legal persons** liable, whether criminally, civilly or administratively (art. 10).
- Provides for extensive provisions covering **extradition, mutual legal assistance and law enforcement cooperation** (arts. 16-18, 27).
- Encourages States parties to set up **joint investigation teams** and utilize **special investigative techniques** (arts. 19-20).
- Sets forth a legal framework for **witness protection** and to provide **collaborators of justice** with mitigated punishment (arts. 24-25).
- Establishes a **Conference of the Parties** to monitor the implementation of UNTOC (arts. 32-33).

Organizing the smuggling of cigarettes from country A to country B will normally necessitate the involvement of more than 3 people. It will require those involved to *act in concert* and the aim would be to smuggle cigarettes without paying the owed duties and taxes, which could constitute a serious crime (a penalty of more than 4 years imprisonment), to obtain a *financial benefit*. This group will probably have existed for *a period of time*, as one cannot plan smuggling activity overnight.



## Box 19: UNTOC Legal resources

### Digest of Organized Crime Cases

UNODC and INTERPOL have developed a compilation of cases and good practices related to organized crime with the aim of promoting the implementation of the Convention and its Protocols; and to assist policymakers, judicial officials, central authorities and judicial and investigative police in conducting efficient investigative and prosecutorial action.

It contains relevant case law and legal commentaries on cases involving organized crime from different countries and for both, traditional and new and emerging forms of crime. It provides a set of “lessons learned” about problematic and challenging aspects of the criminal justice response in six areas: criminalization; investigation and prosecution; international law enforcement and judicial cooperation; proceeds of crime; specific offences; and prevention.

Source: UNODC

Available languages: English, French, Italian, Spanish

Link: <http://www.unodc.org/unodc/en/organized-crime/digest-of-organized-crime-cases.html>

### Legislative database (SHERLOC)

Through its Sharing Electronic Resources and Laws against Organized Crime (SHERLOC), UNODC has developed a database of legislation containing national laws against organized crime.

The collected legislation can be searched by country; UNTOC article; crime type; liability of legal persons; jurisdiction and international cooperation; law enforcement measures; and measures to protect witnesses and victims.

Source: UNODC

Link: <https://www.unodc.org/cld/index-sherloc-leg.jsp>

### Model Legislative Provisions against Organized Crime

This model law provides an assistance tool to States in the process of becoming party to, or implementing UNTOC and the Protocols thereto.

It facilitates the review and amendment of existing legislation and the adoption of new legislation, focusing on the implementation of articles 2, 3, 5, 10, 11, 15, 17 and 19-31.

Source: UNODC

Available languages: Arabic, Chinese, English, Russian

Link: [http://www.unodc.org/unodc/en/organized-crime/tools-and-publications.html#Model\\_Laws\\_and\\_Treaties](http://www.unodc.org/unodc/en/organized-crime/tools-and-publications.html#Model_Laws_and_Treaties)

### Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime

This compendium of good practices intends to serve as a reference tool to achieve effective and sustainable programmes for the protection of witnesses and to ensure the safety of individuals giving testimony in a judicial setting or cooperating with law enforcement investigations.

Source: UNODC

Available language : English

Link: <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

### Legislative Guides for the United Nations Convention against Transnational Organized Crime and the Protocols thereto

The UNODC has developed this explanatory tool to assist policymakers and legislators in the ratification and implementation of UNTOC and its Protocols.

The guide lists items that are mandatory or optional for States parties and relates each article and provision to other regional or international instruments and to examples of how States with different legal traditions might address provisions of UNTOC.

Source: UNODC

Available languages: Arabic, Chinese, English, French, Russian, Spanish

Link: <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

## 2.2.2. United Nations Convention Against Corruption (UNCAC)

Corruption is a fundamental element and facilitator of the ITTP.

Bribery can be resorted to at different phases of the tobacco supply chain. For example, bribes can be offered to customs officials to permit the cross-border movement of smuggled cigarettes. When counterfeiting operations are involved, bribes might be given to law enforcement officials to allow the operation of an illegal manufacturing facility. Corruption can also play a role in the process of obtaining various types of permits and licenses from national authorities. While traditionally *bribery* has involved giving undue advantages to public officials, increasing attention is being devoted to corruption practices affecting the private sector. In the context of illicit trade, for example, one could imagine an employee of a legitimate company being bribed in order to divert goods otherwise destined for the regular market.

The United Nations Convention Against Corruption (UNCAC) is the first global, legally binding instrument against corruption.

While UNTOC requires that States parties criminalize corruption in its classical form (active and passive bribery of national public officials), UNCAC goes much further. It defines a much wider range of “**corruption-related**” **conducts**, notably:

- Bribery of national public officials (art. 15)
- Bribery of foreign public officials, officials of public international organizations (art. 16)
- Embezzlement, misappropriation or other diversion of property by a public official (art. 17)
- Abuse of functions, purpose of obtaining undue advantage (art. 19)
- Bribery and embezzlement in private sector (arts. 21 & 22)
- Laundering of proceeds of crime (art. 23)
- Concealment of property (art. 24)
- Obstruction of justice (art. 25)

Unlike UNTOC, its scope of application is broader in that it is independent from the involvement of an organized criminal group. UNCAC provisions can therefore be utilized to support criminal proceedings against individuals acting by themselves or groups that do not fulfil the requirements of an “organized criminal group” set forth in UNTOC.

### United Nations Convention against Corruption

**Adopted:** 31 October 2003

**Opened for signature:** 9 December 2003 - 9 December 2005

**Entry into force:** 14 December 2005

**Status:** Signatories: 140 Parties: 171

**Latest accession:** State of Palestine, 2 April 2014

**Depositary:** Secretary-General of the United Nations

**Link to the text of the Treaty:**

<http://www.unodc.org/unodc/en/treaties/CAC/>

**Link to current status of the Treaty:**

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en)

(As of June 2014)

Last but not least, UNCAC is the first and only international instrument to contain extensive provisions on asset recovery (arts. 51-59). These aim at facilitating the return of assets exported abroad through corruption practices. **Asset recovery** is defined as a “fundamental principle” of the Convention (art. 1(b)), and is of particularly acute concern for several developing countries which have been deprived of their national wealth through the corrupt practices of their leaders. Chapter V of UNCAC attempts to reach a delicate balance between the legitimate goal of countries seeking to recover their assets and the legal and procedural safeguards in force in countries from which assistance is sought.

#### Box 20: UNCAC highlights

- Offers a particularly broad definition of “**public official**” focused on the functions performed by the incumbent rather than the “nominal title”. The definition includes, in particular:
  - (i) *any person holding a legislative, executive, administrative or judicial office of a State party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;*
  - (ii) *any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State party and as applied in the pertinent area of law of that State party;*
  - (iii) *any other person defined as a “public official” in the domestic law of a State party. [...] (art. 2)*
- Identifies a number of areas that are key in the development of effective policies and practices to prevent corruption, notably:
  - The creation of **national anti-corruption bodies** which shall be afforded the necessary independence to carry out their functions “effectively and free from any undue influence” (art.6).
  - The adoption of systems for the recruitment, hiring, retention, promotion and retirement of civil servants and non-elected public officials “based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude” (art.7).
  - The promotion of **codes of conduct for public officials** (art. 8).
  - The establishment of transparent and objective **public procurement processes** and the sound and accountable management of public finances (art. 9).
  - The promotion of various measures to grant civil society an enhanced role in corruption prevention by strengthening its contribution to decision-making processes and ensuring public access to information (art.13).
- Sets forth various types of conducts which States parties are either required to criminalize or to consider for criminalization.
- Deals with the elements needed to support the correct functioning of the criminal justice process in corruption-related cases. These include: the **liability of legal persons**; a legal framework for States parties to take **freezing, seizing and confiscation measures**, measures for the **protection of witnesses and reporting persons** (so called “whistle blowers”), the establishment of **bodies specialized in combating corruption through law enforcement**, access to **bank information** and **criminal records**, etc. (arts. 26, 31, 32, 33, 36, 40, 41).
- Sets forth a broad legal framework for cooperation through extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement cooperation, joint investigations and special investigative techniques (arts. 43-50).
- Establishes **the Conference of the States parties** as a forum to promote and review the implementation of UNCAC. To assist in these tasks, the Conference has established an **intergovernmental review mechanism** based on the “peer review” principle. According to such mechanism, the anti-corruption policies and legal framework of each State party is examined by two other States parties with the technical and logistical support of the UNODC Secretariat (arts. 63-64).





## Box 21: UNCAC Legal resources

### Asset Recovery Handbook: A Guide for practitioners

The **Asset Recovery** Handbook is a tool developed by the World Bank and UNODC to improve the recovering of assets stolen through corruption practices.

The Handbook is a tool for practitioners, including law enforcement officials, investigating magistrates, and prosecutors, asset managers and policy makers in civil and common law jurisdictions.

It points at the differences across jurisdictions in the terminology applied, the authorities entitled to conduct investigations, specific procedures, etc.; and highlights how different concepts or practices may offer similar solutions to the same challenges.

It is divided in 9 chapters to guide the reader in the different aspects of an asset recovery process, including establishing a relationship with foreign counterparts for international cooperation, techniques used to trace assets, provisional measures to secure assets prior to confiscation, etc.

*Source: World Bank*

*Available languages: Arabic, English, French, Korean, Russian, Spanish, Thai*

*Link: <http://star.worldbank.org/star/publication/asset-recovery-handbook>*

### Legislative Guide for the Implementation of the United Nations Convention against Corruption

Like the Legislative Guides for UNTOC, this guide has been drafted mainly for policymakers and legislators in States preparing for the ratification and implementation of the Convention but can also provide a basis for bilateral technical assistance projects. It can be applied in different legal traditions with a focus on those provisions which will require legislative change and/or action prior to or at the time the Convention becomes applicable to the State party concerned.

The Guide identifies the legislative measures that States Parties are *required to take* –i.e. mandatory requirements-, those that they are *required to consider* –i.e. optional requirements- and those that they *may wish to consider* –i.e. optional measures.

The content is not authoritative and the guide is not intended to provide definitive legal interpretation of the articles of the Convention.

*Source: UNODC*

*Available languages: Arabic, Chinese, English, French, Russian, Spanish*

*Link: <https://www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html>*

### Technical Guide to the United Nations Convention against Corruption

The Technical Guide has been developed by the Division for Treaty Affairs of the UNODC to assist anti-corruption practitioners and authorities in their efforts to implement the UNCAC.

It complements the Legislative Guide –which is addressed more specifically to legislators – through the inclusion of best practices, policy options and technical and legal advice.

*Source: UNODC*

*Available languages: Chinese, English, French, Russian, Spanish*

*Link: <http://www.unodc.org/unodc/en/treaties/CAC/technical-guide.html>*

### Model Law to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses

MESICIC, the Anti-Corruption Mechanism of the Organization of American States (OEA), has adopted a model law to improve the fight against corruption and related crimes.

This tool can support States in the implementation of international instruments against corruption by facilitating the mechanism of reporting acts of corruption and protecting those who either give information or who act as witnesses in a corruption case.

*Source: OAS*

*Available languages: English, Spanish*

*Link: [http://www.oas.org/juridico/english/model\\_laws.htm](http://www.oas.org/juridico/english/model_laws.htm)*



## Box 21: UNCAC Legal resources (continued)

### Legal Library against Corruption

UNODC provides access to adopted national legislation around the world against corruption. This tool facilitates the process of searching information because it offers the possibility to find legislation related to each specific article of the United Nations Convention against Corruption, including the criminalization of bribery, embezzlement, abuse of functions, money laundering, obstruction of justice, among others.

*Source:* UNODC

*Link:* <http://www.track.unodc.org/LegalLibrary/Pages/home.aspx>

### StAR Corruption Cases Search Center

The Stolen Asset Recovery Initiative (StAR), a joint initiative between The World Bank and UNODC, offers a range of databases including completed and ongoing asset recovery related cases. The databases contain an extensive list and description of cases involving large-scale corruption; provides links to judicial processes and their final decisions; and gives further information on which articles of the Convention are involved in each case.

*Source:* STAR

*Link:* <http://star.worldbank.org/corruption-cases/?db=All>

## Box 22: OECD's instruments and initiatives

The OECD has been playing a leading role in the fight against corruption over the past 15 years by developing anti-corruption standards and normative principles that govern the conduct and activities of the public and private sectors (the latter focusing on multinational enterprises). In addition to being instrumental in the adoption of the 1997 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, the OECD has intensified its fight against corruption by adopting measures with respect to the operation of export credits, tax deductibility, transparency and accountability, especially in the public sector.

**OECD's Guidelines for Multinational Enterprises** are particularly interesting. They are non-binding Government recommendations to multinational enterprises, providing voluntary principles and standards for responsible business conduct in a variety of areas. Specific steps have been taken to promote implementation of the Guidelines, including establishing national contact points (government offices responsible for the implementation and promotion of the Guidelines). The Guidelines are one of the first international instruments recognizing multinational enterprises as international actors. The recommendations contained therein are particularly relevant to the fight against the ITTP as they apply directly to the manufacturers of tobacco products.

*Available languages:* English, French

*Link:* <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>

### 2.2.3. International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)

The 1999 Terrorist Financing Convention aims to facilitate the prosecution of persons accused of involvement in the financing of terrorist activities by obliging States parties to prosecute them or extradite them. States parties are also required to take a number of measures to prevent and counteract the financing of terrorism, so as to prevent the commission of terrorist acts by **“drying up” terrorists’ sources of financing.**

The Terrorist Financing Convention requires the criminalization of **acts of providing or collecting funds** “directly or indirectly, unlawfully and willfully [...] with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out”:

- An act which constitutes an offence under one of the previous nine “sectoral” terrorism-related conventions listed in the annex to the Convention; or
- “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act” (art. 2.1).

For the purposes of the Convention, “Funds” are defined as:

“Assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.”

Crucially, the above definition of “funds” appears broad enough to include tobacco products, whenever they are provided or collected with the intention that they should be used, or with knowledge that they will be used to carry out terrorist activity. Thus those engaged in ITTP activity could be prosecuted under the relevant provisions relating to the financing of terrorism whereby the supply of the cigarettes themselves ended up supporting/enabling terrorist activity, regardless of whether or not the terrorist act is eventually committed.

Where States manage to make the necessary connections between cigarette smuggling and the financing of terrorist activity, this convention can be particularly useful in terms of assisting States for the purposes of international cooperation against the ITTP. Case studies shown in boxes 13 and 15 (“*Mokhtar Belmokhtar*” and “*United States v Mohamad Hammoud*”) illustrate two scenarios in which the Financing Convention might find ideal application.

#### International Convention for the Suppression of the Financing of Terrorism

**Adopted:** 9 December, 1999  
**Opened for signature:** 10 January 2000 – 31 December 2001  
**Entry into force:** 10 April 2002  
**Status:** Signatories: 132 Parties: 186  
**Latest accession:** Timor-Leste, 27 May 2014

**Depositary:** Secretary-General of the United Nations

**Link to the text of the Treaty:**

[https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml](https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml)

**Link to current status of the Treaty:**

[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-11&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-11&chapter=18&lang=en)

(As of June 2014)



## 2.3. Treaties on the protection of intellectual property (IP)

Counterfeit products are products that generally breach intellectual property (IP) laws protecting trademarks, although they may also involve breaches of copyright, industrial designs, patents and undisclosed information. As reflected in the report of the expert group convened by the Conference of the Parties to the Framework Convention on Tobacco Control (*see chapter 3*), counterfeit tobacco products pose a significant challenge to eliminating illicit trade in tobacco products<sup>30</sup>.

### Box 23: Trademarks

Trademarks are words, names, symbols, devices or combinations of these, used by manufacturers and merchants to identify their goods and distinguish them from the products of their competitors.

The international legal framework on IP rights involves a multiplicity of multilateral and regional instruments. The World Intellectual Property Organization (WIPO) classifies those instruments into three categories:

- **Standard-setting treaties** which define agreed minimum standards for the protection of IP rights (for example, the 1883 Paris Convention for the Protection of Industrial Property);
- **Global protection system treaties** which ensure that the registration of IP rights in one jurisdiction takes effect in all States parties (for example, the 1891 Madrid Agreement concerning the International Registration of Marks); and
- **Classification treaties** which create systems for the organization of information relating to inventions, trademarks and industrial designs into indexed, manageable structures for easy retrieval (for example, the 1957 Nice Agreement concerning the International Classification of Goods and Services for the purpose of registration of Marks).

The treaties falling within the above categories represent the cornerstone of the legal framework for the protection of IP rights. They define the scope of IP rights, set forth standards and procedures to create, manage and protect IP rights against infringements. At the same time, the only international instrument currently in force which contains some basic provisions for the protection of IP rights through criminal laws and procedures is **the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement)**.

### 2.3.1. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was negotiated under the auspices of the World Trade Organization (WTO). It sets minimum standards of protection for IP by encompassing all of the main areas of IP law, including those relevant to counterfeit tobacco products.

It sets forth four broad categories of enforcement measures to be put in place at the national level:

- **Civil and administrative procedures and remedies:** The Agreement deals with access by right holders to civil judicial procedures in Member States' jurisdictions. It authorizes the judiciary to impose certain remedies for parties whose rights have been infringed, such as injunctions, ordering infringers to pay damages to the right's holder, and to destroy or dispose of the illicit goods and the materials and implements used to produce them outside the channels of commerce (Part III, section 2).
- **Provisional measures:** Judicial authorities can order provisional measures to prevent an infringement from occurring and to preserve evidence regarding alleged infringements. Judicial authorities may require the applicant to provide reasonably available evidence to satisfy them to a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent (Part III, section 3).
- **Border measures:** Right holders are allowed to request the competent authority to suspend, through customs authorities, the free circulation of goods suspected of infringing trademark and copyright regulations (Part III, section 4).
- **Criminal procedures and penalties:** The Agreement provides for criminal procedures and penalties to be applied **at least in cases of** wilful trademark counterfeiting and copyright piracy on a commercial scale (Part III, section 5).

#### **Criminal remedies include:**

- Imprisonment;
- Monetary fines (sufficient to act as deterrents);
- Seizure, forfeiture and destruction of infringing goods; and
- Seizure, forfeiture and destruction of materials and implements used predominantly to commit the offence (Part III, section 5).

#### Agreement on Trade-Related Aspects of Intellectual Property Rights

**Adopted:** 15 April 1994

**Entry into force:** 1 January 1995

**Status:** *Parties:* 159

**Depositary:** World Trade Organization

**Latest ratification:** Tajikistan, 2 March 2013

**Link to the text of the Convention:**

[http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?group\\_id=22&treaty\\_id=231](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=22&treaty_id=231)

**Link to the status of ratification:**

[http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22)

*(As of June 2014)*



## Box 24: TRIPS Agreement Legal Resources

### WIPO Legislative Database and Country Profiles

The World Intellectual Property Organization (WIPO) has two databases of national legislation:

**a. WIPO Lex** is a **legislative database** of Member States' IP laws.

*Link:* <http://www.wipo.int/wipolex/en/>

**b. Country Profiles** provide information on WIPO Member and non-Member States. It includes **national legislation**, points of contact and national statistics.

*Link:* <http://www.wipo.int/directory/en/>

### Handbook on the TRIPS Agreement

Published in 2012 by the WTO, this Handbook provides the background for a better understanding of the text of the TRIPS Agreement.

It contains non-technical explanations of the **provisions contained in the Agreement** and information about current policy issues and later instruments.

*Source:* WTO

*Available language:* English

*Link:* [http://onlinebookshop.wto.org/shop/article\\_details.asp?id\\_Article=795&lang=EN](http://onlinebookshop.wto.org/shop/article_details.asp?id_Article=795&lang=EN)

Several tools have been developed in order to facilitate the understanding and the implementation of the TRIPS Agreement. Mentioned below are the most important ones, developed in the framework of the WTO and a joint project between the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD).

### World Trade Organization

**-Analytical index – Guide to WTO Law and Practice:** The analytical index is a “comprehensive guide to the interpretation and application of the WTO agreements by the **Appellate Body**, dispute settlement panels and other WTO bodies. It contains extracts of key pronouncements and findings [...] including panel reports, Appellate Body reports, **arbitral decisions** and awards, and decisions of WTO committees, councils and other WTO bodies.

*Link:* [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/analytic\\_index\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm)

### United Nations Conference on Trade and Development (UNCTAD)

A joint project was developed by the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD) on Intellectual Property Rights and Sustainable Developments in order to address the concerns raised by certain developing countries about the implementation of the TRIPS Agreement as well as other trade-related instruments containing dispositions on Intellectual Property Rights.

Within this framework, a number of tools and documents were published, particularly:

**-Resource Book on TRIPS and Development:** This book is directed at negotiators and policy makers. It provides guidance and technical information on the main issues addressed by the TRIPS Agreement, including States parties' obligations, the enforcement, acquisition and maintenance of rights, interpretation and dispute settlement.

*Link:* <http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm>

**-Regional Research Agenda:** This document contains a number of policy-oriented research papers on Intellectual property written by regional experts. It aims at contributing to national and regional policy-making. The Regional Research Agenda is divided into five regions: Latin America, Southern and Eastern Africa, Pacific, Asia; and the United States and Canada.

*Link:* [http://www.iprsonline.org/unctadictsd/regional\\_research.htm](http://www.iprsonline.org/unctadictsd/regional_research.htm)

### Box 25: Anti-Counterfeiting Trade Agreement (ACTA)

ACTA opened for signature in 2011. In October 2011, Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States signed it. In 2012, Mexico, the European Union and 22 of its member states signed as well. Only one signatory (Japan) has ratified the ACTA, which requires six ratifications before entering into force.

ACTA negotiations sought to find specific solutions to the proliferation of counterfeit and pirated goods<sup>\*</sup>. It strives to establish effective and appropriate **means for the enforcement** of intellectual property rights. In doing so, it is supposed to complement the TRIPS Agreement.

In comparison with the TRIPS Agreement, it contains more extensive and detailed provisions on criminal law and procedures. It foresees that criminal proceedings and penalties will apply in cases of wilful infringement of IP rights on a commercial scale. For the purpose of this Agreement, “acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage”<sup>\*\*</sup>.

During its negotiation and afterwards, various concerns were raised about the fact that ACTA could seriously jeopardize civil liberties, in particular freedom of expression and privacy. Also, it was argued that the negotiations were carried out behind a veil of secrecy that prevented developing countries and the general public from contributing to its development.

*\*Introduction to TRIPS Agreement, Japan Patent Office, Asia-Pacific Industrial Property Center, 2008/ \*\* Art. 23(1) ACTA.*

## 2.4. Sector-specific treaties

Two specific treaties adopted under the auspices of the World Health Organization deal with the ITTP, namely:

- **The Framework Convention on Tobacco Control, 2003.**
- **The Protocol to Eliminate Illicit Trade in Tobacco Products, 2012.**

Although the latter is not yet in force, it constitutes the most comprehensive attempt by the international community to condense into one dedicated legal instrument all the measures necessary to eliminate the ITTP by means of a criminal justice approach. As the Tobacco Protocol will require a major effort by its States parties in order to implement its varied provisions, it will be the object of extensive analysis and policy recommendations at chapter 4 (*“Protocol To Eliminate Illicit Trade In Tobacco Products”*).

### 3. Framework Convention on Tobacco Control (WHO FCTC)

The WHO FCTC is an international legal instrument establishing broad commitments in the health sector and a general system of governance. Its relevance for the ITTP stems from article 15, under which States parties “recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national laws, in addition to subregional, regional and global agreements, are essential components of tobacco control” (para. 1).

Subsequent paragraphs require the following:

- Adoption of effective measures for the “marking” of unit packets and packages of tobacco products and any outside packaging with a view to determining the origin of tobacco products and their points of diversion (paras. 2 and 3).
- Considering the development of “**tracking and tracing**” regimes to secure the distribution system and assisting in the investigation of illicit trade (para. 2(b)).
- Taking measures in the areas of **monitoring and collecting data on cross-border trade in tobacco products**, criminal legislation, destruction of confiscated equipment and illegal tobacco products (para. 4(a)(b)(c)).
- Enabling the **confiscation of proceeds** from illicit trade (para. 4).
- Broadly promoting **international cooperation** in relation to investigations, prosecution and proceedings (para. 6).
- Endeavoring to adopt measures aimed at **preventing illicit trade**, including through **licensing**.

Crucially, art. 15 of the WHO FCTC set forth in an embryonic form the basic obligations and requirements that were subsequently developed by the Protocol to Eliminate Illicit Trade in Tobacco Products.

Article 23 establishes a **Conference of the Parties (COP)**, the governing body of the WHO FCTC and comprised of all Parties to the Convention. It is responsible for the regular review of the implementation of the WHO FCTC. It is able to make decisions relating to effective implementation of

#### WHO Framework Convention on Tobacco Control

**Adopted:** 21 May 2003

**Opened for signature:** 16 June 2003-29 June 2004

**Entry into force:** 27 February 2005

**Status:** Signatories: 168 Parties: 178

**Depositary:** Secretary-General of the United Nations

**Latest accession:** Ethiopia, 25 March 2014

**Link to the text of the Convention:**

[http://www.who.int/fctc/text\\_download/en/index.html](http://www.who.int/fctc/text_download/en/index.html)

**Link to status of ratification:**

[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en)

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the WHO FCTC, and can adopt Protocols, annexes and amendments to the Protocol. A Convention Secretariat was tasked with the secretariat functions specified by the Convention at article 24. The Rules of Procedure<sup>31</sup> govern the work of the COP. Regular sessions are held every two years.



**Box 26: Further reading on the FCTC**

For publications of the Convention Secretariat and official documentation of the COP please refer to the website of the WHO FCTC. Documents include COP and INB documents, and other FCTC and Protocol related publications.

**Link:** <http://www.who.int/fctc/publications/en/index.html>

Access to the database of available resources to assist in implementation of the WHO FCTC is available to Parties to the FCTC upon request to the General Secretariat.

**Link:** <https://extranet.who.int/fctcresources/>

## 4. Protocol to Eliminate Illicit Trade in Tobacco Products (Tobacco Protocol)

### 4.1. Background

In the *Preamble* to the WHO FCTC, the States parties recognize that cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling, illicit manufacturing and counterfeiting. Under article 15 of the WHO FCTC, States parties recognize that “the elimination of all forms of illicit trade in tobacco products” is an ‘essential component’ of tobacco control and undertake obligations towards this end. Article 15 forms the **legal basis** of the Protocol to Eliminate Illicit Trade in Tobacco Products, a Protocol to the WHO FCTC solely dedicated to combatting the ITTP. Article 15 begins Part IV of the WHO FCTC “Measures Relating to the Reduction of the Supply of Tobacco”.

In light of the focus of the WHO FCTC on the ITTP, it is no surprise that the first Protocol to be adopted under it relates to the issue of illicit trade.

The table that follows provides a brief overview of article 15 (Illicit Trade in Tobacco Products) and where its provisions have been elaborated within the Protocol.

**Table 3: WHO FCTC Part IV: Measures relating to the reduction of the supply of tobacco (art. 15)**

Article 15 Paragraph	Related Tobacco Protocol Provisions
1. The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.	Art. 2 relationship between this Protocol and other agreements Art. 3 Objective Art. 4 General obligations
2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:  (a) Require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market	Art. 8 Tracking and tracing  Art. 8 (4)(1) outlines the type of information that is required to be available as part of the global tracking and tracing regime, including intended market of retail sale, warehousing and shipping details inter alia.

### Protocol to Eliminate Illicit Trade in Tobacco Products

**Adopted:** 12 November 2012

**Opened for signature:** 10 January 2013-9 January 2014

**Will enter into force:** The 90<sup>th</sup> day following the deposit of 40 instruments of ratification, acceptance or approval of the Parties to the WHO Framework Convention on Tobacco Control

**Status:** Signatories: 54 Parties: 1

**Latest ratification:** Nicaragua, 20 December 2013

**Depositary:** Secretary-General of the United Nations

**Last signatories:** Togo & Austria, 9 January 2014

**Link to the text of the Convention:**

[http://apps.who.int/iris/bitstream/10665/80873/1/9789241505246\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/80873/1/9789241505246_eng.pdf)

**Link to status of ratification:**

[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4-a&chapter=9&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&lang=en)

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<p>carry the statement: "Sales only allowed in (insert name of the country, subnational, regional or federal unit)" or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and</p> <p>(b) Consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.</p>	
<p>3. Each Party shall require that the packaging information or marking specified in paragraph 2 of this article shall be presented in legible form and/or appear in its principal language or languages.</p>	
<p>4. With a view to eliminating illicit trade in tobacco products, each Party shall:</p> <p>(a) Monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities, as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements;</p> <p>(b) Enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes;</p> <p>(c) Take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally-friendly methods where feasible, or disposed of in accordance with national law;</p> <p>(d) Adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction; and</p> <p>(e) Adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.</p>	<p>Art. 9 Record keeping, Art. 8 Tracking and tracing, Art. 20 General information sharing, Art. 21 Enforcement information, Art. 27 Law enforcement cooperation</p> <p>Part IV Offences, Art. 14 Unlawful conduct, including criminal offences</p> <p>Art. 18 Disposal or destruction</p> <p>Art. 12 Free zones and international transit Art. 13 Duty free sales</p> <p>Art. 6 Licensing (3)(b)(vii) complete identification of bank accounts and other relevant payment details, Art. 27 (1(c)) law enforcement cooperation relating to movement of proceeds of crime or property derived, and property, equipment or other instrumentalities used or intended for use in the commission of ITTP offences.</p>
<p>5. Information collected pursuant to subparagraphs 4(a) and 4(d) of this article shall, as appropriate, be provided in aggregate form by the Parties in their periodic reports to the Conference of the Parties, in accordance with article 21.</p>	
<p>6. The Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products.</p>	<p>Art. 19 Special investigative techniques Part V: International Cooperation (Art. 20 – 31)</p>
<p>7. Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.</p>	<p>Art. 6 Licence, equivalent approval or control system Art. 7 Due diligence Art. 9 Record keeping Art. 10 Security and preventive measures Art. 11 Sale by internet, telecommunication or any other evolving technology Art. 17 Seizure payments</p>

### Box 27: History of the Intergovernmental Negotiating Body (INB)

At the first meeting of the COP of the FCTC in February 2006, the decision was made to establish an Expert Working Group to prepare a template for a Protocol to the FCTC on suppressing the illicit trade in tobacco products. This expert group met in late 2006, and produced a template, the main aim being the prevention of diversion of tobacco products from licit trade. The template introduced two main components in the treatment of the problem:

- A series of **measures to regulate the supply chain** so it did not feed the illicit trade; and
- **Deterrent measures** mainly against the criminals involved in the illicit trade such as criminal offences, legal assistance and law enforcement cooperation measures.

At its second session in July 2007, the COP established an Intergovernmental Negotiating Body (INB) to draft and negotiate a Protocol on Eliminating Illicit Trade in Tobacco Products which would build upon and complement Article 15 of the WHO FCTC. The template produced by the Expert Working Group formed the basis of the negotiations for the Protocol.

Following the first INB session the Chairperson of the INB delivered a first draft text. The second session started the negotiations on the draft text presented at the INB1. The third INB session concluded with a decision to establish two drafting groups to work on the draft provisions of the Protocol before the INB4. The fourth INB session took account of the proposals of the two drafting groups, and consensus was achieved on some but not all of the provisions of the draft Protocol. The COP at its fourth session (Punta del Este, Uruguay, 15–20 November 2010) acknowledged the progress made by the INB on the Protocol during the four sessions of the INB that had been held up to that point. The COP extended the mandate of the INB to a final session which was held in early 2012. The INB was requested to submit the text of a draft Protocol to eliminate illicit trade in tobacco products for consideration by the COP at its fifth session.

The COP also decided to establish an Informal Working Group to work prior to the final session of the INB. The COP mandated the Informal Working Group to:

- Develop possible text for those articles in Part III (Supply Chain Control) of the draft Protocol that had not yet been agreed;
- Make proposals with regard to the method of financing the Protocol;
- Make proposals with regard to the question of whether the provisions on mutual legal assistance and extradition needed to be retained in the draft Protocol;
- Make proposals with regard to the question of how to cover the issue of protection of personal data in the draft Protocol; and
- Make proposals with regard to the question of how the text of the draft protocol, and its implementation, could best complement existing relevant agreements and arrangements, including the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC), in order to maximize synergy and to avoid duplication. Within this, a particular issue was where the global information sharing focal point would be organizationally located.

The informal working group, comprised of 30 Party representatives (five Parties from each WHO region), held two meetings in Geneva, on 4–8 July and 19–23 September 2011. Representatives of States non-Parties, intergovernmental organizations and nongovernmental organizations accredited as observers to the COP and with specific expertise in the matters under the mandate of the working group also participated in the meetings. It reported on its work to the fifth INB Session, as requested\*.

After four years of negotiations, on 4 April 2012, the INB agreed on a draft text for the Protocol. The text was submitted to the COP at its fifth session in Seoul, Republic of Korea, and adopted on 12 November 2012, and is the first Protocol to the WHO FCTC.



- \*See the report titled "Informal Working Group on the draft protocol to eliminate illicit trade in tobacco products: Outcome of the Two Meetings of the Working Group", FCTC/COP/INB-IT/5/3, 24 October 2011.
- **Link:** [http://apps.who.int/gb/fctc/PDF/it5/FCTC\\_COP\\_INB-IT5\\_3-en.pdf](http://apps.who.int/gb/fctc/PDF/it5/FCTC_COP_INB-IT5_3-en.pdf)

#### 4.1.1. How the Protocol Deals with the ITTP

While it is connected to the WHO FCTC through article 15, the Protocol heavily relies on the United Nations Convention on Transnational Organized Crime (UNTOC), which is the main reference for provisions dealing with criminal law, law enforcement and international cooperation.

The Protocol uniquely spans different disciplines, reflecting the development at an international level of approaching problems such as illicit trade all-inclusively, bringing together all the relevant stakeholders and linking relevant processes. It also contains different measures aimed at the prevention of the ITTP and at the improvement of law enforcement cooperation and international cooperation.

A key feature of the Protocol is the **regulatory regime** it seeks to impose on legitimate tobacco trade. Particular provisions of this regulatory regime include:

- Licensing, due diligence, and record-keeping;
- A “track and trace” national system and international track and trace regime;
- Provisions control of the sale of tobacco products over the internet and through duty-free sales; and
- Control on the manufacture of and transactions in tobacco products in free-trade zones.

To complement the regulatory regime, the Protocol provides **a list of unlawful conduct** for States to establish as unlawful (whether through criminal or administrative penalties attached) under their domestic law, and a detailed framework dealing with international cooperation, especially through extradition and mutual legal assistance.

##### Box 28: The cooperation agreements between the EU and the tobacco industry

Four legally binding and enforceable cooperation agreements are in effect between the EU, all 27 of its Member States, and the four leading tobacco manufacturers (Philip Morris International, Japan Tobacco International, British American Tobacco and Imperial Tobacco International). Their importance in the context of this handbook lies in the fact that they represented a blueprint for the subsequent negotiation of the Tobacco Protocol. They are designed to combat smuggling in genuine tobacco products and prove most useful tools in decreasing the extent of illicit trade in the EU. They outline a long-range and comprehensive framework for national Governments, the EU, and the four tobacco companies named above to work together to combat illicit trade, they provide for industry commitment to track and trace tobacco products, implement a “know your customer” policy, anti-money laundering provisions, transparent payment procedures as well as to supply markets commensurate to local demand. The agreements also set forth a comprehensive process in case of seizures and for close cooperation between the European Anti-Fraud Office (OLAF), the law enforcement authorities of the EU and the four tobacco companies.

Key terms of all Agreements include:

- Sales and distribution practices implemented to ensure that cigarettes are sold, distributed, stored and shipped in accordance with all legal requirements.
- Due diligence provisions to ensure a complete understanding of the identity of tobacco customers.
- Anti-money laundering initiatives.
- Record-keeping requirements.
- Implement a tracking system to assist law enforcement authorities to identify when cigarettes are traded illegally.
- Cigarettes to be sold in brands and amounts consistent with legitimate demand in the intended market.
- In the event of future seizures of genuine products in the EU, manufacturers agreed to examine seized products to determine whether they are counterfeit or genuine, to provide documentation and examination results, and to provide relevant information relating to seized contraband products.
- Supplementary payments to be made in the event of seizures of genuine tobacco products equaling the amount of duties and taxes due on the smuggled cigarettes seized. If the number of cigarettes seized in a year exceeds a predefined baseline amount, the supplementary payments will include an additional amount based on a significant multiplication of the duties and taxes due on the seized cigarettes.

*Link:* [http://ec.europa.eu/anti\\_fraud/investigations/eu-revenue/cigarette\\_smuggling\\_en.htm](http://ec.europa.eu/anti_fraud/investigations/eu-revenue/cigarette_smuggling_en.htm)

## 4.2. Overview, scope and objectives of the Protocol

### 4.2.1. Overview

The text of the Protocol is divided into 10 parts (*see table 4*). However, the **core** of the Protocol is contained in Part III (supply chain control), Part IV (offences) and Part V (international cooperation).

*Table 4: Overview of the structure of the Protocol*

Structure of the Protocol	
I Introduction	VI Reporting
II General Obligations	VII Institutional Arrangements and Financial Resources
III Supply Chain Control	VIII Settlement of Disputes
IV Offences	IX Development of the Protocol
V International Cooperation	X Final Provisions

### 4.2.2. Scope of the Protocol

The Protocol requests that States parties adopt and implement effective measures to control or regulate the supply chain of goods covered by this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods.

The “supply chain” is defined within the Protocol and its scope is quite broad so as to be comprehensive. It specifies the **goods** that fall under its ambit of control and various **activities** involved in international trade.

The scope of the Protocol covers the following products:

- Tobacco products<sup>32</sup>; and
- Manufacturing equipment<sup>33</sup>.

**Key inputs** (not defined by the Protocol but referring to acetate tow, cigarette paper, cigarette filters and inputs essential for the manufacture of tobacco products) do not fall within the scope of the Protocol, though an obligation is created under article 6(5) to conduct research on key components five years following the entry into force of the Protocol (*see section 4.3.3, “Key Inputs”*).

The Protocol also contains provisions dealing with the following activities, subject to differing levels of control:

- The manufacture of tobacco products and manufacturing equipment;
- The import or export of tobacco products and manufacturing equipment;

- The retailing of tobacco products;
- The growing of tobacco, **except for** traditional small-scale growers, farmers and producers;
- The transporting of commercial quantities of tobacco products or manufacturing equipment;  
and
- The wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.

#### 4.2.3. Objectives of the Protocol

The objective, as prescribed in article 3 of the Protocol, is *to eliminate all forms of illicit trade in tobacco products*, in accordance with the terms of article 15 of the WHO FCTC.

To achieve its objectives the Protocol aims to implement a **dual approach targeting prevention and suppression** of ITTP. The provisions aimed at prevention are contained in Part III Supply Chain Control, and those aimed at suppression within Part IV Offences.

The prevention provisions, at Part III: Supply Chain Control, are where much of the administrative regime in controlling and monitoring the licit manufacture and distribution of tobacco products and manufacturing equipment is established. The Protocol requires that:

- States assess participants involved in the tobacco trade through licensing;
- Participants assess those they deal with through the adoption of due diligence processes;  
and
- Products in which licensed participants deal are tracked and traced by authorities.

The aim of dealing with all key players in the supply chain in this way is to ensure that, if diversion occurs, steps can be taken to prevent recurrence and ensure action will be possible against criminals as well licit participants in the process who are responsible for not adequately protecting the supply chain. The provisions on supply chain control are complemented by Part IV of the Protocol which identifies certain conduct as unlawful, and Part VI which iterates accepted standards on law enforcement cooperation and international cooperation.

The Protocol provides a range of complex provisions which countries will be required or recommended to implement if they become a State party to the treaty. This will require thorough analysis and capacity to ensure that administrative, legal and technical requirements are met.

## 4.3. Supply Chain Control (Part III of the Protocol)

### 4.3.1. What is a “Supply Chain”?

A supply chain involves a system consisting of organizations, information, people, activities and resources involved in the movement of a product or service from the supplier to the consumer. The supply chain is the flow of the product through various stages before reaching the consumer.

The supply chain is usually made up of three components:

- The **supply of raw materials** to a manufacturer through various means depending on the location of the manufacturer;
- The **manufacturing**, using the raw material to produce a finished product; and
- The **distribution** of the finished product, whether it be for use in another manufacturing process, or directly to the consumer of the finished product, through a network of distributors, warehouses and retailers.

In the tobacco sector, the supply chain involves the sourcing of the raw tobacco from growers, as well as other components required to manufacture cigarettes such as the cigarette paper, the acetate tow for the cigarette filter, or a pre-made cigarette filter, the flavorings, the packaging material, etc. The manufacturer then manufactures the tobacco products and relies on distributors, transporters, brokers, wholesalers etc. to move the goods along the supply chain to the end consumer. In between the manufacturer and the consumer there are intermediaries who can purchase the finished products and on sell them before they enter the retail market. The finished products are either exported, imported by various players in the supply chain, and sold to numerous customers before the final consumer of the product. A main consequence of having many actors involved in the supply chain is that more “entry points” are available in a particular market, and therefore more opportunities exist to divert or smuggle the product. For a diagram on how the legal supply chain works in the tobacco industry, see figure 1 (“*Legal supply chain*”).

The Protocol at article 1(12) (“Use of terms”) states:

*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.*



According to the Protocol, the applicability of its provisions to the supply chain are limited to manufacturers, importers and exporters of tobacco products and manufacturing equipment and will only be extended to other players such as retailers, growers, distributors, transporters, etc., if a State party decides to exceed the minimum threshold set by the Protocol.

Part III Supply Chain Control (articles 6 – 13), establishes a regime aimed at the **prevention** of the illicit tobacco trade by securing the legitimate supply chain. Members of the legitimate supply chain would be required to take measures to prevent diversion of tobacco products and manufacturing equipment into illicit trade channels. Securing the supply chain would allow enforcement authorities to more easily detect the point of diversion of the products and identify the subjects dealing in the illicit trade.

The aspects of the supply chain included within the ambit of Part III of the Protocol attempt to provide a comprehensive regime for securing the legitimate supply chain. The main measures introduced to prevent the diversion of tobacco products are shown in figure 4.

Controlling the supply chain in this way assists law enforcement authorities in identifying illegitimate actors, in gathering intelligence in relation to the processes used by them to carry out their illegitimate activity and in interrupting these networks and dismantling them. Thus Part III of the Protocol is key to its functionality and the achievement of the Protocol’s aims.

*Figure 4: Outline of supply chain control provisions*  
*The effectiveness of these measures will depend upon their practical enforcement.*



#### 4.3.2. Licence, equivalent approval or control system (art. 6)

In article 1(7) of the Protocol, “**licence**” is defined as permission from a competent authority following submission of the requisite application or other documentation to the competent authority. Article 6 distinguishes between “**tobacco**” and “**tobacco products**”, defining the latter as products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used in smoking, sucking, chewing or snuffing. The term “tobacco” is not defined but presumably refers to leaf tobacco.

Article 6 is elaborated from article 15(7) of the WHO FCTC. The aim of the licensing provisions and those provisions pertaining to Supply Chain Control are to assist in the **prevention** of the ITTP. A licensing regime will specifically aid in the identification and control of legitimate market operators. However, the effectiveness of such a licensing system will depend on effective enforcement and deterrent penalties to ensure that:

- Only bona fide and legitimate businesses are engaged in the manufacture, import, and export of tobacco products and manufacturing equipment, and even their distribution and sale;
- Licensees can be monitored, reviewed and be subject to fees and renewal processes to ensure on-going legitimacy in their businesses; and
- All industry entities trade in tobacco products and manufacturing equipment only with other entities operating legally in any given jurisdiction (licensed or otherwise approved).

For success on the second point, a proper implementation of the due diligence provisions (art. 7) within the Protocol will also be essential.

##### a. The scope of the licence

*At a minimum*, article 6 calls for natural and legal persons engaged in the activity of manufacture, import or export of tobacco products and manufacturing equipment to do so pursuant to a licence. Article 6 does not however provide guidance to States parties on what the scope of licenses to be issued should be.

- Should States parties issue a **general licence** to cover all activities requiring a licence For example, one licence would cover manufacturing, importing, exporting and other related activities; or
- Should **multiple licences** be issued for each activity requiring a licence? For example, persons would require one licence for manufacturing and one for exporting etc.

The ‘general licence’ approach might have the benefit of reducing the administrative burden on the competent government authority responsible for the licensing regime. Multiple licences would have the advantage of more control over the system, though it would come with an administrative encumbrance.



Article 6 also provides some ‘high level’ guidance on certain aspects of the additional administrative processes necessary to implement and maintain an effective licensing system, which are outlined in table 5. Individual States will need to consider the full set of administrative requirements in support such as: design of forms to capture requisite information; risk criteria for approval; sets of conditions/restrictions to reduce risk, length of licence validity; range of breaches and sanctions etc.

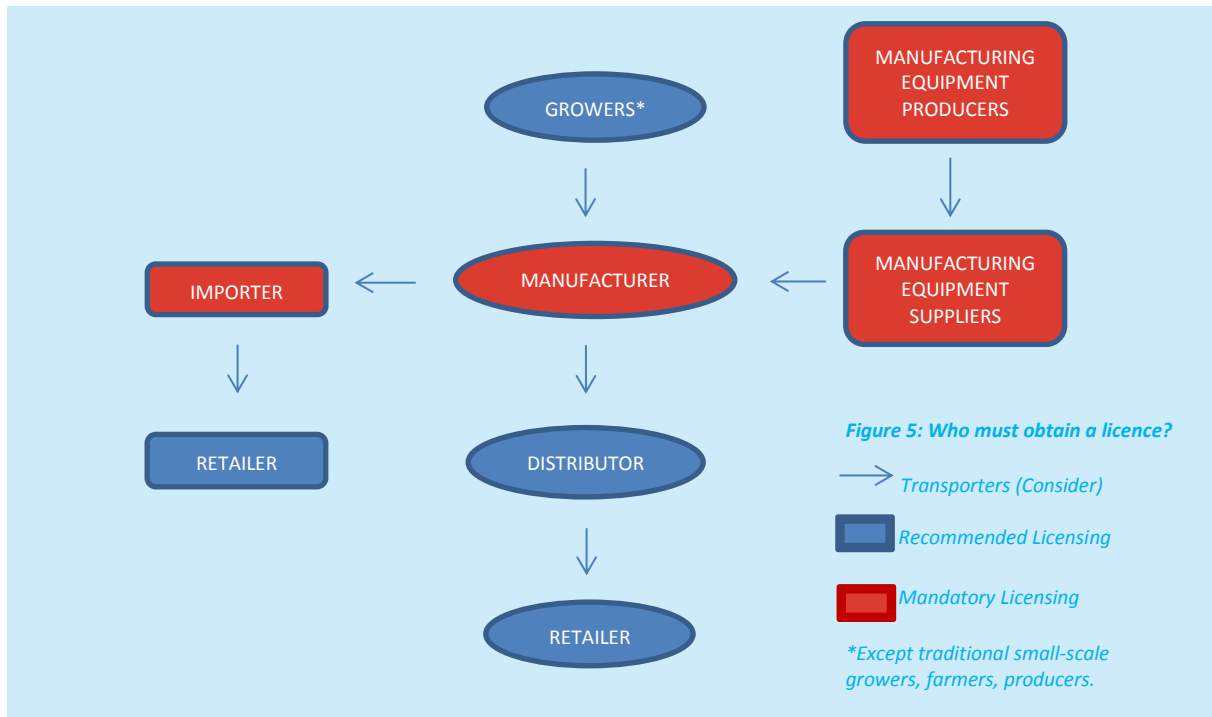
**Table 5: Licence, equivalent approval or control system (art. 6)**

Article 6: Licence, equivalent approval or control system		
Obligations (Protocol Provisions)	Recommendations (Protocol Provisions)	Comments
<p>1. Each party shall prohibit:</p> <p>(a) Manufacture of tobacco products and manufacturing equipment; and</p> <p>(b) Import or export of tobacco products and manufacturing equipment</p> <p>By any natural or legal person except pursuant to a licence</p>	<p>2. Shall <b>endeavour</b> to license, to the extent considered appropriate:</p> <p>(a) <b>Retailing</b> of tobacco products;</p> <p>(b) <b>Growing</b> of tobacco, <i>except</i> for traditional small-scale growers, farmers and producers;</p> <p>(c) <b>Transporting commercial quantities</b> of tobacco products or manufacturing equipment; and</p> <p>(d) <b>Wholesaling, brokering, warehousing or distribution</b> of tobacco/tobacco products or manufacturing equipment.</p>	<p>Article 6(1) is a substantive provision imposing a positive obligation (requiring regulation by the State) on States to implement a licensing system for the manufacture, import and export of tobacco products and manufacturing equipment.</p> <p>To the extent that a decision is made to licence retailers under article 6(2), the following assessments will have to be made: e.g. which retailers will fall under the regime, tobacco specific retailers, non-tobacco specific retailers such as supermarkets and newsagents. This will also need to be tied to the regime regarding packaging of tobacco products to ensure that appropriately packaged products are sold in compliance with relevant legislation.</p> <p>Legislative measures to this effect will need to be taken by States, and penalties enshrined for those who engage in these activities without the necessary licence/approval.</p>
<p>3. Each party shall:</p> <p>(a) Establish / designate a competent authority/-ies to issue, renew, suspend, revoke and/or cancel licences relating to the manufacture/import or export of tobacco products and manufacturing equipment.</p> <p>(b) Require that each application for a licence contains all the requisite information about the applicant which should include the information listed in (i) – (viii).</p> <p>(c) Monitor and collect any licence fees that may be levied.</p>	<p>3. (b)(i) Where the applicant is a <b>natural</b> person, information regarding identity: full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and any other information to allow identification to take place;</p> <p>(ii) When the applicant is a <b>legal</b> person, information regarding its identity: full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated legal representatives, including any other information to allow identification to take place;</p>	<p>The main obligation for State parties will be to allocate/create a competent authority to control/monitor the licensing regime. Currently, most countries have an allocated authority to deal with such a requirement, especially in States where such a system exists.</p> <p>The allocated authorities will require enforcement and auditing capabilities (already predominantly held by Customs and Revenue authorities). Where countries desire a new established licensing authority they will need to connect its functions to the entities responsible for tobacco control,</p>

<p>(d) Take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;</p> <p>(e) Undertake measures such as periodic review, renewal, inspection or audit of licences where appropriate;</p> <p>(f) Establish, where appropriate, a time frame for expiration of licences and subsequent requisite reapplication or updating of application information;</p> <p>(g) Oblige any licensed natural or legal person to inform the competent authority in advance of any change of location of their business or any significant change in information relevant to the activities as licensed;</p> <p>(h) Oblige any licensed natural or legal person to inform the competent authority, for appropriate action, of any acquisition or disposal of manufacturing equipment; and</p> <p>(i) Ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent authority.</p>	<p>(iii) Precise business location of the manufacturing unit(s), warehouse location and production capacity of the business run by the applicant;</p> <p>(iv) Details of the tobacco products / manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make and serial number of the manufacturing equipment;</p> <p>(v) Description of where manufacturing equipment will be installed and used;</p> <p>(vi) Documentation or a declaration regarding any criminal records;</p> <p>(vii) Complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and</p> <p>(viii) A description of intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with <i>reasonably</i> anticipated demand;</p> <p>(c) Consider using licence fees levied in effective administration and enforcement of the licensing system, or public health, or related activity.</p>	<p>particularly measures arising from the WHO FCTC.</p> <p>While the use of “shall” in article 3 implies the obligatory nature of the provision, many of the provisions use <b>qualifiers</b> such as “where appropriate” and thus leave it to the discretion/interpretation of States as to the extent of the implementation of the provision.</p> <p>When setting the <b>license fee</b> States may wish to consider:</p> <ul style="list-style-type: none"> <li>• The cost for an effective administration and enforcement of the licensing system;</li> <li>• The activity for which a license is sought; and</li> <li>• The scope of the licence.</li> </ul> <p>The Protocol encourages use of the fees for the effective administration and enforcement of the licensing system. Once the system is operational, the costs may be supplemented, to the extent necessary, by any fines collected for license violations. While according to the Protocol States parties might allocate the revenues generated from payment of licence fees to public health or related activities, one could imagine other objectives, such as the pursuit of law enforcement efforts, research into illicit trade, etc.</p>
<p>4. Each Party shall ensure that no licence shall be assigned and/or transferred without receipt from the proposed licensee of the appropriate information contained in paragraph 3, and without prior approval from the competent authority.</p>		<p>This provision recognizes the reality of genuine business activity, without weakening the control of the government authority over the licensing regime and its enforcement.</p>

## b. Who will be required to obtain a licence to carry out their business activity? (art. 6)

Figure 5 outlines the obligations imposed by the Protocol on States as to which actors in the supply chain process must obtain licences to conduct their activities, and recommendations to States regarding which actors, also part of supply chain, should be required to fall within the licensing regime. Further, the Protocol recommends that States consider licensing the transport of commercial quantities of tobacco products and manufacturing equipment.



## c. Policy Considerations

- States parties will have to consider which State authority to nominate as the “**Competent Authority**”.
- States parties will need to decide whether they wish to **go beyond the minimum requirements** of the Protocol and licence:
  - Growing tobacco;
  - Wholesale, distribution, dealing, broking in tobacco products;
  - Retailing tobacco productsif they do not already do so, and to what extent.
- States parties should consider whether **registration** could be an alternative where licensing certain activities is not yet possible. For example, a State could require the registration of retailers of tobacco products in place of licensing.

- According to article 6(2) States parties are required to endeavor to licence certain activities including the growing of tobacco, *except for* traditional small-scale growers and farmers. State parties will need to determine how “**small scale traditional grower**” is defined, and whether this exception will create loopholes in the licensing regime for undeclared production.
- At national level, States:
  - Must designate a competent national authority.
  - May levy licensing fees.
  - May consider licensing tobacco/tobacco products’ transporters and distributors.
  - May consider licensing transporters and distributors of manufacturing equipment.
  - May consider registration/licensing of retailers, growers, brokers, wholesalers and warehousing.
  - May require the declaration of bank accounts intended to be used in the relevant transactions, payment currency and institutions by applicants of a licence.
  - May require disclosure location of production facilities and capacity of the business by applicants of a licence.
  - May require a licence for duty-free sales of tobacco products.
  - May require the provision of market information to Governments .
- States will need to decide which administrative aspects will require implementation:
  - Fees (structure).
  - Length of the licence.
  - Conditions for obtaining the licence and for its renewal, suspension, cancellation.
  - Monitoring of activities of licence holders.
  - Verification of information received by applicants, cross-checked against information received from related applicants.
  - Penalties for operating outside the terms of the licence, such as loss of licence, for how long, variation of penalties depending on the severity of the breach.
  - Training of staff of the competent authority particularly in relation to the peculiarities of the ITTP.
  - Capacity of the competent authority to implement what the Protocol requires at its minimum.

- States should consider whether a **regional standard for licensing** is necessary, and whether there are inter-regional intergovernmental groups to assist with implementation. The regional standard will be a measure to ensure that there are no ‘weak links’ in the tobacco supply chains.
- The following aspects could perhaps be achieved regionally:
  - Standards to determine the integrity of the applicant;
  - Which aspects of the supply chain should be licensed and monitored.
- Regional approaches should seriously be considered given that we are concerned with a transnational activity (the trade of tobacco products) and countries will need to cooperate in cases of infringements and offences committed on various levels. If similar systems and standards are in place, at least regionally, this will simplify investigation and the meeting of thresholds for prosecutions to be successful. It will also help create common regional standards.

#### d. Challenges

There are a number of challenges for States parties that will need to be considered:

- There may be **significant implementation costs** for the introduction of a number of requirements of the Protocol, whether a State party has already implemented a licensing scheme that will merely require expansion, or have to create the entire scheme. These costs will not merely be borne by governments but market operators and citizens will also incur expenses. Governments will incur significant financial and human resource costs. Countries with limited resources may need to be perceptive to this.
- **Lack of capacity** in developing countries – technical cooperation in training, sharing of experience and transfer of technology
- The **risks of corrupt and fraudulent practices** that article 6 creates will also need to be assessed by countries. For example, bribing authorities to issue licences, forgery of licences, falsification of the licensing requirements by market operators in circumstances including the rejection of applications. This will need to be taken into account more by countries with a former low level of enforcement against the ITTP.
- An **informal Sector** existing in countries will need to be taken into account. For example, where business activities go unrecorded, taxes are not paid, opportunities for corruption exist, and many citizens are not able to participate in public policy-making. Thus many engage in business activities informally. In this context, and to increase the effectiveness of the licensing provision within the Protocol, governments must at least attempt to deal with the informal sector and merge it with the formal economy. Governments may consider offering incentives that encourage entrepreneurs to formalize their business, such as a simplified business registration process, operating alongside the licensing regime.

- **Countries without a developed infrastructure** will need to consider how to implement the recommended licensing for the activities of retailing, growing, transporting of commercial quantities, and wholesaling, brokering, warehousing and distribution.
- Keep in mind any **loopholes** created by article 6. For example, at 6.2(d) where traditional small-scale growers, farmers and producers are exempt from falling under an extended licensing regime. Such exceptions may be exploited for illicit purposes, particularly as relates to counterfeit cigarettes and cheap whites. Bear in mind that article 6.2 leaves States parties to apply discretion as to which actors in the supply chain will require licences and which will not, depending on the diverse licensing systems of various States parties.

### 4.3.3. Key Inputs (art. 6(5))

#### Box 29: Key inputs

In essence, “key inputs” refer to the important components required for the manufacture of cigarettes such as cellulose acetate tow, ready-made cigarette filters, cigarette paper, cigarette tubes, reconstituted tobacco leaf.

Article 6(5) of the Protocol requires that five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain whether any **key inputs** exist that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

The term “key inputs” is not defined in the Protocol so as not to restrict any research to be carried out.

The most important component for the manufacture of cigarettes is of course tobacco which falls within the scope of the Protocol. The concept is akin to that of the monitoring and control of the trade in drug precursors in the context of international drug control treaties. Controlling the supply of key inputs would assist in effectively combatting illicit manufacturing of tobacco products, which supplies the ITTP.

#### a. The obligation created by article 6(5)

Article 6(5) does not create any legal obligation to include “key inputs” within the scope of the Protocol. At best, the obligation it creates is to reexamine the issue **within five years** of the entry into force of the Protocol at the next session of the Meeting of the Parties and then to consider appropriate action.

However, from the first session of negotiations for the Protocol in 2008, to its adoption in November 2012, the inclusion of “key inputs” within the scope of the Protocol has been advocated heavily by tobacco control groups and the tobacco industry and there is general consensus within the wider international community that “key inputs” essential to the manufacture of tobacco products do in fact exist, can be identified and can be subjected to an effective control mechanism.

The hesitation for States in including “key inputs” in the scope of the Protocol was linked to imposing regulations on other industries whose products perhaps had multiple uses, and were not singularly used for the manufacture of tobacco products. Several States parties argued that “key inputs” needed to be *essential* to the manufacture of tobacco products and *identifiable* if they are to be controlled. Cigarette paper and cellulose acetate tow appear to meet these requirements (*see figure 6*).



Figure 6: Key components of a cigarette

For key inputs to fall within the scope of the Protocol:

- The relevant evidence-based research will need to be undertaken to determine whether there are **key inputs essential** to the manufacture of tobacco products, they are **identifiable** and can be **subject to an effective control mechanism**;
- If States parties agree with the research, they can opt to include key inputs within the scope of the Protocol via an amendment to the Protocol in the context of the COP.

#### b. Cigarette paper and Cellulose Acetate Tow

Both cigarette paper and cellulose acetate tow are listed in the harmonized tariff schedules of the EU, Canada, Brazil, China and the United States, **evidencing their ability to be identified**, though this list is not exhaustive.

##### Box 30: Harmonized Tariff System and the WCO

The Harmonized Commodity Description and Coding System, known as the "Harmonized System" or simply "HS," is a multipurpose international product nomenclature (a standardized system of names and numbers for classifying traded products) developed and maintained by the WCO. It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure, and supported by well-defined rules to achieve uniform classification. The system is used by more than 200 countries and economies as a basis for their customs tariffs and for the collection of international trade statistics. More than 98 percent of the merchandise in international trade is classified in terms of the HS.

The Harmonized System Committee (representing the Contracting Parties to the International Convention on the Harmonized Commodity Description and Coding System) is an international body with the mandate to make classification decisions in order to ensure uniformity in the interpretation and application of the HS. The Committee considers the classification of articles on a case-by-case basis.

Cigarette papers are required to have specific properties for their use in cigarette production. This is in order to control factors such as density, porosity, and burn rate. Cigarette papers are known to be used only in the manufacture of cigarettes due to their specificity. 4813 is the unique **Harmonized Tariff Code** for **cigarette papers**. Cigarette paper is further divided in the tariff schedule into three subcategories:

- Cigarette paper in the form of booklets or tubes (HTS 48131000);
- Cigarette paper in rolls of a width not exceeding 5 cm (HTS 48132000); and
- Cigarette paper, whether or not cut to size (HTS 48139000).



**Cellulose acetate** is used to make acetate tow for cigarette filters. Its unique Tariff Code is 5502 (Man-made staple fibers – Artificial filament – Tow). This code is used by most jurisdictions and acetate tow manufacturers to classify acetate tow. HS Code 3912 (Cellulose and its Chemical Derivatives, not elsewhere Specified or Included, in Primary Forms) appears to also be available for use, though in practice is not. Current HS codes for key inputs of tobacco products would benefit from a review focused on simplification and rationalization.

Cellulose acetate is a good candidate to be selected by States as a “key input” due to the following industry characteristics: a) It is a capital intensive industry so the barrier to entry is high, as a result there are a limited number of players to be included in the control mechanism; and b) the industry is, to a large extent, vertically integrated which has as an advantage the fact that supply of the main base component, “high alpha pulp”, is controlled by the same actors.

Although cellulose acetate has several industrial uses, **cellulose acetate tow** is used in very few products. More than 80% of world tow production is used in the manufacture of cigarettes. There are only a handful of companies worldwide that manufacture acetate tow; six are members of the Global Acetate Manufacturers Association (GAMA).

Today most cigarettes are filtered using acetate tow as the main material. Despite the presence in the market of different materials, acetate tow remains the dominant technology for the manufacture of cigarette filters. There is currently no acceptable and qualified alternative filtration technology for cigarettes which can fully or partially replace acetate tow.

If “key inputs” could be included within the scope of the Protocol, there would be greater chance of combatting the illicit trade in not only genuine smuggled tobacco products but also counterfeit and illicit white products, the profits from the sale of which also contribute to the increase of and continuation in illicit trade activity. While this process unfolds, States parties are encouraged to develop national legislation that could fill the gap and provide a concrete and effective tool to fight against the illicit trade in tobacco products.

### **c. What is GAMA?**

GAMA was founded in Brussels on 27 January 2000, by member companies that manufacture cellulose acetate tow, filament and flake. Its mission is to advance, develop and promote cellulose acetate, and to jointly address the challenges faced by the industry. The current GAMA members are Celanese, Daicel, EASTMAN, Mitsubishi, Rhodia Acetow, and Sichuan Push Acetati Co. Ltd<sup>34</sup>.

### **d. GAMA’s Know Your Customer Compliance Certificate**

In 2005, GAMA established a “Know Your Customer Compliance Certificate” (KYC) Program with all its members “to support public authorities and cigarette companies in combatting the counterfeit cigarette trade”. Members of GAMA engage in the KYC Program on an entirely voluntary basis. Participating companies are independently audited to evaluate their compliance with the GAMA KYC standard. The following are the possible levels of implementation that can be awarded:

- **Good implementation:** Exceeds the basic requirements of the GAMA-standard. Only a limited number of minor deficiencies were identified.
- **Satisfactory implementation:** Meets most of the basic requirements of the GAMA-standard. Only an acceptable number of deficiencies were identified. There is still room for improvement.
- **Deficient implementation:** Does not meet the basic requirements of the GAMA-standard. One or more significant deficiencies and/or deficiencies were identified, which, in the aggregate, leads to a material weakness. There is room for significant improvement.
- **No implementation:** No substantial attempts are made to implement the GAMA-standard.

#### Box 31: Know your Customer (KYC)

International obligations to enact KYC obligations on persons engaged in licit activities vulnerable to criminal activity is common, such as in Article 14 of the United Nations Convention against Corruption (UNCAC).

KYC schemes typically require:

- Identification procedures
- Monitoring
- Suspicious transaction reporting
- Adequate record keeping of communications
- Control systems

KYC is a major component of the Financial Action Taskforce (FATF) recommendations adopted in the context of money laundering and terrorist financing. KYC obligations are also enshrined in other international treaties such as the Terrorist Financing Convention.

No open source information could be found which details the criteria upon which GAMA bases its KYC Standard. GAMA has also released official statements acknowledging the seriousness of and its opposition to illicit trade and noting that it has a KYC standard.

#### e. Manufacturing Equipment and the Scope of the Protocol

Machinery for the manufacture of cigarettes and other tobacco products is found in Chapter 84 of the Harmonized System, while some relevant machine parts are found in Chapter 82. Classification of machinery depends on its function and operational principle<sup>35</sup>.

States parties negotiating the provisions of the Protocol evidently (given the inclusion of manufacturing equipment within the scope of Protocol) found that:

- There was identifiable manufacturing equipment used for the manufacture of tobacco products and/or parts thereof;
- The Harmonized System contains a number of classifications that include such machinery;
- Some machinery used for the manufacture of tobacco products can also be used for other purposes; and
- Conversely, machinery not identifiable as being for the manufacture of tobacco products may be used for the manufacture of such products.

Most of the equipment may be disassembled into smaller components that may be difficult to identify under HS classifications or with specificity in terms of its function. However, the fact that the

Harmonized System contains references to machines used for the manufacture of tobacco products asserted their ability to be identified and illustrated that there are some machines that are used for this purpose.

Manufacturing equipment falls within the scope of the Protocol. The fact that it has a Harmonized Tariff Code, and is complex as it can be divided into many components, shows that certain key inputs (at the least acetate tow and cigarette paper) should be able to be subjected to an effective control mechanism, i.e. the Protocol, such as for manufacturing equipment<sup>36</sup>.

#### Box 32: Chapter 84 of the Harmonized System

In Chapter 84, there are three tariff headings under which the equipment listed may be considered to be important for the manufacture of tobacco products.

1. Tariff heading 84.41: **“Other machinery for making up paper pulp, paper or paperboard**, including cutting machines of all kinds”. Machines under this heading can be used for many purposes, including working with cigarette paper. These machines can also be traded and transported in pieces with various functionalities indicated.
2. Tariff heading 84.78: **“Machinery for preparing or making up tobacco**, not specified or included elsewhere in this Chapter”. This is an “umbrella” heading that would cover any machinery for preparing or making up tobacco that has not already been specified by or included under another heading. Under this heading, two specific pieces of machinery are listed that are used in the manufacture of tobacco products:
  - (i) Tobacco **leaf stripping or cutting machines** (produced, traded and transported under heading 84.78 of the HS). However, machines which can be used for other agricultural products, such as tea, can also be used for tobacco plants. As such, leaf stripping or cutting machines are widely used and therefore not unique to the manufacture of tobacco products.
  - (ii) **Cigar- or cigarette-making machines**, whether or not equipped with an auxiliary packaging device (produced, traded, transported in many different types and forms and with many different capabilities). Large industrial manufacturers make use of specifically designed, high production machines, which are usually composite machines that meet the needs of the manufacturer. Parts of the composite, or integrated, machines include equipment to transport the tobacco, sometimes to cut it, transport the paper and the filter material, fill the tubes, dose the tobacco, glue the paper, cut the filter, transport the cigarettes, and package them in boxes. Printing can be included, as well as other steps, such as the addition of flavours. Similar results at lower speed can be obtained with various small machines. In addition, all such machines can be disassembled, traded and shipped in pieces.
3. Tariff heading 82.08: **Lists machinery parts**. Under item (5)(b) of this heading, reference is made to “Blades and knives for machines for cutting paper, textiles, plastics, etc.; for tobacco shredding machines, etc.”. However, the equipment parts listed under this heading are not unique to the manufacture of tobacco products.

#### 4.3.4. Due diligence (art. 7)

##### Box 33: Due diligence (art. 7)

All natural/legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment are **required** to:

- **Conduct due diligence before** the commencement of and **during** the course of a business relationship.
- **Monitor sales** to customers to ensure quantities are commensurate with demand within the intended market of sale or use.
- **Report to the competent authorities** any evidence that the customer is engaged in activities in contravention of its obligations arising from the Protocol.
- **Obtain information for customer identification** from the customer, which *may include* documentation/declaration of criminal records, and identification of bank accounts intended to be used in transactions.
- **Take measures to ensure compliance** with the obligations arising from the Protocol, which *may include* designating customers as blocked customers in accordance with national law.

Under securities legislation, brokers are allowed the defense of having taken *all reasonable steps* to discover the financial health of the company whose shares they are selling when charged with inadequate disclosure. It is from this legislation that the notion of due diligence originated. Now is it used in situations where the law stipulates an obligation to take **reasonable care** in doing something.

The concept of due diligence for inclusion in the Protocol was elaborated from the EC-PMI Agreement. Under article 7 of the Protocol, natural and legal persons engaging in the supply chain of tobacco, tobacco products and manufacturing equipment, are required to conduct due diligence with regard to their customers. This article is **complementary to article 6**.

Pragmatically speaking, there are various practices engaged in by tobacco manufacturers when interacting with their customers depending upon their legal obligations and due diligence standards in a particular market. At the lowest level, no due diligence at all is conducted and some manufacturers may be content to provide their product to any client as there is no obligation to engage in due diligence. Moving along the continuum, there would be companies that conduct at least minimum to thorough checks on their customers depending on the obligations imposed on them e.g. as part of a condition for a licence tobacco manufacturers must ensure that information in relation to their clients is up to date, or they must retain records of their clients for a prescribed period of time.

##### a. Policy Considerations

- As article 7 stands, it will have to be closely aligned with the regulatory framework surrounding the licensing regime established by States parties. States parties will need to consider whether they have a licensing regime. If so, they will need to determine what components of due diligence obligations can be imposed under the application of the licensing regime. Where countries do not yet have a licensing regime in place they should consider due diligence obligations arising out of the Protocol as part of this regime.

- An INB 4 document states that, “the notion of “blocked customer” should be included as well, but subject to national legislation. In addition, customer blocking should be an administrative procedure, managed by a “competent authority”, but only after a court has found the person guilty of having committed an offence”<sup>37</sup>.
- The bearing of article 6 of the Protocol on article 7 is particularly relevant for article 7(4) and will depend on how national administrations will define a “**blocked customer**”, and under which provisions of the Protocol. Countries will need to determine what criteria will need to be met before a customer becomes a blocked customer. States parties should consider whether customers will be blocked for any unlawful conduct engaged in or will a higher threshold be established such as the requirement of a criminal conviction before a customer is blocked. Will blocked customers be able to be reinstated and how? What penalties will apply?
- Sanctions will be an important part of the licensing regime. States will necessarily need to consider the **range of penalties available** for those responsible for conducting due diligence and failing to do so. Where possible, national legislation could perhaps treat these aspects as well, at the very least such obligations for manufacturers should be decreed in the regulations of the country.
- States parties are required to **monitor all licensees** and, in view of article 7, the customers of manufacturers, importers, and exporters of tobacco, tobacco products and manufacturing equipment whether or not they are required under the national regime to obtain a licence or register their activity themselves. This is a binding obligation and will depend on the national requirements and domestic framework in place.
- States parties will also need to decide what **type of “evidence”** they will require/accept from those engaged in the supply of tobacco, tobacco products and manufacturing equipment, a process of receipt of such evidence, how it will be verified and consider consequences for the provision of such information, such as security of the provider of the evidence.
- Another important aspect of this article is monitoring sales to **ensure quantities are commensurate with demand** in the intended market of sale. There are three specific provisions in the Protocol that will need to be considered in light of each other, each requiring that the supply of product be commensurate to demand in the intended market of sale. Essentially all three provisions create obligations on the tobacco manufacturer/those subject to licence, to ensure that:
  - Relevant information is notified to the licensing authority regarding a description of the intended market of sale/use;
  - Sales to their customers are monitored to ensure that market supply is commensurate to demand; and
  - Necessary measures are taken to prevent diversion of tobacco products into illicit trade channels, by supplying amounts commensurate with demand only.

- Those subject to a licence will therefore be required to conduct research into the markets they supply, particularly regarding legitimate and legal supply amounts. States parties should consider having information available as well in this regard so that in the event of a discrepancy, authorities are able to verify information themselves. In the event of market verification, countries will be able to utilize channels for mutual administrative assistance, on the basis of the framework provided by the Protocol at article 29.
- It may be necessary in some cases to develop industry guidelines on what measures should be used to establish a market size and what ‘commensurate’ means in this context. The guidelines may suggest timeframes over which a market is identified, or may need to be justified shipment by shipment.

*Table 6: Protocol provisions regarding supply commensurate with demand*

Article	Supply commensurate with demand
Article 6.3(b)	<p>With a view to ensuring an effective licensing system, each State party shall: require that each application for a licence contains all the requisite information about the applicant, which should include, where applicable:</p> <p>(viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;</p>
Article 7.1(b)	<p>Each State party shall require, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment:</p> <p>(b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use;</p>
Article 10.1(b)	<p>Each State 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 6 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, inter alia:</p> <p>(b) supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.</p>

**4.3.5. Tracking and Tracing (art. 8)**

**Box 34: Tracking and tracing**

“Tracking and tracing” means systematic monitoring and recreation 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 8 of the Protocol (art. 1(14)).

For the purpose of article 8, the meaning of “cigarette” also includes fine cut “roll your own” tobacco for the purposes of making a cigarette (art. 1(2)).

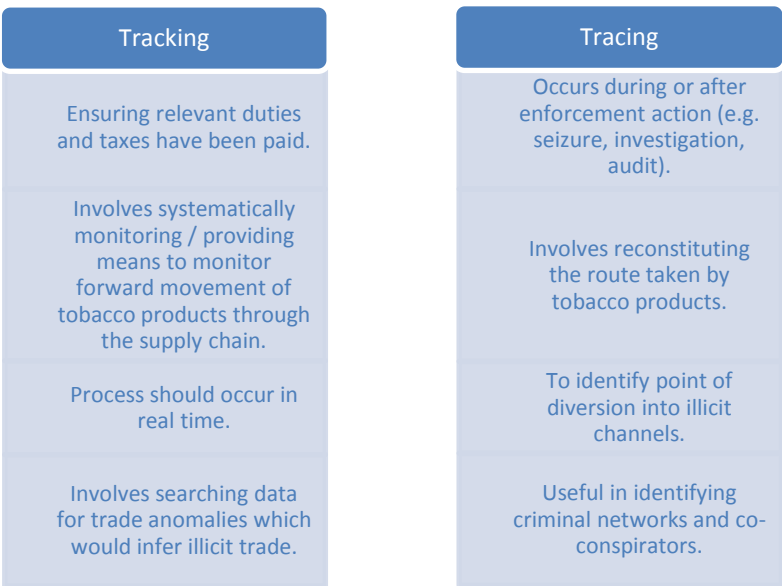
**a. Overview**

Originally, tracking and tracing was a response aimed at **securing the legitimate supply chain** in order to combat the smuggling of genuine tobacco products, most prevalent in the 1990s. The scope of illicit trade has grown over the last decade, and the illegal manufacturing of tobacco products and legal or illegal manufacturing of inexpensive brands has increased (*see section 1.6, “From large-scale smuggling to counterfeits and illicit whites”*).

When studied in this light, tracking and tracing as a tool against the ITTP will not eliminate illicit tobacco trade. What it will do, however, is assist in the control and monitoring of tobacco products produced legally. It will only be effective where the manufacturing of tobacco products is strictly controlled (as is envisaged by Part III of the Protocol). It is unable to monitor the production of tobacco products by illegal manufacturing facilities, such as “under-ground factories” and counterfeit product manufacturers. Components of track and trace could be used by States to ensure that the relevant duties and taxes owed are paid (tax verification) and States will be able to conduct tax verification once the scope of track and trace is expanded under article 8.10.

Tracking and tracing is made up of two distinct components, each with unique functions.

*Figure 7: Functions of tracking and tracing*





### Box 35: The use of track and trace in other sectors

Some existing treaties and agreements contain obligations for tracking-and-tracing, such as the Convention on the Marking of Plastic Explosives 1991, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, a Protocol to the United Nations Convention against Transnational Organized Crime. Under the Firearms Protocol Parties are obliged to require **unique** markings to be placed on firearms in order to identify and trace them. This Protocol was adopted in 2001 by the UN General Assembly and entered into force in 2005. Significantly, the Firearms Protocol recognizes that various systems exist and allows Parties to adopt their own systems, as long as Parties agree to share the required information in the prescribed manner.

Other industries such as food, pharmaceuticals and postal shipments can be drawn upon as examples of tracking systems, though to date, a fully operative international track and trace regime, with international standards, has yet to be developed.

At its fourth INB session from 14 – 21 March 2010, INB4 issued information document FCTC/COP/INB-IT/4/INF.DOC./1, dated 22 February 2010, titled “Analysis of the available technology for unique markings in view of the global track-and-trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products”. The table below, outlining various marking solutions across various sectors, is derived straight from this INB report. The report noted particularly the effort employed by industries to harmonize available marking technologies, and that although industries sometimes use proprietary solutions there has been a shift towards globally recognized standards being used, such as GS1<sup>1</sup> (see section 4.3.5.f, “Global track and trace regime”).

#### Comparison of unique industry marking solutions

Criteria	Industry				
	Pharma- ceutical	Consumer products	Logistics/ postal service	Airline	Firearms
Marking systems used	2D DataMatrix second generation (Gen-2) electronic product code (EPC) <sup>2</sup> RFID	1D DataBar 2D DataMatrix Gen-2 EPC RFID	1D DataBar 2D DataMatrix Proprietary marking	1D DataBar 2D DataMatrix	Proprietary markings
Human-readable?	Yes – serial number is always printed in plain text	Yes – serial number is always printed in plain text	Yes – serial number is always printed in plain text	Yes – serial number is always printed in plain text	Yes
Machine readable?	Yes	Yes	Yes	Yes	No
Unique identification?	Yes – serialized number	Yes – serialized number	Yes – serialized number	Yes – serialized number	Yes
Use of standard codes	GS1 codes: Serialized Global Trading Identification Number (SGTIN) <sup>3</sup> etc.	GS1 codes: SGTIN, SSCC, etc.	GS1 codes: SSCC Proprietary coding schemes	IATA proprietary coding	National proprietary coding systems

1. GS1 is a global organization which designs and implements global standards with regard to supply and demand chains globally and across sectors.

2: An EPC is a unique number used to identify a product at item level. It is electronically recorded in an RFID tag.

[3: SGTIN is Serialized Global Trading Information Number standard, an internationally recognized coding standard]\*

\*Source: Analysis of the available technology for unique markings in view of the global track-and-trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products. Note by the Convention Secretariat

Link: [http://apps.who.int/gb/fctc/PDF/it4/FCTC\\_COP\\_INB\\_IT4\\_ID1-en.pdf](http://apps.who.int/gb/fctc/PDF/it4/FCTC_COP_INB_IT4_ID1-en.pdf)



## **b. The Protocol's Relationship to article 15 of the WHO FCTC and the Agreements with the tobacco industry**

Article 15(2)(b) of the WHO FCTC specifically requires each State party to consider, as appropriate, developing a practical tracking and tracing regime which would further secure the distribution system of tobacco products, including cigarettes and assist in the investigation of illicit trade.

The Agreements between the EC, together with, currently, 27 of the Member States of the EU, and the four major tobacco companies Philip Morris International, British American Tobacco, Japan Tobacco International and Imperial Tobacco, administered by OLAF, contain specific tracking and tracing provisions requiring the:

- Marking of certain “master cases” of cigarettes (a master case contains 10 000 cigarettes), cigarette cartons and packs;
- Establishment of a **master-case database** and schedules for the implementation of programmes to scan information into that database, and provide instant access for designated EC and Member State officials to information in the master case database concerning seized master cases;
- Conducting of additional research on the enhancement of existing tracking and tracing technologies and the development of new ones and to apply new scanning and coding technologies as they become feasible; and
- The ultimate aim is to identify customers in the supply chain who are responsible for diverting cigarettes to the illicit market, so that appropriate action can be taken by enforcement agencies. The Agreements have mechanisms to exclude such customers from the distribution chain.

## **c. Protocol Requirements for a Tracking and Tracing Regime**

According to art. 8(1) of the Tobacco Protocol, the **purpose** of having a global tracking and tracing system is:

- To secure the supply chain; and
- To assist in the investigation of ITTP.

**Table 7: Obligations, interdictions and recommendations under art. 8 of the Tobacco Protocol**

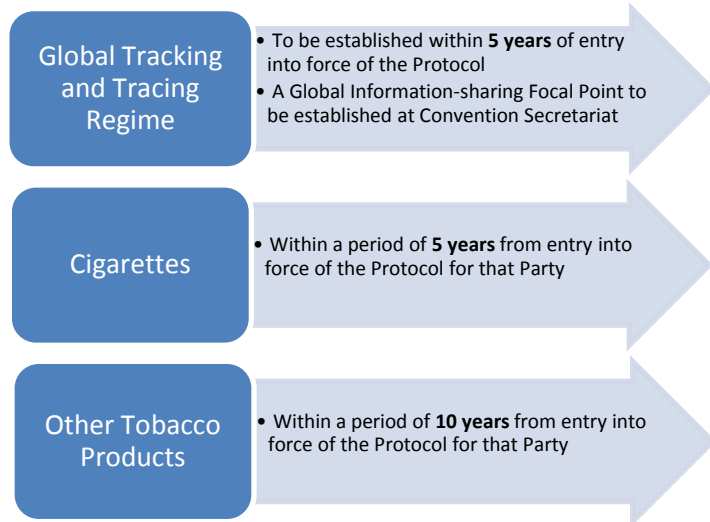
Obligations (mandatory provisions)	
Broad Provision	Detail
Parties agree to establish a global tracking and tracing regime (art. 8(1)):	<ul style="list-style-type: none"> <li>Comprising national/regional tracking and tracing systems;</li> <li>A global information-sharing focal point located at the Convention Secretariat of the WHO FCTC; and</li> <li>Accessible to all States parties to make enquiries and receive relevant information.</li> </ul>
Parties shall establish a tracking and tracing system for all tobacco products <b>manufactured in</b> or <b>imported</b> onto its territory (art. 8(2)).	
Each Party shall require that unique, secure and non-removable identification markings (unique identification markings (UIM)), such as codes or stamps, are affixed to all unit packets and packages and any outside packaging of cigarettes (art. 8(3)):	<ul style="list-style-type: none"> <li>For cigarettes, 5 years following entry into force of the Protocol for that Party;</li> <li>For other tobacco products, 10 years following entry into force of the Protocol for that Party.</li> </ul>
Each Party shall require the following information be available (art. 8(4)):  Note that 8(4)(a), 8(4)(b), 8(4)(g) and where applicable 8(4)(f), shall form part of the UIMs.	<ul style="list-style-type: none"> <li>a) Date and location of manufacture;</li> <li>b) Manufacturing facility;</li> <li>c) Machine used to manufacture tobacco products;</li> <li>d) Production shift or time of manufacture;</li> <li>e) The name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;</li> <li>f) The intended market of retail sale;</li> <li>g) Product description;</li> <li>h) Any warehousing and shipping;</li> <li>i) The identity of any known subsequent purchaser; and</li> <li>j) The intended shipment route, the shipment date, shipment destination, point of departure and consignee.</li> </ul>
Parties shall require the information in paragraph 4 to be recorded at time of production or first shipment by any manufacturer or at time of import (art. 8(5)).	
Parties shall ensure information is accessible by means of a link with the UIM and in an authorized format (Art. 8(6) and (8(7))).	
Parties shall ensure information is accessible to global information-sharing point upon request, through a standard electronic secure interface with its national/regional central point (art. 8(8)).	
Each party shall (Art. 8(9)):	<ul style="list-style-type: none"> <li>a) Have access to information by making query of global information-sharing focal point;</li> <li>b) Request information;</li> <li>c) Not unreasonably withhold information;</li> <li>d) Answer information requests; and</li> <li>e) Treat exchanged information as confidential.</li> </ul>
Parties shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control (art. 8(10)).	
Parties shall cooperate with each other and with competent international organizations to (art. 8(11)):	<ul style="list-style-type: none"> <li>a) Facilitate the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;</li> <li>b) Support training and capacity-building programmes for Parties that express such a need; and</li> <li>c) Further develop the technology to mark and scan unit packets and packages of tobacco products to make accessible the information listed.</li> </ul>
Parties shall ensure that its competent authorities interact with the tobacco industry and their representatives only to the extent strictly necessary in the implementation of this article (art. 8(13)).	
Interdictions	
Assigned obligations shall not be performed by tobacco industry (art. 8(12)).	
Parties shall not delegate assigned obligations to tobacco industry (art. 8(12)).	
Recommendations	
Parties may require the tobacco industry to bear any associated costs (art. 8(14)).	

#### d. A national system and a global regime

The Protocol asks for tracking and tracing capabilities to be created at two levels: a **global** track and trace regime and a **national** track and trace system.

Despite the timelines shown in figure 8, some States have already procured some aspects of tracking and tracing systems (see table 9).

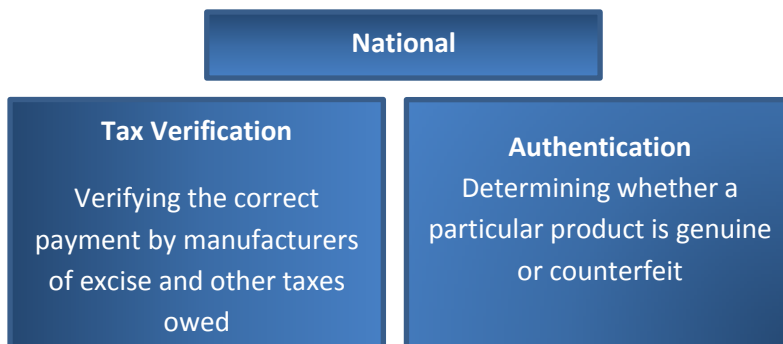
Figure 8: Tracking and tracing timelines



#### e. National track and trace system

Nationally, a track and trace system seeks to address both **tax revenues**, ensuring relevant duties and taxes owed are paid, and **authentication** of the products for law enforcement purposes. For this to be effective, other measures of control as outlined in the Protocol, such as a licensing, due diligence, record-keeping, security and preventive measures, will need to be implemented.

Figure 9: Requirements at a national level



A track and trace system will be established to control licit trade to uncover points of diversion but will not be able to assist in addressing the issue of counterfeiting. The functioning of an efficient international track and trace regime will rely on established national and regional systems. For this reason, national systems will require efficient regulation and processes which take into account the need to ensure the interoperability of their systems with the international regime.

States parties to the Protocol are required to established a track and trace system for all tobacco products that are:

- Manufactured in; or
- **Imported** onto their territory.

States parties shall require markings be affixed that are:

- Unique;
- Secure; and
- Non-removable identification markings.

on all:

- Unit packets (cigarette packs);
- Packages (pallets, master cases, cartons); and
- Outside packaging.

This implies a necessary **hierarchy** to exist between all unit packets and packages. In tobacco manufacture, this refers to pallets (made up of master cases for a shipment/500 000 cigarettes), master cases (made up of cartons/10 000 cigarettes), cartons (made up of cigarette packs/200 cigarettes), cigarette packs and their packaging. As the Protocol requires markings on each packaging unit (pallet, master case, carton, pack), this will require that the marking system chosen by States parties to the Protocol keep track of “aggregation events”. Aggregation refers to the parent-child relationship that exists between different packaging units which is a necessary requirement of article 8. Each time a package is unpacked, this will be an aggregation event that must be recorded. e.g. a master case is unpacked and individual cartons on sold.

When this aggregation event occurs each individual carton will need to be scanned and the necessary information recorded. This information will link the carton to the master case it originated from, and provide information about the next customer in the supply chain. Thus each packaging unit is connected via the information held by the marking on each unit. This will ensure that cigarette packs can be identified as coming from a particular carton, and that carton in turn can be linked to a particular master case, which can be linked to a particular pallet. This is especially useful for tracing purposes, and will assist in identifying the point of diversion, especially where products are disassembled for illicit trade purposes.

#### - Manufacturing Countries

While the track and trace system is to be established by manufacturing and importing countries under the scope of article 8, it will fall to manufacturing countries to ensure that marking requirements under article 8 are realized.

Markings will be affixed to products during the manufacturing process, thus by manufacturers, which manufacturing countries will need to legislate for when implementing article 8 of the Protocol.

## - Requirements for Marking Technologies

The INB4 Report FCTC/COP/INB-IT/4/INF.DOC./1 specifies requirements for marking technologies that will need to be taken into account in order for States parties to meet the objectives of the Protocol in relation to track and trace. These are:

- Human-readability.
- Uniqueness – unique identity given to every single tobacco product.
- Security – indecipherable.
- Integration – products subject to tax require a unique, serialized identity that can be exchanged electronically, along the supply chain, beginning with the manufacturer and continuing preferably to the retailer.
- Compliance – must comply with national/regional regulations.
- Size – must respect space limits on products such as packs and fit within these limits.
- Ease of production – must be able to be placed quickly on products to meet production speeds of today’s fast moving consumer goods.
- Cost effectiveness – to account for interoperability with an international regime, so that countries with limited resources can also implement article 8.

### Box 36: INB4 report on available track and trace technology




INB 4 report (FCTC/COP/INB-IT/4/INF.DOC./1) titled “Analysis of the available technology for unique markings in view of the global track-and-trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products”, is a key document containing much useful information for countries on track and trace technology and requirements for marking systems.

Link:[http://apps.who.int/gb/fctc/PDF/it4/FCTC\\_COP\\_INB\\_IT4\\_ID1-en.pdf](http://apps.who.int/gb/fctc/PDF/it4/FCTC_COP_INB_IT4_ID1-en.pdf)

## - Requirements for Unique Identification Markings (UIM)

Markings can take a number of different forms. The table below summarizes the information contained in the INB4 Analysis Report and has been reproduced in its entirety from this Report<sup>38</sup>.

*Table 8: Available marking technologies*

Marking Technology	Description
Printed serialization number (21)274877906943	Unique, human-readable, printed on product, can be combined with other marking technology.
ID Databar 	Machine readable where information is stored in the spacing between parallel lines and their width. The GS1 Databar is the global standard.
2D Datamatrix 	Machine readable, printed as a square or rectangles and made up of dots and squares. GS1 is again the global standard for such codes.
RFID Tag 	A microchip attached to an antenna, containing a unique serial number and can contain additional information. EPC is the industry standard.

The INB4 Report further outlines specific requirements that a number system used for unique identification numbers (UIM) should meet:

- Unique identification numbers (UIM);
  - Built on international standards
  - Human-readable
  - Extensible
  - Unique (not predictable and never used more than once)
  
- Marking technologies;
  - Type of technology to be used will depend on manufacturing capability (technical and production capacity).
  
- Aggregation;
  - Important to be able to create traceability of events without having to scan products individually, where products are stored one inside the other.
  - Assists with identifying counterfeit products as counterfeiters will not be able to recreate aggregation events.
  - It is the manufacturer's responsibility to record the relationship information in their database and record any changes made.
  
- Data to be captured (requirements under Art. 8.4, at a minimum those bolded items);
  - Date and location of manufacture;
  - Manufacturing facility;
  - Machine used to manufacture tobacco products;
  - Production shift or time of manufacture;
  - The name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;
  - The intended market of retail sale;
  - Product description;
  - Any warehousing and shipping;
  - The identity of any known subsequent purchaser; and
  - The intended shipment route, the shipment date, shipment destination, point of departure and consignee.

- Supply chain events; and
  - The shipping and receipt of goods will need to be recorded throughout the supply chain by those distributing and receiving items along the way from the origin of the goods to their final destination. This will occur through the scanning or manual recording of the information contained in the unique identification marking.
- Data transfer
  - Data will be exchanged throughout the supply chain, between manufacturer and the customers in the supply chain.
  - National authorities will need to collect the available data through the supply chain in databases controlled by the national authorities.
  - The information collected by national authorities will need to be available for use by the global information-sharing focal point as part of the global track and trace regime.

Finally, the INB4 Report concludes that the following are KEY elements for an effective **national** and **international** track and trace regime:

- Serialization of all tobacco products to the level of the smallest saleable unit;
- Common numbering standards for serialization;
- Human-readable printing/labelling of serialization numbers on all traded units;
- Establishment of parent–child relationships between different packaging units (aggregation);
- Recording of any changes in the parent–child relationship along the supply chain;
- Recording of any shipping and receiving events along the supply chain from origin to destination;
- Recording of relevant data by supply-chain partners;
- Establishment of query interfaces between the databases of the supply-chain partners and national/international authorities;
- A standard as a protocol for transferring queries and data, such as EPCIS (a global standard for information sharing between trading partners)<sup>39</sup>.

The INB4 Analysis Report clearly outlines that for the Protocol’s objectives to be achieved **global harmonized standards should be adopted in place of proprietary solutions**, so that national solutions can effectively interact with the global regime to be created. This will be essential for the effective implementation of article 8 and the creation of the global regime depends on harmonized standards being used by States parties to the Protocol when they develop their national systems.

The tobacco product supply chain, like many other products, is global and involves many different stakeholders: manufacturers, third party logistics service providers, distributors, retailers etc. Most of these stakeholders already track and trace various kinds of products (including tobacco) using widely

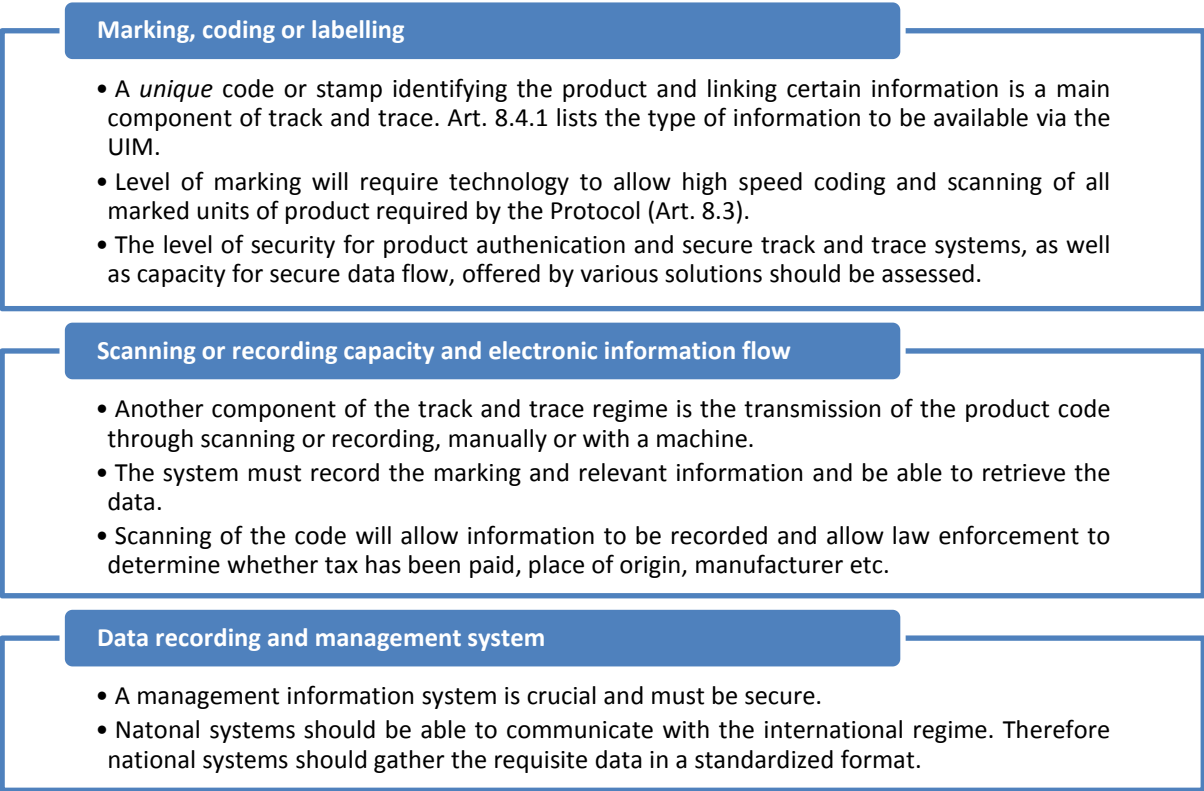
available standardized and harmonized tools. Thus it will be imperative for States parties to the Protocol to put in place product marking technologies that support the use of global standards by supply chain participants, and systems which support interoperability in order to enable the exchange of information between these participants, national authorities and the international track and trace regime.

**f. Global track and trace regime**

The main aims in implementing a **global track and trace regime** are:

- To secure the supply chain;
- To assist in combatting the diversion of genuine tobacco products into the illicit market;
- To assist in the investigation of illicit trade;
- To encourage the sharing of information between the authorities of different States parties; and
- To encourage tracking and tracing as far through the supply chain as possible.

*Figure 10: Elements of a global track and trace regime*





## - The Requirements of a Global Track and Trace Regime

Cost effectiveness is an important consideration for the implementation of a global track and trace regime. For effective implementation of the Protocol's provisions on track and trace for a global regime, countries with low resource capability will need to be considered, and thus the global regime should be based on international standards, and should **not** require any particular proprietary technology, method or system. This was a significant point made by the WHO Expert Review on the Feasibility of an International Track-and-Trace Regime for Tobacco Products, FCTC/COP/INB-IT/3/INF.DOC./5.

National track and trace systems may be based on a particular technology or system, as determined by the State party according to their economic, technical, enforcement and legislative capacities. The international track and trace regime called for by the Protocol must allow for different available secure systems at national or regional levels, that can be upgraded by States parties when required. The sharing of information with other countries and their competent authorities is an essential part of the global regime and thus countries must adopt technological solutions that will enable them to share information with other States parties efficiently and expediently.

Utilizing technology with common, identifiable, core **global standards** (see box 37) is advantageous for the following reasons:

- Technically able to build upon existing practices, without the need to purchase, create or integrate new systems (also cost effective).
- Neutral and common language used for such standards that is internationally acceptable.
- Assists in anticipating progress in technology and techniques, in order that the regime stays current.
- The global regime will be grounded on flexible standards at the international level allowing for change and advancement.

### Box 37: Global standards

Article 8 clearly defines the basic requirements and procedural modalities to be followed in designing and implementing a track and trace system (the **national** requirement), including:

- Identification of actors involved in the supply chain.
- Nature and type of data to be captured and collected.
- Record keeping, archiving, data storage.
- Communication.
- Information sharing, retrieval and search.

### Prerequisites

Generally, the selling unit for the tobacco industry is the master case (which contains usually 50 cartons or 10 000 cigarettes). Therefore, tracking and tracing at the master case level is a prerequisite.

As law enforcement authorities began to seize more and more loose cartons or packs of cigarettes, tracking & tracing was extended to the carton level by the four main tobacco manufacturers under the EC Agreements. This allows first and subsequent purchasers of cartons to be identified. The Protocol requires that markings be placed on **all** unit packs (cigarette packets) and packages (master cases and cartons) and outside packaging, and so tracking and tracing will extend down the hierarchical structure of the products through to individual packets. This is called **aggregation**, which

establishes a parent-child relationship between pallets, master cases, cartons and cigarette packets. An advantage of this is that other actors will now be identifiable in the supply chain further down the chain, such as wholesalers and retailers.

Therefore, **serialization** is a prerequisite for track and trace, i.e. unique identification of each pack, carton and master case, which will enable actors in the supply chain to register product movements with standard tools that are widely available.

It is important to note that a fully implemented and operational master case tracking and tracing system is necessary to allow carton and pack tracking and tracing. Any system chosen will have to be suitable for an industry with high production speed (up to 1000 packs per minute).

### Using the GS1 Traceability Standard

Examples of open standards<sup>40</sup> are those set by GS1, an international standards organization. These standards have been endorsed by the International Organization for Standardization (ISO) and the European Committee for Standardization. The INB 3 encouraged the adoption of the GS1 traceability standard, which is compatible with ISO standard 22005, and stated that it would ensure *maximum interoperability among traceability systems throughout the supply chain*. The GS1 traceability standard is a process standard describing the traceability process independent from the choice of enabling technologies.

Essentially, the GS1 traceability standard defines business rules and minimum requirements to be followed when designing and implementing a traceability system.

#### Box 38: What is GS1?

GS1 is a neutral, not-for-profit organization dedicated to the design and implementation of global standards, technologies and solutions aimed at improving the efficiency of supply and demand chains by adding useful information to any exchange of goods or services. It was formed from the joining together of EAN International and the Uniform Code Council (UCC), and is today the most widely used supply chain standards system in the world.



#### Box 39: Further reading on track and trace

GS1 Traceability Standard

**Link:** <http://www.publications.gs1.fr/Publications/GS1-Traceability-Standard>

GS1 Traceability Standard: What you need to know

**Link:** <http://www.publications.gs1.fr/Publications/GS1-Traceability-Standard.-What-you-need-to-know>

See WHO Export Reports on various aspects of track and trace, including:

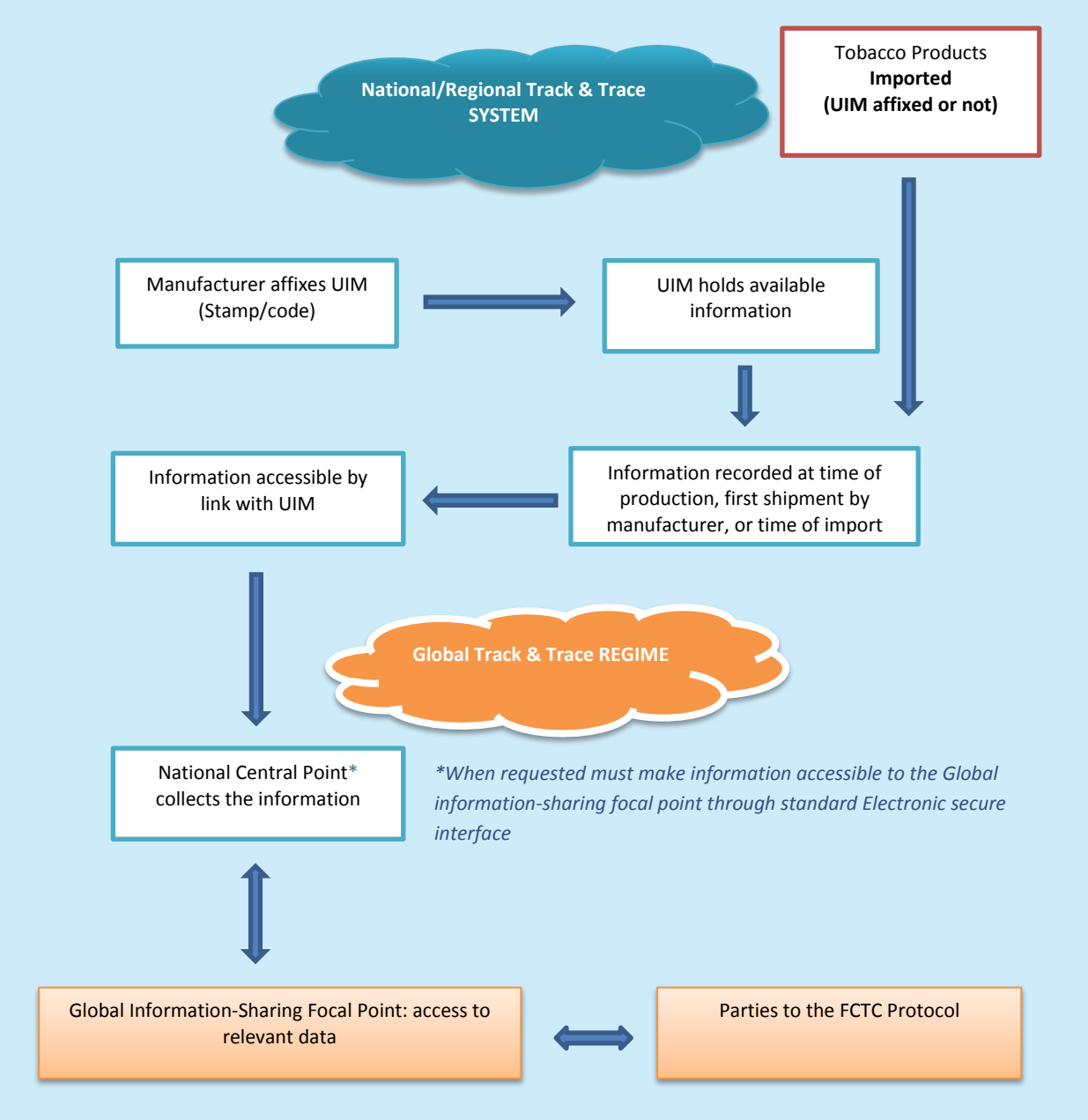
- Document FCTC/COP/INB-IT/3/INF.DOC./5 Expert review on the feasibility of an international track-and-trace regime for tobacco products
- Document FCTC/COP/INB-IT/3/INF.DOC./5 Assessment of potential requirements at national level for an international tracking and tracing system for tobacco products
- Document FCTC/COP/INB-IT/4/INF.DOC./1 Analysis for the available technology for unique markings in view of the global track and trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products

**Link:** <http://apps.who.int/gb/fctc/E/index.html>

**g. The interaction between the Global Regime and the National System**

The provisions of the Protocol require States parties to establish their own **national** tracking and tracing systems (Art. 8.2) where Unique Identification Markings (UIM), containing required and necessary information (Art. 8.4), are to be affixed to all unit packets and packages (Art. 8.3). This information will be available by link with the UIM, must be recorded and will form part of the global regime. Countries shall establish a national/regional central point which will hold the information and which will be connected to the global information-sharing focal point through a secure electronic interface for the exchange of information. Collecting this information is a necessary part of the national track and trace system.

Figure 11: Relationship between national system and global regime



## h. Policy Considerations

### National Central Points

- The national central point would function similarly to the global information-sharing focal point. The Convention Secretariat states that it could design and build a generic (for the national central point and global information-sharing focal point) application for use by States parties at no cost. States parties will need to consider their economic and technical capabilities.
- Proper information technology infrastructure, stable internet connection, a few servers and staff, are minimum requirements for the establishment of national central points.

### Unique Identification Markings

- Manufacturing countries would require UIMs to be printed by manufacturers on unit packets and packages and outside packing of cigarettes at the time of manufacture. In some cases this may require legislation or an amendment to existing legislation to require this UIM to be placed on a product and specify where and how it is to be placed (*see tables 10 and 11 on available solutions*).
- In cases of products imported into the territory, States parties will need to decide who is required to mark the products and how information will be collected and obtained. The Protocol requires that the information set out in art. 8.4 be recorded at the time of production, first shipment by the manufacturer or at the time of import onto its territory. If States parties are importing from non-Parties to the Protocol, they will need to develop a process to have the necessary information available and recorded to meet their obligations under the Protocol.
- States parties should consider whether markings are required to be **human-readable** (to be able to trace the product across borders) or involve graphical markings, e.g. two dimensional barcodes read by a machine. It is more difficult to counterfeit products only read by means of an electronic device, though this would increase implementation cost for States parties to the Protocol, so a human-readable element is advisable. These considerations may have more bearing for States parties with limited resources.
- States parties should consider whether their requirements for UIMs are indecipherable (data elements cannot be deduced), which is a prerequisite for a secure system. If a numeric identifier is used, it, or part of it, should be randomly generated to avoid easy guessing.
- Observing a seemingly valid identifier does not automatically ensure the product is genuine. Counterfeiters may be in a position to copy valid markings and it will not be immediately evident if the product is genuine or counterfeit, unless the same identifier is discovered to have been used a number of times.

### **Access to data nationally and globally**

- In manufacturing countries, the national central point would collect information directly from the manufacturer. States parties should consider the access they have to information and how their national central points would obtain that information.
- Manufacturers print the marking on the product which will link the product to certain information.
- National central point should consider the collection of information from a number of data sources, including manufacturers, importers, national customs authorities, distributors and national central points.
- Data from imported products should be available through the global information-sharing focal point, as the manufacturing country would be obliged to collect that data and provide it upon request to the global information-sharing clearing house. This is important to note for States parties who are not manufacturing countries. These States parties will need to consider their interaction with the global information-sharing focal point, both technically and as a matter of diplomacy.
- The track and trace system is to be implemented by States parties to the Protocol for products manufactured in or imported into their territory. Imported products manufactured in a non-Party country may not have been marked, nor their information recorded at the global information-sharing focal point. The system will rely on the quality of the information able to be obtained from data sources within a country and the obligations imposed on them in relation to disclosure (e.g. on manufacturers, distributors, wholesalers, importers etc.). Thus it is vital that the information listed at Art. 8.4 is legislated for and acquired by those obliged to obtain it, such as manufacturers, and in cases of importing countries, customs, and importers.
- It may be unproductive capturing information at the time of import as products may already have been diverted, and legislation may be needed to ensure the importer has required their offshore supplier to have marked the products at the time of manufacture.

### **Accuracy of information**

- The national central point will need to verify that the information provided by data sources is correct. This will depend on when the information is captured in the distribution chain. The sooner it is captured, the easier it will be to verify it.

### **Language**

- States parties will need to agree on the language to be used for the sharing of information.

## **Country Resources**

- Depending on the system chosen, the costs for countries will vary. In the most simplest of systems, the manufacturer is responsible for marking the products and providing the information to the national central point. The national central point may use generic software provided by the Convention Secretariat or other entities to fulfil their obligations to make requested information available.
- Other types of systems will require additional costs to States parties: e.g. States parties develop their own software, use markings that are not human-readable requiring scanners to read the information.
- States parties' obligations will vary depending on whether they are a manufacturing country, an importing country, and whether they collect information from different data sources at different points of the distribution chain.

## **Development of scope**

- States parties to the Protocol are obliged to develop and expand the scope of the track and trace system to being able to determine that taxes have not been evaded, and other obligations have been discharged, throughout the supply chain from manufacture, import or release from customs/excise control. This means the track and trace system may be extended beyond the first customer.

Table 9: Select countries and their level of use of track and trace components

COUNTRY	Protocol signed	Marking system used	Tax stamp	Human-readable	Machine readable	Unique identification	Use of standard codes	Additional remarks
Australia	<input checked="" type="checkbox"/>							
Brazil	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	no	SICPA, not readable outside Brazil, need to provide specific scanners to be readable outside the country – no tracking and tracing functionality. Tracking and Tracing with Codentify implemented since 2008 –tracking and tracing functionality as codes are human readable and can be read outside the country.
Canada	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	no	SICPA, not readable outside of Canada – no tracking and tracing functionality.
China	<input checked="" type="checkbox"/>						n/a	
France	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	yes	Codentify*
India	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	yes	Codentify*
Indonesia	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> local supplier	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			Codentify* (master case level, further roll-out down to pack level starting 2014).
Iraq	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>				Codentify*
Italy	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		Codentify* (Tracking to first customer).
Kenya	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					
Malawi	<input checked="" type="checkbox"/>							
Malaysia	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			SICPA – ink taggant.
Morocco	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		SICPA
Nigeria	<input checked="" type="checkbox"/>							
Panama	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		Codentify
Paraguay	<input checked="" type="checkbox"/>							

COUNTRY	Protocol signed	Marking system used	Tax stamp	Human-readable	Machine readable	Unique identification	Use of standard codes	Additional remarks
Philippines	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Poland	<input checked="" type="checkbox"/>							
Russia	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Codentify - yes	EGAIS, Codentify
Singapore	<input checked="" type="checkbox"/>							
South Africa	<input checked="" type="checkbox"/>							
Switzerland	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		Codentify - industry implementation to comply with existing legal reporting requirements.
Thailand	<input checked="" type="checkbox"/>							
Togo	<input checked="" type="checkbox"/>							
Turkey	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Sicpa	<input checked="" type="checkbox"/> Codentify	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Sicpa - no (proprietary, incompatible system)	SICPA, tax stamps are for domestic use only, and only readable using SICPA scanners (not human-readable) – no tracking and tracing functionality. Codentify - Tracking and tracing functionality.
Ukraine	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Codentify - yes	EDAPS Consortium tax stamp system, Codentify is used already for tracking and tracing.
UAE	<input checked="" type="checkbox"/>							
United Kingdom	<input checked="" type="checkbox"/>				<input checked="" type="checkbox"/>			
United States*	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		* Suppliers include Xerox, Red Bear Stamp, Authentix, 3M, and SICPA (only in the States of CA and MA).
Uruguay	<input checked="" type="checkbox"/>							
Vietnam	<input checked="" type="checkbox"/>							

\*Voluntarily introduced by manufacturers.

Countries using Codentify include: Belgium, Colombia, Dominican Republic, Ecuador, Germany, Guatemala, Italy, Lebanon, Mexico, Netherlands, Peru, Portugal, San Marino, Spain and Sweden.

Source: Framework Convention Alliance, 31 March 2012



Table 10: Select Governmental control solutions

AVAILABLE SOLUTIONS	Events tracked along supply chain	Aggregation	Serialization	Data control by government	Data storage by government	Tax stamp	Printed tax code	Unique identifier	Link to national authorities	International serialization standards
3M	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	?
ATOS	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ArjjoWiggins	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Authentix	no						?			?
Axway	?			<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Bundesdruckerei	?						?			?
Codentify	yes	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> (digital)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
DELARUE	no									?
EDAPS	no	no				<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Giesecke&Devrient	no		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	?			?
IBM	no (pure data storage for track and trace systems)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		N/A			<input checked="" type="checkbox"/>
SAP GBT	yes		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		N/A	<input checked="" type="checkbox"/>	?	<input checked="" type="checkbox"/>
SICPA	no (no full aggregation and tracking available)	no	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	?	<input checked="" type="checkbox"/>	?	no

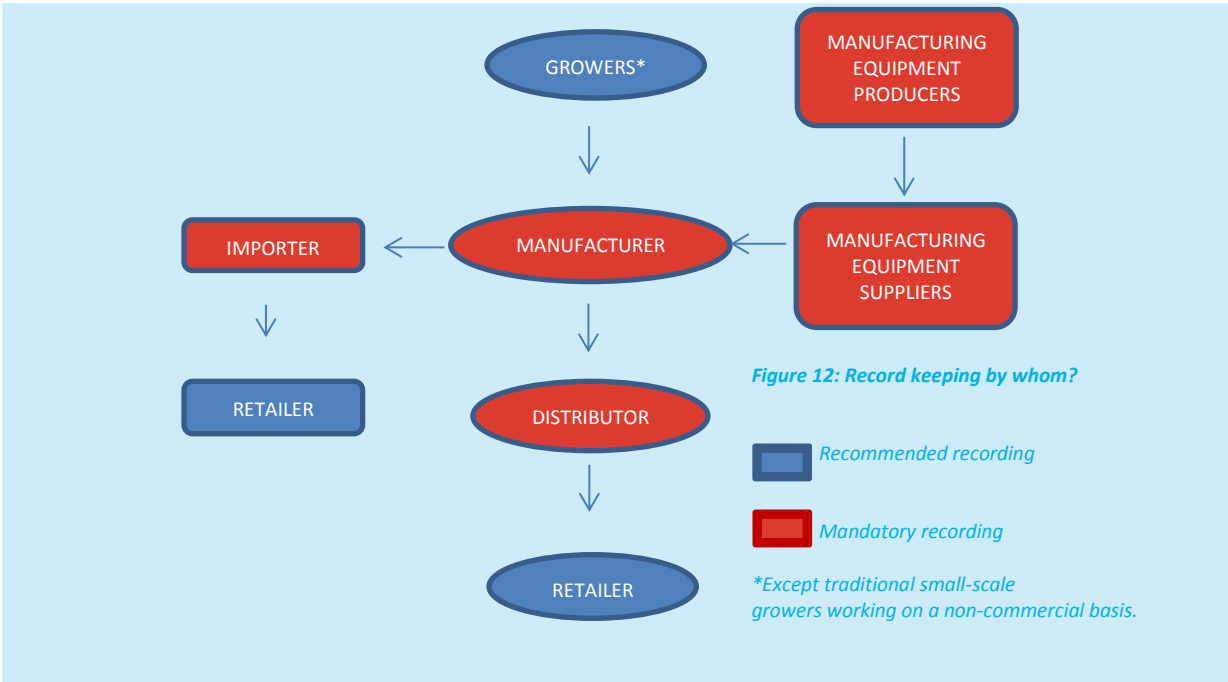
Table 11: Data capture required by art. 8(4)

AVAILABLE SOLUTIONS	Date of manufacture	Manufacturing facility	Machine used to manufacture tobacco products	Production shift or time of manufacture	First customer data	Intended market of retail sale	Product information	Warehousing	Identity subsequent purchaser	Shipment data
3M	no	no	no	no	no	yes	no	no	no	no
ATOS	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
ArjjoWiggins	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
Authentix	no	yes	no	no	no	yes	no	no	no	no
Axway	?	?	?	?	no	yes	no	no	no	no
Bundesdruckerei	no	yes	no	no	no	yes	no	no	no	no
Codentify	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
DELARUE	no	yes	no	no	no	yes	no	no	no	no
EDAPS	no	yes	no	no	no	yes	no	no	no	no
Giesecke&Devrient	no		no	no	no	yes	no	no	no	no
IBM	N/A (data storage/track and trace provider)		N/A (data storage/track and trace provider)	N/A (data storage/track and trace provider)	N/A (data storage/track and trace provider)	N/A	no	N/A	N/A	N/A
SAP GBT	N/A (data storage/track and trace provider)		N/A (data storage/track and trace provider)	N/A (data storage/track and trace provider)	N/A (data storage/track and trace provider)	N/A	no	N/A	N/A	N/A
SICPA	Yes, if activated/ no if pre-activated for imports	Yes, if activated domestically /no if pre-activated for imports	Yes, if activated/ no if pre-activated for imports	Yes, if activated/ no if pre-activated for imports	no	yes	no	no	no	no

**4.3.6. Record Keeping (art. 9)**

**a. Who will be required to keep records?**

Figure 12 outlines the obligations imposed by the Protocol on States as to which actors in the supply chain process must keep adequate records of their activities, and recommendations to States regarding which actors, also part of supply chain, should be required to keep records.



**b. Obligations**

During Protocol negotiations, many delegations reiterated the need for the inclusion of strong obligations for this provision highlighting the benefits governments would receive from having access to information of the kind outlined by the Protocol. It was considered important to impose robust obligations, particularly on manufacturers and distributors and so we have article 9 as it is adopted in the Protocol (see table 12).

*Table 12: Obligations (mandatory provisions) for art. 9*

Provision	Detail
Parties to require all natural and legal persons engaged in the supply chain of: <ul style="list-style-type: none"> <li>• Tobacco;</li> <li>• Tobacco products; and</li> <li>• Manufacturing equipment</li> </ul> to maintain complete and accurate records of all relevant transactions. (Art. 9.1)	Records must allow for full accountability of materials used in the production of tobacco products.
Parties shall adopt effective legislation, executive, administrative or other measures requiring records: (Art. 9.5)	<ul style="list-style-type: none"> <li>• Are maintained for at least 4 years;</li> <li>• Made available to competent authority; and</li> <li>• Maintained in the required format.</li> </ul>

### c. Recommendations

Advantages for States parties adopting the recommendations contained within article 9 (see table 13) are:

- Improves the monitoring of tobacco products and manufacturing equipment in transit.
- States parties can benefit from industry data collection in relation to market trends which will help States parties survey affected markets. This could assist in States parties' ability to act ahead instead of reactively. This will also assist with provisions of the Protocol regarding ensuring supply of tobacco products is commensurate to demand.
- If States parties have access to this type of information it will help in the identification of suspicious transactions.
- Most importantly, it will assist in more control over legal trade of tobacco products and manufacturing equipment and will only increase transparency.

*Table 13: Recommendations within art. 9*

Provision	Detail
Parties to have licensees provide information on request regarding (Art. 9.2):	<ul style="list-style-type: none"> <li>• General information on market volumes, trends, forecasts and other relevant information; and</li> <li>• Quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under transit or transshipment or duty suspension.</li> </ul>
Parties to require licensees, as appropriate, to provide on request specific information for tobacco products and manufacturing equipment sold or manufactured for export, or subject to duty-suspended movement in transit or transshipment, to the competent authorities in the country of departure, <b>at the time of departure from their control</b> Art. 9.3).	<p>Information required under article 9.3:</p> <ul style="list-style-type: none"> <li>• Date of shipment of products from last point of physical control</li> <li>• Details concerning shipped products (brand, amount, warehouse)</li> <li>• Intended shipping routes</li> <li>• Intended destination</li> <li>• Identity of recipient of products (natural/legal person)</li> <li>• Mode of transportation</li> <li>• Identity of transporter</li> <li>• Expected date of arrival of shipment at intended destination</li> <li>• Intended market of retail sale or use</li> </ul>
Parties can extend reporting obligations to retailers and growers, except traditional tobacco growers working on a non-commercial basis (Art. 9.4).	
Establish system for sharing details contained in all records kept with other Parties (Art. 9.6).	
Parties shall endeavour to cooperate together and with competent international organizations, in sharing and developing improved record-keeping systems (art. 9(7)).	

#### d. Policy Considerations

- Record-keeping obligations should extend to all participants in the supply chain where possible and should be regulated.
- Records must show **full accountability for materials** used in production. The term “*materials*” is not defined, however the intention is that a manufacturer should be able to reconcile their production quantities with the inputs they use in production – thereby providing confidence no unrecorded or illicit production has occurred. This provision will need to be considered with article 6(5) on key inputs. States parties can begin to determine themselves which materials they consider as key inputs (particularly with regard to cellulose acetate tow and cigarette paper) and how manufacturers should account for the use of key inputs in production. Obligations should also be imposed on suppliers of key inputs to supply commensurate to demand.
- Excluding traditional growers working on a non-commercial basis may create loopholes and may provide incentives for abuses of the system and fraud to be engaged in to avoid the obligation. States parties will need to ensure they define what **a traditional grower working on a non-commercial basis** means, and establish ways of inspecting those that fall within this category in their jurisdiction, to minimize loopholes.
- Domestic legislation will need to be detailed in relation to which entity involved in the supply chain will keep records of what information. Thus “**all relevant transactions**” will need to be defined. Further, the type of information to be retained and then given to competent government authorities upon request will need to be detailed in relation to the role of the natural/legal person in the supply chain. For example, manufacturers will have different information from distributors, from growers, from importers. The process will be more effective if the connections between each are well established from the information retained and transferred to authorities upon request.
- There may need to be a policy on the timing of such requests and these may be different for each of the transactions. For example, for tax suspended and export transactions, the details required under article 9(3) could be requested prior to the goods leaving to a licensed place and such goods not being permitted to move until the Competent Authority so permits. For information on “quantities produced and on hand” under article 9(2) this could be provided on a monthly basis within a specified timeframe at the end of the accounting month in question.
- Where the Protocol calls for a system to be established (art. 9(6)) for **sharing details contained in all records kept with other States parties**, the following steps will be prerequisites:
  - States parties will need to legislate for manufacturers and other participants in the legal supply chain to mandatorily retain specific information and records.
  - The designated competent authority, at a national level, will need to be able to request this information, and record it themselves in some form, electronically where feasible, to

assist with sharing the information with other States parties. Perhaps this could form part of the information technology solutions developed for data capture under the track and trace obligations created by the Protocol.

- States parties are able to share this information with other States parties, either upon request by other States parties or upon their own initiative (e.g. where goods are being exported to an intended destination, that State party could be informed in advance).
- If the purpose for the creation of the system is to ensure that countries cooperate and coordinate on known shipment departures and arrivals, this will require a real-time ability to share the information and coordinate action. This will then also mean that manufacturers and other actors involved in the supply chain will need to share this information quickly with the competent authority **before** goods are shipped.
- As it is, the provision creates no obligations on States parties to inform intended destination countries of the export. There is nothing to prevent States parties from implementing such a system, though of course it should not be too much of an administrative burden on States parties.
- This provision ties in to the provisions on international cooperation at Part V of the Protocol, more formally, where the same information can be shared, for various purposes such as law enforcement cooperation, mutual administrative assistance and mutual legal assistance.

#### 4.3.7. Security and Preventive Measures (art. 10)

##### Box 40: Security and preventive measures (art. 10)

- Parties shall require licensees to take necessary measures to prevent diversion of **tobacco products** into illicit trade channels, including:
  - Reporting to the competent authorities the cross-border transfer of cash, or cross-border payments in kind, and all “suspicious transactions”; and
  - Supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand in the intended market of retail sale or use (art. 10(1)(a) – 10(1)(b)).
- Payments for **transactions** and for **materials** used for the manufacture of tobacco products, carried out by natural or legal persons subject to Art. 6, should only be made in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market, and not operated through any other remittance system (art. 10(2) - 10(3)).
- Contravention of these requirements shall be subject to criminal, civil or administrative sanctions, including suspension or cancellation of a licence (art. 10(4)).

This article applies specifically to the prevention of the **diversion of tobacco products** into illicit trade channels. A major component of this article is the requirement that States parties oblige all licensees to take the measures necessary to ensure that their supply of tobacco products and manufacturing equipment is in amounts commensurate with demand in the intended market of sale. Refer to section 4.3.4 (“*Due diligence*”) for other provisions within Protocol requiring supply to be commensurate with demand.

Article 10(1)(b) was included within this provision of the Protocol so that it would be easier to recognize extreme cases, for instance where a producer of manufacturing equipment proposed to export large quantities of machinery to a country where it was evident that the domestic market could not absorb the quantity of tobacco products which that machinery could produce. This would allow States parties to keep count of such events.

Article 10 is based on previous agreements at a national and regional level between government authorities and the tobacco industry.

##### a. Policy Considerations

- The scope of article 10 relates to tobacco products primarily, though it has been extended by article 10.1(b) to apply to manufacturing equipment as well, for the purpose of that particular provision. States parties should consider how they will require licensees to determine that the supply of manufacturing equipment is commensurate to demand. States parties will need to consider such instances as upgrading of facilities by manufacturers. Further, States implementing this article should consider accompanying it by legislation and regulations regarding the seizure and/or destruction of manufacturing equipment in criminal matters or administrative matters where licences have been cancelled or revoked, and what will happen to equipment disused after an upgrade by a manufacturer. The resale of such manufacturing equipment domestically should also fall within the regulatory framework, and be connected to obligations imposed on licensees.

- States parties would need to consider any **accompanying obligations** for such requirements, such as **offering legal protection to informants** who provide information on criminal matters, and consider the application of laws relating to defamation, data protection, and privacy to this provision.
- States parties should be aware of **current trading practices** regarding methods of payments transnationally in international business transactions where different currencies are used and payments are made subject to currency conversion through legitimate financial institutions. These practices will need to be adapted to fit the requirements of the Protocol that payments are made in the currency and amount of the invoice.
- The measures contained in article 10 are to be applied to all licensees. At a minimum this will oblige manufacturers of tobacco products and manufacturing equipment, depending on the State party concerned. By extension, these provisions should apply to all actors involved in the tobacco supply chain, which would connect this provision with article 6 (licensing).
- States parties will need to define what amounts to a **“suspicious transaction”** as the Protocol does not define this term. Guidance can be obtained though from the reporting obligations outlined under other provisions of the Protocol, such as under article 6 and 9. The INB5 anticipated that “suspicious transactions” would require definition and thus it was left in inverted commas in the text of the Protocol.
- There has also been no definition provided for **“financial institution”**. It was suggested by the Australian delegate at the INB5, from 29 March – 4 April 2012<sup>41</sup>, that the definition provided by the Financial Action Task Force might be useful in this regard<sup>42</sup>.
- The article, at 10.2, also assumes that States parties have a pre-established **national framework for anti-money laundering**. National anti-money laundering laws should be consulted so that legislation in respect of this provision remains consistent with existing national legislation, particularly where anti-money laundering legislation and national obligations are concerned (*see section 4.4.1.d, “Framework for money-laundering”. See also section 5.2.7.c of INTERPOL’s Countering Illicit Trade in Goods: A Guide for Policy-makers” for further discussion on money-laundering*).



#### 4.3.8. Sale by Internet, telecommunication or any other evolving technology (art. 11)

##### Box 41: Sale by Internet, telecommunication or any other evolving technology (art. 11)

- Parties shall require those engaged in **any** transaction regarding tobacco products through internet, telecommunication or any other evolving technology-based mode of sale to comply with all relevant obligations covered by the Protocol.
- Parties **shall consider** banning retail sales of tobacco products through the internet, telecommunication, or any other evolving technology-based modes of sale.

The Internet exacerbates the illicit trade problem as sellers of illicit products find simplified means and additional “low risk” channels of distribution in the virtual world to promote and sell these products, while protecting their anonymity (*see section 1.6 of INTERPOL’s Countering Illicit Trade in Goods: A Guide for Policy-makers” for more information on Internet channels of distribution of goods*).

Of course, generally, Internet sales are an increasingly important part of commerce and provide an ease by which goods can be bought and sold around the world. In many countries, cigarettes and other tobacco products can be bought over the Internet.

##### a. Policy Considerations

- Countries will need to consider how they will regulate internet sales to ensure that:
  - There is reliable **age verification**;
  - That the product is in compliance with all **applicable product regulations** (e.g. local health warnings); and
  - All applicable **duties and taxes** are paid.
- Countries may wish to determine where other protocol provisions will be applicable to internet sales and incorporate these into national legislation. Starting from the premise that all Protocol provisions will apply is a useful way of approaching this task, and then noting specific instances where certain provisions will not apply. This will ensure that retailers and distributors over the internet will be encapsulated by all relevant provisions pertaining to them and that national legislation does not exclude important measures. Of course, for this provision to have maximum effect, it should be married with other regulatory measures such as licensing, due diligence, track and trace, record keeping, security and preventive measures and offences.
- The Protocol contains no obligation to ban Internet retail sales of tobacco products. A decision to introduce such a ban would be entirely the prerogative of individual States parties, who are best placed to take into account local characteristics of wholesale and retail channels. Moreover, such decision would need to be made in consideration of trade obligations States parties to the Protocol have with other countries and within the World Trade Organization framework. The General Agreement on Tariffs and Trade 1994 (GATT) and General Agreement on Trade in Services (GATS) are relevant agreements creating obligations for its States parties.

- Countries will need to consider **which entities will be controlled**: all entities offering tobacco products for internet sale, content hosts who control interconnected-computer servers on which the content is stored, content navigators who facilitate the location of content by users of communication services such as search engines, access providers who provide end-user access to communication services such as internet service providers and mobile telephone companies, and financial entities involved in the payments for internet sales of tobacco products<sup>43</sup>.
- States parties will need to consider how to and whether they should establish jurisdiction over the mere availability of content online within their territory. The *Expert Review on a possible ban of internet sales* undertaken by the INB highlights that this is the case in some areas of law, such as defamation, irrespective of where the content originated and endorses the application of similar principles to the internet sale of tobacco products, though it advises States parties to specify that *the operation is extra-territorial*.



**Box 42: Further reading on Internet sales**

International Trademark Association's paper, "Addressing the sale of Counterfeits on the Internet", September 2009.

**Link:** <http://www.inta.org/Advocacy/Pages/Anticounterfeiting.aspx>

See also: Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: Expert review on a possible ban on Internet sales of tobacco products, 7 May 2009, FCTC/COP/INB-IT/3/INF.DOC./4.

**Link:** [http://apps.who.int/gb/fctc/PDF/it3/FCTC\\_INB\\_IT3\\_ID4-en.pdf](http://apps.who.int/gb/fctc/PDF/it3/FCTC_INB_IT3_ID4-en.pdf)

### 4.3.9. Free zones and international transit (art. 12)

#### Box 43: Protocol provisions regarding FZs (art. 12)

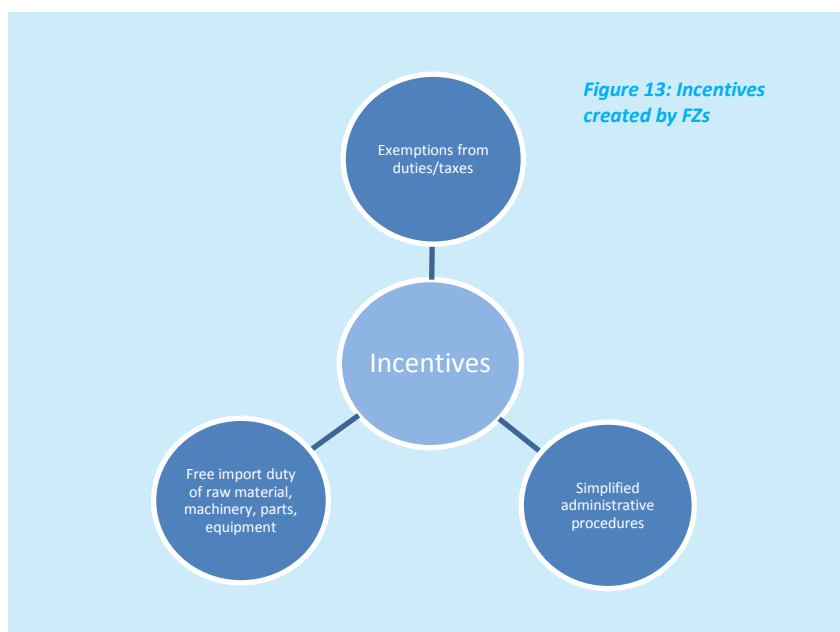
1. Within three years of the entry into force of the Protocol, free zones **shall** be subject to effective controls on all manufacturing of and transactions in tobacco and tobacco products, and to the relevant measures of the Protocol.
2. The intermingling of tobacco products with non-tobacco products in a single container at the time of removal from free zones **shall** be prohibited.
3. International transit or transhipment of tobacco products and manufacturing equipment **shall** be subject to control and verification measures, within a Party's territory.

Free Zones (FZs) play a central role in the globalization of the world economy. The development of FZs has thus progressed and is reflected through the range of types of FZs specifically tailored to reduce barriers and facilitate global free trade while providing important economic stimuli to national and local economies.

#### a. What are Free Zones?

The International Convention on the Simplification and Harmonization of Customs Procedures (known as the Revised Kyoto Convention) defines FZs as “a part of the territory of a contracting party where any goods introduced are generally regarded, **insofar as import duties and taxes are concerned**, as being outside the Customs territory”. The Protocol adopts the same definition of FZs. Essentially this means that certain geographic areas within countries are designated to fall within the ambit of special and minimal regulatory and tax measures applied to certain trade-related products and services. These measures are generally incentives to support the development of:

- Exports.
- Foreign direct investment (FDI).
- Local employment.



Currently, there are approximately 3 000 FZs in 135 countries around the world.

Due to their special status, FZs are often regarded as being extra-territorial (remaining outside a country’s jurisdiction) and thus falling outside customs’ jurisdiction nationally.

While FZs encourage national economies, global trade, and legitimate business, the lax controls in place (reduced regulation, lack of transparency, confusion over customs jurisdiction within FZs, ability to manufacture products out of sight, easy access to exporting goods etc.) make them highly appealing for illicit actors/criminals who take advantage of the relaxed oversight and exploit their vulnerabilities.

*Table 14: Types of FZs*

Type of FZ	Description
<b>Free Trade Zones (FTZs)</b>	Fenced in duty free areas offering warehousing, storage and distribution facilities for trade, transshipment and re-export of products.
<b>Export Processing Zones (EPZ)</b>	Industrial areas focusing on assembly and manufacturing of intermediate imports, primarily though not exclusively aimed at foreign markets. Promotes links with the domestic economy by encouraging technology transfer and innovative industrial strategies.
<b>Hybrid EPZs</b>	Combine the traditional focus of an EPZ with a sub-divided area in which non-export oriented activities can occur.
<b>Enterprise Zones</b>	Economic development areas intended to revitalize specific urban or rural areas where they are located through tax incentives and financial grants.
<b>Freeports</b>	The largest of all the zones accommodating all types of activities including tourism, retail sales, on site residence. Differing from FTZs in that they are not export drivers, they promote overall economic growth linking the zone with the overall economy of the nation.
<b>Single Factory EPZ Schemes/Sub-zones in the US</b>	They are not a zone at all although they provide incentives similar to EPZs. They are a single factory located anywhere in the country receiving the special duty free privileges of FTZs.
<b>Foreign Trade Zones</b>	Specially designated zones in the US, established in or adjacent to a port of entry where all types of goods may be held exempt from US customs duties and other taxes.
<b>Special Economic Zones (SEZ)</b>	Extend relaxed tax and administration characteristics of FTZs to investment arrangements, labor laws, management practices, and wage rate policies in specific areas of the country.
<b>Bonded Warehouses</b>	Specially designated storage warehouses that have the authorization of customs authorities.
<i>These definitions have been derived directly from FATF’s Report titled “Money Laundering Vulnerabilities of Free Trade Zones” of March 2010. See this report for more detailed information on the different types of zones.</i>	

The way FZs are organized and established under investment laws rather than customs laws, and, including the fact that they are also now largely privatized, exposes them to a number of vulnerabilities including, inter alia:

- **Relaxed oversight and lack of transparency**

- Goods are not subject to the usual customs controls where customs intervention is intermittent, absent or applied only if goods leave the FZ for the domestic market.
- Goods pass through various economic operations including assembly, manufacturing, processing, warehousing, re-packaging, storage, transshipment, export, re-export.
- Lack of clarity regarding regulations covering the responsibility and control of FZs.
- Lack of clarity regarding customs' jurisdiction over potentially illegal activities within the FZ.
- Disruption in the monitoring of the legal supply chain due to lenient/absent controls.
- Ease of setting up legal companies in an FZ where company formation services are available from zone operating authorities, and little ownership information about the company is required.

- **Lack of interoperability of national systems**

- FZ transactions must be reported to both zone authorities and customs authorities in theory, which involves two differing and non-integrated systems, relying on both paper and software. Data to authorities overseeing the zone may relate to ensuring levels of investment related activity are maintained, whilst data for customs relates to revenue protection and preventing unlawful activity.
- Lack of a clear standard related to customs clearance makes it a difficult system to monitor.
- Lack of integrated systems creates difficulties in analyzing trends related to specific ports, zones, regions or businesses.
- The use of paper based systems and computer software systems that are not integrated, in the same jurisdiction as well as regionally, also compounds the problems arising from a lack of coordination between systems, within an FZ itself and transnationally.

- **Vulnerability of Certain Types of Goods**

- Certain types of goods are particularly vulnerable to misuse due to their value, size, high tariff rate, volume of trade and potential for IPR violations. Examples are cigarettes, alcohol, luxury goods and other goods most often used in IPR violation, electronic items, and other high duty goods.
- IPR violations are difficult to detect and substantiate at the time of inspection. It is easy to take advantage of a system where there are few inspections and large cargo entering and exiting, relaxed oversights regarding importing, re-packaging, re-labelling, and exporting.

- Repackaging in FZs is a common method employed by criminals to cut ties between the real country of origin or destination.
- Re-issuing commercial documentation is also possible for goods which are imported to the FZ as tobacco products, but can be exported with a different goods description under different owner names.

These vulnerabilities are discussed in detail in the FATF Report, “Money-laundering vulnerabilities of free trade zones” of March 2010.

## b. Current applicable international legal framework

Existing international conventions containing customs-related provisions include:

### - World Customs Organization’s Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention (RKC)).

The **RKC** covers FZs for control of goods, such as the right of customs to enter and inspect goods in the zone for tariff and non-tariff conformance to laws and regulations. Provisions covering FZs are in a specific annex that is not mandatory for RKC contracting parties or all members of the WCO.

The WCO adopted the **Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework)** in 2005, encouraging the complete functionality of customs within FZs. The framework involves compliant traders, or Authorized Economic Operators (AEOs), receiving beneficial customs treatment, including fewer or no inspections on goods imported or exported by or via the AEO, if companies self-regulate to meet certain standards, resulting in quicker customs clearance and lower operator transport costs. FZs and the companies in the zones can join in receiving these types of benefits only if customs is fully functional inside FZs. This framework supports customs interaction with private entities and also customs to customs interaction, whereby national customs’ administrations cooperate and mutually recognize each other’s AEOs.

#### Box 44: Customs’ authority in FZs

“When Customs authorities are unable to exercise their due responsibilities in FZs, bad practices proliferate. This problem is acute where goods are beyond the reach of Customs authorities and other law enforcement bodies while transiting, in-transit, or in free-zone status. As a consequence, violators are free to act without fear of legal sanction.” BASCAP, *Controlling the Zone*

### - World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The **TRIPS Agreement** provides comprehensive requirements for the protection of intellectual property, including border measures. but does not specifically address FZs. Additionally, some of its more stringent provisions are not mandatory for WTO Members.

### c. Policy Considerations

Protocol provisions aim to address the key vulnerabilities identified for the manufacture and distribution of tobacco products. If this article is implemented by States parties to the Protocol it will go a long way in assisting reducing the availability of counterfeit cigarettes, illicit whites and in the diversion of genuine tobacco products.

- States parties will need to balance the economic benefits of FZs including foreign direct investment and job creation with the vulnerabilities of FZs, which impact globally. Given commitments existing under various international conventions in the area, the balance should not be too difficult to find, but it will be a matter of the political will of the State. States parties will need to interact with their various departments and ministries responsible for their foreign affairs and trade relations, as well as customs and border control authorities and determine their obligations under various international trade related treaties, as well as any customs' treaties they are party to.
- States parties should consider if there are any specific goods which should be excluded from admission into their FZ, and whether national legislation delineates this clearly. Legislation enacted should allow for monitoring of goods entering the FZ.
- One exceptionally important consideration for States parties is whether their national customs administrations are empowered to control FZs. Usually customs laws will provide control over goods entering and leaving a FZ, but it often less clear if customs laws cover processing, manufacture, repackaging, relabeling and other procedures impacting on raw materials or finished goods, as well as the businesses authorized to operate in FZs. States parties should ensure that customs' jurisdiction within the FZ is clearly enunciated in the national legislation and regulations, outlining customs' right to control the goods stored in FZs at any time, the businesses operating therein, and the activities taking place within an FZ. States parties should note that goods are generally regarded as being outside of customs' control only so far as import duties and taxes are concerned, which is iterated in the definition of FZs provided by the RKC, because of the very fact that goods in FZs are mostly in transit.
- As part of the above consideration, States parties will need to ascertain what control regimes exist within their jurisdiction, whether they are enforced on a regular basis or at all, and whether their customs authorities actually exercise any right of control over FZs. More often than not, control mechanisms are in place, but given the misconceptions surrounding customs' jurisdiction, they are not normally abided by.
- In effect, customs' staff will have their usual roles expanded into FZs in terms of identifying and checking the true origin of goods being processed within the FZ, and the verification of documentation and the goods themselves, as well as training on the specific controls that apply to FZs such as goods admission and delivery, accounting for losses and wastage, changes of goods classification, etc.

- Where customs are empowered to grant authorization for FZs, such authorization should define all the activities that may take place in the FZ. States parties where customs do not have the requisite authorization to define activities within the FZ should consider broadening the scope of their customs' jurisdiction to allow for such control. One significant vulnerability of FZs lies in the various goods passing through various economic operations (assembly, manufacturing, processing, warehousing, re-packaging, storage, transshipment, export, re-export) and there being no control over these activities. Requiring controls over these activities will go some way to identifying counterfeit products, illicit whites and genuine tobacco products diverted from legitimate channels. Controls put in place will only serve to alert authorities to any unauthorized and suspicious behavior, and make more of an impact towards achieving the objectives of the Protocol.
- States parties will need to ascertain whether their FZs have specific zone operators, what powers of control the zone operator has, and whether this role interacts and/or overlaps with the customs function. Understanding the role of various participants is essential for achieving clarity regarding what controls are in place and who exercises those controls.
- States parties should also ascertain whether any current controls apply to measures for the control and verification of tobacco products and manufacturing equipment in international transit or in transshipment, and if not consider legislating specifically for the control of tobacco products and manufacturing equipment. This is particularly relevant given article 12(2) of the Protocol requiring States parties to prohibit the intermingling of tobacco products with non-tobacco products in a single container or other similar transportation unit.

Since the purpose of FZs is to promote legitimate global trade, there is even greater justification for customs administrations to exercise their authority in order to identify and eliminate illicit trade, such as counterfeiting and smuggling, without over-burdening legitimate trade. The lack of control on goods in transit is a critical issue with serious implications. It affects public security because it allows infringers and organized criminal networks to profit and prosper, especially from illicit trade of tobacco products.





#### Box 45: Further reading on FZs

The Financial Action Taskforce (FATF), “Money-laundering Vulnerabilities of Free Trade Zones”, March 2010

**Link:** <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20vulnerabilities%20of%20Free%20Trade%20Zones.pdf>

FAFT Guidance Document, “International Best Practices: Detecting and Preventing the Cross-Border Transportation of Cash by Terrorists and Other Criminals, 12 February 2005.

**Link:** [http://www.imolin.org/pdf/imolin/International\\_BPP\\_Detecting\\_and\\_Preventing\\_illicit\\_cross-border\\_transportation\\_SR\\_IX\\_COVER\\_2012.pdf](http://www.imolin.org/pdf/imolin/International_BPP_Detecting_and_Preventing_illicit_cross-border_transportation_SR_IX_COVER_2012.pdf)

See the 2012 FATF Recommendations, including the conversion table from the old Recommendation to the new FATF Recommendation.

**Link:** [www.fatf-gafi.org/](http://www.fatf-gafi.org/)

World Economic Forum’s Report, “Free Trade Zones as Enablers of Organized Crime: Exploiting International Commercial Transactions”, 2012.

**Link:** <http://reports.weforum.org/organized-crime-enablers-2012/>

See Business Action to Stop Counterfeiting and Piracy (BASCAP) Report, “Controlling the Zone: Balancing facilitation and control to combat illicit trade in the World’s Free Trade zones”, May 2013.

**Link:** <http://www.iccwbo.org/advocacy-codes-and-rules/bascap/international-engagement-and-advocacy/free-trade-zones/>

#### 4.3.10. Duty free sales (art. 13)

##### Box 46: Duty free sales (art. 13)

- Parties shall take **effective** measures to subject any duty free sales to all relevant provisions of the Protocol.
- No later than **five years** following the entry into force of the Protocol, evidence-based research shall be conducted to ascertain the extent of illicit trade in tobacco products related to duty-free sales of such products. On the basis of such research, appropriate further action shall be considered.

##### a. Duty free trade in tobacco products

Duty-free trade in tobacco products occurs legally when a departing international traveler purchases such products without paying the internal duties or taxes that would ordinarily apply in the country of purchase and then imports them into the country of destination without paying any customs duties (import tariffs) or taxes that might otherwise apply in that country. Like FZs, duty-free trade in tobacco products relies on exceptions to the usual tax and customs rules in individual countries.

Under the Protocol, the COP undertakes to research the question of the extent of ITTP arising out of duty free sales no later than five years following the entry into force of the Protocol. In the meantime, States parties to the Protocol are encouraged to extend relevant Protocol provisions to duty free sales (*see box 46*).

##### b. Diversion of duty-free tobacco products

In relation to consumer products, taxes are generally imposed on goods intended for domestic consumption such as *goods and services tax*, or *value added tax* and *excise tax* imposed on excisable goods' manufacturers. In principle, the concept of duty free sales originated from the premise that goods intended for consumption in another jurisdiction should not be subject to domestic consumption taxes. Tobacco products intended for duty free sale also benefit from the duty-free system, and thus these products are susceptible to diversion into the illicit market. Controlling duty free sales is considered a way of averting the diversion of tobacco products intended for duty free sale.

This is an aspect of tobacco control that was discussed but not firmly decided on by the INB during negotiations of the Protocol, in the same way as no common agreement could be reached on key inputs. Due to this, article 13 merely creates an obligation to conduct evidence-based research to ascertain the extent of ITTP related to duty free products.

Legitimate duty-free trade is currently regulated and the supply chain of duty free products is supervised by national customs authorities. For example, duty-free retail stores are normally established under Government control, with duty free retailers often paying concession fees to Governments. Sometimes the government themselves owns the duty free establishment.

### c. Policy Considerations

- Once the requisite research has been undertaken by the Meeting of the Parties (MOP) the MOP will decide what further action should be taken, whether that includes a ban on duty free products, such as for internet sales. This will depend on the extent of diversion found to take place through duty free channels, after the research is undertaken and submitted to the MOP.
- Counterfeiters often insert the label “duty free” on packages of tobacco products to assist in avoiding controls on the products. States parties should keep this in mind when legislating in this area. This does not necessarily mean that duty free sales are not subject to illicit trade nor does it mean that there is significant illicit trade in duty free products. The research to be conducted by the MOP will be most helpful in this regard. In saying this, States can always ensure that this channel of sale is also sufficiently considered and controlled so as not to provide any loopholes to criminals engaged in the ITTP.
- States parties will need to determine what legislation governs duty free establishments within their jurisdiction. A further part of this will then be to determine obligations in place for duty free operators as regards the creation of the establishment, the fees paid to the government, the business practices engaged in, the reporting requirements in place, and the information collected from duty free operators as regards their suppliers. Duty free operators should be obliged to have transparent business practices and sound compliance and ethics mechanisms in place. Due diligence practices are a key component of this and governments should verify that stringent legislative provisions are in place requiring sound business practices from duty free operators. If there is a lack of compliance, penalties should be in place within the national regulatory framework.

Article 13 of the Protocol does not provide guidance as to what *effective* measures should be taken to subject duty free sales to the relevant provisions of the Protocol, and what constitutes *effective* measures. Given that duty free shops have in their custody tax suspended tobacco products it would be reasonable to look at applying the same key supply chain measures to duty free shops as would be applied to importers, warehouses and exporters in terms of licensing (art. 6), due diligence (art. 7) and record keeping (art. 9). The other option is for States parties to treat duty free operators as they would other retailers, and thus they should be subjected to provisions that they would apply to retailers, however, given many of these articles are not requirements for retailers the risk of duty free shops with their tax suspended tobacco products cannot be mitigated.

- States parties should also consider whether their national laws and processes allow for a link between the manufacturers’ obligations when supplying duty-free operators. In light of this, States parties will need to connect manufacturers’ obligations under article 6, 7, and 9 of the Protocol to their duty free clients. Manufacturers should be subject to due diligence procedures such as know-your-customer procedures and track and trace systems targeting diversion of tobacco products distributed via this channel and report relevant information, including of their duty free customers to the relevant authorities. States parties will need to consider the necessary links when legislating in this regard.
- States parties should be aware of restrictions already in place in their jurisdictions, particularly as regards age and maximum allowance restrictions relating to duty free products.

**Table 15: Commented overview of Part III of the Protocol to Eliminate Illicit Trade in Tobacco Products – Supply Chain Control**

**Article 6 - Licensing**

Paragraph	Scope	Mandatory	Policy Questions	Checklist and Considerations
1a	Manufacture tobacco products or tobacco manufacturing equipment	Yes	How to prohibit manufacturing activity (unless licensed)?  What legislative measures will need to be taken and what options exist?  What penalties will be available for lack of compliance?	Need to identify all operations within a jurisdiction.  Explore the current links with customs and excise laws already in place.  Penalties should be enshrined for non-compliance.
1b	Import or export of tobacco products and tobacco manufacturing equipment	Yes	How to prohibit import and export activity (unless licensed)?  What legislative measures will need to be taken and what options exist?  What penalties will be available for lack of compliance?	Need to identify all operations within a jurisdiction.  Explore the current links with customs and excise laws already in place.  Penalties should be enshrined for non-compliance.
2a	Retailing tobacco products	Shall endeavour	Should retail activity be licensed?	Need to identify and analyze all relevant factors in addressing the policy question: consider which types of retailers will fall under the regime, those selling only tobacco, or others such as supermarkets, etc.
2b	Growing tobacco (except small scale traditional)	Shall endeavour	Should growing be licensed?  What does “small scale traditional” mean?	Need to identify and analyze all relevant factors in addressing the policy question.  Need to understand the traditional products industry and assess appropriate size production for the exemption.  Ensure licensing regime does not create ‘loopholes’ for undeclared production.

Paragraph	Scope	Mandatory	Policy Questions	Checklist and Considerations
2c	Transporting commercial quantities of tobacco products or manufacturing equipment	Shall endeavour	Should transport activities be licensed?  What is a “commercial quantity”?	Need to identify and analyze all relevant factors and risks from the transport sector in addressing the policy question.  Ensure licensing regime does not create unnecessary high risk areas for illicit trade.
2d	Wholesaling, warehousing, broking, dealing or distributing tobacco products or manufacturing equipment	Shall endeavour	Should some or all of these activities be licensed?	Need to identify and analyze all relevant factors in addressing the policy question.  Ensure licensing regime does not create unnecessary high risk areas for illicit trade.
3a	Competent Authority	Yes	Which agency shall oversee the licensing regime?	Consider any current licensing of any tobacco related activities such as production, import, etc. that may apply.  Designate a competent authority to control and monitor the licensing regime.
3b	Applications for a licence to require certain information	Yes	What information is required for an application for a licence?  <ul style="list-style-type: none"> <li>• Confirmation of identity</li> <li>• Confirmation of legal status</li> <li>• Location of premises</li> <li>• Products and manufacturing equipment</li> <li>• Criminal record (fit and proper)</li> <li>• Bank account details for transaction</li> <li>• Analysis of the market</li> </ul>	Consider what are the existing licensing regimes available relating to production, import, export and distribution, and best practice theory, within the jurisdiction, and decide whether it meets the requirements of the Protocol or will need to amended.  Countries creating a licensing regime should look to other jurisdictions for examples on the models available and assessment of effectiveness of the regime in that jurisdiction.  An effective licensing regime will require that this information be mandatory for all licensees, and will be necessary for implementation and management of the regime by the Competent Authority.

Paragraph	Scope	Mandatory	Policy Questions	Checklist and Considerations
3b				<p>Develop a 'benchmark' licensing regime consisting of aspects such as:</p> <ul style="list-style-type: none"> <li>• Requisite questions for applicants to answer mandatorily</li> <li>• Risk criteria for vetting applicants</li> <li>• Restrictions and conditions to attach to all or certain licences e.g. activities, changes, records, etc.</li> <li>• Fee structure</li> <li>• Licence validity timing and renewal process</li> <li>• Audit program</li> <li>• Sanction options for breaches of licence conditions and/or restrictions</li> </ul>
3c	Monitor and collect licence fees to enhance administration	Fees may be levied	What fee structure applies?	<p>As per 3b</p> <p>Consider the cost of effective administration and enforcement of the licensing regime, the activity for which the license is sought, the scope and length of the license.</p> <p>The use of fees will supplement the cost of creating the system. Costs can later be supplemented by fines obtained for non-compliance.</p>
3d	Measures to prevent, detect and investigate licence breaches	Yes (take appropriate measures)		<p>As per 3b.</p> <p>Competent Authorities will require enforcement and auditing capabilities.</p>
3e	Periodic reviews, audits and inspections of licenses	Yes		As per 3b
3f	Licence expiry time-frame, renewal/reapplication process	Yes (establish where appropriate)		As per 3b

Paragraph	Scope	Mandatory	Policy Questions	Checklist and Considerations
3g	Licensees required to inform of changes	Yes		As per 3b
3h	Licensees required to inform of acquisition or disposal of equipment	Yes		As per 3b
3i	Destruction of tobacco products to be supervised by Competent Authority	Yes		As per 3b
4	Licenses not to be issued without all information as required in the application, and only by Competent Authority	Yes		As per 3b
5	5 years after the Protocol comes into effect the Meeting of Parties will review any evidence based research on key inputs and advise.	Yes		States parties can consider bringing some key inputs within the scope of their regimes, such as cellulose acetate <b>tow</b> and cigarette paper, where they find that these are primarily used for the manufacture of tobacco products, and can be subjected to effective control mechanisms ( <i>see section 4.3.3, "Key Inputs"</i> ).

## Article 7 – Due diligence

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
1a	Suppliers of tobacco, tobacco products and tobacco manufacturing equipment to conduct due diligence before starting and during a business relationship	Yes	What elements are to be satisfied to complete due diligence?	<p>Confirming bona fides of customers.</p> <p>Identify what guidelines already exist for industries obliged to implement due diligence.</p>
1b	Suppliers of tobacco, tobacco products and tobacco manufacturing equipment to monitor sales to customers to ensure they are commensurate with market	Yes	How to establish or confirm market sizes and appropriateness of purchase volumes/capacities?	<p>Confirming appropriateness of purchases in the context of the current and future market.</p> <p>Identify the current obligations for suppliers to identify and forecast current and future market activities.</p>
1c	Suppliers of tobacco, tobacco products and tobacco manufacturing equipment to report any customers they believe are in breach of the Protocol	Yes	What will the nature and form of reporting by suppliers be?	<p>Consider the type of data required for system to be effective.</p> <p>Propose data capture format.</p>
2	Establish a Customer Identification System	Shall, as appropriate	How will this be integrated into the licensing regime?	<p>Consider the links to the licensing regime.</p> <p>Establishing the entity holds a licence under article 6 (if required)</p> <p>For natural persons, information regarding identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and verification of official identification is required. For legal persons, information regarding identity, including full name, trade name, business registration number, date and place of incorporation, corporate HQs and place of business, applicable tax registration, copies of articles of incorporation, corporate affiliates, names of directors and legal representatives,</p>



Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
2				<p>and verification of official identification is required.</p> <p>Description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment is an important component.</p> <p>Description of the location where manufacturing equipment will be installed and used is an important component.</p>
3	Customer Identification to include other information	May include (subject to national law)	What other information is envisaged?	<p>Need to identify and analyze all relevant factors in collecting (and making available) this type of information:</p> <ul style="list-style-type: none"> <li>• Criminal record details (if any)</li> <li>• Bank account details for transactions</li> </ul>
4	List of “blocked customers” compiled from supplier reporting	Shall	<p>What is a “blocked” customer?</p> <p>What criteria needs to be met before a customer is “blocked”?</p>	<p>Consider whether unlawful conduct will need to be engaged in before a customer is “blocked” or a higher threshold, such as a criminal conviction, will be required.</p> <p>Consider the nature and form of reporting such customers.</p>

## Article 8 – Tracking and tracing

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
1	Within 5 years of the Protocol coming into effect establish a global track & trace regime comprising regional and national systems with a global information-sharing focal point at WHO Convention Secretariat	Agree to establish	How is this achievable?  What needs to occur in that timeframe to enable this agreement to be reached?	Consider: <ul style="list-style-type: none"> <li>National and regional track and trace system components that already exist</li> <li>Software systems on a national level that are available</li> <li>The feasibility of linking these national systems to create the global regime</li> </ul>
2	Establish a national track and trace system for all tobacco products that are manufactured in or imported into its territory taking into account national or regional specific needs and available best practice	Yes	What are the minimum requirements for such a system?  How will this be established, keeping in mind interoperability with the global regime to be created?  What are the key elements of such a system?	Do a gap analysis between fiscal marking, authentication, tracking systems already in place and what a national track and trace systems requires.  Consider the differences in implementation required for manufacturing countries and importing countries, such as manufacturing countries requiring UIMs to be placed on all unit packages.  Importing countries should consider how they are to require that those countries they import from have the requisite markings in place, especially if they are importing from countries not party to the Protocol.  Key elements of such a system include: <ul style="list-style-type: none"> <li>Serialization of all tobacco products to the smallest saleable unit</li> <li>Common number standards for serialization</li> <li>Use global standards for serialization, such as GS1</li> <li>UIMs being human and also machine readable, and incorporation of serialization numbers on all traded units</li> <li>Allow for aggregation between products (parent-child relationships established</li> </ul>

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
2				<p>between each pallet, master case, carton and cigarette packet)</p> <ul style="list-style-type: none"> <li>Record all activity along the supply chain from origin to destination</li> <li>Record relevant data by supply chain participants</li> <li>Information recorded to be available to national authorities</li> <li>Use a global standard for information sharing e.g. EPCIS</li> </ul>
3	<p>Unique, secure and non-removable identification markings such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol</p>	Yes	<p>What form will the UIM take?</p> <p>What are the specific requirements UIMs should meet?</p>	<p>Gap analysis between fiscal marking systems today and requirements of the unique identification mark</p> <p>Consider the minimum requirements for security and quality in a fiscal or similar stamp, or other modes of marking products. Consider especially the following requirements for UIMs:</p> <ul style="list-style-type: none"> <li>Human-readable</li> <li>Built on international standards</li> <li>Can develop over time</li> <li>Unique (never used more than once)</li> <li>Be serialized</li> </ul>
4.1, 4.2 & 4.3	<p>The tracking and tracing regime, should have information available, either directly or accessible by means of a link, to assist globally in determining the origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status. This information to be on the unique identification marking.</p>	Yes	<p>What information should be available?</p> <ul style="list-style-type: none"> <li>Date and location of manufacture</li> <li>Manufacturing facility</li> <li>Machine used to manufacture tobacco products</li> <li>Production shift or time of manufacture</li> <li>Name, invoice, order number and payment records of the first customer who is not affiliated with the manufacture</li> <li>Intended market of retail sale</li> <li>Product description</li> </ul>	<p>The nature and format of a common data set to be incorporated in UIM and applied by the State party. Consider adopting the same common solution within the region to be implemented and enforced by national Competent Authorities.</p> <p>Research existing track and trace solutions or options that could be adapted nationally and regionally, including specification and operations of these types of systems and how they can be applied.</p>

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
4.1, 4.2 & 4.3	Where the intended market of retail sale is not known, then information as per article 15.2(a) of the WHO FCTC.		<ul style="list-style-type: none"> <li>Any warehousing and shipping</li> <li>Identity of any known subsequent purchaser</li> <li>Intended shipment route, the shipment date, shipment destination, point of departure and consignee</li> </ul>	<p>Information gathered and analysis conducted to assist policy makers to:</p> <ul style="list-style-type: none"> <li>Recommend track and trace needs nationally</li> <li>Be able to integrate track and trace systems regionally when required</li> <li>Develop terms of reference for tender documentation</li> <li>Examine funding models for running a track and trace system</li> <li>Select service providers</li> </ul>
5	Information on the unique identification mark is to be recorded at time of production, time of first sale by manufacturer or time of import	Yes	<p>Who will be responsible for recording the information?</p> <p>Can other participants in the supply chain be obliged to record information too?</p> <p>How will subsequent customers after the first customer be recorded?</p>	As with 4.1-4.3 above
6	Information recorded under 5 above is to link with unique identification mark	Yes		As with 4.1-4.3 above
7	The information required and the unique identification mark should be set out in a format by the Competent Authority	Yes	<p>Which competent authority will be responsible?</p> <p>Will it fall under the Customs' mandate?</p>	As with 4.1-4.3 above
8	The information on the unique identification mark should be accessible by the global focal point, and electronically	Yes	Interoperability with the global regime	As with 4.1-4.3 above
9	<p>The Competent Authority shall:</p> <ul style="list-style-type: none"> <li>Have access to the information on the unique identification mark in a timely manner by querying the global information-sharing focal point</li> </ul>	Yes	<p>How will the national system be Interoperable with the global regime?</p> <p>How will the sharing of information with other States parties occur?</p> <p>How will requests for information from other States parties take place?</p>	As with 4.1-4.3 above

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
9	<ul style="list-style-type: none"> <li>Request such information only for the purpose of detection or investigation</li> <li>Not unreasonably withhold information</li> <li>Answer the requests in relation to information in accordance with national law</li> <li>Protect and treat as confidential, as mutually agreed, any information that is exchanged</li> </ul>			
10	Further develop and expand the scope of the applicable track and trace system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control	Yes	<p>What technology is to be used?</p> <p>Is it interoperable with systems used in the region?</p> <p>Does it follow global standards for technology of this type? (<i>see section 4.3.5.f, "Using the GS1 Traceability Standard"</i>).</p>	As with 4.1-4.3 above
11	International cooperation on sharing and developing best practice track and trace systems.	Shall as mutually agreed	<p>Is your jurisdiction able to provide required assistance?</p> <p>How can national solutions and technology be shared to assist other States parties in their implementation of article 8?</p>	Assistance can involve capacity building and training programmes for States parties that request it.
12, 13 & 14	<p>Tobacco industry</p> <ul style="list-style-type: none"> <li>No obligations under the Protocol to be assigned to the tobacco industry</li> <li>Only deal with industry to implement when necessary</li> <li>To bear costs associated with obligations under Protocol</li> </ul>	<p>Shall not</p> <p>Shall</p> <p>May</p>	<p>What are the national regulations in place currently which the industry needs to abide by?</p> <p>What solution does the industry currently use?</p> <p>Does it change according to jurisdiction?</p>	As with 4.1-4.3 above

## Article 9 – Record keeping

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
1	Tobacco manufacturers and tobacco manufacturing equipment producers to keep complete and accurate records and be fully able to account for <b>materials used in production</b>	Yes	How is accountability checked?  Who is the competent authority responsible for ensuring requirements for record keeping are met?  What does “materials” mean?	Consider different examples where record keeping is mandatory that could be used for the control regime.  Link this provision with article 6(5) on key inputs. States parties can begin to determine themselves which materials they consider as key inputs and how manufacturers should account for use of key inputs in production.  Obligations should also be imposed on suppliers of key inputs to supply commensurate to demand.
2	Licensees on request to be able to provide the following: <ul style="list-style-type: none"> <li>• General information on market volumes, trends, forecasts and other relevant information</li> <li>• Quantities of tobacco products and manufacturing equipment in possession, custody or control in stock, in bonded warehouses under the regime of transit or transshipment or duty suspension as at the day of request.</li> </ul>	Yes	How will this information be verified?	
3	For tobacco products and manufacturing equipment sold or manufactured for export, or subject to duty-suspended movement in transit or transshipment – licensees, upon request, provide to the Competent	Shall as appropriate	Will other participants beyond the manufacturer require a licence?  In which situations will such requests be made?	Need to identify and analyze all relevant factors in addressing policy questions.  To be able to follow the route information from point of origin to point of arrival it will be necessary to implicate other participants in the

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
3	<p>Authority in the country of departure at the time of departure, the following information:</p> <ul style="list-style-type: none"> <li>• Date of shipment from the last point of physical control of the products</li> <li>• Details concerning the products shipped (including brand, amount, warehouse)</li> <li>• Intended shipping routes and destination</li> <li>• Identity of the natural or legal person(s) to whom the products are being shipped</li> <li>• Mode of transportation, including the identity of the transporter</li> <li>• Expected date of arrival of the shipment at the intended shipping destination</li> <li>• Intended market of retail sale or use.</li> </ul>			supply chain, such as distributors, wholesalers, retailers, growers etc. If a State party only relies on manufacturers for such information entire supply chain routes will not be able to be followed via collection of records and information. This will necessarily tie in to the track and trace solution implemented by States parties to the Protocol. It will also necessitate thinking regionally.
4	Retailers and tobacco growers, except for traditional growers working on a non-commercial basis, maintain complete and accurate records of all relevant transactions in which they engage	If feasible	<p>Should retail and growing activities be licensed?</p> <p>What does “traditional working on a non-commercial basis” mean?</p>	<p>Need to identify and analyze all relevant factors in addressing policy question.</p> <p>Need to understand traditional products industry and assess appropriate size production for exemption as non-commercial.</p>
5	<p>Adopt effective legislative, executive, administrative or other measures to require that all records are:</p> <ul style="list-style-type: none"> <li>• Maintained for a period of at least four years</li> <li>• Made available to Competent Authority on request</li> <li>• Maintained in a format, as required by Competent Authority</li> </ul>	Yes	<p>What format is to be adopted for record keeping?</p> <p>How to ensure consistency with existing customs and tax law record keeping requirements?</p>	Develop a ‘benchmark’ for record keeping and access the regime based on existing customs and tax laws to assist national implementation.

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
6	Subject to national law, establish a system for sharing details contained in all records kept in accordance with this article with other States parties.	Shall, as appropriate	What type of system should be utilized?	<p>Consider the level of commercial detail permissible to share with other jurisdictions.</p> <p>Depending on States parties' technical and economic capabilities the system envisaged for the sharing of track and trace information could also be extended for use to share recorded information between States parties to the Protocol.</p>
7	Cooperate with other jurisdictions and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.	Shall endeavour		<p>Consider the level of commercial detail permissible to share with other jurisdictions and other international organizations e.g. WCO, INTERPOL, UNODC.</p>



## Article 10 – Security and preventive measures

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
1	<p>Require licensees to take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including by:</p> <ul style="list-style-type: none"> <li>• Reporting to the Competent Authority the cross-border transfer of cash in amounts stipulated in national law or of cross-border payments in kind</li> <li>• All “suspicious transactions”</li> <li>• Supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.</li> </ul>	Shall where appropriate and consistent with national law	<p>What will the nature and form of reporting be if permitted under national laws</p> <p>What is a “suspicious transaction”?</p> <p>How will States parties establish or confirm market sizes and appropriateness of purchase volumes/capacities for reporting variances?</p> <p>How will the supply commensurate to demand requirement be determined for manufacturing equipment?</p>	<p>Need to understand what national laws permit in terms of reporting such information.</p> <p>Develop, define and set guidelines on what the criteria will be for “suspicious transactions”, and how these should be reported, keeping in mind accompanying issues such as protection of those providing such information.</p> <p>Consider scenarios where manufacturing equipment will be acquired, such as opening a facility, updating a facility, and consider how this will impact on the determination of supply commensurate to demand with manufacturing equipment, and what will be done with old manufacturing equipment in the event of an upgrade.</p>
2	Require that payments for transactions carried out by licensees be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.	Shall where appropriate and consistent with national law	<p>Are there are other areas where this occurs?</p> <p>What are current methods of payment transnationally?</p>	<p>Need to understand what national laws currently permit in terms of requirements.</p> <p>Need to understand current trading practices that currently exist and methods for payments transnationally.</p>
3	Payments carried out by licensees for materials used for the manufacture of tobacco products in its jurisdiction be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on	May	<p>Who requires a licence? Only manufacturers or others in the supply chain?</p> <p>What is a financial institution?</p>	<p>Consider this provision in light of article 6, and extend obligations to others in the supply chain. This will further assist in strengthening supply chain control mechanisms.</p> <p>States parties can look to FATF recommendations regarding <i>International</i></p>

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
3	the territory of the intended market and shall not be operated through any other alternative remittance system.			<i>Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation</i> , February 2012.
4	Breaches of the requirements of this article are subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, suspension or cancelation of a licence.	Shall	Will breaches be dealt with civilly, administratively or criminally? What penalties will apply?	As per 3b above.

## Article 12 – Free zones and international transit

Paragraph	Scope	Mandatory	Policy questions	Checklist and Considerations
1	Within three years of the entry into force of this Protocol for the Party, implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.	Yes	<p>Will relevant supply chain control provisions be extended to include Free Zones for tobacco products?</p> <p>What are the powers of zone operators and Customs within the Free Zone?</p> <p>Is there interoperability between the two systems and their requirements?</p>	<p>Need to understand current Customs powers and practices relating to Free Zones.</p> <p>What are existing obligations under international conventions in the area:</p> <ul style="list-style-type: none"> <li>• Revised Kyoto Convention</li> <li>• WCO SAFE Framework</li> <li>• TRIPS</li> <li>• ACTA</li> </ul> <p>Consider controls applying to various economic operations conducted within the Free Zone.</p>
2	Intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from free zones shall be prohibited.	Yes	<p>What is the extent of this practice currently?</p> <p>What is the feasibility of implementing this provision?</p>	As per 1 above.
3	Adopt and apply control and verification measures to the international transit or transshipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol	Shall in accordance with national law	<p>What are the current customs' and zone operators' powers to verify and control zone operations?</p> <p>What practices will need to change to widen the scope?</p>	<p>As per 1 above.</p> <p>Need to assess current powers to control of customs and zone operators.</p>

## 4.4. Offences (Part IV of the Protocol)

Part IV of the Protocol provides for the legislative and enforcement aspects of dealing with the illicit trade problem and its **suppression**. Specifically, Part IV provides a list of **unlawful conduct**, including criminal offences, and elaborates on the definition of the ITTP provided for by article 1 of the WHO FCTC and the Protocol. It outlines guidance for Governments in terms of measures to deal with unlawful conduct including prosecutions and sanctions for criminal activity as well as liability. It also covers seizure payments, destruction of seized products and investigative techniques.

Part IV is *fundamental* in the framework of the Protocol as it provides a practical/operational definition of the ITTP, and lays down a number of measures of substantive and procedural criminal law.

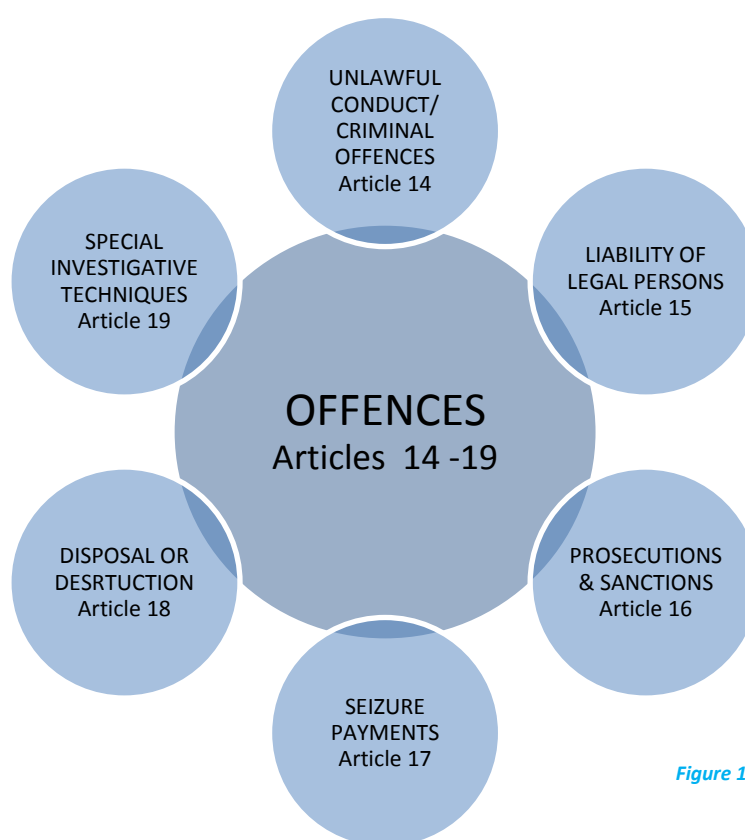


Figure 14: Overview of Protocol Part IV: Offences

Article 14 is the most controversial provision in this part as States had such difficulty in agreeing on its final form. This article also poses one of the most serious problems for the implementation of the Protocol in that **article 14 provides a list of unlawful conduct but not does provide a list of core conduct that all States parties shall criminalize.**

#### 4.4.1. Unlawful Conduct including Criminal Offences (art. 14)

##### a. Overview

The list of unlawful conduct provided under article 14 is the outcome of the inability of the INB to come to an agreement on which conducts shall be criminalized and which ones shall be classified as administrative offences. Hence, the Protocol leaves this decision entirely to the discretion of States parties. However, **all contraventions** of the positive substantive obligations imposed by the Protocol must be considered unlawful and subject to administrative or criminal penalties according to the classified seriousness of the offence.

Unlawful conduct is not defined in the Protocol but refers to conduct infringing a law, an administrative regulation or a decision taken by a competent authority.

Through the implementation of the Protocol into domestic law, States have an opportunity to harmonize law relating to illicit trade of tobacco products by identifying core unlawful conduct that is already criminalized in some States and could be in others. Harmonization of existing laws and the creation of new laws will need to be accompanied by appropriate sanctions that are commensurate with the seriousness of identified unlawful criminal conducts to ensure penalties are sufficiently deterrent.

Whether an offence will be criminalized or dealt with administratively will depend on the level of seriousness attributed to the unlawful conduct within the domestic legal framework. More serious offences may be classed as criminal and less serious offences as administrative, as a starting point. Of course, one must account for the escalation of the severity of offences within each category which can be dealt with through escalating measures. There will be criminal offences considered as ranging in seriousness, and appropriate penalties attached. The same will apply for administrative offences and appropriate sanctions will be attached to the range of offences and whether they are considered more or less serious within the same category.

Where provisions in the Protocol are already part of domestic law, States parties can maintain their legislation and are not required to amend it.

The table below outlines the provisions contained in article 14(1), and provides some preliminary commentary. This table is then followed by a more thorough analysis with policy considerations.

*Table 16: List of unlawful conduct provided by art. 14(1)*

Paragraph	Commentary
<p><b>(a) Manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment contrary to the provisions of this protocol</b></p>	<p>That is, engaging in the listed activities without the requisite licence/authorization under article 6. This includes smuggling/ attempted smuggling offences (importing/exporting without the required authorization), and offences of manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, and shipping without the required authorization.</p> <p>States parties are likely to consider the smuggling offences as the most serious ones amongst the offences listed, thus requiring tougher treatment than the other unlawful conduct listed, in terms of the categorization of the offence as either criminal or administrative, and in terms of determined penalties.</p> <p>The smuggling offence, where criminalized, will also be a predicate offence for other related criminality. As a result, it will have to be added to a State party's list of predicate offences for money laundering.</p>
<p><b>(b) (i) Manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels</b></p>	<p>Contrary to requirements under article 8.</p> <p>This will particularly cover illicit manufacturing offences where national track and trace requirements are not met, and will also encompass smuggling and attempted smuggling offences, where duties and taxes are not paid.</p> <p>Predicate smuggling offence (where criminalized will also have to be added to list of predicate offences for money laundering).</p> <p>Tax evasion.</p> <p>(NB: Smuggling and tax evasion are expected to already be offences under national laws).</p>
<p><b>(b) (ii) Any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment not covered by paragraph (b)(i);</b></p>	<p>Predicate smuggling offence (where criminalized shall be added to list of predicate offences for money laundering).</p> <p>This provision envisages other acts such as crossing of a border that is not a customs border, e.g. travelling between EU borders.</p>
<p><b>(c) (i) 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;</b></p>	<p>This provision foresees counterfeiting activity, being <i>any other form of illicit manufacture</i>, as well as the counterfeiting of fiscal stamps.</p>

<p><b>(c) (ii) 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;</b></p>	<p>Counterfeiting activity would also fall within the scope of this provision where reference is made to illicitly manufactured tobacco, etc. and products bearing counterfeit fiscal stamps (false fiscal stamps).</p>
<p><b>(d) Mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products;</b></p>	<p>Addresses methodology of engagement in illicit trade.</p>
<p><b>(e) Intermingling of tobacco products with non-tobacco products in contravention of article 12.2 of this protocol;</b></p>	<p>See article 12 – Free zones and international transit and the prohibition on intermingling.</p>
<p><b>(f) Using internet, telecommunication, or any other evolving technology-based modes of sale of tobacco products in contravention of this protocol;</b></p>	<p>See article 11 – Sales by Internet.</p>
<p><b>(g) Obtaining, by a person licensed in accordance with article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with article 6;</b></p>	<p>States will have to compare the inclusion of this offence against the list of activities requiring licences in their jurisdictions. If distribution, wholesaling, brokering, transporting, growing, retailing etc. does not require a licence, this unlawful conduct will have no effect.</p> <p>Licensed persons will also be under due diligence obligations so it will need to be decided whether this will be an administrative or criminal offence. If it is made a criminal offence, the intent of the person obtaining the products will be relevant unless the offence is made a strict/absolute liability offence.</p>
<p><b>(h) Obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;</b></p>	<p>UNTOC and UNCAC require that States parties establish offences relating to the obstruction of justice, including interfering with witnesses and with judicial, law enforcement and other public officials. States parties should reference their obligations under these treaties and criminal offences already established and applicable to ITTP under these treaties.</p>

<p><b>(i) (i) Making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;</b></p>	<p>Consider such offences as being strict/absolute liability offences if criminalizing this offence.</p>
<p><b>(i) (ii) Misdeclaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to:</b></p> <p><b>(a) Evade the payment of applicable duties, taxes and other levies, or</b></p> <p><b>(b) Prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;</b></p>	<p>Fits within broad category of Economic crimes such as fraud and tax evasion, where such unlawful conduct is criminalized. Such conduct normally points to the commission of a larger offence, usually a criminal offence, thus being part of criminal conduct.</p> <p>Here also, if the unlawful conduct is criminalized, the fault element (intention, knowledge, recklessness, negligence) is relevant, unless the offence is a strict/absolute liability offence.</p>
<p><b>(i) (iii) Failing to create or maintain records covered by this protocol or maintaining false records; and</b></p>	<p>Contrary to article 9 – Record Keeping of the Protocol.</p>
<p><b>(j) Laundering the proceeds of unlawful conduct established as a criminal offence under paragraph 2.</b></p>	<p>This is the only offence States parties agreed unequivocally shall be criminalized.</p> <p>UNTOC and UNCAC require that States parties establish money laundering as a criminal offence under domestic law. States parties should reference their obligations under these treaties and whether money laundering is a criminal offence already established and applicable to ITTP under these treaties.</p> <p>To the extent that States parties decide to criminalize unlawful conduct described in paragraph 1(a) and (b), such conduct shall be added to their list of predicate offences to money laundering.</p>



The list of unlawful conducts provided at **article 14(1)(a) and 14(1)(b)** provides for what States are likely to consider as the most serious offences contained in the list of unlawful conducts, aside from 14(1)(j) establishing the money laundering offence as criminal. Paragraphs (1)(a) and (1)(b) are broad and envisage a range of illicit activity. At paragraph (1)(a), States parties are to establish the following as unlawful:

- Manufacturing,
- Wholesaling,
- Brokering,
- Selling,
- Transporting (commercial quantities Art. 6(2)(c)),
- Distributing,
- Storing,
- Shipping,
- Importing or
- Exporting

tobacco, tobacco products or manufacturing equipment contrary to the provisions of the Protocol.

The substantive positive obligations imposed by the Protocol under article 6 are specifically in relation to the **manufacture, import and export of tobacco products and manufacturing equipment** which are **prohibited** activities except pursuant to a licence. Article 14 requires States to take *legislative and other measures* to establish this conduct as unlawful. However, article 14 is silent as to how States should do this and does not specifically require criminalization.

Under article 6(2) States parties are to *endeavour to licence* retailing, growing of tobacco (except for traditional, small scale growers, farmers and producers), transporting commercial quantities, wholesaling, brokering, warehousing, or distribution of tobacco products or manufacturing equipment. Countries that require licences for activities extending beyond manufacture, import and export, will need to consider whether they will criminalize the engagement in these activities without the necessary authorization.

When criminalizing such conduct, consideration will have to be given to the **physical elements** to be proved and the accompanying **fault element** (intention, knowledge, recklessness or negligence). This will be especially necessary for activities following manufacturing, such as distributing, transporting etc. For example whether the transporter knew the goods being transported were illicit will be relevant, and whether they should have known will be relevant. States will have recourse to defenses available under their domestic legal frameworks.

## - Illegal manufacturing (operating without the requisite authorization)

As already stated, operating without a licence to manufacture, import or export is a prohibited activity under article 6(1). As such, States should consider criminalizing this conduct to give effect to the weight of the obligation contained in article 6(1).

Many jurisdictions have criminalized illegal manufacturing in some form. As illegal manufacturers are an important source of illicit cigarettes for smugglers, they are themselves inextricably linked to the larger criminal networks they provide.

If illegal manufacturers were criminally liable it would assist in:

- Making clear that participation in illicit manufacturing is considered a serious offence as opposed to if the offence was purely treated administratively;
- The risk to profit ratio would be compounded ensuring that those engaging in illicit manufacturing are aware of the increased risk of their participation;
- Making available tougher penalty options, such as imprisonment;
- Disrupting the activities of organized crime groups by depriving them of their source of illicit goods; and
- Depriving organized crime groups of their profits in the long run.

Criminal prosecution of illegal manufacturers should not neglect to include the forfeiture of illegal product and the manufacturing equipment used and these aspects should be included in the legislation dealing with these offences.

In many jurisdictions, the illegal manufacture of tobacco products is criminalized primarily through anti-counterfeiting and fraud/tax legislation. This approach suffers from some weaknesses:

- The offence is generally deemed criminal only when a certain *damage threshold* amount is reached which depends on the quantity of illegal cigarettes produced. The disadvantage of such an approach is that there is no middle ground. If the threshold is not reached, criminal prosecution is not allowed;
- There is no specific offence of “illegal manufacturing”;
- Penalties against IP crime (trademark infringements) are usually lenient and IP offences are not normally considered serious offences; and

### Box 47: Illegal manufacturing: examples of legislation

#### Austria

The criminal offence of illegally manufacturing tobacco products is committed when someone intentionally and **without proper authorization** commercially manufactures tobacco products. The illegal manufacture of tobacco products is also considered to have occurred if facilities, sites, equipment, appliances, raw or auxiliary materials, intermediate products, or packaging are used to facilitate an offence.

#### Canada

Under sections 226-228 of the *Canadian Excise Act*, every person who manufactures tobacco products **without a license** commits an offence punishable by a minimum of CAN\$10,000. If the fine is not paid, a term of imprisonment up to 12 months can be imposed. Persons found to have violated sections 226 or 227 of the Act will be liable for penalties equal to triple the amount of excise duty and the original license fee that should have been paid.

- Prosecuting under tax laws does not assist in dismantling the organized crime groups involved.

Some countries have criminalized illegal manufacturing as a separate offence where offenders are generally prosecuted irrespective of the quantity of illegal cigarettes they produced.

### Examples

The data reported in the table below indicates the penalty range that can be applied to trademark infringements in various jurisdictions. As shown, the period of imprisonment ranges from 2 months (Egypt) to 12 years (Philippines). This lack of consistency between the legislation of different jurisdictions could hamper international cooperation.

*Table 17: Trademark infringements and penalty ranges in a selection of countries*

Country	Sanctions for trademark infringement (available)							
	Container seizure		Factory/Warehouse raids		Printing facilities		Retail	
	Fine/Others	Imprisonment	Fine/Others	Imprisonment	Fine/Others	Imprisonment	Fine/Others	Imprisonment
<b>Egypt</b>	Minimum fine of EGP 5,000 (approx. USD 830) up to EGP 20,000 (approx. USD 3320)	Imprisonment for not less than 2 months or both – fine and imprisonment	Minimum fine of EGP 5,000 (approx. USD 830) up to EGP 20,000 (approx. USD 3320)	Imprisonment for not less than 2 months or both – fine and imprisonment	Minimum fine of EGP 5,000 (approx. USD 830) up to EGP 20,000 (approx. USD 3320)	Imprisonment for not less than 2 months or both – fine and imprisonment	Minimum fine of EGP 5,000 (approx. USD 830) up to EGP 20,000 (approx. USD 3320)	Imprisonment for not less than 2 months or both – fine and imprisonment
<b>Germany</b>	- A monetary fine - Confiscation of illegally manufactured goods, materials and production equipment	Up to 5 years of imprisonment	- A monetary fine - Confiscation of illegally manufactured goods, materials and production equipment	Up to 5 years of imprisonment	- A monetary fine - Confiscation of illegally manufactured goods, materials and production equipment	Up to 5 years of imprisonment	- A monetary fine - Confiscation of illegally manufactured goods, materials and production equipment	Up to 5 years of imprisonment
<b>Philippines</b>	Fine of PHP 50-10,000 (approx. USD 1.25-250)	Imprisonment of 5 days up to 12 years	Fine of PHP 50-10,000 (approx. USD 1.25-250)	Imprisonment of 5 days up to 12 years	Fine of PHP 50-10,000 (approx. USD 1.25-250)	Imprisonment of 5 days up to 12 years	Fine of PHP 50-10,000 (approx. USD 1.25-250)	Imprisonment of 5 days up to 12 years
<b>UAE</b>	Minimum fine of AED 5000 (approx. USD 1362); and/or Closure of the commercial establishment	Imprisonment – the law does not provide for a range of imprisonment term; not applied in practices	Minimum fine of AED 5000 (approx. USD 1362); and/or Closure of the commercial establishment	Imprisonment – the law does not provide for a range of imprisonment term; not applied in practices	Minimum fine of AED 5000 (approx. USD 1362); and/or Closure of the commercial establishment	Imprisonment – the law does not provide for a range of imprisonment term; not applied in practices	Minimum fine of AED 5000 (approx. USD 1362); and/or Closure of the commercial establishment	Imprisonment – the law does not provide for a range of imprisonment term; not applied in practices
<b>France</b>	-Fine of EUR 400,000; -Fine of EUR 500,000, if committed by an organized crime group	Up to 4 years of imprisonment; Up to 5 years of imprisonment, if committed by an organized crime group	-Fine of EUR 400,000; -Fine of EUR 500,000, if committed by an organized crime group	Up to 4 years of imprisonment; Up to 5 years of imprisonment, if committed by an organized crime group	-Fine of EUR 400,000; -Fine of EUR 500,000, if committed by an organized crime group	Up to 4 years of imprisonment; Up to 5 years of imprisonment, if committed by an organized crime group	-Fine of EUR 400,000; -Fine of EUR 500,000, if committed by an organized crime group	Up to 4 years of imprisonment; Up to 5 years of imprisonment, if committed by an organized crime group

### - Illicit importation (smuggling)

The illicit importation of tobacco products is a highly organized criminal activity in many jurisdictions.

States have a number of different ways of dealing with the smuggling offence. Some treat it administratively and accord it administrative penalties, some criminalize the conduct and institute criminal penalties, and others adopt quasi-criminal frameworks. Sometimes penalties are purely administrative fines and other times the criminal sanction of imprisonment is imposed. Sometimes the matter is brought before a criminal court, or customs authorities are charged with prosecutions with the right to refer the matter to the police.

Essentially, this shows the lack of consistency applied to ITTP and the lack of agreement between States as to the level of seriousness of the illicit conduct. Another effect is that the transnational nature of the offence is not highlighted making international cooperation efforts more difficult, particularly where one country treats smuggling as a criminal offence and another does not. States parties to the Protocol should aim at implementing and enforcing legislation that will assist in disrupting the criminal networks involved from suppliers to end customers, transnationally.

This is one area that could be considered regionally and countries decide together whether certain offences should be criminalized or not.

### - Distribution, purchase and possession

The Protocol does not provide guidelines as to how to deal with those in possession of illicit goods. In this regard, States parties could consider the distribution, purchase and possession of commercial quantities of illicit cigarettes as offences, whether administrative or criminal, and attach appropriate penalties to the unlawful conduct. This would not include the end consumer of the product but would rather target the middle men responsible for the distribution of the product. It may be an effective measure in deterring distributors, sellers and buyers from engaging in the illicit trade in tobacco products. France, for example, in article 1810, 10° of the *General Tax Code* punishes manufacturing, *possessing for the purpose of sale*, and transporting non-duty-paid tobacco with up to one year in prison and/or confiscation of vehicles and other machinery used in the trade of the tobacco products.

### b. Failure to identify core list of conduct to be criminalized: effects on international cooperation

The provisions of article 14 operate to accommodate the variability of the treatment of unlawful conduct in different jurisdictions. Keep in mind the phrases “*subject to the basic principles of its domestic law*” and “*legislative and other measures as may be necessary*”, allowing States to apply their discretion.

Certainly there will be legal consequences for failing to identify a list of core conduct that all States parties should criminalize. For example, if a majority of States have a number of the same offences in place, then a State that decided not to criminalize those same offences would not be able to effectively cooperate with the others in criminal matters. This means that mechanisms provided for

under Part V of the Protocol regarding mutual legal assistance and extradition will not be available for that State party. Also, for extradition purposes the offence needs to be a criminal offence in the requesting and requested country for extradition to occur. Under UNTOC, for extradition to occur the crime needs to be a serious offence with a maximum penalty of at least four years imprisonment.

As a result, international cooperation between law enforcement agencies and judicial authorities could be adversely affected.

Further, investigations and other measures referred to in subsequent articles of the Protocol would be very difficult to implement except under criminal law.

### **c. Guidance from international obligations under UNTOC and UNCAC**

Guidance can be garnered from examining the criminal offences listed under UNTOC and UNCAC.

Those States, party to UNTOC and UNCAC, in compliance with their obligations under these Treaties would already have criminalized the following and have in place the requisite mechanisms to deal with these crimes.

As mentioned in section 2.2 (*“Cross-sectoral criminal justice treaties”*), the criminal conducts in UNTOC are:

- Criminalization of participation in an organized criminal group (art. 5)
- Criminalization of the laundering of the proceeds of crime (art. 6)
- Criminalization of corruption (art. 8)
- Criminalization of the obstruction of justice (art. 23)

and the criminal conducts in UNCAC are:

- Bribery of national public officials (art. 15)
- Bribery of foreign public officials, officials of public international organizations (art. 16)
- Embezzlement, misappropriation or other diversion of property by a public official (art. 17)
- Abuse of functions, purpose of obtaining undue advantage (art. 19)
- Bribery and embezzlement in private sector (arts. 21, 22)
- Laundering of proceeds of crime (art. 23)
- Concealment of property (art. 24)
- Obstruction of justice (art. 25)

Where States have criminalized or will criminalize smuggling of tobacco, tobacco products or manufacturing equipment, this could be a predicate offence for money laundering and transnational organized crime offences. Thus there will always be an interaction between the Protocol and UNTOC and UNCAC, even where some States do not choose to criminalize certain unlawful conduct.

#### d. Prerequisites for the implementation of the Protocol and article 14

There are a number of measures that the Protocol simply “assumes” that States have or will have in place, short of explicitly recommending them to adopt such measures. These measures, however, are “prerequisites” for the effective implementation of the Protocol.

Framework for money laundering (art. 14(1)(j) & 14(4))

Confiscation regime (art. 18)

IP crime regime (art. 14(1)(c)(i) & 14(1)(c)(ii))

Tax regime (art. 14(1)(b)(i) & 14(1)(b)(ii))

##### - Framework for money laundering

The Protocol, at article 14(1)(j) and article 14(4), requires the establishment of a “laundering offence” in relation to proceeds derived from engagement in unlawful conducts which States parties have specifically decided to criminalize.

The Protocol, however, does not identify the constituent elements of this offence which is crucial for the ability of criminals to engage in illicit trade activity. States’ competent authorities may nevertheless refer to several international conventions, including regional ones, for guidance. In light of the Protocol’s heavy reliance on UNTOC, it is advised to refer to article 6 of this latter instrument (*criminalization of the laundering of proceeds of crime*) which specifies the elements of the laundering offence, and adapt it to suit Protocol requirements.

##### - Confiscation regime

Another key prerequisite for countries wishing to effectively implement the Protocol is the need to have an effective regime in place for the confiscation of proceeds of crime (supported by freezing/seizure measures as provisional measures). While the WHO FCTC mentions the obligation for States parties to “adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products” (article 15(4)(e)), the Protocol only refers to the need to dispose of confiscated tobacco, tobacco products and manufacturing equipment at article 18.

The **confiscation of proceeds of crime** therefore is an area about which the Protocol remains silent. In terms of prosecutions, confiscation of proceeds is an issue that should be considered from the outset in all cases where such a regime exists and extends to tobacco-related offences - it should not be treated as a mere “optional add-on” to sentence proceedings or to the conduct of a prosecution, where the applicable domestic legal framework allows it. In most jurisdictions with confiscation regimes, confiscation may be available in many differing types of cases, including, for example, some drug offences, bribery and “contract” bashings, “contract” killings, and ITTP and smuggling offences.

States parties will need to consider what regime they have implemented, if there is a regime at all, whether it is conviction or non-conviction based, what types of orders are available and when. For example, restraining and ancillary orders (which preserve property for possible future confiscation) are normally sought before charges are laid or pecuniary penalty orders (for non-drug offences) and forfeiture orders which are normally only available after conviction. States parties should also consider whether they need to implement a regime for the confiscation of proceeds of crime.

States parties will have to have recourse to international legal texts other than the Protocol (such as UNTOC and UNCAC) where policy-makers/legislators could find guidance (*see INTERPOL's Countering Illicit Trade in Goods: A Guide for Policy-makers*).

### - Intellectual property crime regime

A regime dealing with IP crime which talks of:

- “Any other form of illicit manufacture of tobacco etc. bearing false fiscal stamps etc.”; and
- “Wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting of illicitly manufactured products bearing false fiscal stamps” (art. 14(1)(c)(i) – 14(1)(c)(ii)).

is another prerequisite for the implementation of the Protocol.

Article 14(1)(c)(i) and 14(1)(c)(ii) are broad but envisage conduct involving the counterfeiting of fiscal stamps and their use on counterfeit tobacco products, illicit tobacco products that may be genuine and on illicit whites. The question is the strength of the framework a country has in place in relation to IP Crime. Some countries may have laws established for IP infringements, and some countries may not. At any rate, an assessment of the relevant laws will need to take place to ensure they meet the requirements of the Protocol. Note also, that usually offences concerning the falsification of tax stamps and currency is found in the Criminal Codes of most countries.

### - Tax regime

Another assumed prerequisite for States is the tax regime referred to at art. 14(1)(b):

- Engaging in trading of tobacco products without payment of applicable duties; and
- Smuggling and attempted smuggling.

These provisions seek to enforce the tax laws of States but the Protocol is silent on instituting tax laws or standards (art. 14(1)(b)(i) - 14(1)(b)(ii)).

### - Conclusions

- Countries with these regimes already in place will be in a better position to:
  - Meet their obligations under the Protocol; and
  - Decide which unlawful conducts to criminalize and which to treat as administrative offences based on what already exists in their relevant jurisdictions.

- Countries with some or none of these regimes in place (though it is assumed that all countries have at least a tax regime) will have to create the relevant mechanisms to treat the unlawful conducts outlined so that they meet their obligations under the Protocol, or they will risk not being able to meet their obligations. If Protocol obligations are only half met this will undermine the instrument and its force and will create difficulties in international cooperation.
- Given that certain frameworks are already assumed by the Protocol, this removes the need for countries to implement the Protocol by merely incorporating its text in its entirety into a piece of legislation. The exercise will be more complex and will necessarily involve countries assessing which legislation already covers certain aspects of the Protocol and for which provisions of the Protocol legislation needs to be adopted and/or amended.

#### e. Policy considerations

- Some of the conducts set forth in art. 14 are presented as broad and rather general provisions. In order to incorporate these conducts into their domestic legal systems, especially if States parties will establish certain conducts as criminal offences, legislators will have to pay particular attention to applicable national and international requirements on **criminal law drafting** (see *INTERPOL's Countering Illicit Trade in Goods: A Guide for Policy-makers*). For example, the elements of the offences should be sufficiently precise, etc. Art. 14(1)(h) talks about “obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco”. The provision is so broad that it might lend itself to abuses unless its scope is better defined. The same applies to the provision at art. 14(1)(f) which generically refers to Protocol offences being committed “using Internet-, telecommunication- or any other evolving technology-based modes of sale [...]”; and at art. 14(1)(i) “failing to provide any required information to any public officer [...] in the performance of duties relating to the prevention [...] of illicit trade in tobacco [...]”. The type of conduct envisaged by these provisions and other such provisions should be enumerated and detailed in the relevant national legislation/regulation.
- To be able to better define the scope of unlawful conduct that may fall within the ambit of the broad provisions in art. 14(1), the role of those involved in each aspect of the supply chain may be considered when drafting legislation relating to specific conduct and appropriate penalties mandated according to their place in the supply chain. To successfully complete such an assessment all participants in the supply chain, from manufacturers to distributors to consumers, should be evaluated and each step along the legitimate supply chain and the illicit supply chain should be considered. Incentives, risks and vulnerabilities unique to each participant should be considered carefully.
- Art. 14 of the Protocol sets forth a wide range of conducts involving tobacco products and manufacturing equipment, to be established as unlawful conducts (it covers the areas of smuggling, counterfeiting, laundering, obstruction of public officers, corruption etc., modes of concealment such as intermingling and means of distribution, such as when violations of the Protocol are committed through the Internet). Such conduct dealing with behavior that facilitates (such as obstruction of justice, money laundering etc.) the commission of the primary unlawful conduct, for example the illicit manufacturing of cigarettes, has been included in the



lists of unlawful or criminal conduct of other international conventions under which States parties to these conventions have certain obligations. From the list of unlawful conduct provided in the Protocol, States parties will need to conduct an assessment of:

- Their obligations under relevant international treaties, such as UNTOC and UNCAC; and
  - Other obligations that need to be fulfilled under the Protocol: e.g. by establishing a criminal offence of smuggling of tobacco, tobacco products, or manufacturing equipment, will this criminal offence need to be included under a State party's obligations under UNTOC, particularly where mutual legal assistance, mutual administrative assistance or extradition provisions come into play.
- In deciding whether or not to criminalize Protocol-based conducts relating to the counterfeiting of tobacco products, States parties to the Protocol who are also parties to the TRIPS agreement should bear in mind that under TRIPS any **“wilful trademark counterfeiting” committed on a “commercial scale”** will have to be criminalized with “imprisonment and/or monetary fines sufficient to provide a deterrent”. Although the notion of what constitutes an offence committed on a “commercial scale”, as decreed by the Protocol, is subject to interpretation, TRIPS appears to “limit” to some extent the discretion that States parties to the Protocol have to exclude certain Protocol conducts from the criminal domain.
  - According to art. 2(1)(d) of the 1969 Vienna Convention on the Law of Treaties, a reservation is a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Under the Vienna Convention, States are allowed to formulate reservations unless reservations are prohibited by the treaty in question. In the case of the Tobacco Protocol, article 40 provides that no reservations may be made to the Protocol. This has a direct and practical consequence on the implementation of article 14. The fact that no reservation is possible under the Protocol means that States parties to it will have no possibility to declare (through a reservation) that they will not establish one or more conducts listed in article 14 as unlawful. All such conducts will have to at least be established as unlawful under their legal systems.
  - For those States parties with obligations under various other international conventions, it is likely that most conducts facilitating the primary offence, whether it be smuggling, illicit manufacture, etc. will already be incorporated in several different pieces of domestic legislation (criminal or not, special IP laws, etc.). A thorough analysis of domestic legislation will therefore be necessary to determine:
    - Which unlawful conducts from the list are already criminal offences under their domestic law;
    - Which unlawful conducts are already administrative offences under their domestic law;
    - Where in their domestic legislation would be the best place to incorporate those offences that do not yet exist; and
    - Whether there is any legislation targeting consumers for purchasing illicit tobacco products. This possibility could be considered by States depending on the particular

jurisdiction. This assessment should be made in light of any legislation or intention to adopt legislation on distribution, purchase and possession.

States parties should also consider what countries in the region have adopted as criminal offences and administrative offences, as this will impact upon international cooperation arising with the Protocol as the legal basis. States parties should seek to achieve harmonization in this regard.

- States will have to determine whether the Protocol offences should be established as stand-alone offences or be grouped with others. For example, States could create a specific article/section of their criminal legislation on counterfeiting of tobacco products, or they could introduce/amend a general provision on counterfeiting of various goods and ensure that the counterfeiting of tobacco products is implicitly included within its general scope of application.
- Certainly, the gravity of offences will need to be determined, and this is likely to differ across jurisdictions, whereby administrative penalties are expected to be imposed for less serious offences, reserving criminalization for those offences considered more serious. As a further consideration, the **penalties** attributed to criminal conduct should be commensurate with the determined seriousness of the offence and create the necessary deterrent effect when applied and enforced.

The gravity of the offence is especially important in relation to Part V, article 30 Extradition, of the Protocol. At art. 30(1)(c) the Protocol establishes that the offence must be *punishable by a maximum period of imprisonment or other forms of 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 or multilateral treaties or other international agreements.*

- It is worth noting that the offence must be a criminal offence for **international cooperation purposes** where extradition is concerned. Also, where States parties meet the requirement of an offence punishable by a maximum penalty of at least four years imprisonment, they will be able to use the Protocol as the legal basis for international cooperation, specifically extradition requests (*see section 4.5.8, "Extradition and measures to ensure extradition"*). To achieve this, States parties will have to go through a process of identifying the relevant unlawful conduct that will be criminalized, outline the range of criminal offences and their seriousness, and attribute appropriate penalties keeping mind the consequences for international cooperation if penalties are too low, or where some unlawful conduct is not criminalized.
- In determining applicable penalties when new offences are introduced, States should be aware that if offences are punishable with a maximum penalty of less than two years imprisonment, international cooperation in relation to mutual legal assistance (MLA) will be affected. This could occur when a request for MLA is made from another State party, the requested State may refuse to execute the request according to art. 29(14)(d) which provides that *where the request involves a crime where the maximum penalty in the requested party is less than two years of imprisonment or other forms of deprivation of liberty or, 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.*

International cooperation is a key factor to keep in mind when deciding on the seriousness of the unlawful conduct, whether it should be criminalized and what penalties should be adopted. As ITTP is transnational in nature, the objectives of the Protocol to eliminate ITTP will not be met unless States cooperate effectively to dismantle the organized networks involved in illicit trade. International cooperation plays a major role in States abilities to identify individuals involved in these networks, to gather the relevant evidence, and to effectively prosecute.

- On the **fault (*mens rea*) elements** of the offences set forth in article 14, the Protocol is not explicit as to whether or not those conducts have to be committed willingly/intentionally. The Protocol limits itself to saying at art. 16(3) that the “legal principles controlling the lawfulness of conduct” are left to each State party. Again, this is an additional issue for States to determine. The definition of the type and degree of “intention” would have to be addressed depending on whether or not the relevant conducts are incorporated as administrative or criminal offences.

If the criminalization option is chosen, States parties will need to consider the fault elements of intention, knowledge, recklessness and negligence. Particular problems in terms of defining the required *mens rea* will concern such conducts as transporting/shipping illicitly manufactured products. What will be the required level of knowledge of couriers? Will they have to know that they are transporting illicit goods? Would it be enough if they had reasonable doubts to suspect that this is the case but they decided to proceed without checking? What obligations are imposed on them to ensure any necessary checks are made? Etc. States will have to be very careful when decision-making in this area, striking a delicate balance between the need to fight smuggling/counterfeiting operations and the need to protect innocent/unaware transporters from being held criminally responsible. States will also have to consider the obligations they impose regarding licensing and due diligence for those involved further in the supply chain, such as transporters, and what this would mean for the fault element of the offence. Where a transporter is always required by a State to conduct due diligence checks (depending on what these checks are<sup>44</sup>) and does not and ends up transporting illicit tobacco products, what will this mean?

- States should also consider whether some offences in art. 14 will be **strict liability or absolute liability offences**. These types of offences have no *mens rea* requirement and the prosecution does not have to prove the *mens rea* of the offence. Keep in mind that strict liability offences are usually minor in nature, and due to their severity, absolute liability offences are not that common.

Finally, States parties should turn their mind to what **defenses** are available and applicable and in what circumstances. There are no allowable defenses for absolute liability offences. Honest and reasonable mistake of fact is only an available defense for a strict liability offence.

- When legislating, and taking into account deterrent penalties, States parties to the Protocol should also consider **enforcement requirements**. Consistent enforcement is central to reducing illicit trade. States parties will need to consider the enforcement requirements that may be necessary and should adopt new powers and responsibilities in dealing with tobacco related crime accordingly. They will need to understand what enforcement requirements are necessary to enforce offences within criminal codes targeting such criminal activity. To ensure efficiency

and effectiveness, judges and prosecutors could be trained on the new or relevant provisions, and how they operate in relation to ITTP offences. This will ensure that relevant actors charged with implementation, and in whose hands outcomes lie, feel confident operating under such provisions.

- Article 14 of the Protocol is silent on the issue of **the involvement of organized criminal groups** in the commission of the relevant offences. States parties might, for example, decide to increase the penalties in the event an organized crime group is involved in the commission of the offence, including through the inclusion of this as an aggravating factor for sentencing purposes. States may also consider, where they have decided to sanction certain conducts only with administrative penalties, to apply criminal sanctions if the same conduct is committed within the framework of an organized crime group.
- The Protocol requires that States establish as unlawful such conducts as the manufacturing, selling, distributing, etc. of 1) tobacco products and 2) manufacturing equipment, contrary to the provisions of the Protocol. The Protocol does not technically require the inclusion of so called **“key inputs”** (i.e. products that are essential to the manufacture of tobacco products, notably acetate tow and cigarette paper) within the scope of application of the illicit conduct. Nevertheless, States can certainly decide to go beyond Protocol requirements and include them. On the other hand, States cannot establish offences with a narrower scope of application than the minimum required by the Protocol.
- Likewise, the Protocol does not require that States parties criminalize conduct relating to **“attempts”** (except for para (1)(b)(i)) or **“preparations”** to commit the relevant offences. Each State will have to decide the extent to which they wish to link art. 14 conducts to those of “attempt” and “preparation”, and, more broadly, to those parts of criminal law statutes/ criminal codes outlining generally applicable provisions on the perpetration of offences, the role of accomplices, instigators, the exclusion of criminal responsibility, etc.

Acts of “aiding and abetting” the commission of offences and other forms of involvement in facilitating them should also be considered. For example, someone who promotes the sale of counterfeit tobacco products (including through advertising, or by donating them/giving them for free) without actually being the one who sells them or even possesses them.

- States may decide not to criminalize certain, less serious conducts listed in article 14. Nevertheless, they may consider it appropriate to qualify them as criminal whenever a number of **aggravating circumstances** are present. Such aggravating factors could be:
  - Results in death or serious injury;
  - Affects or is likely to affect the health of a large number of people;
  - The operation has resulted in significant monetary gain;
  - The perpetrator is an authorized operator (manufacturer, retailer, other);
  - The offence has been committed by an organized criminal group and defined in national legislation.

## 4.4.2. Liability of legal persons (art. 15)

### Box 48: Liability of legal persons (art. 15)

1. Parties **shall** adopt measures to establish liability of legal persons for the unlawful conduct including criminal offences established under article 14.
2. The liability of legal persons may be criminal, civil or administrative.
3. Such liability **shall** be without prejudice to the liability of natural persons who have engaged in unlawful conduct including criminal offences.

### a. Overview

Provisions regarding the liability of legal persons were introduced in domestic legislation to account for the difficulty in identifying those natural persons responsible for certain unlawful conduct, and to target perpetrators of serious criminal offences who engaged in criminal activity through using corporations as fronts. In this way, also, assets of the corporation could be pursued and confiscated (*see INTERPOL's Countering Illicit Trade in Goods: A Guide for Policy-makers*”).

The term *legal person* is not, however, defined in the Protocol. The definition will be a matter left to the legislature of each State party to the Protocol and will depend on the corporations law regime in the State. Not all jurisdictions ascribe the liability of legal persons through criminal law, and some only do so through the civil or administrative laws of the country. For this reason, the Protocol requires that liability over legal persons be asserted by States parties to the Protocol criminally, civilly or administratively.

Ensuring the liability of legal persons is especially important for combatting the ITTP since many criminal organizations operate through legal persons, whether they be legitimate corporations engaging in illicit over-production and supply of tobacco products, or corporations created to hide illicit activity, such as illicit manufacture of counterfeit tobacco products.

### b. Policy considerations

- It is worth noting that this article applies to all unlawful conduct including criminal offences established in accordance with article 14 of the Protocol.
- Reference should be made to article 16 which deals with prosecutions and sanctions for natural **and** legal persons. Procedural issues relating to the prosecution of legal persons will need to be accounted for.
- States should keep in mind the issue of **negligence** when legislating for the corporate criminal responsibility, whereby a legal person may be held liable on account of negligence only, i.e. the negligent commission of any criminal offence when one of the actors is negligent with regard to his/her supervision or control.

- States should also be mindful of whether prosecuting a natural person for their participation in/commission of a criminal offence precludes the prosecution of the legal person for the same offence and vice versa. A natural person may be subsequently prosecuted even where a legal person has been held criminally responsible for the same offence or has even been acquitted. Note that no issues of *ne bis in idem* (double jeopardy) arise as the legal person and natural person are different and double jeopardy applies only to one particular person being prosecuted twice for the same offence.
- States will also need to have recourse to obligations arising under Part 3 of the Protocol for legal persons, for example operating under a licence, conducting due diligence before or during business relationships etc., and create the requisite liability for legal persons so that they can be held responsible.
- As criminal liability of legal persons is not a globally accepted concept, States parties to the Protocol will have to create legal liability administratively, civilly and/or criminally. States parties will need to understand their domestic laws by way of corporate responsibility.



**Box 49: Further reading on liability of legal persons**

For general information about **liability of legal persons**, refer to section 5.2, “Are illicit trade related offences in place? Are they subject to the appropriate sanctions?” of INTERPOL’s “Countering Illicit Trade in Goods: A Guide for Policy-makers”.

*Link:* <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance>

### 4.4.3. Prosecutions and sanctions (art. 16)

#### Box 50: Prosecutions and Sanctions (art. 16)

1. Parties **shall** adopt measures as may be necessary to ensure natural and legal persons held liable for the unlawful conduct including criminal offences established under Article 14 are subjected to:
  - Effective
  - Proportionate
  - Dissuasivecriminal sanctions, including monetary sanctions.
2. Parties to ensure discretionary legal powers under domestic law are exercised to maximise the effectiveness of law enforcement measures in respect of unlawful conduct including criminal offences, and with regard to deterrence.
3. Legal defences and other legal principles controlling the lawfulness of conduct shall be prosecuted and sanctioned under domestic laws of States Parties.

#### a. Overview

The main basis for prosecution is the domestic law of the States parties and not the Protocol itself.

**Article 16(3)** refers to the general criminal law of the State party, under which various legal defenses would remain applicable even if the State party had implemented the Protocol by establishing certain offences under a special part of its criminal law. Thus States parties will not lose any power.

#### b. Policy considerations

##### - Criminal offences covering illicit trade

There are already a number of different ways jurisdictionally an offence with the same facts can be treated, with many possibilities and interacting relationships. Regarding illicit trade activity countries will often have an interplay between the arena in which a particular offence can be dealt with:

- **Customs**
- **Intellectual Property**
- **Criminal**

Essentially, within a country there are different ways of dealing with the same unlawful conduct, where it amounts to criminal behavior. Countries will need to look broadly across their various frameworks when beginning to implement Part IV and particularly article 14, to ascertain which unlawful conducts they have already dealt with and under which framework and whether this treatment meets the requirements and obligations imposed by the Protocol.

##### - Types of charges that can be laid

- **Fraud:**
  - Obtaining property or a financial advantage by deception
  - Conspiracy to defraud
  - General dishonesty – obtaining a gain/causing a loss

- Obtaining financial advantage
- Tax evasion
- Making false/misleading statements: in applications and in documents
- Unwarranted demands: with menaces, of public officials or made by the public officials
- Bribery and related offences:
  - Bribery of national public official
  - Corrupting benefits given to, or received by public official
  - Abuse of public office
- Forgery and related offences:
  - Using forged document
  - Possessing forged document
  - Possession, making or adaptation of devices etc. for making forgeries
  - Falsification of documents
  - Giving information derived from false or misleading documents
- Criminal associations and organizations: associate in support of serious organized crime activity
  - Support criminal organization
  - Commit offence for benefit of, or at the direction of, a criminal organization
  - Direct activities of a criminal organization
- Money laundering
  - Conversion or transfer of property, knowing property is proceeds of crime, to conceal or disguise illicit origin
  - Concealing, disguising true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing property is proceeds of crime
  - Acquisition of property, knowing property is proceeds of crime
  - Establish widest range of predicate offences

Substantive charges are preferable to conspiracy where possible (the elements of conspiracy are more difficult to prove); however, there will be occasions when a charge of conspiracy is appropriate by reason of the facts and/or the need adequately to address the overall criminality of the conduct alleged. States parties may need to introduce substantive charges for ITTP involvement if they have not already done. Organized crime provisions also provide a charge that adequately addresses the overall criminality of offences related to ITTP.



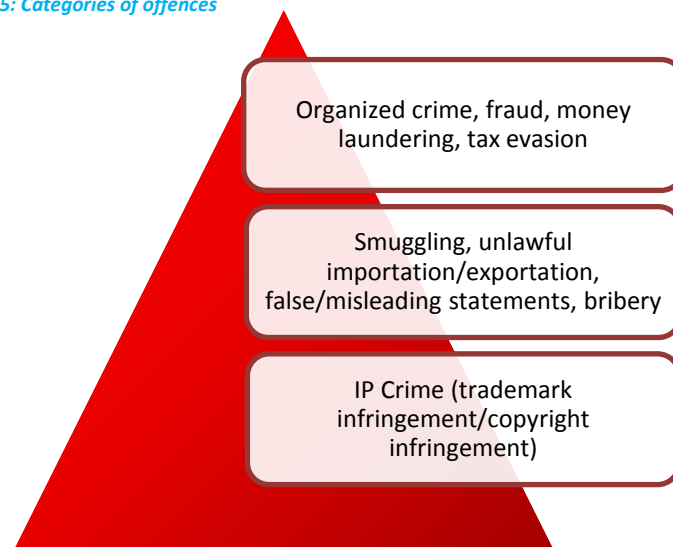
States parties will need to check domestic legislation particularly their Customs Acts, Criminal Codes and IP Crime legislation.

Successful prosecution should be a key aim. Without it offenders engaged in the ITTP continue to operate, and the high profit low risk ratio continues to be appealing, encouraging more organized crime groups to engage in ITTP, and effectively nullifying the investment of law enforcement in the field.

But how is successful prosecution achieved? Offenders should be pursued for the range of activity in which they engage, without deciding to curb certain “lesser” charges because there are more serious charges on the indictment. Serious charges carry with them weightier evidentiary burdens and the elements of the offences are more cumbersome to prove. Pursuing lesser charges will mean that offender can be prosecuted, and where the evidence perhaps does not satisfy the evidentiary burden for a more serious crime, it can satisfy it for a lesser offence. This will mean in turn that an offender will now have this offence noted on their criminal record, which can be relevant for sentencing procedures. It can also mean that evidence of this offence may be used to strengthen cases against other accused for more serious offences, and that perhaps the offender may serve a sentence without being acquitted and immediately released. All these factors will need to be weighed when deciding the charges to pursue for prosecution.

The Figure below ranks the various categories of offences that could be prosecuted generally, those at the bottom evidently having lesser penalties attributed, and those at the top with heavier associated penalties reflecting their perceived level of objective seriousness. Keep in mind that this is general and may vary across jurisdictions.

Figure 15: Categories of offences



## - Sanctions

The lack of deterrent criminal penalties in many jurisdictions is considered one of the main barriers to effectively fighting the illicit trade in tobacco products and current criminal penalties are often perceived as too weak. Another significant barrier is the gap between the written law and its enforcement, often because the courts are unwilling or unable to apply sufficient and effective sentences.

When prosecuting matters in court, and lacking perhaps specific provisions dealing with the smuggling of tobacco products, police and prosecutors will need to be conscious of:

- The need to target the organized criminal activity as smuggling activity necessarily involves more than one person to coordinate the trade;
- Those participants involved at all points through the illicit supply chain (this will be difficult for players outside the jurisdiction, but at least the necessary connections will need to be made for those participants involved within the jurisdiction);
- The need to dismantle the groups involved otherwise various players will be easily replaceable and the activity allowed to continue;
- Pursuing charges with a significant deterrent effect;
- Ensuring sentencing is vigorously pursued after the trial or guilty plea is received so that enforcement of the penalties provided for by the legislature occurs;
- Seizure orders and destructions orders are applied for before a judge.

## - Other key factors to complement the prosecution

- Sentencing proceedings are crucial in convincing courts to impose deterrent penalties.
- Prosecutors need to seek the forfeiture of the assets that criminals derive from engaging in the illicit trade in tobacco products and having a robust and legally solid confiscation of proceeds of crime procedure is essential for States to remove the incentive for criminals to engage in the ITTP.
- Prosecutors/police or the responsible authority must remember to seek from the Court the disposal/destruction of seized illicit goods. Where countries do not have solid frameworks in place for destructions/disposal, they will need to assess their frameworks and amend them accordingly.

## - Other considerations

Prosecutors must be aware of the risk of hearings being complex and/or lengthy (although complexity and/or length in some cases may be unavoidable, necessary or otherwise appropriate). It is likely to be the case with ITTP offences, especially where prosecutors are pursuing the involvement of organized crime groups in the ITTP. This should not deter prosecutors from proceeding with charges on indictment that target the organized crime group, even though the trial may become more lengthy or complex. It is only by pursuing such trials that they will become easier to run, and expertise will be built by both prosecutors and judiciary hearing the cases.

In many countries, efforts to fight the trade in counterfeit tobacco products also face the problem of judiciaries that do not have adequate knowledge of and experience in matters involving intellectual property law, serious organized crime offences, and international law. This challenge could be overcome through training courses covering these topics, both for judges and prosecutors. Such training is provided by international organizations such as INTERPOL, and the United Nations Office of Drugs and Crime (UNODC).

### Box 51: INTERPOL's Legal Assistance and Services

Countering illicit trade and IP crime calls for dynamic and creative legal solutions. Justice operators need to constantly keep up with non-stop criminal evolution. In order to keep them abreast of the highest international legal standards and requirements, INTERPOL's Office of Legal Affairs provides legal advice, assists in the reform of domestic laws and delivers capacity building and training gathering international specialists from all relevant sectors.

These services are tailored to the needs and requests of individual countries and are carried out in close coordination with national law enforcement entities and ministries (Foreign Affairs, Interior, Justice, Security, etc.), relevant international organizations and affected private sector entities.

**Link to INTERPOL's website:** <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance>

#### 4.4.4. Seizure payments (art. 17)

##### Box 52: Seizure payments (art. 17)

Parties **should**, in accordance with their domestic law, consider adopting such legislative and other measures as may be necessary to authorise competent authorities to levy an amount proportionate to lost taxes and duties from the producer, manufacturer, distributor, importer or exporter of seized tobacco products and/or manufacturing equipment.

##### a. Overview

This provision allocates further discretionary powers to States parties to introduce seizure payments made to governments by producers, manufacturers, distributors, importers or exporters of seized tobacco products. Article 17 is akin to provisions found in the EU agreements with the four major cigarette manufacturers, PMI, JTI, BAT and ITI to address situations where illicit tobacco products have been seized in the market without direct knowledge as to who has diverted those products into the market. The provision places greater responsibility on the manufacturers to undertake proper due diligence on their sales and customers to lower the risk of such diversion.

##### b. Policy considerations

- States parties will need to consider how this provision will operate alongside other sanctions and penalties for administrative/criminal offences that are committed by natural and legal persons.
- Consideration will have to be made as to how this provision may operate within the tobacco control regime proposed by the Protocol, namely:
  - Mandatory licensing for various actors in the supply chain;
  - A requirement that actors in the supply chain maintain adequate fiscal compliance policies and procedures, including both anti-contraband and anti-counterfeit product tracking and tracing capabilities;
  - A requirement that, in certain circumstances, actors involved must provide a report detailing their fiscal compliance policies in certain markets and certifying their compliance with those policies;
  - The possibility of an independent third party auditing a manufacturer's compliance with its local fiscal obligations; and
  - Fines could be levied on an actor involved in the supply chain for repeated failure, without reasonable cause, to comply with its fiscal compliance obligations.
- If States parties decide that the imposition of **financial penalties** will be fault-based and/or conditioned on specific offences or wrongful conduct, they will need to determine what will be the case for actors in the supply chain who have complied substantially with all domestic legal requirements. Advantages of a fault based system include:

- Companies have an incentive to take steps to curb the sales of illicit cigarettes;
  - Clearer assessment of local factors will be taken into account to determine why some companies were more successful than others in securing their supply chains, such as tax-driven price differentials between neighboring markets.
- States should take **local factors** into account.
  - Issues to consider include the defined degree of culpability, seizure thresholds, auditing requirements and availability of legal recourse for those considered liable.
  - States will need to ensure that a focus on a seizure based system does not deter from pursuit of investigating the smuggling activity further, so that illicit trade networks responsible are identified and prosecuted.
  - An administrative system may need to be adopted to deal with seizure payments, as they will need to be recorded and reported to a central authority, as well as reported to the stakeholder and the products authenticated. Perhaps this could be tied in to the central authority responsible for licensing, or it could be a particular function tied to customs authorities in States.
  - States should consider multinational companies that operate in many countries and local stakeholders that have a single market of operation. States must understand the various forms of illicit trade, such as illicit manufacture, smuggling of legitimate product, counterfeiting, illicit whites, etc. For example, some domestic entities have emerged as a predominant source of illicit product and have the potential to hinder international control efforts, such as those entities producing illicit whites. States will need to decide whether requirements will apply to local and regional actors that often do not operate in the countries of seizure, and how this will apply.

#### 4.4.5. Disposal or destruction (art. 18)

##### Box 53: Disposal or destruction (art. 18)

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**.

##### a. Overview

The destruction of confiscated tobacco, tobacco products and manufacturing equipment is vital in securing the legal market and legal supply chains, protecting from the re-entry of these products into the illicit market or for use in manufacturing illicit cigarettes, and assisting in curbing the ITTP.

It must be made clear that this provision refers to the seizure and confiscation of tobacco, tobacco products and manufacturing equipment, and their destruction/disposal and not the regime that applies to the confiscation of the proceeds of crime.

##### b. Policy considerations

- It will be important to conduct **an assessment of the legislation in place** in each jurisdiction relating to confiscation and destruction/disposal of the products themselves.
- There are two main processes that will need to be considered:
  - Customs' seizures of tobacco, tobacco products and manufacturing equipment and how destruction/disposal provisions of national legislation apply to them; and
  - Prosecutions and court orders relating to confiscation and destruction/disposal.
- It is also important to consider whether the scope of the national legislation encompasses goods (tobacco, tobacco products and manufacturing equipment) whether they are imported, exported or in-transit, to ensure that goods passing through the supply chain are also dealt with if interrupted while on course to the final destination.
- Another serious consideration when legislating for confiscation and destruction/disposal, is **the timeframe** within which confiscated goods must be destroyed/disposed of. In an area such as the ITTP, time is of the essence, and time considerations come into play especially at the border and given obligations customs authorities have regarding the quick turnover of goods from ports. Destruction/disposal of confiscated goods must occur quickly, before such goods are dealt with, or forgotten, and re-enter the market either through theft or other means. A legal framework within which States parties can operate in this respect can be derived from obligations States parties have under other international treaties, particularly the TRIPS agreement, which provides for civil and criminal remedies allowing for destruction of IP infringing goods (see Part III, section 2 of TRIPS). Customs agreements and regional

legislation governing the movement of goods and goods in transit is also relevant e.g. European Commission's Transit Manual.

- Other methods of disposing of goods, such as sale (auction) of the goods by the government, would appear to counter the aims of the Protocol, being to eliminate ITTP. Items such as manufacturing equipment should not be on sold in order to eliminate the chances of its acquisition by those engaged in illicit manufacture of tobacco products. Furthermore, sale of counterfeit tobacco products, or contraband tobacco and tobacco products would allow circulation of illicit products.
- Where legislation does not prescribe for destruction/disposal by either customs authorities or courts, this creates problems in adequately addressing the ITTP and eliminating it. Countries should aim to legislate for destruction/disposal of confiscated tobacco, tobacco products and manufacturing equipment if they lack such laws.

#### 4.4.6. Special investigative techniques (art. 19)

##### Box 54: Special investigative techniques (art. 19)

1. Parties **shall** allow for appropriate use of controlled delivery and other special investigative techniques such as electronic or other forms of surveillance and undercover operations, if permitted by the basic principles of its domestic legal system.
2. Parties are **encouraged** to conclude appropriate bilateral or multilateral agreements/arrangements for using the techniques referred to in paragraph 1 in the context of international cooperation.
3. In the absence of such agreements as prescribed in paragraph 2, decisions to use such special investigative techniques at the international level shall be made on a case by case basis.
4. Parties recognize the importance of, and need for, international cooperation and **shall** cooperate with each other and with international organizations, in developing capacity to achieve the goals of this Article.

##### a. Overview

This article completes Part IV of the Protocol and forms an important link to Part V, International Cooperation. Special investigative techniques are encouraged to be utilized, particularly through engagement with other States parties in the form of bilateral or multilateral agreements.

As the very nature of illicit trade offences is that they are transnational offences, it is imperative that countries work together to target operational, organized criminal networks. There are various ways of achieving this goal, using the Protocol as the legal basis, for example, or entering into such bilateral or multilateral agreements/arrangements.

Along with the criminalization of certain unlawful conduct, and determining the necessary sanctions for administrative and criminal offences, an initial step is ensuring that law enforcement authorities have the requisite powers to effectively utilize special criminal investigative techniques domestically for successful outcomes in court and to ease international cooperation.



##### Box 55: Further reading special investigative techniques

For general information about **special investigative techniques**, refer to section 5.3.3, “Enhancing law enforcement ability to gather and use evidence to support criminal charges” of INTERPOL’s “Countering Illicit Trade in Goods: A Guide for Policy-makers”.

*Link to INTERPOL’s website: <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance>*



## 4.5. International cooperation (Part V of the Protocol)

Part V creates a foundation for improving international cooperation against the ITTP. The Protocol calls on all States parties to cooperate with competent international organizations, as mutually agreed, in sharing a wide range of enforcement information and best practices and with regional organizations to provide training and technical assistance in scientific and technological matters.

Part V was heavily inspired by the United Nations Convention Against Transnational Organized Crime (UNTOC) to the point that several key provisions are virtually identical in the two instruments. As a result, a number of legal tools developed to assist States in the implementation of UNTOC can be of direct relevance for the implementation of the Protocol (*see box 19, "UNTOC Legal resources"*).

The term **international cooperation** includes all interactions occurring between two or more States where those States are working together to assist each other. International cooperation is founded by two or more States either on the basis of an international treaty to which both States are party, or on the basis of bilateral or multilateral agreements or arrangements entered into. International cooperation can occur directly among States or through the involvement and assistance of international organizations and through other mechanisms created by States.



Figure 16: International cooperation provisions

#### 4.5.1. General and enforcement information sharing, its confidentiality and protection (arts. 20-22)

##### Box 56: General and enforcement information sharing, its confidentiality and protection (arts. 20-22)

###### Article 20:

1. Parties **shall** report relevant information as part of the WHO FCTC reporting instrument.
2. Parties **shall** cooperate with each other and competent international organizations to build the capacity of Parties to collect and exchange information.
3. The exchanged information is deemed to be confidential and for Parties' use only, unless otherwise stated by the transmitting Party.

###### Article 21:

1. Parties **shall** exchange information at their own initiative or at the request of a Party justifying why such information is necessary for detecting or investigating illicit trade in tobacco, tobacco products or manufacturing equipment.
2. Information received is to be used exclusively to meet the objectives of the Protocol, and Parties may specify that that information not be shared without their consent.

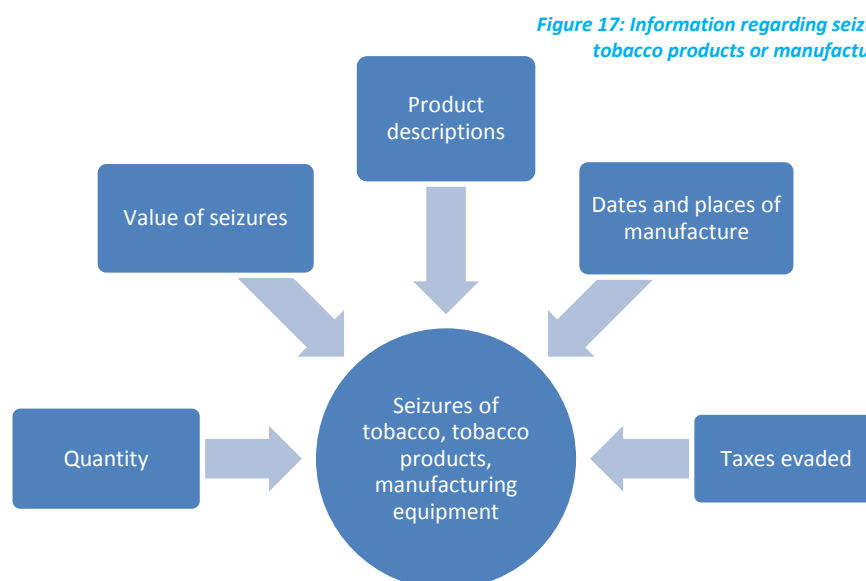
###### Article 22:

1. Parties **shall** designate the competent national authorities to which data referred to in Articles 20, 21 and 24 are supplied and notify Parties of such designation through the Convention Secretariat.
2. Exchange of information under the Protocol is subject to domestic law and confidentiality and privacy.

##### a. Article 20 (1)

States parties shall report relevant information, in aggregate form, as part of the WHO FCTC reporting instrument:

- Detailing **seizures** of tobacco, tobacco products or manufacturing equipment (art. 20(1)(a)) (see *figure 17*);



- Information on (art. 20(1)(b)):
  - Import, export, transit;
  - Tax-paid and duty-free sales;
  - Quantity or value of production
 of tobacco, tobacco products or manufacturing equipment.
- Information on (art. 20(1)(c)):
  - Trends;
  - Concealment methods;
  - Modi operandi
 used in illicit trade in tobacco, tobacco products or manufacturing equipment.
- Other relevant information as agreed by the States parties (art. 20(1)(d)).

#### Box 57: INTERPOL's i24/7 Network

INTERPOL has particular expertise in data and information exchange, and provides its members countries with its secure I-24/7 Global Communications Network. This allows the continuous exchange of sensitive information to law enforcement all around the world (including access by immigration and customs authorities to limited relevant databases). INTERPOL also provides continuous support to policing and law enforcement.

INTERPOL developed the I-24/7 global police communications system to connect law enforcement officers in all its member countries. It enables authorized users to share sensitive and urgent police information with their counterparts around the globe, at any time.

I-24/7 is the network that enables investigators to access INTERPOL's range of criminal databases. Authorized users can search and cross-check data in a matter of seconds, with direct access to a number of databases. It also provides a secure information exchange platform for police information.

The I-24/7 network underpins all INTERPOL operational activity. From routine checks at border crossings to targeted operations against different crime areas, and from the deployment of specialized response teams to the search for international fugitives, I-24/7 is the foundation of information exchange between the world's police.

### b. Article 21

The *relevant information* for exchange for the purposes of **article 21**, enforcement information sharing, includes, inter alia:

- Records of licensing (natural/legal persons);
- Information for identification, monitoring, prosecution of natural/legal persons involved in illicit trade;
- Records of investigations and prosecutions;
- Records of payment re import, export, duty-free sales; and
- Details of seizures, modi operandi

where that information is to assist with the detection and investigation of illicit trade in tobacco, tobacco products and manufacturing equipment. Essentially, this applies to the exchange of information by law enforcement where a criminal offence has been committed.

### c. Article 22

Designated competent national authorities shall be supplied the data referred to in articles 20, 21 and 24. Exchange of information under the Protocol is subject to domestic law and confidentiality and privacy.

#### d. Policy considerations

- States parties will need to consider how the relevant information is to be exchanged. There has been discussion at the level of the WHO FCTC Secretariat of the creation of a database for this purpose. One must keep in mind developing countries and their technological capabilities, as the gathering and uploading of such information will be complicated.
- Other organizations that already capture such data will need to be kept in mind as a useful resource, such as the WCO which already collects information on routes, seizures, reported quantities of goods imported, exported and in-transit, on their database.
- Similarly, international organizations that have a ready-made and already utilized means of secure information exchange should also be used for this purpose, such as INTERPOL.
- States parties will have to consider which domestic agencies will be responsible for the collection and sharing of the information. Information will need to be gathered from various agencies involved such as customs, police, tax authorities, tobacco licensing and control bodies.

## 4.5.2. Cooperation through international and regional organizations (arts. 23-24)

### Box 58: Cooperation through international and regional organizations (arts. 23-24)

Article 23:

1. Parties **shall** cooperate with each other and through competent or regional organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters.
2. Parties may, as appropriate, enter into bilateral, multilateral or other agreements or arrangements to promote training, technical assistance and cooperation in scientific, technical and technological matters, taking into account the needs of developing country Parties or Parties with economies in transition.
3. Parties **shall** cooperate, **as appropriate**, to develop and research the possibilities of identifying the exact geographical origin of seized tobacco and tobacco products.

Article 24:

1. Parties **shall**, in accordance with their domestic law, take all necessary measures, where appropriate, to strengthen cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of natural or legal persons engaged in illicit trade in tobacco, tobacco products or manufacturing equipment.
2. Each Party **shall** ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating illicit trade in tobacco, tobacco products or manufacturing equipment (including, where permitted under domestic law, judicial authorities) cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law.

### a. Overview

The assistance and cooperation envisaged by **article 23** is for the purpose of providing training, technical assistance and cooperation in **scientific, technical and technological matters** through competent international and regional organizations, and with each other.

The Protocol envisages the following types of assistance, inter alia:

- **Transfer of expertise and**
- **Transfer of appropriate technology**

in the areas of information gathering, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.

**Article 23(2)** also foresees States parties cooperating through entering into bilateral or multilateral arrangements to promote training, technical assistance and cooperation in scientific, technical and technological matters, taking into account the needs of developing-country States parties and those States parties with economies in transition.

**Article 24** provides for the same cooperation and assistance to be sought from other States parties through multilateral, regional and bilateral agreements for the *prevention, detection, investigation, prosecution and punishment of natural or legal persons* engaged in the ITTP. States parties to the Protocol undertake to cooperate and exchange relevant information at national and international levels for the aforementioned purpose. The cooperation and assistance envisaged by this article is not limited to criminal offences but can be exercised for administrative offences as well.

## b. Policy considerations

- States parties will need to assess what bilateral and multilateral agreements are already in place and whether they stemmed from other international conventions, particularly those whose legal basis is derived from UNTOC.
- States parties who have such arrangements in place, outside of UNTOC framework, can draw on these instruments and ascertain whether the Protocol's provisions also applies under these treaties, or whether their scope can be broadened to include the implementation of the Protocol for article 23.
- States parties requiring assistance should consider the international organizations that could provide such assistance, particularly those to which their country is a member country.
- States parties should consider utilizing the expertise of those international/regional organizations already working in the area of illicit trade, particularly the ITTP, such as those previously mentioned in this toolkit (WCO, INTERPOL, OLAF and EUROPOL with specific groups attached to illicit tobacco trade).
- Article 24 is also tied to MLA provisions at article 29 of the Protocol, though can be relied on in place of MLA provisions which might be cumbersome in some instances. For example, if certain information is required to assist with an investigation and is not necessarily to be used as evidence in a prosecution, this provision could form the basis of cooperation between countries and would be more expedient. Where coercive measures requiring court orders are necessary, however, then formal MLA procedures will need to be utilized. Importantly, this provision does not appear to be limited to criminal offences, as is the case with article 29 of the Protocol (MLA). Another alternative to article 24 is article 27 of the Protocol, law enforcement cooperation, which explicitly stresses at art. 27(2) that in the absence of bilateral or multilateral agreements, or direct cooperation between law enforcement agencies, States parties may consider the Protocol as the legal basis for mutual law enforcement cooperation.
- Further, the strengthening of cooperation by multilateral, regional or bilateral arrangements, called for by the provision could refer to use of pre-existing agreements or the forming of new agreements and arrangements with the aims of the Protocol in mind.

### 4.5.3. Protection of sovereignty (art. 25)

#### Box 59: Protection of Sovereignty (art. 25)

1. Parties **shall** carry out their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of States.
2. Nothing in the Protocol entitles a Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Article 25 Protection of sovereignty, is a standard clause used in international conventions. This article has been taken verbatim from article 4 of UNTOC, with the goal of remaining consistent with customary international law and the UN Charter.

### 4.5.4. Jurisdiction (art. 26)

#### Box 60: Jurisdiction (art. 26)

Article 26:

1. Parties **shall** adopt measures as may be necessary to establish jurisdiction over the criminal offences established in accordance with article 14 when:
  - a. The offence is committed in the territory of that Party; or
  - b. The offence is committed on board a vessel flying the flag of that Party or an aircraft registered under the laws of that Party at the time the offence is committed.
2. Parties may also establish jurisdiction of any such criminal offence when:
  - a. The offence is committed against that Party;
  - b. The offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or
  - c. The offence is one established in accordance with article 14 and committed outside the territory of the Party with a view to the commission of an offence established in accordance with article 14 within its territory.
3. Parties **shall** adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with article 14 when the alleged offender is present on its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
4. Parties may adopt measures as may be necessary to establish jurisdiction over the criminal offences established in accordance with article 14 when the alleged offender is present on its territory and it does not extradite him or her.
5. Parties exercising jurisdiction under paragraphs 1 or 2 that have been notified, or otherwise learn, that one or more Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to the norms of international law, this Protocol does not exclude the exercise of any criminal jurisdictions established by a Party in accordance with its domestic law.

Article 26 Jurisdiction, is a standard clause used in international treaties in criminal matters. This article has been taken verbatim from article 15 of UNTOC, with the goal of remaining consistent with customary international law and the UN Charter.

Article 26 limits itself to criminal offences established in accordance with article 14, though the INB negotiations did have discussions on the point of article 14 referring to unlawful conduct including criminal offences. This article is only applicable to the extent that States parties have criminalized certain offences and only vis-à-vis those offences. As some of the unlawful conduct under article 14 will be established as criminal offences in some jurisdictions, States parties will establish jurisdiction over those offences which they have criminalized.

## 4.5.5. Law enforcement cooperation (art. 27)

### Box 61: Law Enforcement Cooperation (art. 27)

1. Parties **shall** adopt effective measures to:
  - a. Enhance/establish communication between agencies for the rapid exchange of information relating to criminal offences;
  - b. Ensure effective cooperation among competent authorities, agencies, customs, police and other law enforcement agencies;
  - c. Cooperate with other Parties in conducting enquiries regarding:
    - i. Identity, whereabouts, activities of suspected persons
    - ii. Movement of proceeds of crime or property derived
    - iii. Movement of property, equipment or instrumentalities used
    - d. Provision of items/substances for analytical or investigative purposes;
  - e. Facilitate effective coordination among agencies, promote exchange of personnel/experts, posting of liaison officers;
  - f. Exchange relevant information on means and methods used to commit such offences e.g. routes, conveyances, false identities or documents, means of concealing activities; and
  - g. Exchange information, coordinate administrative or other measures for early identification of criminal offences.
2. Parties **shall consider** entering bilateral/multilateral agreements on direct cooperation between their law enforcement agencies. This Protocol can be considered the basis for mutual law enforcement cooperation, in the absence of agreements between Parties. Parties shall make full use, wherever possible, of agreements/arrangements, including international or regional organizations, to enhance cooperation.
3. Parties **shall endeavour** to cooperate within their means to respond to transnational illicit trade of tobacco products through the use of modern technology.

### a. Overview

The aim of this article is to achieve enhanced cooperation between law enforcement agencies of the States parties to the Protocol. It creates a platform for an international framework addressing the need for international cooperation in combatting the ITTP. Through such a provision, the Protocol recognizes that law enforcement cooperation is vital for the attainment of its goals. Without the direct involvement of law enforcement agencies and a strong commitment on their part to promote anti-illicit trade measures, the Protocol will be of little use.

Enhanced cooperation of law enforcement agencies will mean an ability to anticipate future operational requirements stemming from the Protocol's implementation. These agencies need to keep abreast of progress in this area, know the legal requirements for successful prosecutions, and be able to use the tools of the Protocol to enforce it effectively.

### b. Policy considerations

- Policy makers should consider law enforcement cooperation as part of a larger, targeted enforcement strategy to reinforce a State party's anti-illicit trade strategy.
- At country level, the main enforcement bodies usually include customs authorities, police and specialized police units. Targeted discussions with these agencies is suggested, so that their views are considered as to how cooperation between law enforcement can be



effectively enhanced. These agencies are often well aware of the difficulties encountered in practice when performing their law enforcement duties and can play a fundamental role in advising legislators and sharing their expertise to ensure that the provisions of the Protocol are adapted to local contexts.

- Governments need to recognize that without effective law enforcement cooperation, tackling the ITTP will be impossible. Given the transnational nature of the activity, coordinated responses and the sharing of information are necessary. As offenders are not limited by borders, in this respect, governments will need to be educated as to the gravity of these types of offences and why effective strategies should be in place to combat the ITTP. A necessary step is the empowering of law enforcement nationally to more effectively perform their roles, and to have more successful outcomes.
- Law enforcement success will of course impact success for prosecutions and generally imply success for a country's overall aims of combatting illicit tobacco trade.

### c. Available international and regional arrangements

#### - INTERPOL

Assisting with international law enforcement cooperation is INTERPOL's mandate. INTERPOL's central role is law enforcement cooperation among policing bodies globally and its activities assist in executing this central role. INTERPOL is competent to assist States parties to the Protocol, its Member States, to fully meet their obligations set out under article 27 of the Protocol.

Over the past 13 years, INTERPOL has conducted operational training seminars to train police, investigators, regulatory authorities and customs officials about the transnational reach of trafficking in illicit goods, to identify and share successful investigative techniques, to increase the number of specialists in member countries and to encourage participation in INTERPOL operations. Consistent with training provided, INTERPOL also coordinates tactical operations in conjunction with local authorities, facilitating proactive cross-industry law enforcement cooperation between various States for multi-disciplinary enforcement action.

INTERPOL's data exchange infrastructure has been discussed above (*see box 57 "INTERPOL's i24/7 Network"*), outlining its i-24/7 communications system allowing for secure information exchange and access to its many databases collating police information.

#### - WCO

The **World Customs Organization (WCO)** is the international intergovernmental organization in charge of customs matters<sup>45</sup>. It was founded in 1952 and represents 179 customs authorities. Its mission is to improve the efficiency of customs authorities worldwide and to assist them in securing the international trade supply chain. In order to do so, the Organization has developed a number of activities in several key areas<sup>46</sup> (*see box 62*).

## Box 62: WCO activities to improve the efficiency of Customs authorities worldwide

### Harmonization

The WCO sets and **implements international standards** to facilitate cross-border trade as well as international cooperation against illicit trade in areas such as:

- Customs procedures
- International goods nomenclature
- Harmonized rules of Origin

### Enforcement

The WCO contributes to strengthening the international trade supply chain by :

- Providing training to Customs authorities;
- Managing secure communication tools for the exchange of intelligence and information;
- Facilitating international law enforcement operations;
- Managing a global network of regional intelligence liaison offices;
- Putting together analyses of illicit cross border activities' trends.

### Cooperation

The WCO offers its Members a **forum for dialogue and for sharing experiences**. It encourages and facilitates cooperation between Customs authorities, promotes coordinated border management as well as the exchange of information and intelligence.

The Organization **sponsors or administers a number of international Conventions and Agreements** that provide legal bases for international cooperation, such as the bilateral or multilateral exchange of information among customs administrations when it is required.

The WCO also actively cooperates with other international organizations in areas of mutual interest, such as INTERPOL in fighting against the traffic of illicit goods and counterfeits.

### Assistance

The WCO provides assistance to its members in the form of capacity building, training and technical assistance. It notably supports the modernization of national administrations and processes in order to enhance the national and international response to illicit trade while facilitating licit trade.

## - Regional arrangements

Regional and sub-regional arrangements may also be utilized for the purposes of enhanced law enforcement cooperation. Examples include EUROPOL, OLAF, the South African Regional Police Chiefs Cooperation Organization (SARPCCO), the Eastern Africa Police Chiefs Cooperation Organization (EAPCCO), and the Mercado Común del Sur (MERCOSUR).

#### 4.5.6. Mutual Administrative Assistance (art. 28)

##### Box 63: Mutual Administrative Assistance (art. 28)

The Protocol provides that Parties **shall** provide each other, either on request or at their own initiative, with information to ensure proper application of customs and other relevant law in the prevention, detection, investigation, prosecution and combatting of illicit trade in tobacco, tobacco products or manufacturing equipment.

##### a. Overview

Mutual administrative assistance (MAA) typically refers to the type of assistance provided by one country's customs authorities to another's and includes assistance in the prevention, investigation and combating of customs offences. Such assistance, and in particular the exchange of information referred to in article 28 among customs administrations, requires a legal basis in the form of international treaty provisions, or either a bilateral or multilateral arrangement.

However, it does not have to be limited to customs and there is the possibility of States parties to the Protocol using this provision to ensure cooperation amongst other agencies more broadly, such as the authority responsible for licensing, IP agencies and other national administrative authorities.

The information envisaged to be provided includes, inter alia:

- New customs/other enforcement techniques of demonstrated effectiveness;
- New trends, means or methods in engaging in the ITTP;
- Goods known to be the subject of the ITTP: details of description, packaging, transport, storage and methods used in respect of these goods;
- Natural or legal persons known to have committed or be party to the commission of an ITTP offence; and
- Other data to assist designated agencies in risk assessment for control and enforcement purposes.

A good source of this type of information is held in the WCO's Regional Intelligence Liaison Offices (RILOs). States parties should be ensuring that they take the opportunity to seek such information regularly through WCO RILO bulletins and regular contact point meetings. Where States parties are feeding in generic data on significant seizures (as is sought) to their respective WCO RILO office, then this enhances the quality of the information that can be circulated.

##### b. What is MAA?

MAA is not the same as mutual legal assistance, which is usually provided in the context of formal proceedings, where information is for example required in criminal proceedings for evidentiary purposes. MAA does not fall within the scope of formal criminal or court procedures.

MAA refers to the exchange of information and the provision of other types of assistance, intended to ensure the proper application of customs laws and to prevent, combat and investigate customs offences, including illicit trafficking in tobacco products. MAA is not a new concept and is seen in a wide range of common international cooperative activities, such as those mentioned throughout the Protocol including enhanced law enforcement and technical assistance.

As with other agencies, customs administrations function on the basis of their national legislation which grants them broad powers but only within their jurisdictions, for domestic purposes. Globally, legal frameworks and customs administrations' competencies can differ widely among States. It follows that practices in administrative and legal assistance related to customs matters also differ, thereby complicating the exchange of information between countries. Such exchange requires a legal basis, and an instrument for bilateral or multilateral cooperation is often required to facilitate the exchange.



## Box 64: International, regional and bilateral instruments on Mutual Administrative Assistance (MAA)

Some legal instruments on MMA, adopted by international and regional organizations and bodies, include:

### International

#### World Customs Organization (WCO)

##### - International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences, 1977

*Status of ratification:* 52 Contracting parties (as of June 2012)

*Link to the text of the treaty:* <http://www.wcoomd.org/en/about-us/legal-instruments/~media/574B25F13D9C4D4BA44AB4CD50A967C5.ashx>

*Link to the status of ratification:* <http://www.wcoomd.org/en/about-us/legal-instruments/conventions.aspx>

##### - Model Bilateral Agreement on Mutual Administrative Assistance in Customs Matters (June 2004)

This legal instrument contains model provisions including, inter alia:

- Exchange of information
- New enforcement techniques proved effective
- New trends or methods of tobacco smuggling
- Transport and storage methods used in smuggling
- People known to have engaged in ITTP activity or suspected of engagement
- Other data for risk assessment/control purposes

*Link to the text of the model bilateral treaty:* <http://www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~media/DFAAF3B7943E4A53B12475C7CE54D8BD.ashx>

Arrangements are already in place under custom's administrations and under the WCO. WCO members can seek to cooperate through the existing framework where it is sufficient for the purposes of art. 28 of the Tobacco Protocol.

### Regional

#### South Asian Association for Regional Cooperation (SAARC)

##### - Agreement on Mutual Administrative Assistance in Customs Matters, 2005

- Parties' customs' administrations provide each other with administrative assistance
- Information and intelligence for the proper application of customs law and for the prevention, investigation and combating of customs offences
- New enforcement techniques proven effective
  - New trends, means, methods for commission of customs offences
  - Goods the subject of customs offences (transport/storage methods)
  - People known to have committed an offence or suspected of being about to commit an offence
  - Other data for risk assessment control and facilitation purposes

*Link to the text of the treaty:*

[http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.saarc-sec.org%2Fuserfiles%2FFinalAgreementonCustomsMatters.doc&ei=6poZU\\_yWA62v7AbYj4GgDA&usg=AFQjCNFsf\\_H0eEROfGFvjQLCNktZfvYV1A&bvm=bv.62578216,d.bGQ](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.saarc-sec.org%2Fuserfiles%2FFinalAgreementonCustomsMatters.doc&ei=6poZU_yWA62v7AbYj4GgDA&usg=AFQjCNFsf_H0eEROfGFvjQLCNktZfvYV1A&bvm=bv.62578216,d.bGQ)

#### European Anti-Fraud Office (OLAF)

##### - OLAF

- Is responsible for preventing, detecting and investigating customs frauds affecting the European Union budget
- Interacts regularly with customs authorities worldwide
- Has formal cooperation agreements with a number of countries and also ad hoc operational arrangements to ensure rapid and secure exchange of information
- Office's Cigarettes Task Group uses agreements on Customs cooperation and MAA for their investigations into cigarette smuggling.
- Council Regulation (EC) No 515/97 enables EU Member States to exchange information both among themselves and with the European Commission for anti-fraud purposes, including the smuggling of contraband and counterfeit cigarettes.

*Link to the agreements on MAA:* [http://ec.europa.eu/anti\\_fraud/about-us/legal-framework/customs\\_matters/index\\_en.htm](http://ec.europa.eu/anti_fraud/about-us/legal-framework/customs_matters/index_en.htm)

## 4.5.7. Mutual Legal Assistance (art. 29)

### Box 65: Mutual Legal Assistance (art. 29)

Parties **shall** afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14 of the Protocol.

### a. Overview

This provision has been adopted in its entirety from UNTOC, except 29(14)(d) which has been added. Article 29(14)(d) states that MLA may be refused *where the request involves a crime where the maximum penalty in the requested Party is less than two years of imprisonment or other forms of deprivation of liberty or, 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*. It applies solely to criminal offences established in accordance with article 14 of the Protocol.

### b. What is Mutual Legal Assistance (MLA)?

MLA refers to the formal procedures by which a country requests and provides assistance to facilitate criminal proceedings in the requesting country as enumerated in article 29 of the Protocol.

In the context of illicit tobacco trade, the term refers to a broad range of cooperative measures that assist in the enforcement of laws and prosecution of relevant offences established under different domestic legislation. Measures can include the gathering and exchange of information, executing seizures and searches, and assisting in obtaining evidence and taking statements from people.

Most countries have the necessary institutional measures for MLA in place, particularly given their obligations under other international treaties.



### Box 66: Further reading on MLA

The UNODC website contains model law on international cooperation in criminal matters that may be of assistance.

**Link:** [http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html#International\\_Cooperation](http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html#International_Cooperation)

UNODC also provides an MLA Request Writer Tool to assist in drafting MLA requests.

**Link:** <http://www.unodc.org/mla/introduction.html>

**Table 18: Article 29 – Mutual Legal Assistance (MLA) – checklist of key provisions**

Paragraph	Description
1	Widest measure of MLA to be afforded in investigations, prosecutions and judicial proceedings in relation to criminalized Protocol offences.
2	MLA to be afforded in relation to offences for which legal persons may be held liable.
3	Non-exhaustive list of purposes for which MLA may be afforded: taking evidence or statements from persons, executing searches and seizures, etc. MLA to be afforded for any type of assistance that is not contrary to the domestic law of the requested State party.
4	Art. 29 of the Protocol not to affect obligations States parties have under other treaties.
6	States parties to designate a central authority in charge of receiving and executing or transmitting MLA requests to competent domestic authorities for execution. Head of WHO FCTC Secretariat to be notified of designated central authority. MLA requests to be transmitted between central authorities without prejudice to diplomatic channel if required by the requested State. In urgent circumstances, possibility for States parties (when they agree) to transmit requests through appropriate international organizations.
7	Requests to be made by any means capable of producing a written record. Acceptable languages to be notified to Head of WHO FCTC Secretariat. In urgent circumstances, possibility for requests to be made orally followed by written confirmation.
8	Elements/information to be included in MLA requests: identity of requesting authority, summary of facts, purpose for which the evidence is sought, etc.
10	Requests to be executed in accordance with law of requested State party. To the extent not contrary to law of requested State party, requests to be executed in accordance with the procedures specified in the request.
11	Information transmitted via MLA to be used only for investigations, prosecutions or judicial proceedings stated in the request unless prior consent of requested State party is obtained to use the information in other investigations, prosecutions or judicial proceedings.
12	Confidentiality of the request.

Paragraph	Description
13	Possibility to hear witnesses or experts located in other jurisdictions via video conference.
14	Grounds for refusal of MLA requests. Ex: prejudice to sovereignty, security, "ordre public" or other essential interests of the requesting State; if the request involves a crime where the maximum penalty in the requested State is less than two years of imprisonment, etc.
15	Reasons to be provided for any refusal to execute an MLA request.
16	Prohibition for States parties to decline to render MLA on the ground of bank secrecy.
17	Prohibition to refuse an MLA request on the sole ground that the offence is also considered to involve fiscal matters.
18	States parties' discretion as to whether or not to execute an MLA request when dual criminality principle is not fulfilled.
19	MLA requests to be executed as soon as feasible, progress in their execution to be provided upon request.
20	Possibility to postpone execution of MLA requests in case of interference with ongoing investigations, prosecutions or judicial proceedings.
21	Duties to consult requesting State party before refusing or postponing the execution of a request.
22	Ordinary costs of executing MLA requests to be borne by requested State party, unless otherwise agreed. Extraordinary costs to be shared following consultations.
24	States parties to consider concluding agreements/arrangements with the purpose of giving practical effect to art. 29 of the Protocol.



#### 4.5.8. Extradition and measures to ensure extradition (arts. 30-31)

##### Box 67: Extradition and measures to ensure extradition (arts. 30-31)

1. Article 30 applies to criminal offences established in accordance with Article 14 of the Protocol when:
  - a. The person the subject of the request is located on the territory of the requested Party;
  - b. The criminal offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested Party; and
  - c. The offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least 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.

##### a. Overview

Extradition is the surrender of a wanted person by one State at the request of another, and relies on formal international cooperation between States to effect the request.

This provision is taken verbatim from UNTOC, except for article 30(1)(c) which refers to a maximum period of imprisonment 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*.

##### b. Policy considerations

- States parties could consider working regionally when deciding which unlawful conduct to criminalize to make this provision more effective and easier to implement.
- States will need to consider that article 30 will only be available where offences are punishable by a maximum period of imprisonment of at least four years imprisonment for conduct established as criminal offences under article 14.
- The offences established under article 14 should be included in countries' lists of extraditable offences under the Protocol as well as under other treaties that countries are State party to, such as UNTOC.



##### Box 68: Further reading on mutual legal assistance and extradition

For general information about **mutual legal assistance and extradition**, refer to section 5.6, "Are the appropriate channels for international cooperation in place? Are they well-functioning?" of INTERPOL's "Countering Illicit Trade in Goods: A Guide for Policy-makers".

**Link to INTERPOL's website:** <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance>

**Table 19: Articles 30, 31 – Extradition and measures to ensure extradition – checklist of key provisions**

Article and Paragraph	Description
Art. 30(1)	Art. 30 of the Protocol to apply to criminal offences established under the Protocol when: <ul style="list-style-type: none"> <li>a) Sought person is in the territory of the requested State party;</li> <li>b) The offence is punishable under the law of both the requesting and the requested State party;</li> <li>c) The offence is punishable by a maximum deprivation of liberty of at least four years, unless a different agreement or arrangement is reached by the two States parties.</li> </ul>
Art. 30(2)	Criminalized Protocol offences deemed to be included as extraditable offences in existing extradition treaties between the States parties and in future ones.
Art. 30(3)	Possibility for States that make extradition conditional on the existence of a treaty to take the Protocol as the legal basis for extradition.
Art. 30(4)	Obligation for States parties that do not make extradition conditional on the existence of a treaty to consider criminalized Protocol offences as extraditable between themselves.
Art. 30(5)	Extradition subject to procedures and conditions set forth in the law of the requested State party.
Art. 30(6)	States parties to endeavor to expedite extradition proceedings and to simplify evidentiary requirements.
Art. 30(7)	States parties that refuse extradition on the ground that the sought person is their national are obliged to institute domestic criminal proceedings (principle “extradite or prosecute”).
Art. 30(10)	Persons subject to extradition proceedings to be granted fair treatment.
Art. 30(11)	States parties under no obligation to extradite when there are reasonable grounds to believe that the request has been made for discriminatory purposes (on grounds of a person’s sex, race, religion, political opinions, etc.).
Art. 30(12)	States parties not to refuse a request on the sole ground that the offence is also considered to involve fiscal matters.

Article and Paragraph	Description
Art. 30(13)	Duty of consulting the requesting State party before refusing a request.
Art. 30(14)	States parties to seek to conclude agreements or arrangements to enhance the effectiveness of extradition on Protocol offences.
Art. 31(1)	Requested States parties to be in a position to take sought person into custody or take other measures to ensure his or her presence at extradition proceeding.
Art. 31(2)	Measure under para.1 to be notified to the requesting State party.
Art. 31(3)	<p>Right of sought person (whose liberty has been restricted during extradition proceedings) to:</p> <ul style="list-style-type: none"> <li>a) Communicate with nearest representative of the State of which he or she is a national;</li> <li>b) Be visited by a representative of that State.</li> </ul>



## APPENDICES



## Appendix 1: Protocol to Eliminate Illicit Trade in Tobacco Products

### PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

#### FOREWORD

The Protocol to Eliminate Illicit Trade in Tobacco Products is the first protocol to the WHO Framework Convention on Tobacco Control (WHO FCTC), and a new international treaty in its own right. It was adopted by consensus on 12 November 2012 at the fifth session of the Conference of the Parties (COP) to the WHO FCTC (Seoul, Republic of Korea, 12–17 November 2012). The Protocol builds upon and complements Article 15 of the WHO FCTC, which addresses means of countering illicit trade in tobacco products, a key aspect of a comprehensive tobacco control policy.

The Protocol was developed in response to the growing international illicit trade in tobacco products, which poses a serious threat to public health. Illicit trade increases the accessibility and affordability of tobacco products, thus fuelling the tobacco epidemic and undermining tobacco control policies. It also causes substantial losses in government revenues, and at the same time contributes to the funding of transnational criminal activities.

The objective of the Protocol is the elimination of all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO FCTC.

The Protocol, in particular, aims to secure the supply chain of tobacco products – measures widely considered to be the “heart” of the Protocol. It requires the establishment of a global tracking and tracing regime within five years of entry into force of the Protocol, comprising national and/or regional tracking and tracing systems and a global information sharing point located in the Convention Secretariat. Other provisions to ensure control of the supply chain cover licensing, due diligence, record keeping, and security and preventive measures, as well as measures in relation to Internet- and telecommunication-based sales, duty free sales, and free zones and international transit.

The Protocol also covers important matters concerning offences, with provisions on liability, prosecutions and sanctions, seizure payments and special investigative techniques, as well as the disposal and destruction of confiscated products. Another key group of substantive articles addresses the issue of international cooperation, such as measures on information sharing, technical and law enforcement cooperation, protection of sovereignty, jurisdiction, mutual legal and administrative assistance, and extradition.

The Protocol establishes the reporting obligations of the Parties, linked to the reporting system of the WHO FCTC, as well as the financial and institutional arrangements necessary for its implementation. The Protocol stipulates that the Meeting of the Parties shall be the governing body of the Protocol, and that the Convention Secretariat shall also be the Secretariat of the Protocol.

The Protocol was opened for signature on 10 January 2013 at WHO Headquarters in Geneva. More than 50 Parties participated in this event, during which 12 Parties, representing all six regions, signed the Protocol. The Protocol then remained open for signature at United Nations Headquarters in New York until 9 January 2014.

The Secretary-General of the United Nations is the Depositary for the Protocol (Article 46).

Any Party to the WHO FCTC may become a Party to the Protocol. The Protocol shall enter into force on the 90th day following the deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

The development and adoption of the Protocol is the result of close cooperation between the Parties and multiple sectors of government, demonstrating how a unified stand on a public health subject can benefit important government objectives on health and beyond. Continued intersectoral and international collaboration, including cooperation with relevant international organizations, as called for in the Protocol, will be crucial to its successful implementation.

The Protocol to Eliminate Illicit Trade in Tobacco Products is a milestone in strengthening global action against tobacco and is a new legal instrument in public health. It supplements the WHO FCTC with a comprehensive tool to counter and eventually eliminate illicit trade in tobacco products and to strengthen legal dimensions for international health cooperation.

Dr Haik Nikogosian  
Head, Convention Secretariat

## PREAMBLE

The Parties to this Protocol,

Considering that on 21 May 2003, the Fifty-sixth World Health Assembly adopted by consensus the WHO Framework Convention on Tobacco Control, which came into force on 27 February 2005;

Recognizing that the WHO Framework Convention on Tobacco Control is one of the United Nations' most rapidly ratified treaties and a fundamental tool for attaining the objectives of the World Health Organization;

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;

Determined also to give priority to their right to protect public health;

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;

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;

Seriously concerned by the adverse effects that the increase in accessibility and affordability of illicitly traded tobacco products has on public health and the wellbeing, in particular of young people, the poor and other vulnerable groups;

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

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

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

Acknowledging also that, although free 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;

Recognizing also that illicit trade in tobacco products undermines the economies of Parties and adversely affects their stability and security;

Also aware that illicit trade in tobacco products generates financial profits that are used to fund transnational criminal activity, which interferes with government objectives;

Recognizing 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;

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;

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;

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;

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



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

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 obligation 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;

Recognizing the need to build enhanced cooperation between the Convention Secretariat of the WHO Framework Convention on Tobacco Control and the United Nations Office on Drugs and Crime, the World Customs Organization and other bodies, as appropriate;

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

Considering that this Protocol does not seek to address issues concerning intellectual property rights; and

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

Hereby agree as follows:

## PART I: INTRODUCTION

### ARTICLE 1

#### Use of terms

1. "Brokering" means acting as an agent for others, as in negotiating contracts, purchases, or sales in return for a fee or commission.
2. "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. For the purpose of Article 8, "cigarette" also includes fine cut "roll your own" tobacco for the purposes of making a cigarette.
3. "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority.
4. "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.
5. "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.
6. "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.
7. "Licence" means permission from a competent authority following submission of the requisite application or other documentation to the competent authority.
8. (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<sup>1</sup>  
(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.
9. "Party" means, unless the context indicates otherwise, a Party to this Protocol.
10. "Personal data" means any information relating to an identified or identifiable natural person.
11. "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<sup>2</sup>.
12. 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

<sup>1</sup> Parties may include reference to the Harmonized Commodity Description and Coding System of the World Customs Organization for this purpose, wherever applicable.

<sup>2</sup> Where appropriate, national or domestic will refer equally to regional economic integration organizations.

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.
13. "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.
14. "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 8.

## ARTICLE 2

### Relationship between this protocol and other agreements and legal instruments

1. The provisions of the WHO Framework Convention on Tobacco Control that apply to its protocols shall apply to this Protocol.
2. Parties that have entered into the types of agreements mentioned in Article 2 of the WHO Framework Convention on Tobacco Control shall communicate such agreements to the Meeting of the Parties through the Convention Secretariat.
3. Nothing in this Protocol shall affect the rights and obligations of any Party pursuant to any other international convention, treaty or international 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.
4. Nothing in this Protocol shall affect other rights, obligations and responsibilities of Parties under international law, including the United Nations Convention against Transnational Organized Crime.

## ARTICLE 3

### Objective

The objective of this Protocol is to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO Framework Convention on Tobacco Control.

## PART II: GENERAL OBLIGATIONS

## ARTICLE 4

### General obligations

1. In addition to the provisions of Article 5 of the WHO Framework Convention on Tobacco Control, Parties shall:
  - (a) adopt and implement effective measures to control or regulate the supply chain of goods covered by this Protocol in order to prevent, deter, detect, investigate and prosecute illicit trade in such goods and shall cooperate with one another to this end;
  - (b) take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol;
  - (c) adopt effective measures for facilitating or obtaining technical assistance and financial support, capacity building and international cooperation in order to achieve the objectives of this Protocol and ensure the availability to, and secure exchange with, the competent authorities of information to be exchanged under this Protocol;
  - (d) cooperate closely with one another, consistent with their respective domestic legal and administrative systems, in order to enhance the effectiveness of law enforcement action to combat the unlawful conduct including criminal offences established in accordance with Article 14 of this Protocol;
  - (e) cooperate and communicate, as appropriate, with relevant regional and international intergovernmental organizations in the secure<sup>3</sup> exchange of information covered by this Protocol in order to promote the effective implementation of this Protocol; and
  - (f) within the means and resources at their disposal, cooperate to raise financial resources for the effective implementation of this Protocol through bilateral and multilateral funding mechanisms.
2. 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.

## ARTICLE 5

### Protection of personal data

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.

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<sup>3</sup> A secure exchange of information between two parties is resistant to interception and tampering (falsification). In other words, the information exchanged between the two parties cannot be read or modified by a third party.

ARTICLE 6

**Licence, equivalent approval or control system**

1. To achieve the objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco products and manufacturing equipment, each Party shall prohibit the conduct of any of the following activities by any natural or legal person except pursuant to a licence or equivalent approval (hereafter "licence") granted, or control system implemented, by a competent authority in accordance with national law:
  - (a) manufacture of tobacco products and manufacturing equipment; and (b) import or export of tobacco products and manufacturing equipment.
2. Each Party shall endeavour to license, to the extent considered appropriate, and when the following activities are not prohibited by national law, any natural or legal person engaged in:
  - (a) retailing of tobacco products;
  - (b) growing of tobacco, except for traditional small-scale growers, farmers and producers;
  - (c) transporting commercial quantities of tobacco products or manufacturing equipment; and
  - (d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.
3. With a view to ensuring an effective licensing system, each Party shall:
  - (a) establish or designate a competent authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, and in accordance with its national law, to conduct the activities specified in paragraph 1;
  - (b) require that each application for a licence contains all the requisite information about the applicant, which should include, where applicable:
    - (i) where the applicant is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and any other information to allow identification to take place;
    - (ii) when the applicant is a legal person, information regarding its identity, including full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and of any designated legal representatives, including any other information to allow identification to take place;
    - (iii) precise business location of the manufacturing unit(s), warehouse location and production capacity of the business run by the applicant;
    - (iv) details of the tobacco products and manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make and serial number of the manufacturing equipment;
    - (v) description of where manufacturing equipment will be installed and used;
    - (vi) documentation or a declaration regarding any criminal records;
    - (vii) complete identification of the bank accounts intended to be used in the relevant transactions and other relevant payment details; and
    - (viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated demand;
  - (c) monitor and collect, where applicable, any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing system or for public health or any other related activity in accordance with national law;
  - (d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;
  - (e) undertake measures such as periodic review, renewal, inspection or audit of licences where appropriate;
  - (f) establish, where appropriate, a time frame for expiration of licences and subsequent requisite reapplication or updating of application information;
  - (g) oblige any licensed natural or legal person to inform the competent authority in advance of any change of location of their business or any significant change in information relevant to the activities as licensed;
  - (h) oblige any licensed natural or legal person to inform the competent authority, for appropriate action, of any acquisition or disposal of manufacturing equipment; and
  - (i) ensure that the destruction of any such manufacturing equipment or any part thereof, shall take place under the supervision of the competent authority.
4. Each Party shall ensure that no licence shall be assigned and/or transferred without receipt from the proposed licensee of the appropriate information contained in paragraph 3, and without prior approval from the competent authority.
5. Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain whether any key inputs exist that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the Meeting of the Parties shall consider appropriate action.

## **ARTICLE 7**

### **Due diligence**

1. Each Party shall require, consistent with its national law and the objectives of the WHO Framework Convention on Tobacco Control, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment:

- (a) conduct due diligence before the commencement of and during the course of, a business relationship;
- (b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and
- (c) report to the competent authorities any evidence that the customer is engaged in activities in contravention of its obligations arising from this Protocol.

2. 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:

- (a) establishing that the natural or legal person holds a licence in accordance with Article 6;
- (b) when the customer is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers (if any) and verification of his or her official identification;
- (c) when the customer is a legal person, information regarding its identity, including full name, trade name, business registration number, date and place of incorporation, location of corporate headquarters and principal place of business, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, names of its directors and any designated legal representatives, including the representatives' names and verification of their official identification;
- (d) a description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment; and
- (e) a description of the location where manufacturing equipment will be installed and used.

3. Due diligence pursuant to paragraph 1 may include requirements for customer identification, such as obtaining and updating information relating to the following:

- (a) documentation or a declaration regarding any criminal records; and
- (b) identification of the bank accounts intended to be used in transactions.

4. Each Party shall, on the basis of the information reported in paragraph 1(c), take all necessary measures to ensure compliance with the obligations arising from this Protocol, which may include the designation of a customer within the jurisdiction of the Party to become a blocked customer as defined by national law.

## **ARTICLE 8**

### **Tracking and tracing**

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties agree to establish within five years of entry into force of this Protocol a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information-sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control and accessible to all Parties, enabling Parties to make enquiries and receive relevant information.

2. Each Party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.

3. With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.

4.1 Each Party shall, for purposes of paragraph 3, as part of the global tracking and tracing regime, require that the following information be available, either directly or accessible by means of a link, to assist Parties in determining the origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status:

- (a) date and location of manufacture;
- (b) manufacturing facility;
- (c) machine used to manufacture tobacco products;
- (d) production shift or time of manufacture;
- (e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;
- (f) the intended market of retail sale;
- (g) product description;
- (h) any warehousing and shipping;
- (i) the identity of any known subsequent purchaser; and
- (j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee.

4.2 The information in subparagraphs (a), (b), (g) and where available (f), shall form part of the unique identification markings.

4.3 Where the information in subparagraph (f) is not available at the time of marking, Parties shall require the inclusion of such information in accordance with Article 15.2(a) of the WHO Framework Convention on Tobacco Control.

5. Each Party shall require, within the time limits specified in this Article, that the information set out in paragraph 4 is recorded, at the time of production, or at the time of first shipment by any manufacturer or at the time of import onto its territory.

6. Each Party shall ensure that the information recorded under paragraph 5 is accessible by that Party by means of a link with the unique identification markings required under paragraphs 3 and 4.

7. Each Party shall ensure that the information recorded in accordance with paragraph 5, as well as the unique identification markings rendering such information accessible in accordance with paragraph 6 shall be included in a format established or authorized by the Party and its competent authorities.

8. Each Party shall ensure that the information recorded under paragraph 5 is accessible to the global information-sharing focal point on request, subject to paragraph 9, through a standard electronic secure interface with its national and/or regional central point. The global information-sharing focal point shall compile a list of the competent authorities of Parties and make the list available to all Parties.

9. Each Party or the competent authority shall:

(a) have access to the information outlined in paragraph 4 in a timely manner by making a query to the global information-sharing focal point;

(b) request such information only where it is necessary for the purpose of detection or investigation of illicit trade in tobacco products;

(c) not unreasonably withhold information;

(d) answer the information requests in relation to paragraph 4, in accordance with its national law; and

(e) protect and treat as confidential, as mutually agreed, any information that is exchanged.

10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control.

11. Parties shall cooperate with each other and with competent international organizations, as mutually agreed, in sharing and developing best practices for tracking and tracing systems including:

(a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;

(b) support for training and capacity-building programmes for Parties that express such a need; and

(c) further development of the technology to mark and scan unit packets and packages of tobacco products to make accessible the information listed in paragraph 4.

12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.

13. Each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article.

14. Each Party may require the tobacco industry to bear any costs associated with that Party's obligations under this Article.

## **ARTICLE 9**

### **Record-keeping**

1. Each Party shall require, as appropriate, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment maintain complete and accurate records of all relevant transactions. Such records must allow for the full accountability of materials used in the production of their tobacco products.

2. Each Party shall, as appropriate, require persons licensed in accordance with Article 6 to provide, on request, the following information to the competent authorities:

(a) general information on market volumes, trends, forecasts and other relevant information; and

(b) the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime of transit or transshipment or duty suspension as of the date of the request.

3. With respect to tobacco products and manufacturing equipment sold or manufactured on the territory of the Party for export, or subject to duty suspended movement in transit or transshipment on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 6, provide, on request, to the competent authorities in the

country of departure (electronically, where the infrastructure exists) at the time of departure from their control with the following information:

(a) the date of shipment from the last point of physical control of the products;

(b) the details concerning the products shipped (including brand, amount, warehouse);

(c) the intended shipping routes and destination;

(d) the identity of the natural or legal person(s) to whom the products are being shipped;

(e) the mode of transportation, including the identity of the transporter;

(f) the expected date of arrival of the shipment at the intended shipping destination; and

(g) intended market of retail sale or use.

4. If feasible, each Party shall require that retailers and tobacco growers, except for traditional growers working on a non-commercial basis, maintain complete and accurate records of all relevant transactions in which they engage, in accordance with its national law.

5. For the purposes of implementing paragraph 1, each Party shall adopt effective legislative, executive, administrative or other measures to require that all records are:

- (a) maintained for a period of at least four years;
- (b) made available to the competent authorities; and
- (c) maintained in a format, as required by the competent authorities.

6. Each Party shall, as appropriate and subject to national law, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties.

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

#### **ARTICLE 10**

##### **Security and preventive measures**

1. 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 6 take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, inter alia:

(a) reporting to the competent authorities:

- (i) the cross-border transfer of cash in amounts stipulated in national law or of cross-border payments in kind; and
- (ii) all "suspicious transactions"; and

(b) supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.

2. Each Party shall, where appropriate, 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 subject to Article 6 be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

3. A Party may require that payments carried out by natural or legal persons subject to Article 6 for materials used for the manufacture of tobacco products in its jurisdiction be allowed only in the currency and in the same amount as the invoice, and only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system.

4. Each Party shall ensure that any contravention of the requirements of this Article is subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, as appropriate, suspension or cancellation of a licence.

#### **ARTICLE 11**

##### **Sale by Internet, telecommunication or any other evolving technology**

1. Each Party shall require that all legal and natural persons engaged in any transaction with regard to tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale comply with all relevant obligations covered by this Protocol.

2. Each Party shall consider banning retail sales of tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale.

#### **ARTICLE 12**

##### **Free zones and international transit**

1. Each Party shall, within three years of the entry into force of this Protocol for that Party, implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones, by use of all relevant measures as provided in this Protocol.

2. In addition, the intermingling of tobacco products with non-tobacco products in a single container or any other such similar transportation unit at the time of removal from free zones shall be prohibited.

3. Each Party shall, in accordance with national law, adopt and apply control and verification measures to the international transit or transshipment, within its territory, of tobacco products and manufacturing equipment in conformity with the provisions of this Protocol in order to prevent illicit trade in such products.

#### **ARTICLE 13**

##### **Duty free sales**

1. Each Party shall implement effective measures to subject any duty free sales to all relevant provisions of this Protocol, taking into consideration Article 6 of the WHO Framework Convention on Tobacco Control.

2. No later than five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain the extent of illicit trade in tobacco products related to duty free sales of such products. On the basis of such research, the Meeting of the Parties shall consider appropriate further action.



## PART IV: OFFENCES

### ARTICLE 14

#### Unlawful conduct including criminal offences

1. Each Party shall adopt, subject to the basic principles of its domestic law, such legislative and other measures as may be necessary to establish all of the following conduct as unlawful under its domestic law:

- (a) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment contrary to the provisions of this Protocol;
- (b) (i) manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels;  
(ii) any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment not covered by paragraph (b)(i);
- (c) (i) 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;  
(ii) 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;
- (d) mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products;
- (e) intermingling of tobacco products with non-tobacco products in contravention of Article 12.2 of this Protocol;
- (f) using Internet-, telecommunication- or any other evolving technology based modes of sale of tobacco products in contravention of this Protocol;
- (g) obtaining, by a person licensed in accordance with Article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 6;
- (h) obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;
- (i) (i) making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment and when not contrary to the right against self-incrimination;  
(ii) misdeclaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to:
  - (a) evade the payment of applicable duties, taxes and other levies, or
  - (b) prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment;
- (iii) failing to create or maintain records covered by this Protocol or maintaining false records; and
- (j) laundering of proceeds of unlawful conduct established as a criminal offence under paragraph 2.

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 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.

3. Each Party shall notify the Secretariat of this Protocol which of the unlawful conduct set out in paragraphs 1 and 2 that 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.

4. In order to enhance international cooperation in combatting the criminal offences related to illicit trade in tobacco, tobacco products and manufacturing equipment, Parties are encouraged to review their national laws regarding money laundering, mutual legal assistance and extradition, having regard to relevant international conventions to which they are Parties, to ensure that they are effective in the enforcement of the provisions of this Protocol.

### ARTICLE 15

#### Liability of legal persons

1. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the unlawful conduct including criminal offences established in accordance with Article 14 of this Protocol.

2. Subject to the legal principles of each Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the liability of the natural persons who have engaged in the unlawful conduct or committed the criminal offences established in accordance with national laws and regulations and Article 14 of this Protocol.

### ARTICLE 16

#### Prosecutions and sanctions

1. Each Party shall adopt such measures as may be necessary, in accordance with national law, to ensure that natural and legal persons held liable for the unlawful conduct including criminal offences established in accordance with Article 14 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

2. Each Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for the unlawful conduct, including criminal offences established in accordance with Article 14, are exercised to maximize the effectiveness of law enforcement measures in respect of such unlawful conduct including criminal offences, and with due regard to the need to deter the commission of such unlawful conduct including offences.

3. Nothing contained in this Protocol shall affect the principle that the description of the unlawful conduct including criminal offences established in accordance with this Protocol and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a Party and that such unlawful conduct including criminal offences shall be prosecuted and sanctioned in accordance with that law.

#### **ARTICLE 17**

##### **Seizure payments**

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 and/or manufacturing equipment.

#### **ARTICLE 18**

##### **Disposal or destruction**

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.

#### **ARTICLE 19**

##### **Special investigative techniques**

1. If permitted by the basic principles of its domestic legal system, each Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems it appropriate, for the use of other special investigative techniques, such as electronic or other forms

of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment.

2. For the purpose of investigating the criminal offences established in accordance with Article 14, Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using the techniques referred to in paragraph 1 in the context of cooperation at the international level.

3. In the absence of an agreement or arrangement as set forth in paragraph 2, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

4. Parties recognize the importance of, and need for, international cooperation and assistance in this area and shall cooperate, with each other and with international organizations, in developing capacity to achieve the goals of this Article.

### **PART V: INTERNATIONAL COOPERATION**

#### **ARTICLE 20**

##### **General information sharing**

1. Parties shall, for the purpose of achieving the objectives of this Protocol, report, as part of the WHO Framework Convention on Tobacco Control reporting instrument relevant information, subject to domestic law, and where appropriate, inter alia, on matters such as:

(a) in aggregate form, details of seizures of tobacco, tobacco products or manufacturing equipment, quantity, value of seizures, product descriptions, dates and places of manufacture; and taxes evaded;

(b) import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment;

(c) trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment; and

(d) any other relevant information, as agreed by the Parties.

2. Parties shall cooperate with each other and with competent international organizations to build the capacity of Parties to collect and exchange information.

3. Parties shall deem the said information to be confidential and for the use of Parties only, unless otherwise stated by the transmitting Party.

#### **ARTICLE 21**

##### **Enforcement information sharing**

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

(a) records of licensing for the natural and legal persons concerned;



- (b) information for identification, monitoring and prosecution of natural or legal persons involved in illicit trade in tobacco, tobacco products or manufacturing equipment;
  - (c) records of investigations and prosecutions;
  - (d) records of payment for import, export or duty-free sales of tobacco, tobacco products or manufacturing equipment; and
  - (e) details of seizures of tobacco, tobacco products or manufacturing equipment (including case reference information where appropriate, quantity, value of seizure, product description, entities involved, date and place of manufacture) and modi operandi (including means of transport, concealment, routing and detection).
2. Information received from Parties under this Article shall be used exclusively to meet the objectives of this Protocol. Parties may specify that such information may not be passed on without the agreement of the Party which provided the information.

#### **ARTICLE 22**

##### **Information sharing: confidentiality and protection of information**

1. Each Party shall designate the competent national authorities to which data referred to in Articles 20, 21 and 24 are supplied and notify Parties of such designation through the Convention Secretariat.
2. The exchange of information under this Protocol shall be subject to domestic law regarding confidentiality and privacy. Parties shall protect, as mutually agreed, any confidential information that is exchanged.

#### **ARTICLE 23**

##### **Assistance and cooperation: training, technical assistance and cooperation in scientific, technical and technological matters**

1. Parties shall cooperate, with each other and/or through competent international and regional organizations in providing training, technical assistance and cooperation in scientific, technical and technological matters, in order to achieve the objectives of this Protocol, as mutually agreed. Such assistance may include the transfer of expertise or appropriate technology in the areas of information gathering, law enforcement, tracking and tracing, information management, protection of personal data, interdiction, electronic surveillance, forensic analysis, mutual legal assistance and extradition.
2. Parties may, as appropriate, enter into bilateral, multilateral or any other agreements or arrangements in order to promote training, technical assistance and cooperation in scientific, technical and technological matters taking into account the needs of developing-country Parties and Parties with economies in transition.
3. Parties shall cooperate, as appropriate, to develop and research the possibilities of identifying the exact geographical origin of seized tobacco and tobacco products.

#### **ARTICLE 24**

##### **Assistance and cooperation: investigation and prosecution of offences**

1. Parties shall, in accordance with their domestic law, take all necessary measures, where appropriate, to strengthen cooperation by multilateral, regional or bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of natural or legal persons engaged in illicit trade in tobacco, tobacco products or manufacturing equipment.
2. Each Party shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating illicit trade in tobacco, tobacco products or manufacturing equipment (including, where permitted under domestic law, judicial authorities) cooperate and exchange relevant information at national and international levels within the conditions prescribed by its domestic law.

#### **ARTICLE 25**

##### **Protection of sovereignty**

1. Parties shall carry out their obligations under this Protocol in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Nothing in this Protocol entitles a Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

#### **ARTICLE 26**

##### **Jurisdiction**

1. Each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when:
  - (a) the offence is committed in the territory of that Party; or
  - (b) the offence is committed on board a vessel that is flying the flag of that Party or an aircraft that is registered under the laws of that Party at the time that the offence is committed.
2. Subject to Article 25, a Party may also establish its jurisdiction over any such criminal offence when:
  - (a) the offence is committed against that Party;
  - (b) the offence is committed by a national of that Party or a stateless person who has his or her habitual residence on its territory; or
  - (c) the offence is one of those established in accordance with Article 14 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 14 within its territory.
3. For the purposes of Article 30, each Party shall adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it

does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each Party may also adopt such measures as may be necessary to establish its jurisdiction over the criminal offences established in accordance with Article 14 when the alleged offender is present on its territory and it does not extradite him or her.

5. If a Party exercising its jurisdiction under paragraph 1 or 2 has been notified, or has otherwise learnt, that one or more other Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Protocol does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

## **ARTICLE 27**

### **Law enforcement cooperation**

1. Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to:

(a) enhance and, where necessary, establish channels of communication between the competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the criminal offences established in accordance with Article 14;

(b) ensure effective cooperation among the competent authorities, agencies, customs, police and other law enforcement agencies;

(c) cooperate with other Parties in conducting enquiries in specific cases with respect to criminal offences established in accordance with Article 14 concerning:

(i) the identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) the movement of proceeds of crime or property derived from the commission of such offences; and

(iii) the movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(d) provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(e) facilitate effective coordination among its competent authorities, agencies and services and promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the Parties concerned, the posting of liaison officers;

(f) exchange relevant information with other Parties on specific means and methods used by natural or legal persons in committing such offences, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities; and

(g) exchange relevant information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the criminal offences established in accordance with Article 14.

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

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

## **ARTICLE 28**

### **Mutual administrative assistance**

Consistent with their respective domestic legal and administrative systems, Parties shall provide each other, either on request or on their own initiative, with information to ensure proper application of customs and other relevant law in the prevention, detection, investigation, prosecution and combating of illicit trade in tobacco, tobacco products or manufacturing equipment. The Parties shall deem the said information to be confidential and for restricted use, unless otherwise stated by the transmitting Party. Such information may include:

(a) new customs and other enforcement techniques of demonstrated effectiveness;

(b) new trends, means or methods of engaging in illicit trade in tobacco, tobacco products and manufacturing equipment;

(c) goods known to be the subject of illicit trade in tobacco, tobacco products and manufacturing equipment as well as details of description, packaging, transport and storage and methods used in respect of those goods;

(d) natural or legal persons known to have committed or to be a party to an offence established in accordance with Article 14; and

(e) any other data that would assist designated agencies in risk assessment for control and other enforcement purposes.

## **ARTICLE 29**

### **Mutual legal assistance**

1. Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14 of this Protocol.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and

arrangements of the requested Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which legal persons may be held liable in accordance with Article 15 of this Protocol in the requesting Party.

3. Mutual legal assistance to be afforded in accordance with this Article may be requested for any of the following purposes:

- (a) taking evidence or statements from persons;
- (b) effecting service of judicial documents;
- (c) executing searches and seizures, and freezing;
- (d) examining objects and sites;
- (e) providing information, evidentiary items and expert evaluations;
- (f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) facilitating the voluntary appearance of persons in the requesting Party; and
- (i) any other type of assistance that is not contrary to the domestic law of the requested Party.

4. This Article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance.

5. 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 intergovernmental agreement of mutual legal assistance. If the Parties are bound by such a treaty or intergovernmental agreement, the corresponding provisions of that treaty or intergovernmental agreement shall apply unless the Parties agree to apply paragraphs 6 to 24 in lieu thereof. Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

6. Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to their respective competent authorities for execution. When a Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. Each Party shall notify the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol of the central authority designated for this purpose. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the central authorities designated by the Parties. This requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through appropriate international organizations, if possible.

7. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested Party under conditions allowing the Party to establish authenticity. The language or languages acceptable to each Party shall be notified to the Head of the Convention Secretariat at the time of accession, acceptance, approval, formal confirmation or ratification of this Protocol. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

8. A request for mutual legal assistance shall contain:

- (a) the identity of the authority making the request;
- (b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or judicial proceeding;
- (c) a summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;
- (d) a description of the assistance sought and details of any particular procedure that the requesting Party wishes to be followed;
- (e) where possible, the identity, location and nationality of any person concerned;
- (f) the purpose for which the evidence, information or action is sought; and
- (g) the provisions of the domestic law relevant to the criminal offence and the punishment therefore.

9. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

10. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

11. The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested Party. Nothing in this paragraph shall prevent the requesting Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting Party shall notify the requested Party prior to the disclosure and, if so requested, consult with the requested Party. If, in an exceptional case, advance notice is not possible, the requesting Party shall inform the requested Party of the disclosure without delay.

12. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

13. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a Party and has to be heard as a witness or expert by the judicial authorities of another Party, the first Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual

in question to appear in person in the territory of the requesting Party. Parties may agree that the hearing shall be conducted by a judicial authority of the requesting Party and attended by a judicial authority of the requested Party.

14. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with this Article;

(b) if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) if the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) where the request involves a crime where the maximum penalty in the requested Party is less than two years of imprisonment or other forms of deprivation of liberty or, 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; or

(e) if it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

15. Reasons shall be given for any refusal of mutual legal assistance.

16. A Party shall not decline to render mutual legal assistance under this Article on the ground of bank secrecy.

17. Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

18. Parties may decline to render mutual legal assistance pursuant to this Article on the ground of absence of dual criminality. However, the requested Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested Party.

19. The requested Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting Party and for which reasons are given, preferably in the request. The requested Party shall respond to reasonable requests by the requesting Party regarding progress in its handling of the request.

The requesting Party shall promptly inform the requested Party when the assistance sought is no longer required.

20. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

21. Before refusing a request pursuant to paragraph 14 or postponing its execution pursuant to paragraph 20, the requested Party shall consult with the requesting Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting Party accepts assistance subject to those conditions, it shall comply with the conditions.

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

23. In the event of a request, the requested Party:

(a) shall provide to the requesting Party copies of government records, documents or information in its possession that under its domestic law are available to the general public; and

(b) may, at its discretion, provide to the requesting Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

24. Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this Article.

## **ARTICLE 30**

### **Extradition**

1. This Article shall apply to the criminal offences established in accordance with Article 14 of this Protocol when:

(a) the person who is the subject of the request for extradition is located in the territory of the requested Party;

(b) the criminal offence for which extradition is sought is punishable under the domestic law of both the requesting Party and the requested Party; and

(c) the offence is punishable by a maximum period of imprisonment or other forms of deprivation of liberty of at least 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.

2. Each of the criminal offences to which this Article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

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

4. Parties that do not make extradition conditional on the existence of a treaty shall recognize the criminal offences to which this Article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the domestic law of the requested Party or by applicable

extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested Party may refuse extradition.

6. Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any criminal offences to which this Article applies.

7. A Party in whose territory an alleged offender is present, if it does not extradite such person in respect of a criminal offence to which this Article applies solely on the ground that he or she is one of its nationals, shall, at the request of the Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a similar nature under the domestic law of that Party. The Parties concerned shall cooperate with each other, in

particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

8. Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that Party and the Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 7.

9. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

10. Any person regarding whom proceedings are being carried out in connection with any of the criminal offences to which this Article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the Party in the territory of which that person is present.

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

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

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

14. Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. 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 1 to 13 in lieu thereof.

#### **ARTICLE 31**

##### **Measures to ensure extradition**

1. Subject to its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition Proceedings.

2. Measures taken in accordance with paragraph 1 shall be notified, in conformity with national law, as appropriate and without delay, to the requesting Party.

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

### **PART VI: REPORTING**

#### **ARTICLE 32**

##### **Reporting and exchange of information**

1. Each Party shall submit to the Meeting of the Parties, through the Convention Secretariat, periodic reports on its implementation of this Protocol.

2. The format and content of such reports shall be determined by the Meeting of the Parties. These reports shall form part of the regular WHO Framework Convention on Tobacco Control reporting instrument.

3. The content of the periodic reports referred to in paragraph 1, shall be determined having regard, inter alia, to the following:

(a) information on legislative, executive, administrative or other measures taken to implement this Protocol;  
(b) information, as appropriate, on any constraints or barriers encountered in the implementation of this Protocol and on the measures taken to overcome those barriers;  
(c) information, as appropriate, on financial and technical assistance provided, received, or requested for activities related to the elimination of illicit trade in tobacco products; and



(d) the information specified in Article 20.

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

4. The Meeting of the Parties, pursuant to Articles 33 and 36, shall consider arrangements to assist developing-country Parties and Parties with economies in transition, at their request, in meeting their obligations under this Article.

5. The reporting of information under those Articles shall be subject to national law regarding confidentiality and privacy. Parties shall protect, as mutually agreed, any confidential information that is reported or exchanged.

## **PART VII: INSTITUTIONAL ARRANGEMENTS AND FINANCIAL RESOURCES**

### **ARTICLE 33**

#### **Meeting of the Parties**

1. A Meeting of the Parties is hereby established. The first session of the Meeting of the Parties shall be convened by the Convention Secretariat immediately before or immediately after the next regular session of the Conference of the Parties following the entry into force of this Protocol.

2. 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.

3. Extraordinary sessions of the Meeting of the Parties shall be held at such other times as may be deemed necessary by the Meeting or at the written request of any Party, provided that, within six months of the request being communicated to them by the Convention Secretariat, it is supported by at least one third of the Parties.

4. The Rules of Procedure and the Financial Rules of the Conference of the Parties to the WHO Framework Convention on Tobacco Control shall apply, *mutatis mutandis*, to the Meeting of the Parties unless the Meeting of the Parties decides otherwise.

5. The Meeting of the Parties shall keep under regular review the implementation of the Protocol and take the decisions necessary to promote its effective implementation.

6. The Meeting of the Parties shall decide on the scale and mechanism of the voluntary assessed contributions from the Parties to the Protocol for the operation of this Protocol as well as 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 WHO Framework Convention on Tobacco Control budget and workplan.

### **ARTICLE 34**

#### **Secretariat**

1. The Convention Secretariat shall be the Secretariat of this Protocol.

2. The functions of the Convention Secretariat with regard to its role as the secretariat of this Protocol shall be to:

(a) make arrangements for sessions of the Meeting of the Parties and any subsidiary bodies as well as working groups and other bodies established by the Meeting of the Parties and provide them with services as required;

(b) receive, analyse, transmit and provide feedback to Parties concerned as needed and to the Meeting of the Parties on reports received by it pursuant to this Protocol and facilitate the exchange of information among Parties;

(c) 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 to facilitate implementation of the obligations under this Protocol;

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

(e) ensure, under the guidance of the Meeting of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies;

(f) enter, under the guidance of the Meeting of the Parties, into such administrative or contractual arrangements as may be required for the effective discharge of its functions as secretariat to this Protocol;

(g) 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; and

(h) perform other secretariat functions specified by this Protocol and such other functions as may be determined by the Meeting of the Parties.

### **ARTICLE 35**

#### **Relations between the meeting of the Parties and intergovernmental organizations**

In order to provide technical and financial cooperation for achieving the objective of this Protocol, the Meetings of the Parties may request the cooperation of competent international and regional intergovernmental organizations, including financial and development institutions.

## **ARTICLE 36**

### **Financial resources**

1. Parties recognize the important role that financial resources play in achieving the objective of this Protocol, and acknowledge the importance of Article 26 of the WHO Framework Convention on Tobacco Control in achieving the objectives of the Convention.
2. Each Party shall provide financial support in respect of its national activities intended to achieve the objective of this Protocol, in accordance with its national plans, priorities and programmes.
3. Parties shall promote, as appropriate, the utilization of bilateral, regional, subregional and other multilateral channels to provide funding for strengthening the capacity of developing-country Parties and Parties with economies in transition in order to meet the objectives of this Protocol.
4. Without prejudice to Article 18, Parties are encouraged, subject to national laws and policies and where appropriate, to use any confiscated proceeds of crime deriving from the illicit trade in tobacco, tobacco products and manufacturing equipment to achieve the objectives set out in this Protocol.
5. Parties represented in relevant regional and international intergovernmental organizations and financial and development institutions shall encourage these entities to provide financial assistance for developing-country Parties and for Parties with economies in transition to assist them in meeting their obligations under this Protocol, without limiting the rights of participation within these organizations.
6. Parties agree that:
  - (a) to assist Parties in meeting their obligations under this Protocol, all relevant potential and existing resources available for activities related to the objective of this Protocol should be mobilized and utilized for the benefit of all Parties, especially developing-country Parties and Parties with economies in transition; and
  - (b) the Convention Secretariat shall advise developing-country Parties and Parties with economies in transition, upon request, on available sources of funding to facilitate implementation of their obligations under this Protocol.
7. Parties may require the tobacco industry to bear any costs associated with a Party's obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of the WHO Framework Convention on Tobacco Control.
8. Parties shall endeavour, subject to their domestic law, to achieve self-financing of the implementation of the Protocol including through the levying of taxes and other forms of charges on tobacco products.

## **PART VIII: SETTLEMENT OF DISPUTES**

### **ARTICLE 37**

#### **Settlement of disputes**

The settlement of disputes between Parties concerning the interpretation or application of this Protocol is governed by Article 27 of the WHO Framework Convention on Tobacco Control.

## **PART IX: DEVELOPMENT OF THE PROTOCOL**

### **ARTICLE 38**

#### **Amendments to this Protocol**

1. Any Party may propose amendments to this Protocol.
2. Amendments to this Protocol shall be considered and adopted by the Meeting of the Parties. The text of any proposed amendment to this Protocol shall be communicated to the Parties by the Convention Secretariat at least six months before the session at which it is proposed for adoption. The Convention Secretariat shall also communicate proposed amendments to the signatories of this Protocol and, for information, to the Depositary.
3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment to this Protocol. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For purposes of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the Convention Secretariat to the Depositary, who shall circulate it to all Parties for acceptance.
4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least two thirds of the Parties.
5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

### **ARTICLE 39**

#### **Adoption and amendment of annexes to this Protocol**

1. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol.
2. Annexes shall be restricted to lists, forms and any other descriptive material relating to procedural, scientific, technical or administrative matters.
3. Annexes to this Protocol and amendments thereto shall be proposed, adopted and enter into force in accordance with the procedure set forth in Article 38.

## PART X: FINAL PROVISIONS

### ARTICLE 40

#### Reservations

No reservations may be made to this Protocol.

### ARTICLE 41

#### Withdrawal

1. At any time after two years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the WHO Framework Convention on Tobacco Control shall also be considered as having withdrawn from this Protocol, with effect as of the date of its withdrawal from the WHO Framework Convention on Tobacco Control.

### ARTICLE 42

#### Right to vote

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

### ARTICLE 43

#### Signature

The Protocol shall be open for signature by all Parties to the WHO Framework Convention on Tobacco Control at World Health Organization Headquarters in Geneva from 10 to 11 January 2013, and thereafter at United Nations Headquarters in New York until 9 January 2014.

### ARTICLE 44

#### Ratification, acceptance, approval, formal confirmation or accession

1. This Protocol shall be subject to ratification, acceptance, approval or accession by States and to formal confirmation or accession by regional economic integration organizations that are Party to the WHO Framework Convention on Tobacco Control. It shall be open for accession from the day after the date on which the Protocol is closed for signature. Instruments of ratification, acceptance, approval, formal confirmation or accession shall be deposited with the Depositary.
2. Any regional economic integration organization that becomes a Party without any of its Member States being a Party shall be bound by all the obligations under this Protocol. In the case of organizations one or more of whose Member States is a Party, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the Member States shall not be entitled to exercise rights under this Protocol concurrently.
3. Regional economic integration organizations shall, in their instruments relating to formal confirmation or in their instruments of accession, declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification to the extent of their competence.

### ARTICLE 45

#### Entry into force

1. This Protocol shall enter into force on the ninetieth day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.
2. For each Party to the WHO Framework Convention on Tobacco Control that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in paragraph 1 for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval, accession or formal confirmation.
3. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States Members of that organization.

### ARTICLE 46

#### Depositary

The Secretary-General of the United Nations shall be the Depositary of this Protocol.

### ARTICLE 47

#### Authentic texts

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



**Annex 1:****Decision FCTC/COP5(1) – Protocol to Eliminate Illicit Trade in Tobacco Products**

The Conference of the Parties,

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;

Taking into account Article 15 of the WHO Framework Convention on Tobacco Control, which recognizes, inter alia, that the elimination of all forms of illicit trade in tobacco products is an essential component of tobacco control;

Recalling its decision FCTC/COP2(12) by which the Intergovernmental Negotiating Body was established, with the objective of drafting and negotiating a protocol on illicit trade in tobacco products, which would build upon and complement the provisions of Article 15 of the WHO Framework Convention on Tobacco Control, and further decisions FCTC/COP3(6) and FCTC/COP4(11) which reflected upon the progress achieved during the negotiations;

Acknowledging the work undertaken by the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products resulting in the draft protocol to eliminate illicit trade in tobacco products, contained in document FCTC/COP5/6; Convinced that supplementing the WHO Framework Convention on Tobacco Control with a comprehensive protocol will be a powerful, effective means to counter illicit trade in tobacco products and its grave consequences,

1. ADOPTS in accordance with Article 33 of the WHO Framework Convention on Tobacco Control the attached Protocol to Eliminate Illicit Trade in Tobacco Products; and
2. CALLS UPON all Parties to the WHO Framework Convention on Tobacco Control, to consider signing, ratifying, accepting, approving, formally confirming or acceding to the Protocol at the earliest opportunity, with a view to bringing the Protocol into force as soon as possible.

**Annex 2:****History of the negotiations of the Protocol to Eliminate Illicit Trade in Tobacco Products**

As early as 2006, at the first meeting of the Conference of the Parties (COP) following entry into force of the WHO FCTC, the Parties discussed possible protocols to the Convention. One of the areas in which they agreed that a protocol could be established was illicit trade in tobacco products, and accordingly, the COP set up an expert group to prepare a template for a possible protocol in this area. The expert group presented its report to the COP at its second session in 2007.

Recognizing that cooperative action was necessary in order to eliminate the illicit trade, the COP at its second session established an Intergovernmental Negotiating Body (INB), open to all Parties, to draft and negotiate a protocol on illicit trade in tobacco products that would build upon and complement the provisions of Article 15 of the WHO FCTC.

The INB held five sessions, all in Geneva, Switzerland. The first session of the INB was held on 11–15 February 2008. The template for a protocol on illicit trade as proposed by the expert group served as the basis for the negotiations. Mr Ian Walton-George, representing the European Union, was elected as Chairperson of the INB, and Dr J. Al-Lawati (Oman), Dr E. Jaramillo (Mexico), Mr P. Krishna (India), Mrs L. Asiedu (Ghana) and Mr J. Martin (Federated States of Micronesia) as Vice-Chairpersons. Following the first session, Mr Walton-George drafted a “Chairperson’s text”, taking into account the comments made by Parties during the first session.

The second session of the INB was held on 20–25 October 2008, with the Chairperson’s text serving as the basis for negotiations. The INB reported to the third session of the COP (17–22 November 2008, Durban, South Africa) on progress. The Conference requested the INB to continue its work and to submit a draft protocol to its fourth session.

As also requested by the COP, regional consultations were held for all six regions between the second and third sessions of the INB. The consultations took place in Tehran, Islamic Republic of Iran (Eastern Mediterranean Region), Geneva (African and European Regions), Mexico City, Mexico (Region of the Americas), Beijing, China (Western Pacific Region) and Dhaka, Bangladesh (South-East Asia Region).

Expert papers were also prepared by the Secretariat on several technical matters to serve as background documents for the discussions at the third session of the INB: the feasibility of an international tracking and tracing regime; the legal ramifications of a possible ban of sales of tobacco products via the Internet as well as of a possible ban on duty free sales of tobacco products; legal advice on the scope of the protocol; and an assessment of potential requirements at national level for an international track and trace regime.

For the third session of the INB (28 June – 5 July 2009), the Chairperson prepared a revised Chairperson’s text, taking into account the discussions during the second session of the INB, the expert papers, and legal advice.

The revised Chairperson’s text served as the basis for discussions at the third session of the INB. The INB re-elected Mr Walton-George as Chairperson. As Vice-Chairpersons, the INB elected Dr T. Vinit (Papua New Guinea), Mr H. Mohamed (Maldives), Mrs L. Asiedu (Ghana) – replaced by Dr M. Anibueze (Nigeria) at the fourth session of the INB –, Dr E. Al Mansoori (United Arab Emirates) and Dr J. Regalado Pineda (Mexico).

The third session resulted in a negotiating text, which the INB agreed would form the basis for further negotiations.

Two drafting groups established by the INB worked between its third and fourth sessions and proposed text for articles relating to the control of the supply chain and matters of criminal law, mutual legal assistance and extradition, in order to facilitate further negotiations at the fourth session. The groups were chaired by Dr M. Anibueze (Nigeria) and Mrs I. Demuni de Silva (Sri Lanka).

At the fourth session of the INB (14–21 March 2010), the delegations discussed provisions of the negotiating text as well as proposals made by the drafting groups. At the closure of the session, the INB decided to recommend that the draft protocol be considered by the COP at its fourth session. The text of the draft protocol showed the progress made by the INB to this point – consensus had been reached on 26 provisions, while 23 remained under discussion. In particular, consensus had been reached on the tracking and tracing provisions and the great majority of the provisions relating to licensing. However, a number of important and challenging issues remained unsolved. On several matters, the INB sought guidance from the COP, including regarding the method of financing of the protocol.

The COP acknowledged the progress made by the INB and extended the mandate of the INB to a final session in early 2012, requesting the INB to submit the text of a draft protocol to its fifth session for consideration. It also established an informal working group to make proposals and develop possible text, in order to facilitate negotiations at the fifth session of the INB.

The informal working group, comprising representatives of 30 Parties (five Parties per WHO region), held two meetings (Geneva, 4–8 July and 19–23 September 2011) and was chaired by Dr Nuntavarn Vichit-Vadakan (Thailand). In accordance with its mandate, the group developed possible text for those articles in Part III of the protocol, on supply chain control, that had not yet been agreed, and made proposals on the other matters within its mandate, including the method of financing of the protocol and the inclusion of mutual legal assistance and extradition in the draft protocol.

The fifth session of the INB was held from 29 March to 4 April 2012. The INB confirmed Mr Walton-George as Chairperson. Mr A.T. Faireka (Cook Islands) replaced Dr T. Vinit (Papua New Guinea), and Dr M. Kabir (Nigeria) replaced Dr M. Anibueze (Nigeria) as Vice-Chairpersons.

After four years and five sessions of negotiations, on 4 April 2012 the delegations to the fifth session of the INB agreed on a consensus text to be submitted to the COP for consideration at its fifth session. The text of the draft protocol also took account of the comments submitted by Parties on the Arabic, Chinese, French, Russian and Spanish translations of the English text, in line with the decision of the INB.

On 12 November 2012, the Protocol was adopted by consensus at the fifth session of the COP (Seoul, Republic of Korea, 12–17 November 2012). It thus became the first protocol to the WHO FCTC, and a new international treaty in its own right. The Protocol was opened for signature on 10 January 2013 at WHO headquarters in Geneva. More than 50 Parties participated in this event, during which 12 Parties, representing all six WHO regions, signed the Protocol; one more Party signed the following day. The 13 Parties are: China, France, Gabon, Libya, Myanmar, Nicaragua, Panama, Republic of Korea, South Africa, Syrian Arab Republic, Tunisia, Turkey and Uruguay. The Protocol remained open for signature at United Nations Headquarters in New York until 9 January 2014.

The Protocol to Eliminate Illicit Trade in Tobacco Products is a landmark in the strengthening of global action against tobacco and is a new legal instrument in public health. It supplements the WHO FCTC with a comprehensive tool to counter and eventually eliminate illicit trade in tobacco products and to strengthen legal dimensions for international health cooperation.

### **Annex 3:**

#### **Article 15 of the WHO Framework Convention on Tobacco Control Illicit trade in tobacco products**

1. The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.
2. Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status. In addition, each Party shall:
  - (a) require that unit packets and packages of tobacco products for retail and wholesale use that are sold on its domestic market carry the statement: “Sales only allowed in (insert name of the country, subnational, regional or federal unit)” or carry any other effective marking indicating the final destination or which would assist authorities in determining whether the product is legally for sale on the domestic market; and
  - (b) consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade.

3. Each Party shall require that the packaging information or marking specified in paragraph 2 of this Article shall be presented in legible form and/or appear in its principal language or languages.

4. With a view to eliminating illicit trade in tobacco products, each Party shall:

(a) monitor and collect data on cross-border trade in tobacco products, including illicit trade, and exchange information among customs, tax and other authorities, as appropriate, and in accordance with national law and relevant applicable bilateral or multilateral agreements;

(b) enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes;

(c) take appropriate steps to ensure that all confiscated manufacturing equipment, counterfeit and contraband cigarettes and other tobacco products are destroyed, using environmentally-friendly methods where feasible, or disposed of in accordance with national law;

(d) adopt and implement measures to monitor, document and control the storage and distribution of tobacco products held or moving under suspension of taxes or duties within its jurisdiction; and

(e) adopt measures as appropriate to enable the confiscation of proceeds derived from the illicit trade in tobacco products.

5. Information collected pursuant to subparagraphs 4(a) and 4(d) of this Article shall, as appropriate, be provided in aggregate form by the Parties in their periodic reports to the Conference of the Parties, in accordance with Article 21.

6. The Parties shall, as appropriate and in accordance with national law, promote cooperation between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products. Special emphasis shall be placed on cooperation at regional and subregional levels to combat illicit trade of tobacco products.

7. Each Party shall endeavour to adopt and implement further measures including licensing, where appropriate, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

#### **Annex 4:**

#### **Article 33 of the WHO Framework Convention on Tobacco Control Protocols**

1. Any Party may propose protocols. Such proposals will be considered by the Conference of the Parties.

2. The Conference of the Parties may adopt protocols to this Convention.

In adopting these protocols every effort shall be made to reach consensus. If all efforts at consensus have been exhausted, and no agreement reached, the protocol shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For the purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote.

3. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption.

4. Only Parties to the Convention may be parties to a protocol.

5. Any protocol to the Convention shall be binding only on the parties to the protocol in question. Only Parties to a protocol may take decisions on matters exclusively relating to the protocol in question.

6. The requirements for entry into force of any protocol shall be established by that instrument.

## Appendix 2: Protocol Timeline

Subject	Article	Timeframe	Undertaking
<b>KEY INPUTS</b>	Article 6(5)	5 years following entry into force of this Protocol.	Meeting of the Parties (MOP) to ensure at its next session that evidence-based research is conducted to ascertain whether any key inputs exist that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the MOP shall consider appropriate action.
<b>TRACKING AND TRACING</b>	Article 8(1)	Within 5 years of entry into force of this Protocol.	States parties agree to establish a global tracking and tracing regime, comprising national and/or regional systems and a global information sharing focal point located at the Convention Secretariat of the WHO FCTC and accessible to all States parties, enabling States parties to make enquiries and receive relevant information.
	Article 8(3)	Cigarettes within 5 years of entry into force of this Protocol for that State party and within 10 years of entry into force of this Protocol for that State party for other tobacco products.	States parties shall require that unique, secure, and non-removable identification markings (unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes and other tobacco products.
	Article 8(5)	Within the time limits specified in article 8.	States parties shall require that information set out in art. 8(4) is recorded, at the time of production, or at the time of first shipment by the manufacturer or at the time of import onto that State party's territory.
<b>FREE ZONES AND INTERNATIONAL TRANSIT</b>	Article 12(1)	Within 3 years of entry into force of Protocol for that State party.	States parties shall implement effective controls on all manufacturing of, and transactions in, tobacco and tobacco products, in free zones by use of all relevant measures provided in this Protocol.
<b>DUTY FREE SALES</b>	Article 13(2)	No later than five years following entry into force of this Protocol.	The MOP shall ensure at its next session that evidence-based research is conducted to ascertain the extent of illicit trade in tobacco products related to duty-free sales of such products. On the basis of such research, the MOP shall consider appropriate further action.
<b>MEETING OF THE PARTIES</b>	Article 33(1)	Following entry into force of this Protocol.	The first MOP shall be convened by the Convention Secretariat immediately before or immediately after regular sessions of the COP.

	Article 33(2)	Thereafter.	Regular sessions of the MOP shall be convened by the Convention Secretariat, immediately before or immediately after regular sessions of the COP.
	Article 33(3)	Within 6 months of the request being communicated to the States parties by the Convention Secretariat.	Extraordinary sessions of the MOP shall be held at such other times as may be deemed necessary by the MOP or at the written request of any State party provided that it is supported by at least one third of the States parties.
<b>AMENDMENTS TO THIS PROTOCOL</b>	Article 38(2)	At least 6 months before the session at which it is proposed for adoption.	Amendments to this Protocol shall be considered and adopted by the MOP. The text of any proposed amendment to this Protocol shall be communicated to the States parties by the COP At least 6 months before the session at which it is proposed for adoption.
	Article 38(4)	90 <sup>th</sup> day after the date of receipt by the Depositary.	An amendment adopted in accordance with art. 38(3) shall enter into force for those States parties having accepted it on the 90 <sup>th</sup> day after the date of receipt by the Depositary of an instrument of acceptance by at least two thirds of the States parties.
	Article 38(5)	90 <sup>th</sup> after date of deposit by State party.	The amendment shall enter into force for any other State party on the 90 <sup>th</sup> day after the date on which that State party deposits with the Depositary its instrument of acceptance of the said amendment.
<b>WITHDRAWAL</b>	Article 41(1)	Any time after 2 years from the date of entry into force of the Protocol for a State party.	State party may withdraw from the Protocol by giving written notification to the Depositary.
	Article 41(2)	Upon expiry of 1 year from date of receipt by the Depositary or such later date as specified in notification of withdrawal.	Any such withdrawal shall take effect after receipt by the Depositary of the notification of withdrawal or as may be specified by the notification.
<b>ENTRY INTO FORCE</b>	Article 45(1)	On the 90 <sup>th</sup> day following the date of deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.	Protocol shall enter into force.
	Article 45(2)	On the 90 <sup>th</sup> day following the date of deposit of the State party's instrument of ratification, acceptance, approval, accession or formal confirmation.	Protocol shall enter into force for each State party to the WHO FCTC that ratifies, accepts, approves or formally confirms this Protocol or accedes thereto after the conditions set out in art. 45 (1) for entry into force have been fulfilled

## Appendix 3: Assessment Checklist for Countries

### SELF ASSESSMENT CHECKLIST ON THE IMPLEMENTATION OF THE PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

General information that should be identified at the outset of the self-assessment checklist:

1. Status of the ratification of UNTOC, UNCAC, Terrorist Financing Convention, TRIPS Agreement, WHO FCTC and any other relevant regional conventions by the country.
2. Description of the legal, institutional and political system of the country.
3. Any assessment at a country level undertaken regarding tobacco control and illicit trade in the country.
4. Tobacco control legislation in place, draft bills, policies and/or other measures implemented.
5. Legislation surrounding intellectual property law and counterfeiting, customs law and smuggling offences, relevant applicable criminal law, legislation regarding seizure, confiscation/forfeiture, destruction and legislation regarding the confiscation of proceeds of crime.

### PART III SUPPLY CHAIN CHECKLIST

#### Article 6: Licence, equivalent approval or control

(i) Identify the following activities which are subject to licensing (check all that apply and provide relevant legislation for all checked boxes):

- Manufacturing tobacco products  
Relevant legislation: .....
- Manufacturing tobacco-manufacturing equipment  
Relevant legislation: .....
- Manufacturing of key inputs (acetate tow, cigarette paper, cigarette filters)  
Relevant Legislation: .....
- Retail sale of tobacco products  
Relevant legislation: .....
- Duty free sales of tobacco products  
Relevant legislation: .....
- Commercial tobacco growing (other than for personal use)  
Relevant legislation: .....  
Definition of *commercial* .....
- Transporting commercial quantities of tobacco products  
Relevant legislation: .....
- Transporting tobacco-manufacturing equipment  
Relevant legislation: .....
- Wholesaling tobacco, tobacco products, tobacco-manufacturing equipment, or key inputs  
Relevant legislation: .....
- Brokering tobacco, tobacco products, tobacco-manufacturing equipment or key inputs  
Relevant legislation: .....
- Warehousing tobacco, tobacco products, tobacco-manufacturing equipment or key inputs  
Relevant legislation: .....
- Distributing tobacco, tobacco products, tobacco-manufacturing equipment or key inputs  
Relevant legislation: .....
- Any internet transactions with regard to tobacco products  
Relevant legislation: .....

Other activities requiring licenses  
Which activities.....  
Relevant legislation: .....

None  
Relevant legislation: .....

(ii) Which competent authority (or authorities) is in charge of licensing the activities identified in (i) above, if any?

(iii) What licensing-related activities do the authority identified in (ii) above regulate (check all that apply)?

- Issuance
- Renewal
- Suspension
- Revocation
- Cancellation
- Periodic review
- Inspection or audit of licences
- Other: *Specify*.....
- None

(iv) Describe the process and requirements for obtaining any of the licenses identified in (iii) above.

(v) What licence fees are levied? Where does the money go?

(vi) Are any measures taken to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system? If so, what are they?

(vii) Is there a timeframe of expiration of licences and reapplication?

(viii) Is licensee information updated?

#### Article 7: Due Diligence

(i) Identify the following activities that individuals or companies engaged in the supply chain of **tobacco** must perform (check all that apply and provide relevant legislation for all checked boxes):

- Due diligence before commencement of a business relationship
- Due diligence during a business relationship
- Monitoring sales to customers to ensure that quantities are commensurate with demand within the intend market of sale or use
- Reporting customers' illicit trade activities to authorities
- Obtaining information regarding criminal records
- Obtaining information regarding identification of bank accounts intended to be used in the transaction
- Designation as blocked customer for non-compliant customer

Relevant legislation: .....

(ii) Identify the following activities that individuals or companies engaged in the supply chain of **tobacco products** must perform (check all that apply and provide relevant legislation for all checked boxes):

- Due diligence before commencement of a business relationship
- Due diligence during a business relationship
- Monitoring sales to customers to ensure that quantities are commensurate with demand within the intend market of sale
- Reporting customers' illicit trade activities to authorities
- Obtaining information regarding criminal records
- Obtaining information regarding identification of bank accounts intended to be used in the transaction
- Designation as blocked customer for non-compliant customer

Relevant legislation: .....

(iii) Identify the following activities that individuals or companies engaged in the supply chain of **tobacco-manufacturing equipment** must perform (check all that apply and provide relevant legislation for all checked boxes):

- Due diligence before commencement of a business relationship
- Due diligence during a business relationship
- Monitoring sales to customers to ensure that quantities are commensurate with demand within the intend market of sale
- Reporting customers' illicit trade activities to authorities
- obtaining information regarding criminal records
- obtaining information regarding identification of bank accounts intended to be used in the transaction
- Designation as blocked customer for non-compliant customer

Relevant legislation: .....

(iv) Identify the following activities that individuals or companies engaged in the supply chain of **key inputs** must perform (check all that apply and provide relevant legislation for all checked boxes):

- Due diligence before commencement of a business relationship
- Due diligence during a business relationship
- Monitoring sales to customers to ensure that quantities are commensurate with demand within the intend market of sale
- Reporting customers' illicit trade activities to authorities
- Obtaining information regarding criminal records
- Obtaining information regarding identification of bank accounts intended to be used in the transaction
- Designation as blocked customer for non-compliant customer

Relevant legislation: .....

(v) Describe the process and information required for conducting the due diligence identified in (i)-(iv) above, if any. In each case, you should identify, at a minimum, whether the due diligence process requires:

- A description of the intended use and intended market sale of tobacco, tobacco products, manufacturing equipment or key inputs; and/or
- A description of the location where manufacturing equipment will be installed or used.

Process: .....

#### Article 8: Tracking and Tracing

(i) Is the supply chain of tobacco products manufactured in or imported on to the country's territory subject to tracking and tracing requirements (check "yes" or "no"; if "yes", provide relevant legislation)?

- Yes  
Relevant legislation: .....
- No

(ii) Are unique, secure, non-removable identification markings, such as codes or stamps, for cigarettes, affixed to:

- Unit packets
- Unit packages
- Outside packaging

(iii) Describe the tracking and tracing requirements identified in (i) above, if any.

Requirements: .....

(iv) Are tax stamps, secure ink markings, or other markings used to indicate duty and tax status?

- Tax stamps
- Secure ink markings
- Other markings: *Specify* .....



#### Article 9: Record-Keeping

(i) Complete and accurate records must be maintained by all natural and legal persons engaged in the following activities (check all that apply and provide relevant legislation for all checked boxes):

- Growing of tobacco  
Relevant legislation: .....
- Manufacturing of tobacco and tobacco products  
Relevant legislation: .....
- Import of tobacco, tobacco products and tobacco-manufacturing equipment  
Relevant legislation: .....
- Manufacture of tobacco-manufacturing equipment  
Relevant legislation: .....
- Transport and storage of tax suspended tobacco and tobacco products  
Relevant legislation: .....
- Transport, storage and wholesaling of tobacco and tobacco products  
Relevant legislation: .....
- Export of tobacco, tobacco products and tobacco-manufacturing equipment  
Relevant legislation: .....
- Retailing of tobacco and tobacco products  
Relevant legislation: .....
- None

(ii) Do the records identified in (i) above allow for the full accountability of materials used in the production of tobacco products (check “yes” or “no”; if “yes”, provide relevant legislation)?

- Yes  
Relevant legislation: .....
- No

(iii) Describe the requirements to maintain complete and accurate records by all natural and legal persons identified above, if any.

(iv) What types of records are required to be kept to satisfy customs and tax law obligations? For how long are these records kept?

#### Article 10: Security and Preventive Measures

(i) Do requirements exist that all natural and legal persons subject to licensing take measures to prevent diversion of tobacco products into illicit trade channels (Provide relevant legislation for checked boxes):

- Reporting to competent authorities cross border transfer of cash in amounts stipulated in national law or of cross border payments in kind  
Relevant legislation: .....
- Reporting to competent authorities all “suspicious transactions”  
Relevant legislation: .....
- Supplying tobacco products, manufacturing equipment or key inputs only in amounts commensurate with the demand for such products within the intended market of retail sale or use  
Relevant legislation: .....

- (ii) Are there any cash transaction reporting arrangements in place?
- Yes  
Describe size of cash transaction that needs to be reported:  
.....
- No
- (iii) Which agency administers this arrangement?
- (iv) Are there requirements that payments for transactions carried out by natural or legal persons subject to licensing be allowed (Provide relevant legislation for checked boxes);
- Only in the currency and in the same amount as the invoice  
Relevant legislation: .....
- Only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system  
Relevant legislation: .....
- (v) Are there requirements that payments carried out by natural or legal persons subject to licensing for materials used for the manufacture of tobacco products, be allowed (Provide relevant legislation for checked boxes);
- Only in the currency and in the same amount as the invoice  
Relevant legislation: .....
- Only through legal modes of payment from financial institutions located on the territory of the intended market and shall not be operated through any other alternative remittance system  
Relevant legislation: .....

**Article 11: Sale by Internet, Telecommunication or Any Other Evolving Technology**

- (i) Are retail sales of tobacco products through the internet regulated (If yes, provide relevant legislation)?
- Yes  
Relevant legislation: .....
- No
- (ii) Are retail sales of tobacco products through the internet banned (if yes, provide legislation)?
- Yes  
Relevant legislation: .....
- No

**Article 12: Free Zones and International Transit**

- (a) Who has administrative control over free zones?  
.....
- (ii) Requirements exist to exercise control over the following (check all that apply and provide relevant legislation for all checked boxes):
- Manufacturing of tobacco in free zones
- Manufacturing of tobacco products in free zones
- Transactions involving tobacco in free zones
- Transactions involving tobacco products in free zones
- Intermingling tobacco products with non-tobacco products in a single container at the time of removal from free zones
- Other
- None
- Relevant legislation: .....

(iii) Requirements exist to apply control and verifications measures to the international transit or trans-shipment of the following (check all that apply and provide relevant legislation for all checked boxes):

- Tobacco products
- Tobacco-manufacturing equipment
- Other
- None

Relevant legislation: .....

(iv) Describe the measures used to control illicit trade of tobacco in free zones and the international transit or trans-shipment of tobacco products and tobacco-manufacturing equipment.

### Article 13: Duty Free Sales

(i) Describe legislation and regulatory framework surrounding duty free sales of tobacco products.

.....

(ii) Is there any available assessment in the country regarding the extent of illicit trade related to duty free sales of tobacco products?

- Yes  
Describe: .....
- No

### Other

1. Are there arrangements that allow for movement of goods under bond/duty and tax suspension?

- Yes  
Describe: .....
- No

2. What traditional tobacco products are manufactured and consumed in the country? Do they receive any duty and tax concessions and exemptions?

.....

## PART IV OFFENCES CHECKLIST

1. Is it a criminal offence to engage in the following activities without the requisite licence or authorization for **tobacco** (provide relevant legislation for checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting

Relevant legislation:  
.....

2. Is it a criminal offence to engage in the following activities without the requisite licence or authorization for **tobacco products** (provide relevant legislation for checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting

Relevant legislation:

.....

3. Is it a criminal offence to engage in the following activities without the requisite licence or authorization for **manufacturing equipment** (provide relevant legislation for checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting

Relevant legislation:

.....

4. Is it a criminal offence to carry out the following activities for **tobacco** without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels (please provide relevant legislation for all checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting
- Other acts of smuggling

Relevant legislation:

.....

5. Is it a criminal offence to carry out the following activities for **tobacco products** without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels (please provide relevant legislation for all checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping

- Importing
- Exporting
- Other acts of smuggling

Relevant legislation:

.....

6. Is it a criminal offence to carry out the following activities for **manufacturing equipment** without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels (please provide relevant legislation for all checked boxes):

- Manufacturing
- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting
- Other acts of smuggling

Relevant legislation:

.....

7. Is it a criminal offence to **illicitly manufacture** (counterfeit) tobacco or tobacco products or tobacco packaging bearing false fiscal stamps, unique identification markings, or any other required markings or labels?

- Tobacco
- Tobacco products
- Manufacturing equipment

Relevant legislation:

.....

8. Is it a criminal offence to engage in the following activities for **illicitly manufactured** tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment (provide relevant legislation for checked boxes)?

- Wholesaling
- Brokering
- Selling
- Transporting
- Distributing
- Storing
- Shipping
- Importing
- Exporting

Relevant legislation:

.....

9. Is it a criminal offence to mix tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products (if "yes", provide relevant legislation)?

- Yes

Relevant legislation: .....

- No

10. Is it a criminal offence to intermingle tobacco products with non-tobacco products (if "yes", provide relevant legislation)?

- Yes

Relevant legislation: .....

No

11. Is it a criminal offence to use Internet-, telecommunication- or any other evolving technology based modes of sale of tobacco products without the requisite licence or authorization (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

12. Is it a criminal offence for a licensed person to obtain tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed or authorized under the equivalent approval or control system (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

13. Is it a criminal offence to obstruct any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

14. Is it a criminal offence to make any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment and when not contrary to the right against self-incrimination (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

15. Is it a criminal offence to misdeclare on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to (provide relevant legislation for checked boxes):

Evade the payment of applicable duties, taxes and other levies

Prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment

No  
Relevant legislation: .....

16. Is it a criminal offence to fail to create or maintain records or maintain false records (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

17. Is it a criminal offence to launder proceeds of crime (if “yes”, provide relevant legislation)?

Yes  
Relevant legislation: .....

No

18. Are any of the unlawful conducts provided in 1 - 17 administrative offences (if “yes”, provide relevant legislation and be specific about which conducts and activities are administrative offences)?

Yes  
Administrative offences; .....

Relevant legislation: .....

No

19. Does liability for legal persons exist for the unlawful conducts mentioned in 1 – 17 (if “yes”, provide relevant legislation)?

Yes

Relevant legislation: .....

No

20. For **all** criminal and administrative offences identified, list the sanctions available. Is the sanction linked to the size of the seizure or the amount of duties and taxes evaded?

Available Sanctions: .....

Yes

Relevant legislation: .....

No

21. Are these sanctions enough to allow for international cooperation needs, especially for mutual legal assistance and extradition requests?

Yes

Relevant legislation: .....

No

22. Are there measures in place for the seizure, destruction and disposal of confiscated (provide relevant legislation):

Tobacco

Tobacco products

Manufacturing equipment

Relevant legislation: .....

#### PART V INTERNATIONAL COOPERATION CHECKLIST

1. Identify bilateral and multilateral agreements and arrangements in place regarding mutual legal assistance:

.....

2. Identify bilateral and multilateral agreements and arrangements in place regarding mutual administrative assistance:

.....

3. Identify bilateral and multilateral agreements and arrangements in place regarding extradition:

.....

#### OTHER CONSIDERATIONS FOR SELF-ASSESSMENT CHECKLIST

1. Identify country's capacity to:

- a. Conduct a successful investigation into a sophisticated cigarette-smuggling ring and prosecute the ring leaders.
- b. Develop a detailed call for tenders for a system of unique markings that meets the criteria of article 8, including the database, scanners and other elements needed to make tracking-and-tracing useful.
- c. Set up a licensing system for manufacturers, importers and exporters, enact and enforce a prohibition on failure to register, and keep the registry of licensees up to date.
- d. Coordinate with other international organization with relevant expertise.
- e. Obtain technical information particularly on tracking and tracing systems.  
Support country mission experts for an international and inter-ministerial cooperation.

## Appendix 4: Table of National Legislation

This table provides information regarding the laws of a random selection of countries (from various regions) relating to key legislative areas which countries will need to explore when implementing the Protocol. These areas include licensing and marking requirements, seizure/destruction of illicit goods and the confiscation of proceeds of crime, intellectual property offences and protections and other available offences (smuggling, tax evasion offences, inter alia) under which States can prosecute ITTP.

Among the tools used to extract this information is the WHO FCTC implementation Database<sup>47</sup> where countries report on the implementation of various provisions of the WHO FCTC. For this purpose, implementation in relation to article 15 of the WHO FCTC was explored. Research was also undertaken on countries' legislation regarding criminal offences under which illicit trade activity could be prosecuted, as well as for the confiscation of proceeds of crime provisions. UNODC's Track Legal Library was used to research country proceeds of crime legislation, derived from their obligations under UNCAC<sup>48</sup>. The WIPO Lex database was used to research countries' intellectual property laws<sup>49</sup>.

This table is meant to provide a ready tool for countries wishing to find preliminary information as to how other jurisdictions have dealt with the same issue. Legislation was easier to find for some countries than others and in some areas over others, and this is reflected in the table below. It is difficult to ascertain whether a lack of ability to find legislation in some areas meant that a country did not have an established legislative regime in that area which could be the case, or whether in fact the legislation was not reported via international platforms. The information provided is not exhaustive.



Country	AUSTRALIA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005. Protocol not signed.
Licensing/ Marking	<b>Excise Act 1901 and Excise Tariff Act 1921</b> - Regulatory regime for licensing manufacturer, producer of tobacco leaf, including production and storage, and dealers to deal in tobacco leaf. In some States retailers required to register their activities free of charge with the licensing authority. - Unit marking to determine origin of product.
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Customs Act 1901</b> – Seizure and disposal by Customs and Border Protection Service. <b>Crimes Act 1914</b> - Provides for search and seizure by Police. <b>Proceeds of Crime Act 2002 (Cth)</b> - Freezing, seizure, confiscation including destruction/disposal provisions. Relates to proceeds generated from commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law. - Each State has their own Proceeds of Crime legislation in place. - Unexplained wealth laws exist in six Australian jurisdictions (Western Australia, Northern Territory, New South Wales, Queensland, South Australia and the Commonwealth). <b>Excise Act 1901</b> - s.116 - forfeiture of all excisable goods manufactured by person not a licensed manufacturer, all tobacco seed, plant or leaf found on premises where unlawful manufacture of excisable goods is carried on.
Intellectual Property Protections and Offences	<b>Copyright Act 1968 (Cth)</b> (amendment Act No. 13, 2013) – Part V Remedies and Offences, Part VAA unauthorized access to encoded broadcasts and offences at Division 3. <b>Trademarks Act 1995 (Cth)</b> - ss 145-149 – falsifying or removing a registered trademark, falsely applying a registered trademark, making a die etc. for use in trademarks offence, possessing or disposing of things for use in trademarks offence, goods with false trademarks (max. 5 years imprisonment or fine 550 penalty units for an indictable offence (a Federal penalty unit for 2013 is equal to \$170 AUD). For a summary offence the penalty is max. 12 months imprisonment or 60 penalty units). <b>Intellectual Property Law Amendment (Raising the Bar) Act 2012</b> – particularly Schedule 5 – improving mechanisms for trademark and copyright enforcement (Customs seizure, trademark offences and relief for infringement of offences). <b>Signatory to the Anti-Counterfeiting Trade Agreement (ACTA).</b>
Other Offences	<b>Excise Act 1901</b> - s25- only licensed manufacturers to manufacture excisable goods. Penalty: 2 years imprisonment or the greater of: -500 penalty units (1 penalty unit is \$170); and -5 times the amount of duty that would be payable if the goods had been entered for home consumption on the penalty day. - s25(2) operating without a licence – penalty fine 100 penalty units. - s28 – only licensed producers to produce tobacco leaf, penalties as for s25. - s33 – only licensed dealers to deal in tobacco leaf, penalties as for s25. –s117B - unlawful sale of excisable goods, penalty as for s25. - s117H – unlawful sale of tobacco leaf, penalty as for s25. - s117C - unlawful possession of tobacco seed, plant or leaf, penalty as for s25.  - s4D of <b>Customs Prohibited Imports Regulations 1956</b> – Importation of unmanufactured tobacco leaf, penalty 50 penalty units. <b>Customs Act 1901</b> – s233BABAD Smuggling etc. of tobacco products carries a maximum 10 year imprisonment penalty. <b>Criminal Code Act 1995 (Cth)</b> may also apply when offences are prosecuted under fraud or organized crime offences.

**Various State and Territory laws in place as well. See:**

**New South Wales:**

Public Health (Tobacco) Act 2008

- s6 – certain sales prohibited, not to sell tobacco product not in original manufacturing packaging, penalty 100 penalty units for individual, 500 penalty units for corporation.
- s7 – packaging and sale of tobacco product without health warning, penalty 100 penalty units for individual, 500 penalty units for corporation.

**Victoria:**

Tobacco Act 1987

- s11 – person not to sell tobacco prepared for smoking in a package not labelled as per requirements, penalty 120 penalty units for individual, 600 penalty units for corporation.
- s11A – offence for retailers or wholesalers to possess certain tobacco products (smuggled goods, prohibited imports, duty not paid excisable goods), penalty 60 penalty units for individual, or 300 penalty units for corporation.

**South Australia:**

Tobacco Products Regulation Act 1997

- s30 – sale of tobacco products by retail not allowed unless enclosed in compliant packaging, penalty \$5 000 max.
- s31(2) - person who packs tobacco products for retail sale must ensure that packages are compliant with regulations, penalty \$5 000 max.

**Queensland:**

Tobacco and Other Smoking Products Act 1988

- s22 (1) A supplier must sell cigarettes or herbal cigarettes only in a package containing cigarettes or loose tobacco packed by the manufacturer, or importer, penalty 140 penalty units max.
- s23 (1) A supplier must not sell loose tobacco except in a package, penalty 140 penalty units max.
- s23A (1) A supplier must not sell loose smoking blend except in a package, penalty 140 penalty units max.

**Western Australia:**

Tobacco Products Control Act 2006

- s19 - holder of a licence must not sell, or authorise or allow to be sold, a tobacco product by way of retail sale or wholesale sale unless the tobacco product is in a package that is labelled in accordance with the regulations, penalty first offence \$10 000, second and subsequent offence \$20 000 for an individual; first offence \$40 000, second and subsequent offence \$80 000 for a corporation.
- s105 - holder of a licence must not, without reasonable excuse, be in possession or control of any tobacco products that the licence holder knows or ought reasonably to know are prohibited goods or duty not paid excisable goods, penalty first offence \$10 000, second and subsequent offence \$20 000 for an individual; first offence \$40 000, second and subsequent offence \$80 000 for a corporation.

**Tasmania:**

Public Health Act 1997

- s68 - must not supply cigarettes to the public otherwise than in a package, penalty first offence 50 penalty units, second and subsequent offence 200 penalty units.
- s73 - manufacturer or distributor of any tobacco or tobacco product must ensure that the tobacco or tobacco product is packaged and labelled in accordance with any relevant guidelines, penalty first offence 50 penalty units, second and subsequent offence 200 penalty units.

**Northern Territory:**

Tobacco Control Act

- s12 - person must not sell tobacco products unless they are enclosed in a package that displays a prescribed health warning, penalty 100 penalty units for individual, 500 penalty units for corporation.

Country	BRAZIL
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 1 February 2006 Protocol not signed
Licensing/ Marking	Licensing of manufacturers and a national monitoring authority. Marking on the products at unit level to assist in determining origin, legal sale. Digital tax stamp used on cigarette packets. Each pack has a unique code. Manufacturers pay the costs of the marking system under Brazilian law amounting to 1.7 US cents per pack. Scanners for reading the tax stamp codes are developed specifically for the suppliers of the invisible ink used and for each country. Thus law enforcement outside Brazil cannot read the codes unless scanners are supplied by Brazil.
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Law No. 9.279 of May 14, 1996 (Industrial Property Law) relating to counterfeited marks and their seizure and destruction</b> - s.198 - Products bearing counterfeited, altered or imitated marks, or that show a false indication of source may be seized by customs authorities ex officio or at the request of the interested party, during verification procedures. <b>Law No. 9.279 of May 14, 1996 (Industrial Property Law)</b> - ss.201, 202, 210 outline the law in relation to the confiscation of assets and proceeds and destruction in relation to counterfeit products. <b>Art. 125 Código de Processo Penal Decreto Ley N° 3689 (2009)</b> – Freezing, seizure and confiscation. <b>Anti-Money Laundering Law No. 9613 (1998)</b> No specific legislation focused on confiscation of proceeds of crime particularly enabling the confiscation of proceeds derived from ITTP.
Intellectual Property Protections and Offences	<b>Law No. 9.279 of May 14, 1996 (Industrial Property Law)</b> - Reproducing registered trademarks without authorization from the title holder is a criminal offence, with a penalty of imprisonment from 3 months to 1 year, or a fine. - It is also a crime to import, export, sell, offer or display for sale, conceal or have in stock a product bearing a mark illegal reproduced or imitated, or a product of his own industry or commerce, contained in a vessel, container or package that contains the legitimate mark of another person. A penalty of imprisonment from 1 – 3 months or a fine applies.
Other Offences	<b>Offences against tax law (Law No.8137-90)</b> <b>Crimes against the National Financial System (Law No.4792-86)</b> <b>Crimes against contraband and re-routing (art. 334 of the Criminal Code)</b> Brazilian legislation takes into account the type of product, distinguishing “contraband” (the illegal trafficking of illegal substances) from “re-routing” (illegal commerce in legal merchandise). In Brazil, the legal principle of <i>insignificance</i> is applicable to contraband or rerouting of merchandise, including cigarettes. Application of this principle means it is possible that illicit conduct can be considered as being irrelevant under criminal law, including cancellation of any tax due and costs of filing proceedings. Law 9.099/95 allows for conditional suspension of proceedings under certain circumstances, for instance where no other crimes have been committed or there is no evidence of re-offending in cases involving intentional offenses, a criminal record, or the conduct and personality of the individual. Offences against public faith (art. 229 - 311). Offence of receiving illegal goods (art. 180 of the Criminal Code). Art. 334 of the <b>Penal Code</b> and art. 190 of <b>Law No. 9279/96</b> (offences of sale of smuggled and counterfeit goods).

Country	CANADA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005 Protocol not signed
Licensing/ Marking	<p><b>Excise Tax Act 1985</b></p> <ul style="list-style-type: none"> <li>- Licensing of manufactures, tobacco dealers and warehouses.</li> <li>- Stamping (duty paid), marking (non-duty paid) and package requirements (must include name and address or licence no. of manufacture to determine origin of suspect goods) (see also Stamping and Marking of Tobacco Products Regulations and amendments. Implemented federal tobacco stamping regime in September 2010 where all products entering duty-paid market in Canada must display tax stamp. Provinces or territories can choose to be part of the regime).</li> <li>- s31 – keeping of books (record keeping) – recording all transactions by participants in the supply chain.</li> </ul> <p><b>Customs Act 1985</b> – licensing importers and exporters, customs brokers licence.</p> <p><b>Tobacco Reporting Regulations (SOR/2000-273)</b> – reporting by tobacco industry to government.</p> <p><b>Tobacco Act (S.C. 1997, c. 13)</b> – regulates manufacture, sale, labelling and promotion of tobacco products as well as enforcement of its provisions.</p>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Federal Tobacco Act (S.C. 1997)</b></p> <ul style="list-style-type: none"> <li>- s39 - seizure and restoration. Inspectors may seize products or other things on belief based on reasonable grounds that the Act has been contravened.</li> <li>- s41 – (1) forfeiture – where no application made for forfeiture within specified timeframe, products are forfeited to Her Majesty and may be disposed of; (2) where person convicted of offence under the Act, tobacco products forfeited to Her Majesty and disposed of; (3) products forfeited to Her Majesty and disposed of with consent of the owner.</li> </ul> <p><b>Federal Excise Act (S.C. 1997)</b></p> <ul style="list-style-type: none"> <li>- s239.1 (1) – absence of stamp required by Act is notice that (a) excise duties have not been paid (b) additional customs duty imposed has not been paid.</li> <li>- s239.1 (2) – tobacco or cigars to be forfeited.</li> </ul> <p><b>Criminal Code ss. 83.08, 83.13, 83.14, 462.32, 462.37, 490.1, and 490.81</b> - freezing, seizure, confiscation.</p> <p><b>Proceeds of Crime and Terrorist Finance Act</b></p> <ul style="list-style-type: none"> <li>- s9.4 – measures to be taken before entering banking relationship with foreign entity, s10 not to enter banking relationship with a shell bank.</li> </ul> <p><b>Mutual Legal Assistance in Criminal Matters Act</b> (enforcement of foreign forfeiture order by Canadian court) <b>and Extradition Act</b> (transfer of seized property to extradition partner) – mechanisms for recovery of property through international cooperation in confiscation.</p>
Intellectual Property Protections and Offences	<p><b>Criminal Code</b> – counterfeiting of trademarks, imprisonment for term not exceeding 14 years.</p> <p><b>Trade-marks Act (R.S.C., 1985, c. T-13)</b></p> <ul style="list-style-type: none"> <li>- s. 53.3 re-exportation of counterfeit wares.</li> </ul> <p><b>Tobacco Act (S.C. 1997)</b></p> <p><b>Tobacco Products Information Regulations (SOR/2000-272)</b> – applies to retail sale of tobacco products concerning information re health implications, toxic emissions and constituents, slide and shell packages, and cartons and kits.</p>
Other Offences	<p>Various offenses applicable to manufacturers and retailers for selling/manufacturing tobacco products that do not comply with the Tobacco Act (generally governing labelling, ingredients, methods of selling, sales to minors, and advertising/promotion) (<b>Federal Tobacco Act, SC 1997, c 13, ss. 43-49</b>)</p> <p><b>Federal Excise Act 2001</b></p> <ul style="list-style-type: none"> <li>- Illegal manufacture of tobacco products, maximum fine of \$10,000, in default of payment of fine imprisonment for not more than 12 months</li> </ul>

- Smuggling of tobacco products maximum fine of \$50,000 or maximum term of imprisonment 6 months, or both fine and imprisonment, or fine of not more than \$500,000 or imprisonment for maximum of 5 years or both.

- s237 – Every person who purchases or receives for sale any manufactured tobacco or cigars from any manufacturer not duly licensed under this Act is guilty of an offence punishable on summary conviction and liable to a fine of \$10 000 max., and in default of payment of the fine to imprisonment for 12 months max., and shall, in addition thereto, forfeit all the manufactured tobacco or cigars so purchased or received for sale, or the full value of the manufactured tobacco or cigars including all duties and taxes that were payable under this Act or any other Act in respect of the manufactured tobacco or cigars.

**Criminal Code (R.S.C. 1985)**

-counterfeiting of trademarks, penalty imprisonment for 14 years max.

Country	CHINA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 9 January 2006 Protocol signed 10 January 2013
Licensing/ Marking	State exercises monopoly control in relation to tobacco through the State Tobacco Monopoly Administration (STMA). <b>Tobacco Monopoly Law, 1991</b> - manages the manufacture, sale, import, export and business of tobacco products, increasing the quality of tobacco products, protecting consumers' interests, and ensuring state revenue. Licensing is in place from manufacturers to retailers. <b>Regulations on the Implementation of the Tobacco Monopoly Law</b> , promulgated by <b>Decree No. 223 of the State Council in July 1997</b> . The regulations elaborate upon a range of provisions in the Tobacco Monopoly Law and address topics such as applications for retail licenses, packaging requirements, and the transportation of tobacco products.
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	Art. 6, Amendment VI to the <b>Criminal Law of the People's Republic of China</b> , amending art. 191 of the Criminal Law (freezing, seizure and confiscation) Part II, Chpt. 3, s. 8 <b>Criminal Law of the People's Republic of China</b> – confiscation of property. <b>Customs Law of the People's Republic of China</b> – customs power to seize goods and sell/destroy.
Intellectual Property Protections and Offences	<b>Trademark Law of the People's Republic of China</b> <b>Criminal Law of the People's Republic of China</b> – Part II, Chpt. 3, s.7 Crimes of Infringing on intellectual property rights: - Art. 213 – using identical trademark on same merchandise without permission of registered owner, penalty where serious case imprisonment or criminal detention of less than 3 years, and/or fine, more serious case imprisonment 3 -7 years and fine. - Art. 214 - Knowingly selling merchandise under a fake trademark with a relatively large sales volume – penalty imprisonment or criminal detention of less than three years, and/or fine; in cases involving a large sales volume, imprisonment 3 -7 years and fine. - Art. 215 - Forging or manufacturing without authority or selling or manufacturing without authority others' registered trademarks or identifications – penalty for case of serious nature imprisonment or criminal detention, or restriction for less than three years, and/or fine; for cases of especially serious nature, imprisonment of 3-7 years, and fine.

<b>Other Offences</b>	<p><b>Criminal Law of the People's Republic of China</b> – Part II, Chpt. III Crimes of Disrupting the Order of the Socialist Market Economy:</p> <ul style="list-style-type: none"> <li>- s.1, art. 140: crimes of production and sale of fake or substandard commodities. Penalty: if the sum obtained through sale between 50,000 - 200,000 Yuan, offender sentenced to fixed-term imprisonment 2 years max. or criminal detention, and/or fine of not less than half of the sum obtained through sale and not more than twice of that. If the sum obtained through sale between 200,000 - 500,000 Yuan, offender sentenced to fixed-term imprisonment 2- 7 years, and fine of not less than half of the sum obtained through sale and not more than twice of that. If the sum obtained through sale between 500,000 - 2,000,000 Yuan, offender sentenced to fixed-term imprisonment of not less than 7 years, and fine of not less than half of the sum obtained through sale and not more than twice of that. If the sum obtained through sale is not less than 2,000,000 Yuan, offender sentenced to fixed-term imprisonment of 15 years or life imprisonment, and fine of not less than half of the sum obtained through sale and not more than twice of that or confiscation of property.</li> <li>- s.2, art. 153 smuggling offences - penalties range depending on the amount of tax evaded, with a maximum of 10 years imprisonment to life if tax due more than 500,000 Yuan and fine of 100-500% of evaded taxes, or forfeiture of property.</li> </ul>
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<b>Country</b>	<b>FRANCE</b>
<b>WHO FCTC &amp; Tobacco Protocol</b>	<p>WHO FCTC signed and ratified – entered into force 27 February 2005</p> <p>Protocol signed 10 January 2013</p>
<b>Licensing/ Marking</b>	<p><b>General Tax Code</b></p> <ul style="list-style-type: none"> <li>- Art. 565 – suppliers, under the conditions set by a decree taken by the Conseil d'Etat may import, introduce and wholesale manufactured tobacco in metropolitan France. Manufacturers, under the conditions set by a decree taken by the Conseil d'Etat may manufacture manufactured tobacco on this same territory. The provisions of articles 570 and 571 shall apply to any such person as the supplier. Retail sales of manufactured tobacco products are reserved to the State. Retailers, pursuant to the fourth paragraph of article 568 are not required to establish themselves as a supplier for the introduction, wholesale sale or, as the case may be, importing of manufactured tobacco. These natural or legal persons must obtain the status of authorized warehouse keeper referred to in article 302 G.</li> <li>- Art. L. 568 – the French administration holds the monopoly on retail sale. Under decree retailers can obtain a licence to sell tobacco products on behalf of the French administration.</li> <li>- Art. L. 570-I-1°- suppliers obliged to deliver products to licensed retailers only.</li> <li>- Art. 575H - no person may be in possession of more than 2 kilograms of manufactured tobacco in warehouses, commercial premises or on board modes of transport (exception suppliers in warehouses, tobacconists in sales outlets, the persons referred to in point 3 of art. 565, the retailers referred to in the fourth paragraph of art. 568).</li> <li>- Art. 302G – authorized warehouse keepers (those receiving, holding, dispatching, reselling manufactured tobacco under excise duty suspension).</li> </ul> <p><b>Ministerial Decision of July 8, 2010</b></p> <ul style="list-style-type: none"> <li>- Art. 2.1 retailer required to – only obtain supplies from suppliers approved by customs and excise tax authorities (list regularly published on the Prime Minister and Customs' websites) and to pay the value of the tobacco according to the payment mode requested by the supplier.</li> <li>- Art. 41 - Apart from the management contract termination or non-renewal measures in art. 2, any violation of the obligations hereof and of the management contract as well as any violation of tax legislation by a tobacco retailer in or during the performance of his duties as the public authorities' representative, subjects him to a disciplinary sanction.</li> </ul> <p>The regional customs and indirect tax director can issue the following disciplinary sanctions:</p> <ul style="list-style-type: none"> <li>- A warning letter;</li> <li>- A fine of up to €4,000</li> <li>- After consultation with the disciplinary commission provided for in art. 44, he can impose a fine of more than €4,000 and up to €8,000.</li> </ul>

<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Framework Decisions by the EU</b></p> <ul style="list-style-type: none"> <li>- 2001/500/JHA</li> <li>- 2003/577/JHA</li> <li>- 2005/212/JHA</li> <li>- 2006/783/JHA</li> <li>- 2007/845/JHA</li> </ul> <p>Art. 414 of the <b>French Customs Code</b> - confiscation of contraband good, transportation means, objects used to cover up the fraud, property and assets resulting directly or indirectly from the offence.</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>Intellectual Property Code</b> (as last amended by Decree No. 2012-634 of May 3, 2012).</p> <p><b>Law of November 28, 2011</b> on Certificates of New Plant Variety, published in the Official Gazette on December 8, 2011 amending the Code of Intellectual Property.</p> <p><b>Law No. 2007-1544 of October 29, 2007</b> against Counterfeiting.</p> <p><b>Law No. 91-7 of January 4, 1991</b> on Trademarks and Service Marks.</p>
<p>Other Offences</p>	<p><b>Code Pénal 1 March 1994</b></p> <p><b>French Customs Code, arts. 399, 414, 417, 426(2)</b></p> <ul style="list-style-type: none"> <li>- s.414 - contraband and undeclared import or export when said offences relate to goods of the same category as those that are prohibited or highly taxed, are liable to a three year prison sentence, the confiscation of the contraband good, the confiscation of transportation means, the confiscation of the objects used to cover up the fraud, the confiscation of the property and assets resulting directly or indirectly from the offence and a fine ranging from once to twice the value of the contraband good.</li> <li>- Art. 1810 General Tax Code - manufacturing of tobacco, fraudulent detention with the purpose of sale, the sale, or fraudulent transportation of manufactured tobacco products, regardless of the type and origin of the tobacco.</li> </ul> <p><b>Ministerial Decree 2010-72:</b></p> <ul style="list-style-type: none"> <li>-Due diligence on retail tobacconists required in France.</li> <li>- Art. 5.2 - Offer good repute and probity guarantees, assessed namely in view of the criminal record “bulletin No 2”.</li> <li>- Art. 46 - Resellers are only authorized to sell tobacco to the customers and users of their business, in addition to the main business activity, and to their employees.</li> <li>- Art. 47 - The reseller only obtains his supplies of manufactured tobacco from the ordinary permanent retail tobacco store nearest to his business, hereinafter referred to as “proximity store”. As an exception, he can obtain his supplies from any other neighbouring ordinary permanent retail tobacco store in the two following cases: <ul style="list-style-type: none"> <li>-Express waiver by the manager of the nearest retail store;</li> <li>-Supply of cigars that are not distributed by the proximity store, with the consent of the manager thereof.</li> </ul> </li> </ul>

<p>Country</p>	<p style="text-align: center;"><b>INDIA</b></p>
<p>WHO FCTC &amp; Tobacco Protocol</p>	<p>WHO FCTC signed and ratified – entered into force 27 February 2005</p> <p>Protocol not signed</p>
<p>Licensing/ Marking</p>	<p>Few State Governments (Goa Sikkim Tripura) have used local instruments for licensing of tobacco shops.</p> <p>No marking implemented.</p>

<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Customs Act no. 52, 1962</b> Chpt. XIII Searches, Seizures and Arrests: - Art. 110 – seizure of goods, documents and things. Chpt. XIV – Arts. 111 – 127 Confiscation of goods and conveyances and imposition of penalties: - Art. 113 – confiscation of goods attempted to improperly exported. - Art. 115 – confiscation of conveyances. - Art. 118 – confiscation of packages and their contents. - Art. 119 – confiscation of goods used for concealing smuggled goods. - Art. 120 – confiscation of smuggled goods notwithstanding any change in form. - Art. 121 – confiscation of sale-proceeds of smuggled goods.</p> <p><b>The Trade Marks Act, 1999</b> – IP infringement - Art. 111 - forfeiture of goods, and at (4) court can order destruction of the goods. - Art. 115 – any officer below rank of deputy superintendent, if satisfied offence is being or likely to be committed may search and seize without warrant goods etc., and all articles seized shall be produced before a magistrate as soon as practicable, provided that the opinion of the Registrar is sought on the facts of the case first.</p> <p><b>Art. 212 India Penal Code 1973</b></p> <p><b>Prevention of Money-Laundering Act</b>, Chapters 3, 5</p> <p><b>Prevention of Corruption Act</b>, Chapter 5</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>The Trade Marks Act, 1999</b> - Art. 29 – infringement of registered trademarks. Chpt. 12 offences, penalties and procedures - Art. 101 – meaning of applying trademarks and trade descriptions. - Art. 102 – falsifying and falsely applying trademarks. - Art. 103 – penalties for applying false trademarks – imprisonment 6 months – 3 years, or fine of 50 000 – 2 lakh rupees. - Art. 104 – penalties for selling goods to which false trademark applied (selling, hiring, exposing for sale, possessing) - imprisonment 6 months – 3 years, or fine of 50 000 – 2 lakh rupees, unless no reason to suspect genuineness of trademark having taken all reasonable steps, or gives information to prosecutor regarding person goods obtained from, or he acted innocently. - Art. 105 – enhanced penalty on second or subsequent conviction – imprisonment 1 – 3 years, and fine 1 lakh – 2 lakh rupees, court has discretion to impose lesser sentence. - Art. 107 – falsely representing trademark as registered – penalty prison up to 3 years and/or fine. - Art. 114 – offences by companies. - Art. 115 – cognizance of certain offences and police search and seizure powers. - Art. 118 – limitation period for prosecution is 3 years after commission of offence charged or 2 years after discovery by Prosecutor.</p> <p><b>The Trade Marks (Amendment) Act, 2010</b> –amends various articles of the primary Act.</p>
<p>Other Offences</p>	<p><b>Indian Penal Code, No. 45, 1860:</b> Chpt. XII – Offences relating to coin and government stamps: - Art. 255 – counterfeiting government stamps – penalty imprisonment up to 10 years and/or fine. - Art. 256 – possession of instrument or material to counterfeit government stamp, penalty imprisonment up to 7 years and fine. - Art. 257 – making, selling instrument for counterfeiting government stamp, penalty imprisonment up to 7 years and fine. - Art. 258 – sale of counterfeit government stamp, penalty imprisonment up to 7 years and fine.</p> <p>Chpt. XVIII Offences relating to documents and property marks:</p>



- Art. 463 – forgery.
  - Art. 464 – false documents.
  - Art. 465 – penalty for forgery imprisonment up to 2 years and/or fine.
  - Art. 472 – making, possessing counterfeit seal etc. with intent to commit forgery.
- And following articles relating to counterfeit devices or marks used for authenticating documents etc.:
- Arts. 481/482 – using false property mark, penalty imprisonment up to 1 year and/or fine.
  - Art. 483 – counterfeiting property mark, penalty imprisonment up to 2 years and/or fine.
  - Art. 486 – selling goods marked with counterfeit property mark, penalty imprisonment up to 1 year and/or fine.

**Customs Act No. 52, 1962**

Chpt. XIV:

- Art. 112 – penalty for improper importation of goods.
- Art. 114 – penalty for attempt to export goods improperly.
- Art. 114A – penalty for short-levy or non-levy of duty in certain cases.
- Art. 116 – penalty for not accounting for goods.
- Art. 117 – penalties for contraventions not expressly mentioned.

Chapt. XVI: Offences and Prosecution:

- Art. 132 – false declarations, false documents – penalty imprisonment up to 6 months and/or fine.
- Art.133 – obstruction of customs officer, penalty imprisonment up to 6 months and/or fine.
- Art. 135 – evasion of duty or prohibitions – penalty where market price exceeds one lakh of rupees, imprisonment for 3-7 years and fine, other cases up to 3 years imprisonment and/or fine.
- Art. 135A – preparation to export goods in contravention of Act, penalty imprisonment of up to 3 years and/or fine.

Country	INDONESIA
WHO FCTC & Tobacco Protocol	WHO FCTC not signed Protocol not signed
Licensing/ Marking	Partial- Tax stamps and Holograms for revenue protection
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Limited Proceeds provisions</b></p> <ul style="list-style-type: none"> <li>- Arts. 18 (confiscation of assets), 19 (interests of 3<sup>rd</sup> parties acting in good faith) &amp; 30 (confiscation of postal consignments etc.) Law on the Commission to Eradicate Criminal Acts of Corruption.</li> <li>- Arts. 84 (reversal of burden of proof) &amp; 85 (presentation of sufficient legal evidence) of the Prevention and Eradication of the Crime of Money Laundering (2010).</li> </ul> <p><b>Law of the Republic of Indonesia No. 10/1995 Concerning Customs Law, amended by Law No. 17, 2006</b></p> <p>Chpt. X - art. 53.3 prohibited/restricted goods destroyed            Chpt. XI - Unclaimed Goods, Goods Claimed by the State and Goods that become State Property: Part 3, art. 73 Goods that become State Property            Chpt. XII - Authority of the Customs Official, Part 3 Examination:</p> <ul style="list-style-type: none"> <li>- s.3 Search of building and other places.</li> <li>- s.4 Search of transport.</li> </ul>

	<p>Chpt. XIV Penal Provisions:</p> <ul style="list-style-type: none"> <li>- Art. 109 – imported, exported goods (result of criminal Act) and transportation (used in commission of offence) seized for interests of State; (2) Means of transport used to commit the crime as referred to in art. 102 may be confiscated for the State.</li> </ul>
Intellectual Property Protections and Offences	<p><b>Penal Code of Indonesia, amended by Law No. 27, May 1999</b></p> <p>Chpt. XI</p> <ul style="list-style-type: none"> <li>- Arts. 256 and 257 make it an offence to fix false marks on products, penalty max. imprisonment 3 years.</li> <li>- Art. 393 – imports, without obvious intention to re-export, sells, offers for sale, distributes, delivers, possesses, commodities falsely provided with the name, firm or mark to which another has a right, or imitated mark even with slight deviation penalty imprisonment 4 months 2 weeks, or fine 600 rupiahs max.</li> </ul> <p><b>Law No. 15 of August 1, 2001, Regarding Marks</b> –Chpt. 14, Criminal Provisions:</p> <ul style="list-style-type: none"> <li>- Arts. 90-94 apply to the use of marks similar entirely or in essential parts to registered marks deliberately and without right, which carries a maximum penalty of imprisonment of 5 years and a maximum fine of 1 billion rupiahs, or 4 years imprisonment or fine of 800 million rupiahs (mark similar in essential part to the trademark).</li> </ul> <p><b>Law of the Republic of Indonesia No. 10/1995 Concerning Customs Law, amended by Law No. 17, 2006</b> – Chpt. X:</p> <ul style="list-style-type: none"> <li>- Prohibitions and Restrictions of Imports or Exports (art. 53), and</li> <li>- Control of Import or Export of Goods as a Result of Violations Against Intellectual Property Rights (art. 54)</li> </ul>
Other Offences	<p><b>Law of the Republic of Indonesia No. 10/1995 Concerning Customs Law amended by Law No. 17, 2006</b></p> <p>Chpt. XIV Penal Provisions:</p> <ul style="list-style-type: none"> <li>- Art. 102/102A - Any person who imports/exports or attempts to import or export goods, not complying with the provisions of law, penalized for smuggling and shall be punished with imprisonment 1 - 10 years and fine between 50 million – 5 billion rupiah.</li> <li>- Art. 1028 - The violation as meant in art. 102 and art. 102A that results in disturbances of aspects of state economy, is subject to imprisonment 5 - 20 years and monetary charge of between 5 billion – 100 billion Rupiah.</li> <li>-Other offences are listed from art. 103.</li> </ul> <p><b>Penal Code of Indonesia, amended by Law No. 27, May 1999</b></p> <p>Chpt. XXV Fraud:</p> <ul style="list-style-type: none"> <li>- Art. 383 bis – holder of bill of lading has in possession different copies with onerous title in favor of different receivers, penalty imprisonment max. 2 years 8 months.</li> <li>- Art. 384 – if gain not more than 25 rupiahs, penalty imprisonment max. 3 months or fine 60 rupiahs.</li> </ul> <p>Revenue related offences.</p>

Country	IRAQ
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 15 June 2008 Protocol not signed
Licensing/ Marking	No marking system for unit packets and packages to determine origin and whether product legally sold on domestic market. Tax stamp used Anti-Smoking Act No. 19 of 2012

<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Iraqi Penal Code (1969)</b>          -Paragraph 101 – Confiscation – court may order confiscation of particular items acquired as result of the offence and subsequently seized, or were used in commission of the offence. The court must, in all circumstances, order confiscation of particular items that are used to create funds for the commission of an offence.          -Paragraph 117 - order for confiscation of goods of which the manufacture, possession, acquisition, use, sale or advertisement for sale is considered an offence in itself must be issued even though they do not belong to the accused or the accused has not been convicted. If goods not actually seized at the time of the trial but have been sufficiently identified, their confiscation when they are seized.</p> <p><b>Anti-Money Laundering Law 2004</b></p> <p><b>Coalition Provisional Order No. 80, Amendments to Law No. 21 of 1957 on Trademarks and Trade Names</b>          - Art. 35(5) – confiscation of infringing products.          - Art. 37 – owner of mark can apply to Court before institution of criminal or civil action for seizure of instruments and tools used in the commission of the offence as well as the products, goods, firm name, wrapping materials, papers, hang tags, stickers, etc., which bear the mark of the subject matter of the offence. This includes seizure of products, goods, firm name, wrapping materials, papers, hang tags, stickers, etc., that are imported from abroad.          - Art. 38 – court competent to hear civil order may order seizure and destruction of infringing articles, and materials and instruments used to manufacture counterfeit goods. Charitable donation of such goods not to be authorized without permission of trademark owner. Simple removal of trademark not sufficient to release goods for sale.</p> <p><b>Customs Law No. 23, 1984</b>          - Art. 27 unspecified contraband declared under real name shall not be seized. Goods declared for entry shall be returned abroad.          - Art. 194 (1) (c) - Confiscation of goods subject of smuggling offence or to adjudicate by the equivalent of its value if it is not seized. Transport vehicles, tools and materials used in smuggling may be confiscated, except vessels and aircrafts, unless they are prepared or hired for such purpose, or a judgment for the equivalent of its value should they not be seized.          - Art. 195(2) - seized goods may be restored to its owners, partly or wholly after paying the fine as provided in Para 1 of this article and other dues and taxes, provided that the restrictions as stipulated by the laws in force shall be observed.          - Art. 196 - the Director General or whoever he authorizes shall order the confiscation of the seized smuggled goods and transport vehicles if the smugglers escape or cannot be found.</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>Law No. 9 of 2010</b> on Registration Fees for Iraqi, Arab and Foreign Trademarks and Trade Names (2010).</p> <p><b>Coalition Provisional Order No. 80, Amendments to Law No. 21 of 1957 on Trademarks and Trade Names</b>          -44) Art. 35 is amended to read as follows: “Any person who commits any of the following acts shall be punished by imprisonment of 1 - 5 years and/or fine 50,000,000 - 100,000,000 Dinars:          1) Whoever counterfeits a trademark, which is lawfully registered or imitates it in such a manner as to mislead the public, or uses mala fide a counterfeited or imitated trademark;          2) Whoever unlawfully uses a registered trademark owned by another party;          3) Whoever puts, mala fide, a registered trademark owned by another party on that person’s products;          4) Whoever knowingly sells or offers for sale or circulation or possesses for the purpose of sale, products bearing a counterfeited or imitated trademark, or a trademark which is unlawfully affixed; or          5) Whoever intentionally offers rendering services under a forged, imitated or unlawfully used mark. In all cases, the court shall order the confiscation of the infringing products, goods, firm name, wrapping materials, papers, hang tags, stickers, etc., which bear the mark of the subject matter of the offence, the revenue and the returns of such products as well as the implements used in the infringement.          - 46) Art. 36bis added following art. 36 to read as follows: “Any person who commits for the second time one of the offenses mentioned in articles 35 and 36 of this Law, shall be punished by imprisonment of 5 years - 10 years and fine 100,000,000 -200,000,000 Dinars plus closure of the commercial store or enterprise for a period of 15 days - six months, together with the publication of the judgment at the expense of the infringer.</p>

**Other  
Offences**

**Iraqi Penal Code, 1969**

- Paragraph 215 - Any person who produces, imports, exports or obtains a picture, written material or sign with intent to trade, distribute, display or exhibit such material, which, by its nature, endangers the public security or brings the country into disrepute unless he was acting in good faith, penalty detention and/or fine not more than 300 dinars
- Paragraph 216 – participation in criminal conspiracy, penalty life imprisonment or term of imprisonment for number of years.
- Paragraph 217 – person who participates in criminal organization, gang, association, club, organization, and not an employee or in position of leadership, and distances himself from it when instructed by authorities exempt from penalty. May be punished for offences he has committed himself.
- Paragraph 277 – (1) counterfeiting or forging financial stamps, penalty imprisonment 10 years max. (2) using counterfeit or forged stamp, or re-using genuine stamp, with awareness that stamps are forged, penalty detention.
- Paragraph 302 - manufacturing or obtaining a tool, instrument or anything that can be used to imitate or counterfeit seals, bonds or stamps or falsifying any document with intent to make use of it for the purpose mentioned above, penalty imprisonment 7 years max.

**Customs Law No. 23, 1984**

Part 3 Principles for the Application of the Customs Tariff:

- Art. 18 - smuggled goods liable to the tariff being valid on the date where the date of its occurrence, if deterioration thereof or the date of settlement were possible, whichever is the highest.
- Art. 24 - restricted goods, contraband, goods subject to highest rate of duties or the specified contraband shall in no way be conveyed by vessels having a tonnage less than 200 marine tons within the territorial sea.
- Art. 25 - vessels having a tonnage less than 200 marine tons which convey goods of the kinds referred to in art. 24 shall in no way rove or deviate from their direction of voyage inside marine customs belt unless circumstances arise from marine emergencies or force majeure. In such case, masters shall notify a nearest customs office of this without delay.

Part 14 Customs Belt and the Search for Smuggling:

- Art. 183 – customs officials charged to combat smuggling and may halt transport vehicles, examine goods and search persons

Part 15 Customs Offences:

- Art. 188 – fines and confiscations considered civil compensation for customs administration.
  - Art. 188 Chpt. 1 – smuggling offences.
  - Art. 192 – activities from which smuggling can be construed.
  - Art. 193 – criminal liability and requirement of criminal intent.
  - Art. 194 – penalties
    - (1)(a) imprisonment between 1 month – 5 years and/or fine 3000 Dinars max. (1)(b)(1): customs fine (civil):
      - Six-fold value for specified contraband;
      - Three-fold of values and duties together for contraband goods that are suspended or restricted goods;
      - Four-fold of duties for dutiable goods, should it not be contraband, suspended or restricted, provided that it shall not be less than its value;
      - 25% of the value for goods not dutiable which are not contraband, suspended or restricted.
  - Art. 194(2) - judgment by doubling the penalties referred to in subparts “a and b” of Para 1 of this article may be allowed if those being liable for smuggling have past smuggling records.
- Chpt 2 – art. 197 – offences in respect of declarations to put goods for consumption (declaration contrary to kind, origin or source, real value of goods exceed over 5% of what is declared, weight, number or measurements of goods exceed over 5% of what is declared), penalty fine two folds – four folds of the duty.
- Chpt. 5 – offences in respect of the manifest.
- Chpt. 6 – offences in respect of roving and possessions.
- And other offences at the rest of Part 15.

Country	ITALY
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 30 September 2008 Protocol not signed
Licensing/ Marking	<p><b>Ministerial Decree 67/1999</b> – licensing of tobacco retailers (obtained from AAMS)</p> <p><b>Law 50/1994</b></p> <ul style="list-style-type: none"> <li>- Marking of master cases.</li> <li>- Record and keep information regarding any large seizure of tobacco products.</li> </ul> <p><b>Law no. 907/42</b></p> <ul style="list-style-type: none"> <li>- Art. 45 - The manufacture, preparation, introduction and sale of tobacco and tobacco products are subject to a State Monopoly in the Italian State, except for the province of Zara and for the Communes of Livigno and Campione d'Italia. The production, manufacture, preparation, introduction and sale of surrogates of tobacco are forbidden.</li> <li>- Art. 55 - It is also forbidden to build and hold machinery and tools for the production of tobacco, without the authorization of the Administration of State Monopoly.</li> </ul> <p>Track and Trace – id system on packs identifying date and place of production, the machinery, the shift of production, the Country of origin of shipment, the final market of destination and the first buyer of the product.</p> <p><b>Decree 417/1991</b></p> <ul style="list-style-type: none"> <li>- Art. 6 - the manufacturers of tobacco products have to adopt an identification system of products, in order to identify, with regard to tobacco products smuggled into the territory of the State, from a single pack of cigarettes, the date and place of production, the machinery, the shift of production, the Country of origin of shipment, the final market of destination and the first buyer of the product. The manufacturers must communicate such identification system to the Tax Administration within 30 days from the settlement or amendment of the same.</li> </ul>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Anti-Mafia Code</b></p> <p>Art. 146 of the <b>Code of Industrial Property</b> - Administrative authorities are required to seize counterfeit goods and destroy them within 3 months from the seizure in the case of “evident infringement of registered marks, designs and models or systematic and willful counterfeiting of IP rights”.</p> <p>Art. 474 (<b>Law 99/2009</b>), establishes mandatory confiscation not only for goods used to commit the crime or goods that are object of the IP crime, but also of those goods that are the product, price or profit of the crime, whoever they belong to. If the confiscation of such goods is not possible, the judge can order the confiscation of equivalent value.</p> <p>Art. 240 <b>Penal Code</b> - Conviction-based confiscation of assets derived from all criminal offenses.</p> <p><b>Law Rognoni – Law Torre of 1982</b></p> <ul style="list-style-type: none"> <li>- Confiscation of assets of convicted persons who cannot justify the origin of their asset, through the alleviation of the prosecutor’s burden of proof (extended confiscation). Extended confiscation applies to assets: (i) at the disposal of persons convicted for Mafia-type crimes if (ii) the value of such assets is disproportionate from the legitimate income of their owners; and if (iii) the latter cannot demonstrate the relevant legitimate origin. Alleviation of the burden of proof for the prosecutor.</li> <li>- Confiscation of assets in possession of persons belonging to Mafia-type organizations (non-conviction based confiscation) – preventive measure authorizing seizure and confiscation of property and assets of the suspects belonging to mafia type organizations. Suspected <i>mafiosi</i>, as socially dangerous persons, are subject to a set of personal and financial preventive measures, regardless of the proof of a direct link with the commission of a specific offence. Such measures “are non-conviction based, administrative in nature and are enforced outside criminal proceedings by law enforcement authorities under judicial supervision under looser rules of evidence”.</li> </ul> <p><b>Law No. 109/1996</b> regulates the management and destination of seized or confiscated assets, also indicating the type of assets that can be subject to confiscation: i.e. movable assets (e.g. cash, stock and securities, credit, vehicles, etc.); Real estate (e.g. buildings, apartments, allotments, etc.); and businesses.</p> <p><b>Framework Decisions by the EU</b></p> <ul style="list-style-type: none"> <li>- 2001/500/JHA</li> </ul>

	<ul style="list-style-type: none"> <li>- 2003/577/JHA</li> <li>-2005/212/JHA</li> <li>-2006/783/JHA</li> <li>-2007/845/JHA</li> </ul>
<b>Intellectual Property Protections and Offences</b>	<p><b>Penal Code (P.C.)</b>  Arts. 473, 474 and 517 provide for:</p> <ul style="list-style-type: none"> <li>- Imprisonment between six months and three years and a fine of between 2,500 and 25,000 euros for infringement of registered marks (art. 473).</li> <li>- Imprisonment between one and four years, plus a fine of between 3,500 and 35,000 euro for infringement of patents, designs or models (art. 474).</li> <li>- Imprisonment up to two years and a fine of up to 20,000 euro for the importation, possession for business purposes, sale or putting into circulation of goods that bear counterfeit or altered marks or distinctive signs, or otherwise violate other IP rights.</li> <li>- Imprisonment up to two years or a fine of up to 20,000 euro for selling or putting in circulation products which bear marks that may mislead the buyer as to the origin, provenance or quality (art. 517- unregistered marks).</li> </ul> <p><b>Law 99/2009</b> introduced a specific aggravating circumstance in case of infringements committed in large quantities or in a continuous and organized manner, which increases the prison term from two to six years (art. 474 ter P.C.). A prison term of up to two years, plus a fine of up to euro 20,000, also is envisaged for infringements of denominations of origin on agricultural foodstuffs (art.517 quarter P.C.). Administrative sanctions are also envisaged for legal persons, i.e. companies, which having benefited or having an interest in the commission of the counterfeiting offenses.</p> <p><b>Criminal Code</b></p> <ul style="list-style-type: none"> <li>- s473 - for counterfeiting of trademarks – penalty is detention from 6 months – 3 years, or fine between 2500-25000 euros, with aggravating circumstances (use of arms, obstruction of law enforcement, use of special vehicles) imprisonment from 1 – 4 years, and a fine from 2500-25000 euros.</li> <li>- s474 - whoever introduces in the territory of the State, in order to make a profit, industrial products bearing counterfeited or falsified trademarks or other distinctive signs, national or foreign, is punished with the imprisonment from 1 to 4 years and with the fine from 3,500 Euros to 35,000 Euros. Whoever holds for the sale, offers for sale or otherwise put into circulation, in order to make a profit, the products mentioned in the first paragraph is punished with the detention up to 2 years and with the sanction up to 20,000 Euros.</li> </ul>
<b>Other Offences</b>	<p><b>Law No. 92 of 21 March 2001</b> – entire system of penalties redrafted. The following provisions are of particular importance:</p> <ul style="list-style-type: none"> <li>- A redefinition of the offence of smuggling foreign manufactured tobacco products, which now has a separate position within the Consolidated Customs Law;</li> <li>- More stringent penalties for anyone who imports, acquires or possesses within the State even minimal quantities of foreign manufactured tobacco products;</li> <li>- The inclusion of specific aggravating circumstances, with the addition of conduct (further to that covered by the Consolidated Customs Law) involving the use of: <ul style="list-style-type: none"> <li>-Means of transport whose type-approved features have been changed or modified so as to obstruct police action or pose a threat to public safety;</li> <li>-Partnerships or companies with share capital or financial assets (however constituted) in States which have not ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg, 8 November 1990) or which have not concluded and ratified judicial assistance agreements with Italy in regard to smuggling;</li> <li>-Inclusion in the Consolidated Customs Law of the specific offence of "criminal association for the smuggling of foreign manufactured tobacco products", which comes within the sphere of competence of the National Anti-Mafia Prosecutor's Office.</li> </ul> </li> </ul> <p><b>Law 43/1973</b> – art. 291 - whoever introduces, sells, transports, purchases or holds within the State more than 10 kilos of smuggling of foreign tobacco (T.L.E.) is punished with sanction of 5 Euros for each gram of product, as defined by the article 9 of Law no. 76 dated March 7, 1985, and with the detention from 2 to 5 years.</p> <p><b>D.P.R 43/1973</b> – criminal association for the purpose of smuggling foreign tobacco products, penalty is fine of 26 000 euros for every ounce of conventional product and imprisonment from 3 – 7 years.</p> <p><b>Law no. 907/42, art. 45</b></p> <ul style="list-style-type: none"> <li>- s64, 66 – ways of committing smuggling (manufacturing or producing tobacco without authorization of the State Monopoly, unlawfully transporting, storing, holding, selling tobacco.</li> </ul>

- s72 - Anyone who detains machinery or tools for the manufacturing of tobacco, without the authorization of the State Monopoly commits smuggling, whenever the use of such machinery should be considered pre-arranged to the working of tobacco as to the manner in which the objects are found or from the characteristics of the guilty person or from other circumstances of the fact.

- s73 – other cases of smuggling - Besides the cases provided for in the previous articles, anyone who avoid in any way the payment of the tobacco monopoly fees or the price due to the Administration of Monopoly commits smuggling.

- s79 - Sanctions for the possession of machinery and tools - anyone who detains machinery and tools for manufacturing of tobacco, according to art. 72, is punished with the fine from 6.000 Liras (3 Euros) to 100.000 Liras (50 Euros).

Country	KENYA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005 Protocol signed 29 May 2013
Licensing/ Marking	Marking unit packets and packages to determine origin and whether product legally sold in domestic market, marking all products manufactured in the country as for export or for sale only in Kenya. Tax stamp
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	Confiscation and destruction of illicit products <b>The Trade Marks Act (As last amended by trademarks Amendment Act 2002)</b> Chpt. 506 – Part XI - Offences, and Restraint of Registration and Use of Certain Marks , art. 58H Forfeiture of Goods <b>Penal Code</b> Chpt. 63 of the Laws of Kenya - Chpt. VI - Punishments, art. 29 Forfeiture – if property cannot be found, court as assess value of the property and order sum to be paid. - Chapter XXXVIII - Counterfeiting Trademarks, art. 381(2) persons committing misdemeanor shall forfeit chattels to which counterfeit trademark applied, instruments used to apply trademark. <b>Customs and Excise Act</b> Chpt. 472 of the Laws of Kenya Part XIV – Offences: - Art. 174 – officer may seize and detain documents and goods. - Art. 175 – secure buildings, rooms, excisable goods and materials, vehicles and vessels, containers. Part XV – Penalties, Forfeiture and Seizures – art. 196 prohibited, restricted, uncustomed, imported or exported concealed goods liable to forfeiture. - Art. 197 vessels etc. liable for forfeiture. - Art. 198 – packaging and contents of packaging also liable to forfeiture. - Art. 199 – power to seize goods liable for forfeiture. - Art. 200 – procedure on seizure. - Art. 201 – effect of conviction on goods liable to forfeiture – on acquittal good to be released to person from whom seized or to be condemned. - Art. 204 – restoration of seizures. <b>Proceeds of Crime and Anti-Money Laundering Act 2009</b> , nothing specific to confiscation of proceeds for ITTP offences.
Intellectual Property Protections and Offences	<b>The Trade Marks Act (As last amended by trademarks Amendment Act 2002)</b> Chapter 506 Part XI - Offences, and Restraint of Registration and Use of Certain Marks: - Art. 58C Forgery of registered trademark.

	<p>- Art. 58D Prohibition of forgery of registered trademark: (1) Offences – forging, falsely applying registered trademark, making instruments for purpose of forging registered trademark, making reproduction of registered trademark etc. Penalty fine 200 000 shillings max and/or imprisonment 5 years max. (2) defenses – acted without intent to defraud, employed to make the instruments but not interested in the goods and took reasonable precautions to avoid committing offence charged and at time of commission of offence no reason to suspect trademark not genuine and gave to police all information when asked.</p> <p>- Art. 58E - Prohibition of sale or importation of goods or performance of services with forged registered trade Mark, penalty fine 200 000 shillings max and/or imprisonment 5 years max.</p> <p>- Art. 58F – aiding and abetting offence, penalty fine 200 000 shillings max and/or imprisonment 5 years max.</p> <p>- Art. 58G – Evidence.</p>
<p><b>Other Offences</b></p>	<p><b>Penal Code</b> Chpt. 63 of the Laws of Kenya  DIV VII, Chpt. XXXIV Definitions - Forgery, Coining, Counterfeiting and Similar Offences:  -Art. 348 - intent to defraud.  -Art. 352 – Forgery of, and other offences in relation to Stamps, penalty imprisonment 7 years.  Chapter XXXVII – Counterfeit Stamps, art. 378, penalty imprisonment 7 years, and any die, plate, instrument, paper or other thing as aforesaid which are found in his possession shall be forfeited.  Chapter XXXVIII - Counterfeiting Trademarks, art. 381 – person engaging in forging, counterfeiting trademarks, applying forged/counterfeit trademarks to chattel not intended for trademark etc., guilty of misdemeanor unless can prove acted without intent to defraud.</p> <p><b>Customs and Excise Act</b> Chpt. 472  Part IX – Manufacture of Excisable Goods, art. 90 license to manufacture, penalty imprisonment 3 years max and/or fine 500 000 shillings max., art. 93 power to revoke licence, art. 94 effect of revocation of licence.  Section 111 – Provisions relating to manufacture of tobacco.  Part XIV – Prevention of Smuggling and Evasion (arts. 179- 194):  - Art. 179 - assembling 2 or more persons for contravening Act, penalty imprisonment 5 years max.  - Art. 180 – armed violence, penalty imprisonment 20 years max.  - Art. 184 – vessels adapted for concealing goods, penalty for vessel less than 250 tons fine 300 000 shillings max. and vessel and goods liable for forfeiture, penalty where vessel more than 250 tons fine of such amount as court deems just and vessel may be seized or detained until fine paid and goods liable to forfeiture and penalty for person in charge of vessel fine 1 500 000 shillings and vessel and goods liable to forfeiture.  - Art. 185 – importing restricted/prohibited goods, penalty imprisonment 5 years max. and/or fine 3 times amount of duty and other taxes owed to max. of 1 500 000 shillings.  - Art. 186 – importing/export concealed goods.  - Art. 187 – offence to make or use false documents, penalty imprisonment 3 years max. and/or fine 1 500 000 shillings max.  - Art. 188 –refuse to produce documents.  - Art. 189 – use false measures, goods and materials liable to forfeiture.  - Art. 190 – interfere with customs property, penalty 120 000 shillings max.  - Art. 191 – knowingly buying, having in possession, receiving excisable goods manufactured contrary to provisions of Act, penalty imprisonment 3 years max. and/or fine 1 500 000 shillings max.  - Art. 194 – aiding and abetting, penalty punished as though actually committed the offence.  Part XV- Penalties, Forfeiture and Seizures – art. 195 where no penalty defined, penalty is fine of 1 500 000 shillings max.</p>



Country	MALAWI
WHO FCTC & Tobacco Protocol	WHO FCTC not signed Protocol not signed
Licensing/ Marking	<p><b>Malawi Customs and Excise Act</b>, Chapter 42:01</p> <ul style="list-style-type: none"> <li>- Art. 64.1. Except as otherwise provided in the customs laws no person shall manufacture any excisable goods either in whole or in part unless authorized by, and in accordance with the conditions of, a valid excise licence issued by the Controller: <ul style="list-style-type: none"> <li>Provided that no such licence shall be required (i) by a private individual in respect of excisable goods, other than spirits, manufactured by him for his own use or for the use of his family and not for sale or disposal for profit; (ii) by a person authorized by the Controller to manufacture excisable goods for experiment purposes and not for sale or disposal for profit subject to such conditions as the Controller may direct.</li> </ul> </li> <li>- Art. 65.2 - No excise licence shall be issued in respect of any premises until an appropriate entry of premises has been made.</li> </ul>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Penal Code</b>, Chapter 7:01 - Chapter VI Punishments, art. 30 Forfeiture</p> <p><b>Malawi Customs and Excise Act</b>, Chapter 42:01</p> <p>Part XVIII - Forfeiture, Seizure, Embargo and Abandonment:</p> <ul style="list-style-type: none"> <li>- Art. 145 – any goods in respect of which offence committed, conveyance used without lawful authority liable to forfeiture, if manufacturer of dutiable goods guilty of offence in respect of goods, all goods and machinery, and packages liable to forfeiture.</li> <li>- Art. 146 - Seizure of goods.</li> <li>- Art. 147 - Detention and disposal of seized goods, goods detained until determination of prosecution.</li> <li>- Art. 148 - Forfeited goods vest in the government and may be destroyed or sold or otherwise disposed of as controller thinks fit.</li> <li>- Art. 149 - Embargo on goods if believe offence committed in respect of goods released from customs control.</li> <li>- Art. 150 - Abandonment of goods.</li> <li>- Art. 151 – Saving.</li> </ul> <p>Part XIX Legal Proceedings</p> <ul style="list-style-type: none"> <li>- Art. 159 - Effect of conviction or acquittal on goods or conveyance liable to forfeiture.</li> <li>- Art. 160 - Proceedings for recovery of goods, etc.</li> <li>- Art. 161 - Owner of conveyance to be heard before forfeiture.</li> </ul> <p><b>Merchandise Marks Act</b>, Chapter 49:04</p> <ul style="list-style-type: none"> <li>- Art. 24 – forfeiture of goods in respect of/by means of which offence committed. (4) goods invested in government and sold or destroyed or appropriated to government</li> </ul> <p><b>Money Laundering and Proceeds of Serious Crime and Terrorist Financial Act, 2006</b></p>
Intellectual Property Protections and Offences	<p><b>Trade Marks Act</b>, Chapter 49:01 (1967)</p> <p>Part XI Offence and Penalties:</p> <ul style="list-style-type: none"> <li>- Art. 68 – false entry in register.</li> <li>- Art. 69 – falsely representing a trademark as registered, penalty fine £50 and imprisonment 6 months.</li> <li>- Art. 70 – deceiving or influencing Registrar or officer.</li> <li>- Art. 71 – witness giving false evidence.</li> <li>- Art. 72 – penalties unless otherwise provided, fine £500 and imprisonment for 3 years.</li> </ul> <p><b>Merchandise Marks Act</b>, Chapter 49:04</p> <p>Part II – Marking of Goods and Prohibitions in relation to Trademarks and Trade Descriptions:</p> <ul style="list-style-type: none"> <li>- Art. 4 – certain acts deemed to be forgery of trademark.</li> <li>- Art. 5 – forgery of trademarks and other prohibited acts.</li> <li>- Art. 6 - Prohibition of sale of goods bearing forged trade mark or false trade description.</li> </ul>

- Art. 7 - Prohibition of sale of imported goods unless accompanied by indication of origin.
- Art. 8 - Prohibition of sale of goods, whether made in Malawi or elsewhere, unless accompanied by indication of origin.
- Art. 9 – not to import goods with false trademark or false trade description.
- Art. 10 – manner of application of mark.
- Art. 11 – marking of goods on importation.
- Art. 12 – removal of indication of origin from imported goods is prohibited.
- Art. 13 - Indication of origin and compliance with specified standards in the case of certain classes of goods.
- Art. 23 – penalties first conviction fine £100 and imprisonment 1 year, second and subsequent conviction fine £200 and imprisonment 2 years.

#### Other Offences

##### **Penal Code, Chapter 7:01**

Part 2 Crimes, Division VII Forgery, Coining and Counterfeiting, art. 359 forgery of stamps:

- Chpt. XXXVIII – art. 385 Counterfeit Stamps, penalty imprisonment 7 years, and confiscation of die, plate, instrument, paper etc. found in possession shall be forfeited.
- Chpt. XXXIX – art. 388 Counterfeit Trademarks misdemeanor, offender forfeits articles to which counterfeited trademark applied, instrument for applying such trademark to government.
- Division VIII Attempts and Conspiracies to Commit Crimes and Accessories after the Fact.

##### **Malawi Customs and Excise Act, Chapter 42:01**

Part XVII Offences and Penalties:

- Art. 132 – offences in respect of persons, including counterfeiting and conspiracy.
- Art. 133 – accessories.
- Art. 134 – offences in respect of goods, including smuggling.
- Art. 135 – offences in respect of documents, books, licences etc., including forgery.
- Art. 136 - Offences in respect of conveyances, conveyance adapted to conceal smuggled goods.
- Art. 137 – Offences by masters or persons in charge of conveyances, including conveyances used in smuggling or in the carriage of smuggled goods.
- Art. 138 – Offences in respect of customs areas.
- Art. 139 – Offences by or in relation to officers.
- Art. 140 – Special offences in respect of excise, manufacturing excisable goods contrary to customs law.
- Art. 141 – Offences by officers of corporation, etc.
- Art. 142 – Penalties for certain offences

1. Person guilty of offence under Act with intent to defraud the government of duty or evade restriction or prohibition on importation or exportation of goods:

- (a) in case of dutiable goods which are not prohibited goods, fine not less than 3 times the amount of the duty or K2,000 whichever is the lesser and not more than 10 times the amount of the duty or K2,000 whichever is the greater and imprisonment for 3 years;
- (b) in the case of prohibited goods, fine not less than 3 times the value of the goods or K2,000 whichever is the lesser and not more than 5 times the value of the goods or K2,000 whichever is the greater and imprisonment for 3 years;
- (c) in the case of an offence punishable under paragraphs (a) or (b), where person previously convicted of such an offence the minimum fine shall be double that otherwise provided for;
- (d) in the case of goods which are neither dutiable nor prohibited be liable to the penalties provided for in section 143.

2. Notwithstanding any other provisions of the customs laws the amount of duty or the value of goods for the purposes of this section and of section 143, 146(5) and 162 may be determined by the Controller, and a certificate of such amount of duty or value under the hand of the Controller shall be prima facie evidence of the amount of duty or the value of such goods.

- Art. 143 – General penalty, where no penalty specifically provided fine of K10,000 or to 3 times the value of the goods in respect of which the offence was committed, whichever is the greater, and imprisonment for 3 years.

- Art. 144 – all offences cognizable to police
- Part XIX Legal Proceedings:
- Art. 152 - jurisdiction in respect of claims.
  - Art. 153 - General immunity from legal proceedings.
  - Art. 154 - Actions by or against the controller.
  - Art. 155 - Limitation of proceedings.
  - Art. 156 - Provisions relating to burden of proof.
  - Art. 157 - Provisions relating to evidence.
  - Art. 158 - Provisions relating to witnesses.

Country	MALAYSIA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 15 December 2005 Protocol not signed
Licensing/ Marking	Licensing required under Section 3 of the <b>Industrial Co-ordination Act 1975</b> Security mark with visible and invisible feature applied since 2004 on each cigarette pack intended for the domestic market and duty free sales. Markings are not linked to tax stamps.
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Trademark Act (Act 175 of 1976, as last amended by Act A1138 of 2002)</b></p> <ul style="list-style-type: none"> <li>- Art. 70F - secure storage of seized goods.</li> <li>- Art. 70G - notice to importer and applicant that the goods were seized.</li> <li>- Art. 70H - inspection, release, etc., of seized goods by authorization of Registrar to applicant or importer.</li> <li>- Art. 70I - forfeiture of seized goods by consent.</li> <li>- Art. 70J - compulsory release of seized goods to importer on expiration of retention period where applicant has not instituted proceedings.</li> <li>- Art. 70K - compensation for failure to take action. (2) Where the Court is satisfied that the person aggrieved had suffered loss or damage as a result of the seizure of the goods, the court may order the applicant to pay compensation in such amount as the Court thinks fit to the aggrieved person.</li> <li>- Art. 70L - actions for infringement of registered trade mark, court may order seized goods may or may not be released to importer, may order forfeiture of seized goods.</li> <li>- Art. 70M - disposal of seized goods ordered to be forfeited. - If the Court orders that seized goods are to be forfeited, the goods shall be disposed of in the manner as directed by the Court.</li> </ul> <p><b>Trademark Descriptions Act 1972 (Act 87)</b></p> <p>Part VIII Enforcement – art. 28 – power to enter premises and inspect and seize goods and documents.</p> <p>Part IX – art. 32 forfeiture of goods shall occur if proved to satisfaction of court that offence committed under Act and goods were subject matter of or were used in commission of the offence notwithstanding no person convicted of offence. (3) if no prosecution goods taken and deemed to be forfeited after 1 month from date of seizure unless claim made. (7) forfeited goods delivered to assistant controller and disposed of in accordance with his directions (8) where goods perishable or custody involves unreasonable expense or inconvenience goods may be sold and proceeds of sale held to abide by result of prosecution or claim.</p> <p><b>Industrial Co-ordination Act 1975</b></p> <ul style="list-style-type: none"> <li>- s9 – enforcement – (3) if reasonable cause to believe offence committed can issue warrant for search and seizure of products and manufacturing and any other thing in respect of which offence committed (4) if risk of items being removed authorized officer can search and seize without a warrant.</li> </ul>

	<p><b>Customs Act 1967, Act 235</b> Part XII – inspection, investigation, search, seizure and arrest: - 114. Seizure of goods the subject of an offence. - 115. Return or disposal of movable property.</p> <p><b>Anti-Money Laundering Act</b></p>
<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Trademark Act (Act 175 of 1976, as last amended by Act A1138 of 2002)</b> - Art. 70D - restriction on importation of counterfeit trade mark goods – up to the owner of the registered trademark to submit an application to the Registrar that counterfeit goods are expected to be imported and that he objects to the importation. If the Registrar approves he shall take the necessary action to prohibit any person from importing goods identified in the notice, not being goods in transit, and shall seize and detain the identified goods. - Art. 70E - security - Art. 70N - insufficient security. - Art. 70O - ex-officio action. - Art. 70P - regulations relating to border measures. - Art. 81 - falsely representing a trademark as registered, penalty fine 500 ringgit max. and/or imprisonment 2 months max.</p> <p><b>Trademark Descriptions Act 1972 (Act 87)</b> Part II – art. 3 – prohibition of false trade descriptions. Part IV – art. 16 – trade mark infringement and passing off action, court may make order declaring that infringing trade or other mark is a false trade description. Such an order is called a trade description order. Part V – art. 17 – prohibition of importation of goods bearing false indication of origin. Part VI – art. 18 – penalties for offences fine 100 000 ringgit max. and/or imprisonment 3 years max., second or subsequent offence fine 200 000 ringgit max. and/or imprisonment 6 years max. Body corporate guilty of offence – fine 250 000 ringgit max. and for second and subsequent offence fine 500 000 ringgit max.</p>
<p><b>Other Offences</b></p>	<p><b>Industrial Co-ordination Act 1975</b> - s3 – licence required for manufacturing activity, penalty fine 2000 ringgit max. or imprisonment 6 months max. and further fine of 1000 ringgit for everyday during which default continues. - s4 – application for and issue and conditions of licence . - s6 revocation of a licence if manufacturer has not complied with conditions of issue of licence, is no longer engaged in manufacturing activity for which licence issued, or made false statement in application for licence.</p> <p><b>Penal Code 1997 Act 574</b> Chpt. XII Offences relating to coins and government stamps: - Art. 255 counterfeiting government stamp, penalty imprisonment up to 20 years and fine. - Art. 256 - having possession of an instrument or material for the purpose of counterfeiting a Government stamp, penalty imprisonment 7 years max. and fine. - Art. 257 - making or selling an instrument for the purpose of counterfeiting a Government stamp, penalty imprisonment 7 years max. and fine. - Art. 258. sale of counterfeit Government stamp, penalty imprisonment 7 years max. and fine. - Art. 259 - having possession of a counterfeit Government stamp, penalty imprisonment 7 years max. and fine. - Art. 260 - using as genuine a Government stamp known to be counterfeit, penalty imprisonment 7 years max. and/or fine. - Art. 261 - effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it, with intent to cause loss to Government, penalty imprisonment 3 years max. and/or fine. - Art. 262 - using a Government stamp known to have been before used, penalty imprisonment 2 years max. and/or fine. - Art. 263 - erasure of mark denoting that stamp has been used, penalty imprisonment 3 years max. and/or fine.</p>

**Customs Act 1967, Act 235**

Part XIII Provisions as to trials and proceedings.

Part XIV Offences and Penalties - art. 133 - Penalty on making incorrect declarations and on falsifying documents, penalty fine 500 000 ringgit max. and/or imprisonment 5 years max.

- Art.134 - penalty on refusing to answer questions or on giving false information, penalty imprisonment 6 months max. and/or fine 1000 ringgit max.

- Art. 135 - penalty for various smuggling offences: (1)(a) importing, exporting, (b) shipping, unshipping, delivering uncustomed or prohibited goods, (c) illegally removing or withdrawing goods from customs control, (d) harbouring, concealing, keeping, possessing or causing such of uncustomed or prohibited goods, (e) knowingly conveying, removing, depositing, or dealing with dutiable, uncustomed or prohibited goods with intent to defraud the government of any duties owed or evade any provisions of Act, (g) fraudulent evasion of customs duty: Penalties for dutiable goods first offence fine not less than 10 times the amount of the customs duty or 50 000 ringgit, whichever is lesser, and not more than 20 times the amount of customs duty or 100 000 ringgit, whichever is greater, and/or imprisonment for 3 years max., second or subsequent offence fine of not less than 10 times the amount of customs duty or 100 000 ringgit, whichever is lesser, and not more than 40 times the customs duty or 500 000 ringgit, whichever is greater, and/or imprisonment 5 years max. Where amount of customs duty cannot be ascertained, penalty may be fine 500 000 ringgit max. and/or imprisonment 5 years max.

- Art. 136 - penalty for assaulting or obstructing officers of customs and rescuing goods, penalty first offence imprisonment 3 years max. and/or fine 10 000 ringgit, second or subsequent offence imprisonment 5 years max. and/or fine 20 000 ringgit max.

- Art. 137 - penalty for offering or receiving bribes, penalty imprisonment 5 years max. and/or fine 10 000 ringgit max.

- Art. 138 - penalty for offences not otherwise provided for, e.g. breach of licence conditions, penalty fine 20 000 ringgit max. and/or imprisonment 5 years max.

- Art. 139 - attempts and abetments, penalty same as if committed the offence.

- Art. 140 - offences by bodies of persons and by servants and agents.

- Art. 141 – rewards, director general may grant rewards to any services rendered in connection with smuggling offences and seizures made.

Country	MOROCCO
WHO FCTC & Tobacco Protocol	WHO FCTC signed on 16 April 2004 but not ratified Protocol not signed
Licensing/ Marking	Tax stamp
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Code des Douanes et Impôts Indirects approuvé par le dahir portant loi n° 1-77-339 du 9 octobre 1977 (Customs and Indirect Taxation Code)</b> The Code provides for confiscation of goods the subject of the offence or used in the offence, as well as conveyances, vessels etc. used where offence proven. <b>Law No. 17-97 on the Protection of Industrial Property (promulgated by Dahir No. 1-00-91 of 9 Kaada 1420 (February 15, 2000))</b> - Art. 206 - customs detention procedures, and seizure procedures. Customs and Indirect Tax Administration may, upon application filed by registered trademark owner, suspend circulation of goods being counterfeit, or bear similar marks causing confusion with authentic goods. When customs knows or suspects imported or in transit goods are counterfeit, it automatically suspends them from circulation. - Art. 228 - Court may order destruction of counterfeit goods that are the property of the counterfeiter and all equipment used to manufacture the counterfeit products following a criminal or civil proceedings where offence proven to be committed. - Art. 224 - in case of infringement, holder of exclusive right can ask court to issue a descriptive seizure order. Applicant of such order to pay bond to court to cover any damage suffered by defendant should action prove groundless. Rights holder has 30 days from execution of seizure in which to file an infringement action with the court. Remedies – following successful civil action or criminal prosecution, infringing goods and equipment used in their manufacture will be destroyed.
Intellectual Property	<b>Law No. 17-97 on the Protection of Industrial Property (promulgated by Dahir No. 1-00-91 of 9 Kaada 1420 (February 15, 2000))</b> Chpt. V – Factory Marks, Trade Marks and Service Marks:

<b>Protections and Offences</b>	<p>- Art. 225 - counterfeiting is a criminal offence and subject to penalties including fines and imprisonment. Penalties range from 1 – 6 months imprisonment and/or 50 000 – 500 000 dirhams in fines if fraudulently affix mark belonging to another, using mark without authorization, held goods which bore fraudulently affixed mark, or infringing mark, and deliver and supply good other than one requested under registered trademark.</p> <p>- Art. 226. The following shall be punishable by 1 - 6 months' imprisonment and/or fine of 25,000 to 250,000 dirhams max.:</p> <p>(1) those who, without infringing a registered mark, have made a fraudulent imitation thereof which is liable to deceive the buyer or who have used a fraudulently imitated mark;</p> <p>(2) those who have used a registered mark bearing indications liable to deceive the buyer as to the nature, substantive qualities, composition or content in terms of useful components, the kind or origin of the article or good designated;</p> <p>(3) those who have held without legitimate grounds goods which they knew bore a fraudulently imitated mark or those who knowingly sold, placed on sale or offered to supply goods or services under such a mark.</p> <p>- Any person infringing a manufacturer's trademark may be prosecuted ex officio by the public prosecutor without the need for the rights holder or third party to file a complaint.</p> <p><b>Law No. 13-99 creating the Moroccan Industrial and Commercial Property Office</b> (promulgated by Dahir No. 1-00-71 of 9 Kaada 1420 (February 15, 2000)).</p>
<b>Other Offences</b>	<p><b>Penal Code (promulgated by Dahir no. 1-59-413 of 26 November 1962) (28 Jumada II 1382)</b></p> <p>Chpt. VI Des Faux, Contrefaçons Et Usurpations, Section II de la contrefaçon des sceaux de l'état et des poinçons, timbres et marques (arts. 342 – 350). Penalties range from confinement of 5 – 20 years for counterfeiting or falsifying Government stamps, or using counterfeit or falsified Government stamps. If the deed is not too serious, penalty is imprisonment 1 – 6 months and/or fine 200 – 1000 dirhams. More serious offences penalties are imprisonment 1 – 5 years and fine of 250 – 10 000 dirhams.</p> <p><b>Code des Douanes et Impôts Indirects approuvé par le dahir portant loi n° 1-77-339 du 9 octobre 1977 (Customs and Indirect Taxation Code)</b></p> <p>Titre VIII Impôts Indirects -Taxes Intérieures de Consommation Relevant de L'Administration, art. 182, 1° The administration is responsible for the liquidation and recovery of internal consumption taxes applicable to the following categories of imported goods and works or products on the territory subject to the tax : - manufactured tobacco.</p> <p>Titre IX : Contentieux, Section II -Peines et mesures de sûreté en matière d'infractions douanières</p>

<b>Country</b>	<b>NIGERIA</b>
<b>WHO FCTC &amp; Tobacco Protocol</b>	<p>WHO FCTC signed and ratified – entered into force 18 January 2006</p> <p>Protocol not signed</p>
<b>Licensing/ Marking</b>	<p><b>Customs and Excise Management Act 2004</b></p> <p>- s115 – (1) No person shall manufacture any description of tobacco subject to a duty of excise unless, he holds an excise licence as a tobacco manufacturer.</p> <p>- s116 – (1) The Minister may make regulations (a) regulating the manufacture of tobacco by a tobacco manufacturer; (b) for securing the excise duties on tobacco.</p> <p>(2) Any person contravening or failing to comply with any regulation made under this section shall be liable to a fine of four hundred naira and any goods or article in respect of which the offence was committed shall be forfeited.</p> <p>Part IX. —Excise Licences, Entries, etc. ss121-127 general provisions covering excise licences.</p> <p>Two tobacco bills waiting to be enacted; a 2012 bill (to repeal Tobacco Control Act 1990) sponsored in the Senate by Senator Ifeanyi Okowa and a recent 2013 bill raised in the House of Representatives, sponsored by Senator Yacoob Bush-Alebiosu.</p> <p>A third bill on tobacco regulation has also been initiated at the executive level and is being redrafted by the Federal Ministry of Health.</p> <p>The 2012 bill seeks to provide a legal framework for the control of the production, manufacture, sale, labelling, advertising, promotion, sponsorship, use of tobacco products and exposure to tobacco smoke. The bill states that any person convicted of an offence under the Act for which no other penalty is provided shall be liable to a fine not exceeding N500,000 or a prison term not exceeding 6 months. For corporate offenders, the fine is N2,000,000.</p>

<p><b>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</b></p>	<p>No single legal framework. Law and practice varies and depends on the type of crime and statute being enforced. Several pieces of legislation authorize forfeiture and property subject to forfeiture is the subject matter or constitutes evidence of the offence (s.47 Corrupt Practices and Other Related Offences Act); property confiscated to compensate for loss arising from fraud; instrumentalities of crime confiscated; all property of offender seized or confiscated; forfeiture of proceeds of crime.</p> <p>Some limited authorization of non-conviction based forfeiture of proceeds under some statutes e.g. Advance Fee Fraud Act 2006 and Corrupt Practices and Other Related Offences Act 2000.</p> <p><b>Customs and Excise Management Act 2004</b></p> <ul style="list-style-type: none"> <li>- s46 - forfeiture of goods improperly imported.</li> <li>- s63 - forfeiture of goods improperly exported, etc.</li> </ul> <p><b>Money Laundering (Prohibition) Act 2011</b></p> <ul style="list-style-type: none"> <li>- s115(2), s116(2) – forfeiture of goods in respect of which an offence is committed.</li> </ul> <p>Part XI, ss144-169 – general powers of customs officers for search, forfeiture of goods where mark or seal placed on goods by the customs officer if broken without permission, search, seize, detain (s147).</p> <p>Part XII Forfeiture and Legal Proceedings, ss167-175 – officer can seize or detain thing liable for forfeiture, including ships, aircraft and vehicles.</p> <p><b>The following Acts deal with asset recovery and confiscation of proceeds in various sectors:</b> Banks and Other Financial Institutions Decree, Criminal Procedure Act, Economic and Financial Crimes Establishment Act, Corrupt Practices and Other Related Offences Act 2004, Prevention of Terrorism Act 2011, National Drug Law Enforcement Agency Act 1990</p>
<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Trade Marks Act</b> (Chapter 436) 1990- Offences and restraint of use of Arms of Nigeria</p> <ul style="list-style-type: none"> <li>- s61 (1) Any person who makes a representation: <ul style="list-style-type: none"> <li>(a) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark; or</li> <li>(b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is so registered; or</li> <li>(c) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not registered; or</li> <li>(d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered on the register, the registration does not give that right, shall be liable on summary conviction to a fine not exceeding two hundred naira.</li> </ul> </li> </ul> <p><b>Criminal Code Act</b> (Chapter 77) - Division 3 Forgery and Like Offences, s465 – making false document, counterfeiting seal or mark, penalty is imprisonment for 7 years.</p>
<p><b>Other Offences</b></p>	<p><b>Criminal Code Act</b> of the Federation of Nigeria 1990 (Chapter 77 )</p> <p>Chpt 10 – Unlawful Assemblies: Breaches of the Peace:</p> <ul style="list-style-type: none"> <li>- s78 - Any persons who assemble together to the number of three or more, armed with firearms, bows and arrows, spears, swords, knives, or other dangerous or offensive weapons, in order to effect or aid in effecting any of the following purposes: <ul style="list-style-type: none"> <li>(a) the unlawful shipping, unshipping, loading, moving, or carrying away of any goods the importation of which is prohibited, or any goods liable to customs duties, which duties have not been paid or secured;</li> <li>(b) the rescuing or taking of any such goods from any person authorised to seize them, or from any person employed by him, or assisting him, or from any place where any such person has put them;</li> <li>(c) the rescuing of any person who has been arrested on a charge of any offence relating to the customs;</li> <li>(d) the prevention of the arrest of any person guilty of any such offence, or of any person aiding in effecting any of the purposes in this section mentioned;</li> </ul> </li> </ul> <p>are guilty of a felony, and each of them is liable to imprisonment for seven years.</p> <ul style="list-style-type: none"> <li>- s79 - Any persons who are found assembled together, to the number of six or more, having with them any goods liable to forfeiture under any law relating to the customs, and carrying firearms, bows and arrows, spears, swords, knives, or other dangerous or offensive weapons, or disguised, are guilty of a felony, and each of them is liable to imprisonment for seven years.</li> </ul> <p>Chpt 12 – Corruption and abuse of office offences.</p> <p>Chpt 18 – Miscellaneous Offences against Public Authority, s194-196 offences against customs officers engaged in their duty. Penalties range from life imprisonment for shooting at a vessel which is in use by a customs official or shooting at a customs official, to 3 years imprisonment for assaulting or resisting a customs official employed for the prevention of smuggling.</p>



**Customs and Excise Management Act 2004**

- s47 - penalty for improper importation/evasion of duty or concealment of goods holding a different description- 5 years imprisonment without option of a fine.
  - s64 - penalties for improper exportation of goods, etc. 5 years imprisonment without option of a fine.
- Part VII Tobacco, s115 (2) If any person manufactures any such tobacco otherwise than under and in accordance with an excise licence, he shall be liable to a fine of one thousand naira and any such tobacco so manufactured by him or in his possession, and any plant and materials in his possession capable of being used in the manufacture of such tobacco, shall be forfeited.
- s116 (3) - if at any time the proper officer finds that the quantity of tobacco in the factory of a tobacco manufacturer differs from the quantity which ought to be therein according to any books or other documents kept by the tobacco manufacturer in pursuance of any regulations made under this section and such difference cannot be accounted for to the satisfaction of the Board, then:
    - (a) if the quantity in the factory exceeds the quantity which ought to be therein, the excess shall be forfeited.
    - (b) if the quantity in the factory is less than the quantity which ought to be therein, the tobacco manufacturer shall be liable to a fine of double the excise duty at the highest rate on a quantity of manufactured tobacco equal to the quantity of the deficiency.
  - s117 (1) - Subject to subsections (2) and (3) of this section, the excise duty chargeable on manufactured tobacco shall excise become due and payable by the tobacco manufacturer on delivery of such tobacco from the factory. (2) The Board may allow payment of the duty to be deferred upon such terms as it sees fit: Provided that the date of payment shall not be later than the 21st day of the month next following that in which the duty became due. (3) The Board may, subject to such conditions as it sees fit to impose, allow manufactured tobacco to be delivered from a tobacco manufacturer's factory for exportation or loading as stores in accordance with the customs laws without payment of the excise duty chargeable thereon.
- General offences:
- s160 – excise duty not paid, penalty fine twice the amount of customs duty or 600 naira whichever is greater.
  - s161 – making document or statement untrue in any material particular, knowingly or recklessly, penalty fine of 1000 naira and/or imprisonment 2 years.
  - s162 – counterfeiting/falsifying document, seal, signature, other mark, penalty fine of 1000 naira and/or imprisonment 2 years.
  - s163 – using false or unjust scales, penalty fine of 400 naira and scales forfeited.
  - s164 If any person
    - (a) knowingly and with intent to defraud the Federal Government of any duty payable thereon, or to evade any prohibition with respect thereto, acquires possession of, or is in any way concerned in the carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or Government warehouse or which are chargeable with a duty which has not been paid, or with respect to the importation, exportation or carriage coastwise of which any prohibition is for the time being in force; or
    - (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion of any duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this Act applicable to those goods,
 he shall be liable to a fine of 6 times the value of the goods or 400 naira, whichever is the greater, and/or two years imprisonment.

Country	PANAMA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005 Protocol signed 10 January 2013
Licensing/ Marking	<b>Tobacco Control Law N. 13 (24 January 2008)</b> Partial- unit packets and packages marked to determine origin, date of production and expiration and exact place where the product will be sold. The bar code on the product shall not be adulterated or have tags attached above. Tax stamps and markings for the purposes of tracking are not required. Regulatory regime for licensing Tobacco dealers. Importers and wholesalers of tobacco leaf and equipment for production shall only sell to licensed producers.



<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p>No confiscation of proceeds derived from ITTP</p> <p><b>Law No. 30 of 8 November 1984</b> allows the confiscation of the instruments and effects of smuggling.</p> <p>Article 75 of the <b>Panama Criminal Code</b> allows for confiscation of the instruments and effects of crime. <i>(The judicial interpretation of art. 75 in order to extend the confiscation to crime proceeds has been quite limited and quite restrictive).</i></p> <p><b>Anti- Money Laundering laws No. 45 (2002) and No. 12 (2005)</b></p> <p><b>Law No. 35 of May 10, 1996 on Industrial Property</b> Title VII - Of the Unlawful Use of Industrial Property Rights: - Art. 166 – in case of unlawful use of Industrial Property Rights seizure of goods and machinery used shall be effected and donated to charity after removing all distinctive marks. If removal of marks not possible and owner does not consent to donation goods shall be destroyed by proper authorities.</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>Law No. 35 of May 10, 1996 on Industrial Property</b> Title VII - Of the Unlawful Use of Industrial Property Rights: - Art. 164 – covers various activities such as manufacturing and possessing, knowingly selling distributing infringing goods, falsifying or altering trademarks, trade names. - Art. 165 – penalties include fines ranging from 10 000 – 200 000 balboas; if operating in FTZ fine equivalent to 25% of monthly commercial activity of company and shall not be more than 75 000 balboas; (2) suspension of right to engage in activity for 3 months: (3) suspend or cancel operation code or permit issued by administration of the Colon Free Zone. Suspension applied for minimum of 3 months. In case of repeat offenders penalties shall be applied for 1 year and fines can be up to 4 times the maximum.</p> <p><b>Executive Decree No. 7 of February 17, 1998</b> regulating Law No. 35 of May 10, 1996 on Industrial Property - Title VII Of Unlawful Use of Industrial Property Rights</p>
<p>Other Offences</p>	<p><b>Law No. 30 of 8 November 1984</b> on smuggling and customs fraud, including tax evasion. These offences carry a penalty/fine from 1 to 5 times the value of the infringing products.</p> <p><b>Customs Act No. 1 (13 February 2008)</b> article 100. Protection of intellectual property rights as established in the basic principles of the WTO.</p> <p><b>Penal Code of the Republic of Panama adopted by Law No. 14, May 18, 2007</b> - Title VII, Chapter VI on crimes against intellectual property carries a maximum 6 years imprisonment penalty. - Title IX, Chapter IV on crimes against public health carries a maximum 10 years imprisonment penalty. - Title IX, Chapter VII on organized crime carries a maximum 5 years imprisonment penalty. - Title X, Chapter I/II, on corruption and offences against the public administration and public faith carries a maximum 10 years imprisonment penalty.</p>

<p>Country</p>	<p>PARAGUAY</p>
<p>WHO FCTC &amp; Tobacco Protocol</p>	<p>WHO FCTC signed and ratified – entered into force 25 December 2006 Protocol not signed</p>
<p>Licensing/ Marking</p>	<p>No markings on unit packets and packages to determine origin of product and legal domestic market. In bidding process for the tracking system of tobacco products.</p>

<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Paraguayan Criminal Code</b></p> <ul style="list-style-type: none"> <li>- Art. 86 - allows for confiscation of the instruments and effects of crime, only when they may be dangerous for the community or may be used to commit other crimes.</li> <li>- Art. 90 - allows the 'special' confiscation of crime proceeds under specific circumstances.</li> </ul> <p><b>Article 196 of the Paraguayan Criminal Code on Anti-Money Laundering.</b></p> <p>In relation to IP – See <b>Law No. 1.294/1998 on Trademarks</b> - Title IV - Chapter I – Civil and Criminal Proceedings for Infringement, art. 85- (c) the attachment or confiscation of the infringing products, resulting from the infringement, as well as materials and devices mainly used to commit the infringement; (e) the measures required to prevent the continuation or repetition of the infringement, including the destruction of the products, materials or devices used for this purpose.</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>Law No. 3.440/2008</b> amending various provisions of Law No. 1.160/1997, Criminal Code including Article 184 on crimes against intellectual property, copyright and other related rights.</p> <p><b>Law No. 1.294/1998 on Trademarks</b></p> <p>Title IV - Chapter I – Civil and Criminal Proceedings for Infringement:</p> <ul style="list-style-type: none"> <li>- Art. 89 - the following shall be liable to an obligatory term of 1-3 years in prison and a minimum fine of 1000 - 3000 days' wages: <ul style="list-style-type: none"> <li>(a) persons who falsify or adulterate a registered mark;</li> <li>(b) persons who fraudulently imitate a registered mark;</li> <li>(c) persons who knowingly stock, put on sale, sell or offer for sale or distribute products or services bearing a mark that is falsified, fraudulently imitated or unlawfully affixed;</li> <li>(d) persons who, with fraudulent intent, affix or cause to be affixed on a product or service a declaration or any false designation regarding the nature, quality, quantity, number, weight or measure, the manufacturer's name, the place or country in which the product or service has been manufactured or supplied; and</li> <li>(e) persons who knowingly put on sale, sell or offer for sale products or services bearing any of the false declarations mentioned above.</li> </ul> </li> <li>- Art. 90 - penalty defined in the preceding article shall also apply to persons who make fraudulent use of a trade name.</li> <li>- Art. 91 - For offence to have occurred, it shall not be necessary for the falsification, imitation or fraudulent affixing of the mark to apply to all the goods, affixing on a single specimen shall suffice.</li> <li>- Art. 93 – offences in Arts. 89 and 90 liable to public criminal proceedings.</li> <li>- Art. 94 – period of limitation is 2 years</li> </ul>
<p>Other Offences</p>	<p><b>Customs Act No. 2.422/04</b> - art. 336 - crime against smuggling carries a maximum 5 years imprisonment penalty.</p> <p><b>Penal Code of the Republic of Paraguay</b></p> <ul style="list-style-type: none"> <li>- Art. 195 - offence of receiving illegal goods carries a maximum 10 years imprisonment penalty.</li> <li>- Art. 239 - organized crime carries a maximum 5 years imprisonment penalty.</li> <li>- Art. 250 - 253 - crimes against public faith carries a maximum 5 years imprisonment penalty.</li> <li>- Art. 261 - tax evasion carries a maximum 5 years imprisonment penalty.</li> <li>- Art. 300 - 303 - corruption carries a maximum 10 years imprisonment penalty.</li> </ul> <p><b>Excise Tax Act, Law No. 2421/04</b> - Sanctions and fines against tax infraction.</p>
<p>Country</p>	<p>PHILIPPINES</p>
<p>WHO FCTC &amp; Tobacco Protocol</p>	<p>WHO FCTC signed and ratified – entered into force 4 September 2005</p> <p>Protocol not signed</p>

<p><b>Licensing/ Marking</b></p>	<p><b>National Internal Revenue Code (Republic Act no. 10351)</b>  - s6(1) – internal revenue, non-removable fusion stamps.  - s6(2) – importation or manufacture of cigarette paper without permit prohibited. Only registered manufacturers authorized to buy from permit holders, but cigarette paper seller must secure written authority from Commissioner of Internal Revenue, plus written confirmation of the buyer. Manufacturers to keep manufacturer’s cigarette paper registry book detailing debit entries (date of receipt of paper, date of authority of Commissioner, contact details of person from whom received, number, brand, color of bobbins/rolls received showing length in meters), credit entries (date of disposal/use, number, brand, color of bobbins/rolls disposed of/used, length in meters). Local manufacturers of cigars and cigarettes to keep subsidiary books (inventories of imported leaf tobacco volume and value, inventories of local tobacco volume and value, cost of manufacture of each brand of cigarettes, inventories of cigarettes produced on a per brand basis volumes and values).</p> <p><b>Tobacco Regulation Act of 2003 (Republic Act No. 9211)</b> - an Act regulating the packaging, use, sale distribution and advertisements of tobacco products, smoking bans in public places, minimum age sales, retailer compliance with respect to self-service etc. Penalties for infringements include revocation of licenses and permits.</p>
<p><b>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</b></p>	<p><b>Intellectual Property Code of the Philippines (Republic Act No. 8293)</b> – s157 – Court can order that infringing material be destroyed. (2) For counterfeit goods simple removal of affixed trademark is not sufficient to permit release of goods into channels or commerce other than in exceptional cases.</p> <p><b>The Revised Penal Code (Act No. 3815 of December 8, 1930)</b>  - s186 – property mentioned liable to be forfeited to government.</p> <p><b>Tariff and Customs Code of the Philippines</b></p>
<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Intellectual Property Code of the Philippines (Republic Act No. 8293)</b> – s155 using/reproducing without consent of owner reproductions, counterfeits, copies or colorable imitations of registered marks, penalties 2 – 5 years imprisonment and fine of 50 000 – 200 000 pesos.  - s156 – action, damages and injunction for infringement.  - s157 – court can order infringing goods to be disposed of, without harm to rights holder, or destroyed.  - s169 – false Designations of Origin; False Description or Representation.  - s170 – penalties imprisonment from 2 - 5 years and a fine ranging from 50 000 – 200 000 pesos.</p>
<p><b>Other Offences</b></p>	<p><b>Tariff and Customs Code of the Philippines as amended by Republic Act N°4712</b>  - s102 – prohibited importations – e) machines for distribution of cigars and cigarettes.  Part 3, Penal Provisions:  - s3601 - unlawful Importation - Any person who shall fraudulently import or bring into the Philippines, or assist in so doing, any article, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such article after importation, knowing the same to have been imported contrary to law, shall be punished by a fine of 600 pesos min. – 5 000 pesos max. and imprisonment for 6 months - 2 years max. and, if the offender is an alien, he shall be deported after serving the sentence.  - s3602 – fraudulent practices against customs revenue - makes or attempts to make any entry of imported or exported article by means of any false or fraudulent invoice, declaration, affidavit, letter, paper, false statement, written or verbal, or any false or fraudulent practice whatsoever, or shall be guilty of any willful act or omission by means of whereof the Government might be deprived of the lawful duties, taxes and other charges, or any portion thereof, accruing from the article or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offense, be punished by a fine of between 600 – 5 000 pesos and imprisonment from 6 months - 2 years and if the offender is an alien, he shall be deported after serving the sentence.  - s3605 – concealment or destruction of evidence of fraud, penalty fine 2000 pesos max. and/or imprisonment 1 year max.  - s3607 – alteration of Marks on Any Package of Warehoused Articles placed by customs, penalty fine 1000 pesos max.  - s3608 – fraudulent Opening or Entering of Warehouse, penalty fine 1000 pesos max. and/or imprisonment 1 year max.  - s3609 – fraudulent Removal or Concealment of Warehoused Articles, penalty fine 2000 pesos max. and/or imprisonment 1 year max.  - s3610 – violation of Tariff and Customs Laws and Regulations in General — Any person who violates a provision of this Code or regulations pursuant thereto, for which delinquency no specific penalty is provided, shall be punished by a fine of not more than four hundred pesos or by imprisonment for not more than six months, or both.</p> <p><b>The Revised Penal Code (Act No. 3815 of December 8, 1930)</b></p>

Title 4 Crimes Against Public Interest – counterfeiting of coins, forgeries, false testimony, frauds  
 - Art. 186 - monopolies and combinations in restraint of trade, penalty correctional imprisonment for minimum period and/or fine of 200 – 6 000 pesos.  
 - Art. 188 - subsisting and altering trade-mark, trade-names, or service marks, penalty correctional imprisonment in its minimum period and/or fine from 50 – 2 000 pesos.

Country	POLAND
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 14 December 2006 Protocol not signed
Licensing/ Marking	<b>Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001</b> on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (J. of EU Laws of 18 July 2001)  <b>Act of 9 November 1995 on protection of health against the effects of using tobacco and tobacco products (as amended) (J. of Laws 96.10.55)</b> - Marking of unit packages to assist in determining origin and whether product legally sold in domestic market
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Polish Penal Fiscal Code</b> - Art. 22 – forfeiture, destruction of machinery and components used for illicit manufacturing. - Art. 33 and 41.2-4 – obligatory forfeiture of proceeds of crime and obligation to repay due tax. - Art. 232a – securing and destruction of crucial material evidence. - Art. 291 – investigating and securing defendant’s assets.  <b>Industrial Property Law 2007</b> - Art. 306 - forfeiture, sale, destruction of machinery and components used for illicit manufacturing.  <b>Criminal Code 1997</b> Chpt 5: - Art. 44 – forfeiture of items obtained as a result of offence, items used or intended to be used to commit the offence. - Art. 45 - § 1. If the perpetrator has obtained, even if indirectly, a financial benefit from the commission of an offence, the court may decree its forfeiture or the forfeiture of its equivalent. The forfeiture shall not be decreed, in part or in whole, if the benefit or its equivalent is to be returned to the wronged person or to another entity. § 2. In the case of sentencing a perpetrator referred to in article 65 or a perpetrator who has obtained a substantial benefit from the commission of an offence, the court shall decree the forfeiture of the benefit obtained or its financial equivalent. The provision of § 11, sentence two, shall apply accordingly. Chpt 10: - Art. 100 – forfeiture. - Art. 229 - § 7 (61) – in the event of a conviction for an offense specified in § 1 or 2, the court decides the forfeiture of items derived directly or indirectly from the crime, as well as the benefits of this crime, or their equivalent, even if they did not constitute property of the perpetrator. Forfeiture is not predicated in whole or in part if the object, benefit or its equivalent shall be repaid the victim or other entity.  <b>Code of Criminal Procedure 1997</b> – relating to forfeiture and recovery of assets -Chpt 25, art. 217 – 236 – search and seizure - Tax Intelligence Agency responsible for investigating unexplained wealth
Intellectual Property Protections and Offences	Law of June 30, 2000 on Industrial Property 2007 (as last amended by Law of 23 January 2004, and Law of June 29, 2007).

<b>Other Offences</b>	<p><b>Criminal Code of the Republic of Poland 1997</b></p> <ul style="list-style-type: none"> <li>- Art. 313 – (1) counterfeiting official mark of value, penalty imprisonment 3 years max. (2) trading in counterfeit or altered official mark of value, penalty imprisonment 3 years max.</li> <li>- Art. 315 – tampering with measuring devices, penalty restriction of liberty or imprisonment 2 years max.</li> <li>- Art. 316 – forfeiture of the items and the instruments used to carry out the offence</li> </ul> <p><b>Polish Penal Fiscal Code</b></p> <ul style="list-style-type: none"> <li>- Art. 65 § 1 - Anyone who acquires, stores, transports, transmits, or transfers duty-not-paid cigarettes, or who aids and abets in any of these activities, shall be subject to a fine of up to 720 times the daily rate (with each daily rate varying from PLN 50 to PLN 20,000) and/or imprisonment for a period of up to 3 years.</li> <li>- Art. 69 and 69a – tobacco product manufacture.</li> <li>- Art. 99 – excise duty rates.</li> </ul>
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<b>Country</b>	<b>RUSSIAN FEDERATION</b>
<b>WHO FCTC &amp; Tobacco Protocol</b>	WHO FCTC acceded to 3 June 2008 Protocol not signed
<b>Licensing/ Marking</b>	Adopted measures requiring marking of unit packages of tobacco products to determine origin and that the product is legally sold on the domestic market. <b>Technical Regulations for Tobacco Products, Federal Law No. 268-FZ</b> - covers a range of topics including, but not limited to, definitions of several key terms; ingredients; packaging and labeling; and compliance and enforcement. Tax stamp
<b>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</b>	<b>The Customs Code Of The Russian Federation 2003</b> Chpt 38 – measures applied with regard to specific goods, suspending goods release, cancellation of goods release resolution. Chpt 41 – disposal of goods and means of transport.
<b>Intellectual Property Protections and Offences</b>	<b>Civil Code of the Russian Federation (as last amended on December 8, 2011)</b> Section VII Rights to the Results of Intellectual Activities and Means of Individualization, Chapter 69. General Provisions: - Art. 1225 – trademarks and service marks enjoy legal protection. - Art. 1250 - the Protection of Intellectual Rights. 1. Intellectual rights shall be protected by the remedies envisaged by the present Code, with account taken of the essence of the right violated and of the consequences of the infringement of the right. 2. The remedies set out in the present Code for intellectual rights shall be applicable at the request of right holders, organizations managing rights on a collective basis, and also other persons in the cases established by law. 3. The lack of fault of an infringer shall neither render him free of the duty to stop infringement of intellectual rights nor preclude the imposition of the sanctions on the infringer to protect the rights. For instance, the publication of a court's decision on an infringement committed (Sub-item 5 of Item 1 of article 1252) and the stopping of the actions infringing the exclusive right to the result of intellectual activity or means of individualization or creating the threat of infringement of the right shall take place irrespective of the infringer's fault and at the expense of the infringer.

- Art. 1252. Protecting Exclusive Rights:

1. The protection of the exclusive rights to the result of intellectual activity and means of individualization shall be, inter alia, carried out by means of presenting a claim for:

- (1) recognition of the right: to a person that denies or otherwise does not recognize the right and by doing so violates the interests of the right holder;
- (2) stopping the actions that infringe the right or create the threat of infringement thereof: to a person committing such actions or making the necessary preparations for such actions;
- (3) payment of damages: to a person that has illegally used the result of intellectual activity or means of individualization without concluding an agreement with the right holder (use without a contract) or otherwise has violated the right holder's exclusive right and inflicted a damage thereon;
- (4) seizure of a material medium in accordance with Item 5 of the present article: to its manufacturer, importer, keeper, carrier, seller, another distributor or non-bona fide acquirer;
- (5) publication of a court decision on the infringement committed with reference to the actual right holder: to a violator of the exclusive right.

In the arrangement of provision of security for a claim in a case of infringement of exclusive rights the material media, equipment and materials that are allegedly involved in an infringement of the exclusive right to the result of intellectual activity or means of individualization may be subjected to the security measures established by the procedural legislation, for instance, seizure of material media, equipment and materials.

3. In the cases envisaged in the present Code for certain types of results of intellectual activity or means of individualization when an exclusive right is infringed the right holder is entitled to claim compensation from the infringer for the infringement of the said right. The compensation shall be collected if the fact of infringement is proven. In this case, the right holder that has applied for a remedy shall be relieved from the duty to prove the amount of damage inflicted thereon. The amount of compensation shall be determined by the court within the limits set by the present Code, depending on the nature of the infringement and of the other circumstances of the case with due regard to the requirements of reasonability and justice.

- Art. 1477 – recognizing exclusive right to a trademark or service mark.

- Art. 1515 – liability for the Illegal Use of a Trademark:

1. The goods, labels, packaging of goods on which a trademark or a designation similar thereto to the extent of confusion has been illegally placed are counterfeit.
2. The right holder is entitled to claim withdrawal from transactions and destruction of the counterfeit goods, labels, packaging of goods on which the illegally used trademark or a designation similar thereto to the extent of confusion has been placed at the expense of the infringer. If the placing of these goods in transactions is required for the public interest the right holder is entitled to demand removal at the infringer's expense of the illegally used trademark or a designation confusingly similar thereto that has been placed on the counterfeit goods, labels and packages of goods.
3. A person that has infringed an exclusive right to a trademark while carrying out works or providing services shall remove the trademark or a designation confusingly similar thereto from the materials involved in the performance of such works or the provision of such services, including from documents, advertisements and billboards.
4. The right holder is entitled to demand at his/it discretion that the infringer pay compensation in place of reimbursement of damages: 1) in the amount of 10,000 to 5,000,000 roubles at the court's discretion on the basis of the nature of the infringement; 2) in the amount equal to double the value of the goods on which the trademark has been illegally placed or double the value of the right of using the trademark assessed on the basis of the price normally charged in comparable circumstances for the legal use of the trademark.

**Customs Code of the Customs Union** (Appendix to the Treaty On the Customs Code of the Customs Union adopted by resolution of the interstate council of the Eurasia economic community no. 17 of November 27, 2009) - legal regulation of relations pertaining to the moving of goods across the customs border of the Customs Union, their transportation across the single customs territory of the Customs Union under customs control, temporary storage, customs declaring, release and use in accordance with customs procedures, customs control, transfer of customs payments, as well as authoritative relations between the customs bodies and parties implementing the rights of possession, use and disposal of the mentioned goods.

**Other Offences**

**The Administrative Offences Code of the Russian Federation**, No. 195-FZ of December 30, 2001 - identifies several violations of smoke free policies on means of transport (including railway and water transport), states the penalties for such violations, and designates the officials authorized to hear cases concerning these administrative offenses.

**The Labour Code of the Russian Federation, Law No. 197-FZ of December 30, 2001** - provides the definition of "workplace." Law No. 87-FZ, the principal tobacco control law, bans smoking in workplaces, unless in a designated area. However, unlike the Labour Code, Law No. 87-FZ does not include a definition of "workplace." The law has been amended several times, most recently in November of 2009.

**Criminal Code of the Russian Federation No. 63-FZ of June 13, 1996 (as last amended on March 1, 2012)**

- Arts. 146, 147, 180 – liability for the infringement of copyrights, trademarks and patents.

- Art. 171 – Illegal Enterprise

1. Exercising business activities without registration or without a licence where such licence is obligatory, if this deed has inflicted a major damage upon citizens, organizations' or the State or is connected with deriving profits on a large scale, penalty fine 300 000 thousand roubles max., or in the amount of the wage or salary, or any other income of the convicted person for 2 years max., or by compulsory works for 480 hours max., or by arrest for a term of up to 6 months.

2. The same deed: a) committed by an organized group; b) attended by profit-making on a especially large scale, penalty from 100 000 - 500 000 roubles, or in the amount of the wage or salary, or any other income of the convicted person for 1 – 3 years, or with compulsory labour for 5 years max., or by deprivation of liberty for 5 years, with a fine of 80 000 roubles max., or in the amount of the wage or salary, or any other income of the convicted person for a period of 6 months, or without any fine.

- Art. 171.1

(1) Large scale production, purchase, storage, or transportation with the aim of the sale of unmarked goods and products subject to mandatory marking with excise tax marks, by special marks, or marks of conformance, forgery-proof, if perpetrated on a large scale, penalty fine 200 000 roubles max., or in the amount of salary or any other income of the convicted person earned over 18 months max., or with compulsory labour for 3 years max., or by the deprivation of liberty 3 years max. with a fine of 80 000 roubles max. or in the amount of the wage or salary, or any other income of the convicted person for a period of up to 6 months.

(2) The same deeds, if committed a) by an organized group; b) abolished c) on a specially large scale, penalty fine from 100 000 to 300 000 roubles or in the amount of the wage or salary, or any other income of the convicted person for a period of 1 to 2 years, or with compulsory labour 5 years max., or by the deprivation of liberty for 6 years max. with or without a fine 1 million roubles max. or in the amount of the wage or salary, or any other income of the convicted person for a period of 5 years max.

- Art. 180 – (1) illegal use of a trademark – penalty fine 200 000 roubles max., or in the amount of the wage or salary, or any other income of the convicted person for 18 months max., or by compulsory works for a term of up to 480 hours, or by corrective labour for a term of up to 2 years. (3) if committed by group of persons of previous concert or organized crime group, penalty fine 500 000 to 1 million roubles or in the amount of a wage/salary or other income of the convicted person for a period of 3-5 years, or by compulsory labour for a term of up to 5 years, or by deprivation of freedom for a period of up to 6 years with a fine in the amount of up to 500 000 roubles or in the amount of a wage/salary or other income of the convicted person for a period of up to 3 years or without such.

- Art. 325 - Theft or Damage of Documents, Stamps, and Seals or the Stealing of Excise Tax Marks, Special Marks or Marks of Conformance, penalty fine 200 000 roubles max., or in the amount of a wage/salary or any other income of the convicted person for a period of 18 months max., or with obligatory labour for a term of up to 480 hours, or with corrective labour for a term of up to 2 years, or with compulsory labour for a term of up to 1 year, or with an arrest for a term of up to 4 months, or with deprivation of liberty for a term of up to 1 year. (3) stealing of excise tax marks fine 200 000 roubles max., or in the amount of a wage/salary or any other income of the convicted person for a period of up to 18 months, or with compulsory labour for a term of up to 2 years, or with deprivation of liberty for the same term.

- Art. 327.1

1. Production with the purpose to realize or the realization of forged marks of excise tax, special marks or marks of conformance, all forgery-proof, penalty fine in the amount of 100 000 to 300 000 roubles, or in the amount of a wage/salary or any other income of the convicted person for a period of 1 to 2 years, or with compulsory labour for a term of up to 3 years, or with deprivation of liberty for the same term.

2. Knowing utilization of forged marks of excise tax, special marks or marks of conformance, all forgery-proof, shall be punishable with a fine in the amount of 100 000 to 500 000 roubles, or in the amount of a wage/salary or any other income of the convicted person for a period of 1 to 3 years, or with compulsory labour for a term of up to 5 years, or with deprivation of liberty for the same term.

**The Customs Code Of The Russian Federation 2003**

Part III, Chpt 27, art. 320 - 4. In case of the illegal exportation of goods and means of transport across the customs border, jointly responsible for the payment of customs duties and taxes levied on to goods and means of transport shall be the persons who have illegally conveyed the goods and means of transport across the border, as well as the persons who have participated in said conveyance if they were aware or were supposed to be aware of the illegal nature of said conveyance; in the instance of illegal importation, responsible for the payment of customs duties and taxes levied on to goods and means of transport shall be the persons who have owned or come in possession of the illegally imported goods and means of transport if at the time of the purchasing transaction they were aware, or were supposed to be aware of the illegal nature of said importation, which fact was duly certified by the procedures stipulated by law of the Russian Federation. Said persons shall also be responsible for the payment of customs duties and taxes equivalent to those payable by the declarant of the illegally imported or exported goods.



Country	SINGAPORE
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005 Protocol not signed
Licensing/ Marking	<p><b>Customs Act (revised 2004) and Customs Regulations</b></p> <ul style="list-style-type: none"> <li>- s63 Customs Act –</li> <li>1) No person shall manufacture any dutiable goods, except under and in accordance with the provisions of a license granted by the Director-General and at the place or places of manufacture, specified in the license.</li> <li>(2) Such license shall, on payment of such fee as may be prescribed, be granted at the discretion of the Director-General for such period as may be prescribed and subject to: <ul style="list-style-type: none"> <li>(a) such conditions as may be prescribed; and</li> <li>(b) such further conditions as the Director-General may direct to be endorsed on the license in any particular case.</li> </ul> </li> <li>- s39 of the Customs Regulations (revised 2009) stipulates that every application for a license to manufacture dutiable goods under s63 shall be in writing to the Director-General providing certain required information. –s114 of the Customs Regulation - License period is 1 year, or other period as approved by Director-General.</li> <li>- Part XI Licensed Tobacco Factories – ss68-74</li> <li>- Part XII – Claims to Drawback on Tobacco</li> <li>- Part XIV Assessment of Duty –s110 cigarettes, s111 beedies, s112 cigars</li> <li>- Part XV - fees</li> </ul> <p><b>Control of Manufacture Act:</b></p> <ul style="list-style-type: none"> <li>- s3 – manufacture of goods prohibited except on registration.</li> <li>- s5 – registration</li> </ul> <p><b>Control of Manufacture Rules –</b></p> <ul style="list-style-type: none"> <li>- s2 – applications for registration, detailed information required.</li> <li>- every single cigarette to be marked “SDPC” and have a series of vertical bars around the stick to indicate duties have been paid.</li> </ul> <p>Licensing of importing, wholesaling, distributing, and retailing, control measures under Tobacco (Control of Advertisements and Sale) Act and Tobacco (Control of Advertisements and Sale) (Licensing of Importers, Wholesalers and Retailers) Regulations 2010</p> <p>No marking of products to determine origin or whether product legally sold on domestic market.</p>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Singapore Customs Act 2004 (Chapter 70)</b></p> <ul style="list-style-type: none"> <li>- s54 – power to open and examine goods or packages</li> <li>- s55 – detention of goods where doubt exists</li> <li>- s69 – power to enter licensed premises</li> <li>- s94 – proper officer of customs may take samples</li> <li>- Part XIII, s101-112 – search, seizure and arrest</li> <li>- s110 – seizure of goods subject of an offence</li> <li>- s122 – all goods liable to seizure, liable to forfeiture</li> <li>- s123 – court to order disposal of seized goods</li> <li>- s124 - Goods seized in respect of which there is no prosecution, deemed to be forfeited if not claimed within one month</li> </ul> <p><b>Customs Regulations (revised 2009):</b></p> <ul style="list-style-type: none"> <li>- s116 disposal of forfeitures</li> </ul>



	<p><b>Trade Marks Act (Chapter 332) (2005):</b>  - s53 – forfeiture and destruction of goods on conviction</p> <p>Corruption, Drug Trafficking and Other Serious Crime (Confiscation of Benefits) Act 1992 – dealing with the proceeds of crime, penalty of fine of \$500 000 max. and/or imprisonment 7 years max., penalty for legal persons is fine of \$1 million max.</p>
<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Trade Marks Act (Chapter 332) (2005)</b>  -Part VI Offences:  - s46 – counterfeiting a trademark, penalty fine \$100 000 max. and/or imprisonment 5 years max.  - s47 – falsely applying registered trademark to goods or services, penalty fine \$100 000 max. and/or imprisonment 5 years max.  - s48 – making or possessing of article for committing offence, penalty fine \$100 000 max. and/or imprisonment 5 years max.  - s49 – importing, selling, possessing goods with falsely applied trademark, penalty fine \$10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate \$100,000) and/or imprisonment for 5 years max.  - s50 – falsification of register, penalty fine \$50 000 max. and/or imprisonment 5 years max.  - s51 – falsely representing trademark as registered, penalty fine \$10 000 max.</p> <p><b>Intellectual Property Office of Singapore Act (Chapter 140) (2001)</b></p>
<p><b>Other Offences</b></p>	<p><b>Penal Code 1871 (revised 2008) (Chapter 224)</b>  - Chpt V ss107-120 – abetment  - Chpt VA ss120A-B – criminal conspiracy  - s255 – counterfeiting government stamp, penalty imprisonment which may extend to 10 years and be liable to a fine  - s256 - Having possession of an instrument or material for the purpose of counterfeiting a Government stamp, penalty imprisonment which may extend to 7 years and be liable to a fine  - s257 - Making or selling an instrument for the purpose of counterfeiting a Government stamp, penalty imprisonment which may extend to 7 years and be liable to a fine  - s258 – sale of counterfeit stamp, penalty imprisonment which may extend to 7 years and be liable to a fine  - s259 – having possession of a counterfeit government stamp (knowing it to be counterfeit), penalty imprisonment which may extend to 7 years and be liable to a fine  - s260 – using as genuine a government stamp known to be counterfeit, penalty imprisonment which may extend to 7 years and/or a fine  - s261 - Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it, with intent to cause loss to Government, penalty imprisonment which may extend to 3 years and/or a fine  - s262 – using government stamp known to have been used before, penalty imprisonment which may extend to 2 years and/or a fine  - s263 – erasure of mark denoting that stamp has been used, penalty imprisonment which may extend to 3 years and/or a fine</p> <p><b>Customs Act (Revised 2004) (Chapter 70)</b>  - s52 – dutiable goods imported into Singapore to be deposited in free trade zone or government warehouse  - s60 – dutiable goods for transshipment to be deposited in free trade zone to await arrival of a vessel in which they are to be transshipped.  - s78 – drawback on imported tobacco manufactured in Singapore  - Part XV Offences and Penalties:  - s128 – offences in relation to making or signing untrue or incorrect or incomplete declarations, certificates and documents  - s128A –offences in relation to falsifying documents  - s128B – offences in relation to failure to make declarations  - s128C – offences in relation to failure to produce trade documents  - s128D – offences in relation to fraudulent evasion  - s128E – offences in relation to goods found in person’s baggage or upon his person  - s128F - offences in relation to importation of uncustomed or prohibited goods  - s128G - offences in relation to exportation of uncustomed or prohibited goods</p>

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Country	SOUTH AFRICA
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 18 July 2005 Protocol signed 10 January 2013
Licensing/ Marking	<p>No marking required to determine origin of product of whether goods sold legally in domestic market.</p> <p>Licensing – registration of manufacturers and licensing of tobacco importers</p> <p><b>Customs and Excise Act 91 of 1964</b></p> <ul style="list-style-type: none"> <li>- s19 – warehouses may be licensed for the storage or manufacture of dutiable goods</li> <li>- s35A – special provisions regarding cigarettes and cigarette tobacco, (1) Commissioner may prescribe size and type of containers used by manufacture for pack of cigarettes and tobacco, (2) stamp impression must be made on containers before removal of products from warehouse, (3) No cigarettes or cigarette tobacco shall be sold or disposed of or removed from the customs and excise manufacturing warehouse in question in partly or completely manufactured condition except in accordance with the provisions of this Act, (4) No person shall-             <ul style="list-style-type: none"> <li>(a) counterfeit or make any facsimile of any die or impression stamp determined under subsection (2);</li> <li>(b) be in possession of, use or offer for sale or for use (i) any die or impression stamp counterfeited in contravention of paragraph (a); or</li> <li>(ii) any facsimile of any die or impression stamp made in contravention of that paragraph.</li> </ul> </li> <li>- s36A – any owner or manufacturer of excisable goods shall license premises as a special customs and excise warehouse for the purposes of excise duty</li> <li>- s54 – special provisions regarding importation of cigarettes, imported cigarettes must be packed in prescribed manner and impression of stamp made on containers</li> <li>- s61 – customs and excise warehouse licenses</li> </ul>

	<p><b>Regulations relating to the Labelling, Advertising and Sale of Tobacco Products 1994</b> issued pursuant to s6 of that Tobacco Products Control Act 83 of 1993.</p> <p><b>Tobacco Products Control Act</b> - The Act provides, inter alia, for the regulation of the sale and advertising of tobacco products and sets out the requirements for plain packaging and the appearance of tobacco products, the presentation of brand names and trademarks on tobacco products and packaging. It also prohibits false or misleading labeling and packaging for tobacco products (Sections 3(6), (7) &amp; Section 6(v)).</p>
<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Customs and Excise Act 91 of 1964</b></p> <ul style="list-style-type: none"> <li>- s16 – opening of packages in absence of importer or exporter</li> <li>- Chpt IV - Customs and Excise Warehouses; Storage and Manufacture of Goods in Customs and Excise Warehouses (ss 19-37)</li> <li>- s81 – goods subject of offence liable to forfeiture</li> <li>- s83 – goods subject of offence liable to forfeiture</li> <li>- s84 – goods subject of offence liable to forfeiture</li> <li>- s86 – goods subject of offence liable to forfeiture</li> <li>- s87 – goods irregularly dealt with liable to forfeiture, (1) Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found, (2) ship, vehicle used in carriage of goods liable to forfeiture</li> <li>- s88 – seizure</li> <li>- s89 – notice of claim by owner in respect of seized goods</li> <li>- s90 – disposal of seized goods</li> <li>- s93 – remission or mitigation of penalties and forfeiture (payment of outstanding duties, fines etc.)</li> <li>- s109 – destruction of goods or detention of ships or vehicles (for public safety)</li> <li>- s113 – prohibitions and restrictions (8) (a) An officer may, for the purposes of any law other than this Act or at the request of a member of the police force or the authority administering such law, detain any goods while such goods are under customs control.</li> </ul> <p><b>Prevention of Organized Crime Act no. 121 of 1998</b></p> <ul style="list-style-type: none"> <li>- s6 – proceeds of crime</li> </ul> <p><b>Criminal Procedure Act 1977</b>, Chapter 2, articles 19-36 search warrants, entering of premises, seizure, forfeiture and disposal of property connected with offences:</p> <ul style="list-style-type: none"> <li>- Art. 31 - Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings</li> <li>- Art. 32 - Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid</li> <li>- Art. 34 - Disposal of article after commencement of criminal proceedings</li> <li>- Art. 36 - Disposal of article concerned in an offence committed outside the Republic</li> </ul> <p><b>Counterfeit Goods Act 37 of 1997</b></p> <ul style="list-style-type: none"> <li>- s4 – inspector’s powers in relation to counterfeit goods, seizure, entering premises, collecting evidence etc.</li> <li>- s5 – extent of inspector’s powers in relation to counterfeit goods – take steps reasonably necessary to stop manufacturing of counterfeit goods</li> <li>- s6 – provisions relating to issue and execution of warrant</li> <li>- s7 – duties of inspector following seizure of goods</li> <li>- s9 - Seized goods to be released if criminal investigation or criminal or civil proceedings not contemplated against suspect</li> </ul>
<p>Intellectual Property Protections and Offences</p>	<p><b>Counterfeit Goods Act 37 of 1997 as amended by Counterfeit Goods Amendment Act 25 of 2001</b></p> <p>Concerns all counterfeited goods -2(1) expressly prohibits importing, distributing, selling, bartering, exchanging, offering or exposing counterfeit goods or possessing them for trade purposes, penalty fine R100 million max. or imprisonment 30 years max.</p> <ul style="list-style-type: none"> <li>- 2(2) – acquiring, using or possessing goods that are proceeds of crime, penalty fine R 100 million max. or imprisonment 30 years max.</li> </ul>

	<p><b>Trade Marks Act No. 194 of December 22, 1993</b></p> <ul style="list-style-type: none"> <li>- s34 – infringement of registered trademark</li> <li>- Part XVI – Offences:</li> <li>- s60 – fraud in relation to registers, penalty fine or imprisonment 12 months max.</li> <li>- making false statements or influencing registrar or other officer, penalty fine or imprisonment 12 months max.</li> <li>- s62 – falsely representing trademark as registered, penalty fine or imprisonment 12 months max.</li> </ul>
<p><b>Other Offences</b></p>	<p><b>Customs and Excise Act 91 of 1964</b></p> <ul style="list-style-type: none"> <li>- Chapter XI – Penal Provisions:</li> <li>- s78 – offences not expressly mentioned - (1) Any person who contravenes any provision of this Act or who fails to comply with any such provision with which it is his duty to comply, shall, even where such contravention or failure is not elsewhere declared an offence, be guilty of an offence. (2) penalty – fine R8 000 max., or treble value of goods in respect of which offence committed, whichever is greater, and/or imprisonment 2 years max.</li> <li>- s79 – less serious offences (1)(a) – any person who: <ul style="list-style-type: none"> <li>(a) supplies the means or materials for, or assists in establishing, repairing, maintaining or working any still being made or made, imported, used, set up or in the possession or custody of any person without lawful authority;</li> <li>(e) falsely holds himself out to be an officer;</li> <li>(f) resists or hinders an officer in the exercise of his powers or the performance of his functions under this Act; or</li> <li>(g) rescues any persons apprehended for any offence under this Act, or prevents the apprehension of any person who has committed any such offence, shall be guilty of an offence, penalty fine R8 000 max. and/or imprisonment 2 years max.</li> </ul> </li> <li>- s80 – serious offences - (1) Any person who- <ul style="list-style-type: none"> <li>(a) has upon his premises or in his custody or under his control, or purchases, sells or otherwise disposes of any illicit goods knowing the same to be illicit goods;</li> <li>(b) not being a licensed manufacturer or dealer, without lawful authority has in his possession or custody or under his control any partly manufactured excisable goods or fuel levy goods or excisable goods or fuel levy goods upon which duty has not been paid;</li> <li>(c) removes or assists in or permits the removal of goods in contravention of any provision of this Act;</li> <li>(e) removes or breaks or interferes with any lock, meter, gauge, rod, seal, mark or fastening placed on or fitted to any warehouse, vessel, package, container or other article, place or plant, by an officer under any provision of this Act;</li> <li>(f) damages, destroys or disposes of any goods to prevent the securing or seizure thereof under the provisions of this Act by any officer or other person authorized to secure or seize the same, or takes back any goods which are being detained or have been seized;</li> <li>(h) without lawful excuse (the proof of which shall lie upon him), brings into the Republic, produces or has in his possession any blank or incomplete invoice or any billhead or other similar document capable of being completed and used as an invoice for goods from outside the Republic;</li> <li>(i) makes improper use of a licence, permit or other document issued in respect of goods to which this Act relates;</li> <li>(j) claims or receives any rebate, drawback, refund or payment or sets off any amount in terms of the provisions of section 77 (a) to which he knows he is not entitled under this Act;</li> <li>(k) not being authorized to do so, gives or promises to give, directly or indirectly, any reward to an officer or any person employed by the Government, in respect of the performance or non-performance by any such officer or person of his duty or employment under this Act or agrees with or proposes to any such officer or person to do or permit anything in contravention or evasion of this Act;</li> <li>(l) being an officer or a person employed by the Government, demands or receives, except from or through the Government, any reward in respect of the performance or non-performance of his duty or employment under this Act or by any wilful act, neglect or default does or permits or agrees to do or permit anything in contravention or evasion of this Act;</li> <li>(m) attempts to commit or assists in committing any offence mentioned in this section;</li> <li>(n) from any goods made from or containing excisable goods or fuel levy goods extracts or recovers such excisable goods or fuel levy goods in contravention of the provisions of this Act;</li> <li>(o) contravenes the provisions of section 18 (13), 18A (9), 20 (4)bis, 35A (4), 37 (9), 37A (4) (a), 60 (1), 63 (1), 75 (7A), 75 (19), 88 (1) (bA), 113 (2), 113 (8) (c) or 114 (2A); or</li> <li>(p) fails to comply with any condition determined under section 107 (2) (a), shall be guilty of an offence, penalty fine R20 000 max. or treble the value of the goods in</li> </ul> </li> </ul>

respect of which such offence was committed, whichever is the greater, and/or imprisonment 5 years max.

- s81 – non-declaration in respect of certain goods, offence not to comply with s15, penalty fine R8 000 max. or treble the value of the goods in question, whichever is the greater, and/or to imprisonment 2 years max., and the goods in question and any other goods contained in the same package as well as the package itself shall be liable to forfeiture.
- s82 – any person having in their control or possession stamp used by authority of Commissioner or imprint identical to or resembles imprint of stamp used under authority of commissioner or any government al authority without lawful excuse, is guilty of an offence, penalty fine and/or imprisonment 5 years max. (2) manufacturing or having in control or possession stamps or imprints of foreign companies, firms or businesses, without lawful excuse, guilty of offence, penalty fine and/or imprisonment 5 years max.
- s83- irregular dealings with goods, penalty fine R20 000 max. or treble the value of the goods in respect of which such offence was committed, whichever is the greater, and/or to imprisonment 5 years max., and the goods in respect of which such offence was committed shall be liable to forfeiture.
- s84 – false documents and declarations, penalty fine R40 000 max. or treble the value of the goods to which such statement, declaration or document relates, whichever is the greater, and/or imprisonment 10 years max., and the goods in respect of which such false statement was made or such false declaration or document was used shall be liable to forfeiture.
- s86 – certain specified offences, penalty fine R40 000 max. or treble the value of the goods, whichever is the greater, and/or imprisonment 10 years max., and the goods in respect of offence liable to forfeiture.
- s113 – prohibitions and restrictions, (1) (b) cigarettes with a mass of more than 2 kilograms per 1 000 cigarettes; unless imported under permit issued by the Board of Trade and Industries.

(7) The Commissioner may by rule prohibit or restrict the coastwise carriage or the transit carriage through the Republic of any goods referred to in subsection (1) or of any other goods in respect of which he considers any such prohibition or restriction necessary in the public interest.

(9) No person shall manufacture cigarettes the mass of the tobacco of which exceeds 2 kilograms per 1 000 cigarettes.

**Standard Operating Procedure:**

- para 2.9.4 – all licensees required to maintain and keep records on (i) all raw materials initially received, used in production and/or removed. (ii) yield from raw materials (iii) production (iv) stock on hand (v) receipts of bonded product (vi) removal of bonded product (vii) removal of rebated product (viii) removal for home consumption (ix) returns of duty-paid stock (x) exports.

Check the Penal Code for other offences.

Country	SWITZERLAND
WHO FCTC & Tobacco Protocol	WHO FCTC signed on 25 June 2004 but not ratified Protocol not signed
Licensing/ Marking	<b>Ordinance on Tobacco Products and Products Containing Tobacco By-Products Intended for Smoking of 27 October 2004</b> - Section 3- Manufacture of Tobacco Products - Section 4 – Labelling – art. 11 – producer country, name of manufacturer, specific designation
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Federal Law of August 28, 1992 on the Protection of Trademarks and Indications of Source (status as of August 1, 2008)</b> - 68 – confiscation in criminal proceedings, article 58 of the Swiss Penal Code <sup>30</sup> shall apply; however, the court may, notwithstanding paragraph (2) of that provision, order that an object unlawfully bearing a trademark or an indication of source shall be confiscated as a whole. <b>Swiss Criminal Code 1937 (as amended 2012)</b> - ss69 -72 – conviction based confiscation of proceeds of crime – is mandatory and supplementary to primary penalty imposed by Court, and subject to statutory limitation of 7 years

	<p>- ss 69, 70B – non-conviction based confiscation against property in rem - s249 – forfeiture</p> <p><b>Swiss Criminal Procedure Code of 5 October 2007</b> - Chpt 7 Seizure, arts. 263-268 - Chpt 5, section 3, arts. 376-378- separate forfeiture proceedings</p>
<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Federal Law of August 28, 1992 on the Protection of Trademarks and Indications of Source (status as of August 1, 2008)</b> - s61 – (1) At the request of the injured party, any person who intentionally infringes the trademark rights of another person by: (a) usurping, counterfeiting or imitating such a trademark; (b) placing goods on the market or providing services under the usurped, counterfeit or imitated trademark, offering such goods or services or advertising them, shall be liable to imprisonment of up to one year or a fine of up to 100,000 francs. (2) Any person who refuses to state the origin of objects bearing a usurped, counterfeit or imitated trademark, which are in his possession, shall be liable, at the request of the injured party, to the same penalties. (3) Where the person committing an offense acts by way of trade, he shall be prosecuted ex officio. The penalty shall be imprisonment and a fine of up to 100,000 francs. - s62 – fraudulent use, imprisonment or fine up to 100 000 francs. (2) Where the person committing an offense acts by way of trade, he shall be prosecuted ex officio. The penalty shall be imprisonment of up to five years and a fine of up to 100,000 francs. (3) Any person who imports, exports or stores goods in the knowledge that they are intended to deceive while being offered or placed on the market, shall be liable, at the request of the injured party, to detention or a fine of up to 20,000 francs. -65 - Any person who intentionally infringes the provisions on producer identification signs shall be liable to a fine of up to 20,000 francs.</p> <p><b>Swiss Criminal Code 1937 (as amended 2012)</b> - s155 – counterfeiting of goods, (1) Any person who with a view to deceiving another in trade or business manufactures a product which appears to have a higher commercial value than its true commercial value, in particular by being an imitation or counterfeit version of another product, or imports, stores or markets such a product, is liable, provided the act is not subject to a more severe penalty under another provision hereof, to a custodial sentence not exceeding 3 years or to a monetary penalty. (2) If the offender acts for commercial gain, he is liable, provided the act is not subject to a more severe penalty under another provision hereof, to a custodial sentence not exceeding 5 years or to a monetary penalty. - s245 – forgery of official stamps, Forgery of official stamps (1) Any person who forges or falsifies official stamps, and in particular postage stamps, revenue stamps or fee stamps, in order to pass these off as genuine or non-falsified, any person who gives cancelled official value stamps the appearance of being valid in order to pass them off as such, is liable to a custodial sentence not exceeding 3 years or to a monetary penalty. The offender is also liable to the foregoing penalties if he committed the act abroad, has entered Switzerland and is not being extradited, provided the act is also an offence at the place of commission. (2) Any person who passes off forged, falsified or cancelled official stamps as genuine, non-falsified or valid is liable to a custodial sentence not exceeding 3 years or to a monetary penalty. - s246 – forgery of official marks, Any person who forges or falsifies an official mark which the authorities affix to an object to confirm the result of an inspection or the granting of authorization such as hallmarks, or marks stamped on goods by meat inspectors or customs officials, with the intention of passing the mark off as genuine, any person who passes off such forged or falsified marks as genuine or non-falsified, is liable to a custodial sentence not exceeding three years or to a monetary penalty. - Art. 247 - Counterfeiting equipment and unlawful use of equipment, any person who constructs or acquires equipment for the forgery or falsification of coins, paper money, bank notes or official stamps in order to make unlawful use of such equipment, any person who makes unlawful use of equipment which is used for the production of coins, paper money, bank notes or official stamps, is liable to a custodial sentence not exceeding 3 years or to a monetary penalty.</p>

<b>Other Offences</b>	<p><b>Customs Act 1925</b> – see for smuggling laws, seizure and disposal</p> <p><b>Swiss Criminal Code 1937 (as amended 2012)</b></p> <p>- Art. 251</p> <p>Forgery of a document (1) Any person who with a view to causing financial loss or damage to the rights of another or in order to obtain an unlawful advantage for himself or another, produces a false document, falsifies a genuine document, uses the genuine signature or mark of another to produce a false document, falsely certifies or causes to be falsely certified a fact of legal significance or, makes use of a false or falsified document in order to deceive, is liable to a custodial sentence not exceeding five years or to a monetary penalty.</p> <p>(2) In particularly minor cases, a custodial sentence not exceeding 3 years or a monetary penalty may be imposed.</p> <p>- Art. 252 - Forgery of certificates, any person who with the intention of furthering his own position or that of another, forges or falsifies identity documents, references, or certificates, uses such a document in order to deceive another, or uses a genuine document of this nature but which does not apply to him in order to deceive another, is liable to a custodial sentence not exceeding 3 years or to a monetary penalty.</p> <p>- Art. 253 - Obtaining a false certificate by fraud , any person who by fraudulent means causes a public official or a person acting in an official capacity to certify an untrue fact of substantial legal significance, and in particular to certify a false signature or an incorrect copy as genuine, or any person who makes use of a document obtained by fraud in this way in order to deceive another as to the fact certified therein, is liable to a custodial sentence not exceeding 5 years or to a monetary penalty.</p> <p>- Art. 260 - Criminal organization</p> <p>(1) Any person who participates in an organization, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means, any person who supports such an organization in its criminal activities, is liable to a custodial sentence not exceeding 5 years or to a monetary penalty.</p> <p>(2) The court has the discretion to mitigate the penalty imposed (art. 48a) if the offender makes an effort to foil the criminal activities of the organization.</p> <p>(4) The foregoing penalties also apply to any person who commits the offence outside Switzerland provided the organization carries out or intends to carry out its criminal activities wholly or partly in Switzerland. Article 3 paragraph 2 applies.</p> <p>- Title Seventeen: Felonies and Misdemeanors against the Administration of Justice, arts. 303-311</p> <p>- Title Nineteen – Bribery, art. 322</p>
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Country	THAILAND
WHO FCTC & Tobacco Protocol	<p>WHO FCTC signed and ratified – entered into force 27 February 2005</p> <p>Protocol not signed</p>
Licensing/ Marking	<p><b>Tax stamp on pack – Ministerial Regulation 27, Ministry of Finance</b>, value of stamp is 79% of the price of the cigarette pack</p> <p><b>Tobacco Product Control Act BE 2535, 1992</b> governing packaging and labeling of tobacco products and advertising and promotion</p> <p><b>Thailand Customs Act BE 2469, 1926</b></p> <p>- s97 septem - In the case of the importation of goods into the Kingdom or the taking of raw materials within the Kingdom into a duty free zone for producing, mixing, assembling, packing, or processing of the goods in any manner with the object of exportation from the Kingdom, the goods shall be exempted from the application of the law where related to the control of standards or quality, the affixation of any mark or sign, which shall be in accordance with the regulations prescribed by the Director-General.</p> <p><b>Tobacco Act BE 2509 (1966)</b></p> <p>- s27 – importation and exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by license of the Director-General of the Excise Department. Licenses have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.</p>



<p>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</p>	<p><b>Trademark Act B.E. 2534 (1991) (consolidated as of 2000)</b>  - s115 - All goods which are imported for distribution or had in possession for distribution in violation of this Act shall be confiscated whether or not anyone has been convicted of the offence.</p> <p><b>Thailand Customs Act BE 2469, 1926</b>  - Chapter 4 examination of goods and prevention of smuggling,  - s14- customs official may examine goods and take sample  - s15 – customs official may embark any vessel and inspect any documents relating to goods on that vessel, may place a lock, seal, mark on any goods on board, penalty for interference with lock or seal is 100 000 baht max.  - s16 – removal and storage of goods not duly cleared through customs  - ss17-18 – powers to search  - s19 – power to search where reasonable suspicion that smuggled goods are on board, penalty for refusing or obstructing search is 50 000 baht max.  - s20 – power to arrest without warrant any person found committing or attempting to commit or employing or aiding or inciting any person to commit an offence under the provisions of this Act.  - s24 - Any article liable to forfeiture under this Act may be seized at any time and any place by the customs official, administrative or police official. If claim not lodged within specified time articles will be considered ownerless and become property of the State irrespective of whether criminal prosecution brought.  - s27ter - Any goods related to an offence committed under this section shall be forfeited, irrespective of whether any person is liable to a penalty.  - s30 – goods subject of offence shall be forfeited.  - s32 - Any type of vessel, not exceeding 250 tons burden, and any vehicle, cart, conveyance, packages, carriage, used or for use in the removal, concealment, or carriage of any tax unpaid, restricted, or prohibited goods, shall be forfeited irrespective of whether any person is liable to a penalty and if other goods are contained in a package or tax unpaid, restricted, or prohibited goods founding in the carriage, vessel, vehicle, cart or conveyance, such other goods shall also be liable to forfeiture. If a vessel exceeding 250 tons burden is used or is for use under paragraph one, the Court shall have the power to forfeit such vessel as appropriation for the offence.  - s32bis - In the case where the forfeited goods in respect of an offence committed under this Act does not belong to the offender, the Court shall have the power to order the forfeiture if the owner knows or has reasonable grounds to suspect that an offence is committed or will be committed but does nothing to prevent the commission of offence or, its completion or to take care of such goods from being involved in the offence.  - s37ter – goods subject of offence shall be forfeited.  - s37quinque - In the case where there are reasonable grounds to suspect that smuggling has been committed or about to be committed or an offence in accordance with this Act has been committed in the contiguous sea, the customs official shall have the power to stop or compel to the master to take the vessel to any place to examine, search, arrest or take legal proceedings.  - s61 – destruction of overtime goods.  - s89 – warehoused goods to be kept in original packages, if not can be forfeited.</p> <p><b>Thailand Penal Code</b>  - The penal code authorizes confiscation of only direct proceeds from corruption; not applicable to indirect proceeds (e.g. converted or laundered).  The Anti-Money Laundering Act 1999 provides for a civil forfeiture of proceeds from a number of predicate offences one of which is corruption.</p> <p><b>Organic Act on the Prevention and Suppression of Corruption 1999</b>  allows for civil recovery of property derived from an “unusual increase of assets” and “unusual wealth”.</p>
<p>Intellectual Property Protections and Offences</p>	<p><b>Trademark Act B.E. 2534 (1991) (consolidated as of 2000)</b>  - s107 – making false statement in application for registration etc., penalty imprisonment 6 months max. and/or a fine of 10 000 baht max.  - s108 – counterfeiting trademark etc., penalty imprisonment 4 years max. and/or a fine of 400 000 baht max.  - s109 – imitating trademark etc., penalty imprisonment 2 years max. and/or a fine of 200 000 baht max.  - s110 - Any person who:  (1) imports, distributes, offers for distribution or has in possession for distribution</p>



goods bearing a counterfeit trademark, service mark, certification mark or collective mark under s108 or an imitation trademark, service mark, certification mark or collective mark under s109, or  
 (2) gives or offers a service under a counterfeit service mark, certification mark or collective mark under s108 or an imitation service mark, certification mark or collective mark under s109, shall be liable to the penalties provided in those Sections.

- s111 - Any person who:  
 (1) represents as registered in Thailand a trademark, service mark, certification mark or collective mark which is not so registered,  
 (2) distributes or has in possession for distribution goods bearing a trademark or certification mark under (1) which he knows to be falsely represented, or  
 (3) gives or offers a service under a service mark, certification mark or collective mark under (1) which he knows to be falsely represented, shall be liable to imprisonment 1 year max. and/or fine of 20 000 baht max.

- s112 - Any person who violates s90 shall be liable to a fine of 20 000 baht max.

- s112bis(24) - Any person who obstructs the Registrar or Competent officer in the exercise of his functions under s106bis shall be liable to imprisonment 1 year max. and/or a fine of 20 000 baht max.

- s112ter(25) - Any person who fails to provide convenience to the Registrar or competent officer in the exercise of his functions under s106bis shall be liable to imprisonment of 1 month max. and/or a fine of 20 000 baht max.

- s113 - The penalty for an offence under this Act committed within 5 years from the date of passing the punishment for another offence under this Act shall be doubled.

- s114(26) - In the event an offender liable under this Act is a juristic person, if the offence is committed by an order, act, failure to give an order or failure to act as required by his duties as a director, manager or any person responsible for the operation of such juristic person, shall also be liable to the penalty prescribed for such offence.

- s116 - If there is clear evidence someone is committing or is about to commit an act under ss108, 109 or 110, the owner of the trademark, service mark, certification mark or collective mark may apply to the court to stop or refrain from such act.

**Thailand Penal Code:**

- Title VII – Offences Relating to Counterfeit and Alteration
- ss250 -263 – offences relating to seals, stamps, and tickets, penalty imprisonment from 5 - 20 years and fine from 10 000 – 40 000 Baht.
- ss264-269 – offences relating to documents, penalty imprisonment 3 years max. and/or fine of 6 000 Baht max.

**Other Offences**

**Thailand Penal Code** – see for offences relating to bribery, etc.

**Thailand Customs Act BE 2469, 1926**

- s27 – bringing into kingdom duty-unpaid goods, or avoiding payment of duty owed with intention to defraud the government, penalty fine of 4 times the amount of price of the goods including duty and/or to imprisonment for 10 year max.
- s27bis - Any person whoever assists in concealing, disposing or making away with, purchases, takes in pledge or otherwise receives any goods, knowing that such goods are tax unpaid or restricted or prohibited goods is guilty of an offence, penalty imprisonment for 5 years max. and/or a fine equal to quadruple the duty-paid value of the goods.
- s27ter - No vessel shall discharge any goods outside the limits of the port without reasonable grounds or without the permission of the competent official. Penalty imprisonment for 2 years max. and/or a fine of 3 times the price of the goods or 100 000 Baht, whichever is higher.
- s29 - If any vessel shall be found to have on board any secret or disguised place or any device adapted for smuggling goods, the master shall be liable to a fine of 500 000 baht max. However, the master shall not bear punishment unless there are reasonable grounds to believe that he failed to exercise proper vigilance to prevent, or was involved in or privy to the construction, adaptation, placing, or using such place or device. The place or device shall be destroyed or rendered harmless to the satisfaction of the competent official.
- s30 - If any vessel is found to have on board goods in packages of a size or character contrary to the directions of this Act or any other law or Notifications, the master shall be liable to a fine of 500 000 baht max. and such goods shall be forfeited.
- s31 - If any person loads or permits the loading or is involved with the loading in or unloading from any vessel, at sea or river or canal, goods which are subject to tax payment or which are restricted or prohibited, which forfeited supports the cheating and fraud of state revenue, the avoidance of prohibitions, such person shall be liable to the penalties as prescribed in section 27.
- s33 - If there is a smuggling offence involving a vessel of exceeding 250 tons burden, and the master is not able to prove that he has taken all possible steps to discover

and prevent such offence, the master shall be liable to a fine of 500 000 baht max.  
 - s93 – clandestinely opening warehouse, penalty imprisonment for 6 months max. and/or a fine 100 000 baht max. for each offence.  
 - Chapter XBis – Duty Free Zone  
 - Chapter XII – False Declarations, penalty imprisonment for 6 months max. and/or a fine of 500 000 baht max.

Country	TOGO
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 13 February 2006 Protocol signed 9 January 2014
Licensing/ Marking	No marking on unit packages or products to determine origin but does have marking for whether product legally sold in domestic market. <b>Tobacco Control Law, Law Concerning the Production, Sale and Consumption of Tobacco and its Derivative Products, 2010</b> <b>Decree No. 2012-071</b> Concerning Regulation of Points of Sale of Tobacco and its Derivative Products in Togo, which regulates points of sale of tobacco and tobacco products <b>Decree No. 2012-046</b> Concerning the prohibition of smoking in public places <b>Decree No. 2012 – 047</b> Concerning modalities for the implementation of rules concerning packaging and labeling of tobacco and its derivative products
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Law No. 61-38 of December 28, 1961 on Trademarks (1961)</b> Title III: - Art. 12 – confiscation of products subject of the offence and the instruments used to make them, and destruction of counterfeit and imitated marks. - Art. 13 – confiscation of products subject to offence in art. 9 <b>Tobacco Control Law, Law Concerning the Production, Sale and Consumption of Tobacco and its Derivative Products, 2010</b> - Arts. 22, 23 and 24 – seizure, destruction of products not compliant with provisions of the Act. <b>Customs Code, Law No. 66-22 of December 23, 1966</b> Chapter 3 (arts. 42 – 50) – powers of customs officers: - Section 1 – right to enter premise - Section 2 – right to search goods - Art. 157 – destruction of goods in deposit - Art. 161 – sale of goods on deposit - Art. 197 - 2) Those who find a customs offense have the right to enter any property liable to confiscation, to withhold shipments and all other documents relating to the items seized. - Art. 202 – seizures based on false documents - Arts. 260 – 263 – confiscation, disposal, destruction of goods - Art. 286 – object of fraud liable to confiscation - Arts. 301, 305 – forfeiture of goods regardless of other penalties
Intellectual Property Protections and Offences	<b>Law No. 61-38 of December 28, 1961 on Trademarks (1961) title III</b> - Art. 7 – (1) counterfeiting or using counterfeited mark, (2) fraudulently placing such mark on products, (3) selling counterfeited or fraudulently affixed mark, penalty imprisonment from 3 months – 3 years and/or fine from 100 000 – 10 000 000 francs - Art. 8 – using imitation mark to fraudulently trick the buyer, penalty imprisonment 2 months – 1 year and/or fine of 100 000 – 5 000 000 francs. - Art. 9 – those who do not affix a required mark to their products, penalty imprisonment 15 days – 6 months and fine of 100 000 – 2 000 000 francs.

	<p>- Art. 10 – for offences under arts. 7, 8 and 9, penalty will be doubled in case of recidivism</p> <p><b>Customs Code, Law No. 66-22 of December 23, 1966</b></p> <p>- Art. 24 – prohibitions relating to protection of trademarks and of indications of origin</p>
Other Offences	<p><b>Criminal Code of Togo</b></p> <p>Part II- Chapter VII – Offences against the Treasury and the National Economy:</p> <ul style="list-style-type: none"> <li>- Distribution of counterfeit or altered tickets, penalty 5 – 10 years imprisonment</li> <li>- Art. 202 – abuse of public property, penalty 5 – 10 years imprisonment</li> <li>- Art. 208 – extortion and corruption, penalty 1 – 5 years imprisonment</li> <li>- Art. 216 - whoever manufactured, sold, distributed, purchased or knowingly used instruments for measuring weight and giving false information, by any means whatsoever, penalty 2 – 5 years imprisonment. False instruments will be forfeited and their destruction ordered.</li> </ul> <p><b>Customs Code, Law No. 66-22 of December 23, 1966</b></p> <ul style="list-style-type: none"> <li>- Art. 120 – products excluded from warehouse include counterfeits, foreign goods bearing false mark of manufacture in Togo etc.</li> <li>- Title VIII – Traffic and Detention of Goods</li> <li>- Art. 287 – smuggling offense committed by 3 to 6 people, penalty imprisonment 3 months – 1 year and unpaid tax to be paid</li> <li>- Art. 288 – object of the fraud shall be liable to the confiscation, confiscation of the means of transport of objects used to hide the fraud, a fine equal to quadruple the value of objects confiscated and a imprisonment of 6 months - 3 years where: <ul style="list-style-type: none"> <li>1) the offense of smuggling is committed by more than 6 individuals.</li> <li>2) The offenses of smuggling by aircraft, by vehicle coupled or self-propelled, by ship or sea boat of less than 100 tons net or by river boat.</li> </ul> </li> <li>- Art. 289 – smuggling contraband</li> </ul>

Country	TURKEY
WHO FCTC & Tobacco Protocol	<p>WHO FCTC signed and ratified – entered into force 31 March 2005</p> <p>Protocol signed 10 January 2013</p>
Licensing/ Marking	<p>Tax stamp</p> <p><b>Law on Prevention and Control of Hazards of Tobacco Products, Law No. 4207 amended by Law No. 5727 of 2008</b></p> <p><b>Regulation on Methods and Essentials concerning the Manufacture Type, Labeling and Surveillance for the Protection from the Damages of Tobacco Products</b> sets forth packaging and labeling requirements, with additional specifications set forth in Decision No. 4721 of the Tobacco &amp; Alcohol Market Coordination Committee (TAPDK).</p>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Turkish Customs Code No. 5911 (harmonized with EU):</b></p> <ul style="list-style-type: none"> <li>- simplified destruction procedure regarding goods which are suspected of infringing an intellectual property right in the Turkish Customs Code. Rights holder to inform authorities within 10 days that goods infringe an IP right and provide authorities with a declarant from owner of goods abandoning the goods for destruction.</li> </ul> <p><b>Law N 5549 On Prevention of Laundering of Proceeds of Crime, 2006</b></p> <p><b>Criminal Code of the Republic of Turkey No. 5237, 2004</b></p> <ul style="list-style-type: none"> <li>- Art. 54 – seizure of property may be adjudicated by court provided that it does not belong to a third party</li> <li>- Art. 55 – confiscation of income</li> <li>- Art. 70 – statutory period for confiscation - The decision for conviction may not be executed after lapse of 20 years as of the date of final decision.</li> </ul>

<p><b>Intellectual Property Protections and Offences</b></p>	<p><b>Law No. 4128 of November 7, 1995 on the Amendments to the Decree-Laws No. 551, 552, 554, 555, 556 and 560</b>  Three kinds of conditions and penalties have been defined as follow for each of the industrial property rights (patents, industrial designs, geographical signs and trademarks):</p> <ul style="list-style-type: none"> <li>- False declaration and removing the signs: fine and 1-2 years imprisonment.</li> <li>- Extension of the rights without authorization: fine and 2-3 years imprisonment.</li> <li>- Infringement: fine and 2-4 years imprisonment, closing the enterprise for minimum 1 year. The above-mentioned provisions, which are in line with article 41 of the TRIPS Agreement, took place in: <ul style="list-style-type: none"> <li>- Article 73 of Decree-Law No. 551 of June 24, 1995 on the Protection of Patent Rights</li> <li>- Article 48 of Decree-Law No. 554 of June 24, 1995 on the Protection of Industrial Designs</li> <li>- Article 24/A of Decree-Law No. 555 of June 27, 1995 on the Protection of Geographical Indications</li> <li>- Article 61/A of Decree-Law No. 556 of June 24, 1995 on the Protection of Trademarks.</li> </ul> </li> </ul> <p><b>Law No. 5833 of January 1, 2009 on the Amendment of the Decree-Law No. 556 of June 24, 1995 on the Protection of Trademarks (2009)</b>  Art. 2 changes art. 61 of Decree-Law No. 556 as follows:</p> <ul style="list-style-type: none"> <li>- Art. 61 - The following acts shall be considered infringements of a trademark: <ol style="list-style-type: none"> <li>a) using the trademark as stated in the art. 9, without any consent of proprietor of the trademark.</li> <li>b) the use of an identical or confusingly similar trademark without the consent of the proprietor of the trademark.</li> <li>c) the sale, distribution, putting to commercial use or importation, or to place at the customs area, is subjected to a process or a usage, which had been approved by the customs for such purposes, of goods bearing a trademark that is known or should be known to be an unlawful imitation, by using of an identical or confusingly similar trademark.</li> <li>d) extending or transferring the rights, which had been granted a license by the proprietor of the trademark, to the third parties without the consent.</li> </ol> </li> <li>- Art. 3 amends art. 61 as follows:  Art. 61/A Criminal Provisions:  The person, who is producing, carrying or selling goods or services, as infringing with confusion or quoted to someone else’s trademark right, penalty imprisonment 1 - 3 years and fines up to 20 000 days.  The person who without authority, removes the sign which indicates the trademark protection that had been placed on the goods or packages, shall be imprisoned 1 - 3 years and shall be fined up to 5 000 days  The person who makes savings by selling, transferring, leasing or pledging, on someone else’s trademark right without authority is punished with imprisonment between 2 - 4 years and fines up to 5 000 days.  In case of the crimes defined in the paragraphs above, are committed under activities of legal persons, also the specific security measures shall be judged for them.</li> </ul>
<p><b>Other Offences</b></p>	<p><b>Criminal Code of the Republic of Turkey No. 5237, 2004</b></p> <ul style="list-style-type: none"> <li>- Art. 78 – organized groups – engaging in management of such groups, penalty imprisonment 10 - 15 years, participating in group membership, penalty imprisonment 5 – 10 years.</li> <li>-Fourth section – Offences against Public Confidence: <ul style="list-style-type: none"> <li>- Art. 199 – (1) counterfeiting valuable stamps, penalty imprisonment 1 – 5 years and imposed punitive fine.</li> <li>(2) Any person who accepts counterfeit valuable stamp knowingly is punished with imprisonment from 3 months - 1 year, and punitive fine.</li> <li>(3) Any person who accepts counterfeit valuable stamp unknowingly but puts this stamp in circulation being aware of this fact is punished with imprisonment from 1 – 6 months.</li> </ul> </li> <li>- Art. 200 - Instruments used in production of money and valuable stamp, penalty imprisonment 1 – 4 years and fine.</li> <li>- Art. 204 – counterfeiting official documents, penalty imprisonment 2 – 5 years</li> <li>- Art. 220 – forming organized crime group with intention of committing a crime, penalty imprisonment 2 – 6 years.</li> <li>- Art. 252 – public official taking bribe, penalty imprisonment 4 – 12 years.</li> <li>- Art. 281 – laundering of assets acquired as result of offence, penalty imprisonment 2 – 5 years and fine of 20 000 days.</li> </ul>

Country	UKRAINE
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 4 September 2006 Protocol not signed
Licensing/ Marking	Marking of unit packets and packages to determine origin of product and whether product legally sold on domestic market. <b>Law of Ukraine No. 2899-IV</b> on Measures to Prevent and Reduce the Consumption of Tobacco Products and Their Harmful Influence on the Population’s Health (Law on Tobacco Control) is the primary law governing smoke free places and packaging and labeling. Use of tax stamp Licensing
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<b>Criminal Code 2001</b> - Art. 51 – forfeiture of property is type of punishment - Art. 59 - Forfeiture of property: 1. The punishment of forfeiture consists in forceful seizure of all, or a part of, property of a convicted person without compensation in favor of the State. Where a part of property is to be forfeited, a court shall specify which part is to be forfeited or name the things to be forfeited. 2. Forfeiture of property shall be imposed for grave and special grave offenses and shall only be applied in cases specifically provided for in the Special Part of this Code. 3. The list of property exempt from forfeiture shall be determined by the law of Ukraine. <b>Customs Code 2002</b> No measures enabling confiscation of proceeds derived from illicit trade in tobacco products. - N 1506-VI on the Fundamentals of Preventing and Counteracting Corruption amended 2010 – art. 30 – deals with assets derived from corruption offences.
Intellectual Property Protections and Offences	<b>Law on Protection of Rights to Marks for Goods and Services 1994:</b> - Section VI – Protection of Rights – art. 20 - Infringement of Rights of Certificate Proprietor: 1. Any offence against rights of the proprietor of a certificate that are defined in article 16, including the actions that shall be agreed upon with the proprietor of the certificate but are carried out without his consent as well as a preparation for such actions, shall be considered to be an infringement of the rights of the proprietor of the certificate. The use of the marks and designations specified in item 5 of article 16 in domain names without the certificate proprietor’s consent shall be also considered an infringement of the proprietor’s rights. 2. On the request of the proprietor of the certificate, the said infringement shall be terminated, and the infringer shall indemnify the actual damage to the proprietor of the certificate. The proprietor of the certificate may also request to remove illegally used mark or sign from goods or goods package, which is so much similar to the mark that the mark and the sign may be confused, or to liquidate the produced reproductions of the said mark or the sign, which is so much similar to it that they may be confused. The person who was granted a license shall be also entitled to the right to require the restoration of the affected rights of the proprietor of the certificate by the certificate owner’s consent. - Art. 21 - Methods of Protecting Rights: 1. The protection of rights to a mark is provided in courts or under other procedure determined by the legislation. 2. The jurisdiction of courts covers all legal relations arising in connection with the use of the present Law. The courts, according to their competence, shall resolve disputes regarding: - Determination of the certificate owner; - Conclusion and execution of licensing agreements; - Infringement of the certificate owner rights.

**Criminal Code 2001****- Art. 201 - Smuggling**

1. Smuggling, that is the movement of goods across the customs border of Ukraine bypassing the customs control or by concealing from the customs control, if committed in respect of large amounts, and also illegal movement of historic and cultural values, poisonous, strong, radioactive or explosive substances, weapons and ammunition (except smoothbore hunting guns and ammunition thereto), special technical means for illegal obtaining of information, and also smuggling of strategically important basic commodities, export of which outside Ukraine is regulated by appropriate rules established by law, (Paragraph 1 of article 201 as amended by Law No 2338-VI (2338-17) of 15.06.2010) shall be punishable by imprisonment for a term of three to seven years with the forfeiture of smuggled items.

2. The same actions committed by a group of persons upon their prior conspiracy, or by a person previously convicted of the criminal offense under this article, shall be punishable by imprisonment for a term of five to twelve years with the forfeiture of smuggled items and forfeiture of property.

Note: Smuggling of goods is committed in respect of large amounts if the value of such goods equals or exceeds 1000 tax-free minimum incomes (article 201 as amended by Law No 1071-V (1071-16) of 24.05.2007).

**- Art. 204 - Unlawful manufacturing, storage, sale or transportation for selling purposes of excisable goods**

1. Unlawful purchase or storage for selling purposes, or sale, or transportation for selling purposes of illegally manufactured alcohol, tobacco or any other excisable goods, shall be punishable by a fine of 500 to 1050 tax-free minimum incomes, or restraint of liberty for a term up to three years, with the forfeiture of illegally manufactured goods and manufacturing equipment.

2. Illegal manufacturing of alcohol, tobacco and other excisable goods by establishing clandestine shops or use of equipment for mass production of such goods, or where it was committed by a person previously convicted under this article, shall be punishable by a fine of 1000 to 2000 tax-free minimum incomes, or by imprisonment of 3 to 5 years, with forfeiture of goods so produced and manufacturing equipment.

3. Illegal manufacturing of goods specified in paragraphs 1 and 2 of this article using raw material of poor quality which pose threat to human life and health, or illegal sale of such products, where it caused poisoning of people or any other grave consequences, shall be punishable by imprisonment for a term of five to ten years with forfeiture and destruction of goods so manufactured and forfeiture of manufacturing equipment.

**- Art. 212 - Evasion of taxes, fees or other compulsory payments:**

1. Willful evasion of taxes, fees or other compulsory payments which are part of the taxation system established by law, by an official of an enterprise, institution or organization of any ownership status, or by any unincorporated entrepreneur, or by any other person liable to pay such taxes, fees or other compulsory payments, where such actions resulted in actual non-receipt of significant amounts of funds by budgets or special state funds, shall be punishable by a fine of 300 to 500 tax-free minimum incomes, or deprivation of the right to occupy certain positions or engage in certain activities for a term up to 5 years.

2. The same actions, if committed by a group of persons upon their prior conspiracy, or where they resulted in actual non-receipt of large amounts of funds by budgets or special state funds, shall be punishable by a fine of 500 to 2,000 tax-free minimum incomes, or correctional labor for a term of two years, or restraint of liberty for a term of five years, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

3. Any such actions as provided for by paragraph 1 or 2 of this article, if committed by a person previously convicted of evasion of taxes, fees, or other compulsory payments, or where they resulted in actual non-receipt of especially large amounts of funds by budgets or special state funds, shall be punishable by imprisonment of five to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and with the forfeiture of property.

4. A person who committed an act provided for by paragraph 1 of this article for the first time shall be discharged from criminal liability if he/she paid taxes, fees (compulsory payments) and indemnified the State for the damage caused by late payment (fiscal penalties, fines) prior to the institution of a criminal case against him/her.

Note: A significant amount of funds means any amount of taxes, fees or other compulsory payments which equals or exceeds 500 tax-free minimum incomes as established by law; a large amount of funds means any amount of taxes, fees or other compulsory payments which equals or exceeds 3,000 tax-free minimum incomes as established by law; an especially large amount means any amount of taxes, fees or other compulsory payments which equals or exceeds 5,000 tax-free minimum incomes as established by law.

**- Art. 216 - Illegal production, counterfeiting, use or sale of illegally produced, acquired or counterfeit documentary stamps or check stamps**

1. Illegal production, counterfeiting, use or sale of illegally produced, acquired or counterfeit documentary stamps or check stamps for labeling of packages of copies of audiovisual works and phonograms, or holographic protection elements, shall be punishable by a fine of 100 to 300 tax-free minimum incomes, or restraint of liberty for a term up to four years.

	<p>2. The same actions, if repeated, or committed by a group of persons upon prior conspiracy, shall be punishable by a fine of 300 to 1000 tax-free minimum incomes, or restraint of liberty for a term of three to five years, with the forfeiture of goods labeled with counterfeit labels or holographic protection elements (article 216 in version of Law No 1098-IV (1098-15) of 10.07.2003).</p> <p>- Art. 229 - Illegal use of trade mark          Illegal use of a trade (or service) mark, registered trade name, product marking, where it involved making of significant profits, shall be punishable by a fine of 100 to 200 tax-free minimum incomes, or community service for a term of 100 to 200 hours, or correctional labor for a term up to two years.          Note: Significant profits are made if they equal or exceed 300 tax-free minimum incomes.</p> <p>Code of Ukraine on Administrative Offenses – deals with the administrative offences of smoking on public transport (see arts. 110, 115, 117, 119) and smoking in prohibited places (art. 175-1).</p>
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Country	UAE
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 5 February 2006 Protocol not signed
Licensing/ Marking	Marking of packets and packages to determine origin and whether product legally sold in domestic market.
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p><b>Federal Law No. 37 of 1992 on Trademarks amended by Law No. 19 of 2000 and Law No. 8 of 2002</b></p> <p>- Art. 41 - The owner of a trade mark may at any time, even before any civil or penal action is filed, obtain upon a petition accompanied by an official certificate indicating the registration of such mark an order from the competent court for taking the necessary precautionary measures, in particular the following :</p> <ol style="list-style-type: none"> <li>1. To make a report enumerating and describing in detail the machines and tools being used or have been used in committing any of the offenses stated in this Law as well as the local or imported products or goods, the addresses of shops, the envelopes, the papers or others on which the mark or the note subject of the offense may have been placed.</li> <li>2. To place a garnishment on the objects stated in the above article after the applicant provides a deposit estimated by the Court to compensate the garnishee if required. The court may assign one or more experts to assist in the execution of the precautionary measures. Owners of renowned trademarks shall be exempted from the submission of a certificate that evidences the registration of the mark.</li> </ol> <p>- Art. 43 - The competent court may rule the confiscation of the object attached or to be attached later and the deduction of its price from the fines or compensations or disposition thereof in any other way deemed expedient by the court. The court may also order to destroy the illegal marks or, when necessary, to destroy the products, envelopes, packing, tools and any such other objects bearing such marks or illegal data as well as the machines and tools used specifically in the forging operation. It may likewise order all the foregoing even in case of acquittal. The court may further order that the judgment be published in the bulletin or in an Arabic daily at the cost of the judgment debtor.</p>
Intellectual Property Protections and Offences	<p><b>Dubai Intellectual Property Law - Federal Law No. 37 of 1992 on Trademarks amended by Law No. 19 of 2000 and Law No. 8 of 2002</b></p> <p>- Chapter VI – Sanctions – art. – 37 – penalty imprisonment and/or a fine of at least Dh. 5000:</p> <ol style="list-style-type: none"> <li>1. Any person who forges a trade mark registered according to law or imitates same in a way misleading the public and any person who uses with bad faith a forged or imitated trade mark.</li> <li>2. Any person who places with bad faith on his products a registered trade mark owned by a third party, or uses such mark without right.</li> <li>3. Any person who deliberately sells, offers for sale or negotiation or acquires for sale products having a forged, imitated or illegally placed trade mark, the same applies to any person who deliberately provides or offers the provision of services under a forged, imitated or illegally placed trade mark.</li> </ol> <p>- Art. 38 – penalty imprisonment for 1 year max. and/or to a fine of Dh. 5000 - Dh. 10,000:</p>



	<p>1. Any person who uses a Trade Mark which may not be registered as provided for in Clauses 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 14 of article (3) hereof .</p> <p>2. Any person who illegally notes on his mark or commercial papers statements</p> <p>- Art. 39 – repeat offenders of the offenses stated in Articles 37 and 38, shall be punished with the same penalty in addition to closing the commercial premises or the exploitation project for a period of 15 days -6 months and publishing the judgment at the cost of the party adjudged pursuant to the procedures indicated in the Executive Regulations.</p>
<b>Other Offences</b>	<p><b>Federal Law No. 3 of 1987 on the Penal Code for the United Arab Emirates (the “Penal Procedure”)</b></p> <p>- Art. 211 - A punishment of temporary imprisonment shall be inflicted on any person who, personally or through a third party, counterfeits or forges the seal of the State, the seal or the signature of the President of State or of any of the Emirates Rulers, or their crown princes or representatives, or any of the seals, stamps, or emblems of the Government, its departments, administrations or any of the authorities mentioned in article 5 above, or any seal, signature or mark of any of its public officers, or the governmental hallmarks pertaining to gold and silver or to other heavy or precious metals. The same punishment shall be inflicted on any person who makes use of any of the above-mentioned objects, or who brings it in the State while being aware that it is counterfeited or forged.</p> <p>- Art. 213 - Shall be punished with confinement any individual who unlawfully makes use of the seal of the State, the President of State or any of the Emirates Rulers; or any of the seals, stamps, marks or emblems of the Government, its departments, administrations or any of the authorities mentioned in article 5 above, or the seal of any of its public officers, if such act has contributed to prejudice any public or private interest</p> <p>- Art. 423 - Without prejudice to any more serious penalty, detention and a fine or one of these two penalties shall be imposed upon any one who cheats a party contracting with him in the genuineness, nature, or substantial qualities of goods, the elements of their composition, or the quality or origin of goods in cases where such things are considered basic causes of contracting, or in the quantity, number, measurement, scale, weight, capacity or in the goods themselves, if the items delivered are different from those contracted upon.</p> <p>The same penalty shall apply to any one who imports, buys or circulates such goods for trading purposes, knowing their reality.</p>

Country	UNITED KINGDOM
<b>WHO FCTC &amp; Tobacco Protocol</b>	<p>WHO FCTC signed and ratified – entered into force 16 March 2005</p> <p>Protocol signed 17 December 2013</p>
<b>Licensing/ Marking</b>	<p><b>Customs and Excise Management Act 1979</b></p> <p>- s101 – excise licenses</p> <p>- s103 – renewal of license</p> <p>All packets manufactured in the UK must bear a covert security feature that verifies authenticity (Codentify).</p> <p><b>The law specifically concerned with tobacco products duty and fiscal marks:</b></p> <p>- Tobacco Products Duty Act 1979</p> <p>- Tobacco Products Regulations 2001 - requires tobacco products to carry a ‘UK Duty Paid’ marking and any retailers failing to comply are liable to a fine of up to 500 pounds.</p> <p>- Tobacco Products (Description of Products) and Excise goods (Amendment) Regulations 2006</p> <p>- The Excise Goods (Holding, Movement &amp; Duty Point) Regulations 2010</p>
<b>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</b>	<p><b>Trade Marks Act 1994)</b></p> <p>- s97 – forfeiture of counterfeit goods</p> <p>- s98 – forfeiture in Scotland</p> <p><b>Customs and Excise Management Act 1979</b></p> <p>- s49 – forfeiture of goods improperly imported</p> <p>- ss88-91 – forfeiture of ships for certain offences</p>



- s100F – powers of search in free zones. Officer may enter building and inspect it and goods within in free zone.
- ss108-111 – entry of premises
- Part IX – s138 – detention of persons
- s139 –detention, seizure and condemnation of goods - gives officers the power to seize goods that are liable to forfeiture under customs and excise acts.
- s141 – forfeiture of ships etc. used in connection with goods liable to forfeiture.

**Tobacco Products Duty Act 1979**

- s7(2) - provides that any goods in respect of which any person fails to comply with the regulation made by the Commissioner will be liable to forfeiture. In the case of counterfeit tobacco that does not bear the fiscal mark HMRC can seize the product on the basis that duty has not been paid at the time of the manufacture or importation or at any subsequent duty point.

No specific destruction powers.

**Serious Crimes Act 2007** - This Law makes provisions about serious crime prevention orders, offences in respect of the encouragement or assistance of crime, transfer of functions to the Serious Organized Crime Agency and also amends the Proceeds of Crime Act 2002. This Law is structured into 4 Parts and 14 Schedules. Schedule 1 makes provisions about serious offences and sets out in paragraph 2 that an offence under section 92(1), (2) or (3) of the Trade Marks Act 1994 (c. 26) (unauthorized use of trade mark etc.) shall be considered as serious offences in England and Wales.

Fraud, money laundering, offences in relation to public revenue, corruption, bribery, counterfeiting considered serious offences under Schedule 1 of the Act.

**Proceeds of Crime Act 2002** - Among the offences listed in Schedule 2 of POCA are offences concerned with copyright and trademarks. Specifically, cl.7 refers to an offence under the provisions of Copyright, Design and Patents Act 1988 which prohibit the making or dealing in an article which infringes copyright; making or possessing an article designed or adapted for making a copy of a copyright work; making or dealing in an illicit recording; making or dealing in unauthorized decoders or an offence under section 92 of the Trade Marks Act 1994 concerning the unauthorized use of trademark.

**Customs and Excise Management Act 1979**

Intellectual  
Property  
Protections  
and Offences

**Trade Marks Act 1994)**

- Art. 89 - Importation of infringing goods, material or articles – may be treated as prohibited goods. Proprietor of registered trademark or license may give notice to Commissioner of Customs and Excise in writing that infringing goods about to enter UK.
- s92 – unauthorized use of trademark in relation to goods - (1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—
  - (a) Applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or
  - (b) Sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or
  - (c) Has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).
- (2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—
  - (a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—
    - (i) For labelling or packaging goods,
    - (ii) As a business paper in relation to goods, or
    - (iii) For advertising goods, or
  - (b) Uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or
  - (c) Has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).
- (3) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—
  - (a) Makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or
  - (b) Has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

- (4) A person does not commit an offence this section unless—
- (a) The goods are goods in respect of which the trade mark is registered, or
  - (b) The trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.
- (5) It is a defense for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.
- (6) A person guilty of an offence under this section is liable—
- (a) On summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
  - (b) On conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.
- s94 – falsification of register, (3) penalty (a) on conviction on indictment, imprisonment for a term not exceeding two years and/or a fine;
  - (b) on summary conviction, imprisonment for a term not exceeding six months and/or a fine not exceeding the statutory maximum.
  - s95 – falsely representing trademark as registered, (3) penalty on summary conviction to a fine not exceeding level 3 on the standard scale.

**Fraud Act 2006** (Penalty max 12 month)

#### Other Offences

##### **Customs and Excise Management Act 1979**

- s11 – assistance to be rendered by police
- s50 – improper importation of goods, penalty for (2) or (3) offences, summary conviction – prescribed sum or of 3 times the value of the goods, whichever is greater, and/or imprisonment 6 months max., conviction on indictment – penalty of any amount and/or imprisonment 7 years max.
- s67 – offences in relation to exportation of goods – goods retained and unloaded in UK, penalty 3 times value of goods or level 3 of standard scale whichever is greater.
- ss81 – 87 – prevention of smuggling provisions.
- s87 – offering goods for sale as smuggled goods – penalty 3 times value of goods or level 3 of standard scale whichever is greater and person may be detained.
- s170 – fraudulent evasion of duty – penalty summary conviction – prescribed sum or of 3 times the value of the goods, whichever is greater, and/or imprisonment 6 months max., conviction on indictment – penalty of any amount and/or imprisonment 7 years max.
- s170A – handling goods subject to unpaid excise duty, penalty under s9 of the Finance Act 1994 calculated by reference to the amount of unpaid duty.
- s170B – offence of taking preparatory steps for evasion of excise duty, penalty summary conviction – prescribed sum or of 3 times the value of the goods, whichever is greater, and/or imprisonment 6 months max., conviction on indictment – penalty of any amount and/or imprisonment 7 years max. Goods liable to forfeiture.
- s171 – general provisions as to offences and penalties.

**UK Finance Act 2001** - Provisions in the Act set out rates of duty on tobacco products.

**The Finance Act 2006 (Tobacco Products Duty: Evasion) Order 2006** - this Order imposes a duty on tobacco manufacturers to avoid supplying cigarettes or hand-rolling tobacco to persons likely to smuggle them into the UK.

**The Tobacco Products (Amendment) Regulations 2006** - set out the obligations of tobacco companies not to facilitate smuggling. In the case of seized goods, tobacco manufacturers are required to supply detailed information about the products such as the intended customer and destination.

**Fraud Act 2006** - has offences for making false representations, penalty imprisonment 12 months max.

**Tobacco Products Duty Act 1979, Chapter 7** - This sets out the duty of tobacco manufacturers not to facilitate smuggling and is the primary law supporting the 2006 Tobacco Products (Amendment) Regulations.

Country	UNITED STATES
WHO FCTC & Tobacco Protocol	WHO FCTC signed on 10 May 2004 but not ratified Protocol not signed
Licensing/ Marking	<p>Jurisdiction rests with States regarding tobacco control. E.g. California has had digital tax stamps in place since 2005.</p> <p>Both Federal (Alcohol and Tobacco Tax Bureau, US Department of the Treasury), and State licensing (e.g. California Cigarette &amp; Tobacco Products Licensing Act of 2003 for manufacture, import, retailers and distributors).</p> <p><b>Family Smoking Prevention and Tobacco Control Act</b> in 2006 authorized the Food and Drug Administration (FDA) to regulate tobacco products: - Title III - deals with tobacco smuggling and has new requirements for labeling (e.g. 'Sale only allowed in the US'), inspection and records to track merchandise and redirect the Comptroller General to conduct a study of cross-border tobacco trade. It also requires manufacturers and distributors to report known or reasonably suspected tobacco smuggling or tax evasion.</p> <p>The Federal Trade Commission enforces the Fair Packaging and Labeling Act, which requires information on packages and labels to be accurate and also regulates package warnings and tobacco advertising.</p> <p>U.S. Customs and Border Protection collects taxes and fees, imposes record keeping requirements, and enforces other anti-smuggling laws such as a requirement that imports be marked with the name of the country of origin. American-made cigarettes designated for export cannot be brought back into the United States by anyone except the original manufacturer or a warehouse proprietor it has authorized to do so. There is no federal license to sell tobacco products, but TTB must approve manufacturers and importers.</p> <p>Smuggled Tobacco Prevention Act of 2011 which has not yet been enacted. It would introduce tracking and tracing, amongst other measures.</p>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	<p>2011 US Code, Title 18 Crimes and Criminal Procedure: - Chapter 25 s492 – forfeiture of counterfeit paraphernalia - Chapter 46, ss981-987 forfeiture, possibility for civil (s981) and criminal (s982) forfeiture - Chapter 113 s2323 forfeiture, destruction and restitution.</p> <p><b>Federal Racketeer Influences and Corrupt Organizations</b> supplemented by the <b>Civil Asset Forfeiture Reform Act 2000</b> - which makes forfeitable the proceeds from any of the crimes upon which a money laundering or RICO prosecution might be based.</p>
Intellectual Property Protections and Offences	<p><b>2011 US Code</b>, Title 18 Crimes and Criminal Procedure: - Chapter 25 Counterfeiting and Forgery, ss470 – 514. - Chapter 113 s2320 – trafficking in counterfeit goods or services, using counterfeit mark, penalty fine and/or imprisonment for 10 years max. for individual. If person convicted of another offence under Act, penalty fine and/or imprisonment 20 years max.</p> <p>Party to the <b>Anti-Counterfeiting Trade Agreement (ACTA)</b></p>
Other Offences	<p><b>2011 US Code, Title 18 Crimes and Criminal Procedure:</b> - Chapter 27 ss541 – 555 – Customs – s545 smuggling goods into the US – knowingly or willingly with intent to defraud the US smuggles or clandestinely introduces merchandise which should have been invoiced etc. or fraudulently or knowingly imports merchandise contrary to law, penalty fine and/or imprisonment for 20 years max. - Chapter 47ss1001 - 1040 – fraud and false statements - Chapter 96 ss1961 - 1968 – Racketeer Influenced and Corrupt Organizations - 1962 – prohibited activities – unlawful to use income derived from racketeering activity to invest in foreign commerce/purchase of securities on open market. -unlawful to obtain interest/ control in enterprise engaged in foreign commerce</p>

Penalties – fine and/or imprisonment 20 years

- Chapter 114 ss2341 - 2346 - Trafficking in Contraband Cigarettes and Smokeless Tobacco, 2344 Penalties - any contraband cigarettes or contraband smokeless tobacco involved in any violation of this chapter shall be subject to seizure and forfeiture, and destruction as per the Internal Revenue Code of 1986. Whoever knowingly violates section 2342(a) of this title shall be fined under this title or imprisoned not more than five years, or both.

-Title 26 Internal Revenue Code – s5763 Tobacco product possessed with the intent to defraud; tobacco taxes

**Prevent All Cigarette Trafficking Act 2009**

- Applies reporting requirements for tobacco taxes to sales, advertising of sales, and the shipping and transporting of cigarettes and smokeless tobacco, including shipment into a state, city, town, or Native American reservation that taxes the product being shipped.

Sellers who mail tobacco products to customers must pay the relevant taxes, comply with the laws in force at their customers' location, register with and make periodic reports to the state, and verify customer age at both purchase and delivery. They cannot ship goods weighing more than 10 pounds and must keep records of all deliveries for four years.

- Penalties for violations of the Act include fines and up to 3 years in prison. Civil penalties are 2 percent of annual gross sales of tobacco products or \$5000 for a first violation and \$10,000 for further offenses, whichever is greater.

(The Act is enforced mostly by ATF, although other agencies, such as the U.S. Postal Service, are also involved. It authorizes the ATF to inspect the records and products of delivery sellers).

18 USC 545 Smuggling goods into the US

Country	URUGUAY
WHO FCTC & Tobacco Protocol	WHO FCTC signed and ratified – entered into force 27 February 2005 Protocol signed 10 January 2013
Licensing/ Marking	No marking on unit packets or packages  <b>Law No. 18256 on Smoking Control Regulations</b> , article 12. The Executive Branch shall adopt and apply the methods needed to oversee, document and control the storage and distribution of tobacco products which are in or moved within the country under a system whereby customs taxes or rights are suspended  <i>(implementing regulation not available)</i>
Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime	Yes seizure, destruction, disposal. See <b>Law No. 17.011 of September 25, 1998, Establishing Provisions on Trademarks</b> - art. 84 - trademarks together with instruments used to carry them out shall be destroyed or rendered unusable. Infringing merchandise that has been seized shall be confiscated and destroyed except where, in view of their nature, they may be allocated to public or private charitable institutions.  <b>Law No. 18256 on Smoking Control Regulations</b> , article 12The Executive Branch shall stipulate the human and material resources necessary with the aim of eliminating all forms of illicit trade in tobacco products. It shall therefore take the appropriate steps to guarantee that all counterfeit or smuggled cigarettes and tobacco products and all their seized manufacturing equipment are destroyed by applying, whenever feasible, methods innocuous to the environment.  <b>Law No, 18494 of 23 September 2004 on Anti- Money Laundering.</b>
Intellectual Property Protections and Offences	<b>Law No. 17.011 of September 25, 1998, Establishing Provisions on Trademarks</b> - Chpt XIV – Civil and Penal Actions - Art. 81- any person who for profit or to cause damage, uses, manufactures, falsifies, adulterates or imitates a trademark entered in the Register in the name of another person shall be liable to imprisonment of between 6 months and 3 years. - Art. 82- any person who fills incorrect products into packaging bearing another's trademark shall be liable to imprisonment of between 6 months and 3 years.

	<p>- Art. 83 - any person who knowingly manufactures, stocks, distributes or markets merchandise bearing trademarks as referred to in the preceding articles shall be liable to imprisonment of between 3 months and 6 years.</p> <p>- Art. 86 - the offences laid down in this Law shall be liable to prosecution, at the request of an interested party, in accordance with articles 11 et seq. of the Code of Penal Procedure.</p> <p>- Art. 89 – period of limitation is 1 year from date of knowledge of trademark owner of infringement, or 4 years after commission or repetition of the offence.</p> <p><b>Penal Code</b>, article 252 on crimes against trademarks and commerce.</p>
<b>Other Offences</b>	<p><b>Penal Code of the Republic of Uruguay adopted by Law No. 9155</b></p> <p>- Article 157/8 on corruption carries a maximum 6 years imprisonment penalty.</p> <p>- Article 221 on sale of dangerous substances for health without habilitation carries a maximum 10 years imprisonment penalty,</p> <p>- Articles 236/250 on crimes against public faith carries a maximum 6 years imprisonment penalty,</p> <p>- Article 257 on smuggling.</p> <p><b>Law of 26 March of 1877 and Law No. 13318 of 26 December 1964</b> on smuggling.</p> <p><b>Law. No. 12804 of 30 November 1960</b> on tax evasion.</p> <p><b>Law No. 18362 of 15 October 2008</b> (art. 414) on the creation of specialized Tribunals on organized crime.</p> <p><b>Laws related to organized crimes:</b> No. 17016 of 22 October 1998, No. 17835 of 23 September 2004 (articles 14 to 16), No. 15294 of 23 June 1982, No. 14095, of 17 November 1972, No.2.230 of 2 June 1893, No. 17835 of 23 September 2004.</p>

Country	VIET NAM
<b>WHO FCTC &amp; Tobacco Protocol</b>	WHO FCTC signed and ratified – entered into force 17 March 2005 Protocol not signed
<b>Licensing/ Marking</b>	Marking on unit packets and packages to determine origin and legal market of sale
<b>Seizure/ destruction of Illicit Goods, Confiscation of Proceeds of Crime</b>	<p><b>Penal Code</b></p> <p>s.41 - 1. The property confiscation for State funds shall apply to: a) Tools and means used for the commission of crimes; b) Objects or money acquired through the commission of crime or the trading or exchange of such things; c) Objects banned from circulation by the State. 2. Things and/or money illegally seized or used by offenders shall not be confiscated but returned to their lawful owners or managers. 3. Things and/or money of other persons, if these persons are at fault in letting offenders use them in the commission of crimes, may be confiscated for State funds.</p> <p><b>Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property</b> – Part V, Chpt XVIII, art. 214.2 - Depending on the seriousness of the infringement other penalties include confiscation of goods, raw materials, materials and means used mainly for production or trading of counterfeit goods, and suspension of business activities where infringements committed for a definite time. Art. 214.3 - Destruction or distribution for non-commercial purposes of infringing goods, raw materials and means of production.</p>
<b>Intellectual Property Protections and Offences</b>	<p><b>Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property</b> (promulgated by the Order No. 28/2005/L-CTN of December 12, 2005, of the President of the Socialist Republic of Vietnam) –Part III Industrial Property Rights (s.4 marks, s.5 trade names); Part V Protection of IP Rights, Chpt. XVIII, S.1 Handling of infringements of IP Rights with Administrative and Criminal Remedies, Control of IP Related Imports and/or Exports – administrative sanctions apply to producing, importing, transporting or trading counterfeit goods (art. 211). Forms of administrative sanctions (art. 214) include at clause 1. cautions and fines. 2. Confiscation and 3. Destruction or distribution of infringing goods.</p>

- s.2 Control of IP Imports and/or Exports.

**Law No. 36/2009/QH12 of June 19, 2009, Amending and Supplementing a Number of Articles of the Law on Intellectual Property** (promulgated by the Order No. 12/2009/L-CTN of June 29, 2009 of the President of the Socialist Republic of Vietnam)

**Criminal Code** – Chpt. XVI Crimes of Infringing Upon the Economic Management Order

- Art.156 – manufacturing or trading in fake goods equivalent to the quantity of genuine goods valued between thirty million - one hundred and fifty million dong, or under thirty million dong but causing serious consequences

- Art. 171 - (1) infringing upon industrial property rights including trademarks – penalty fine 20 million - 200 million dong or non-custodial reform for up to two years. (2) Committing crime more than once or in organized manner or causing serious consequences – penalty fine 10 million - 100 million dong, or a ban from holding certain posts, practicing certain occupations or doing certain jobs for 1-5 years.

#### Other Offences

**Circular No 02/2010/TT-BCT:** guides cigarette import activities for duty free trading. **Planning No 14/PA-BCĐ** to control illicit cigarette trading in domestic market.

**Customs Law No. 29/2001/QH10 of June 29, 2001** - prescribes State management over customs with regard to exported, imported or transited goods, transport means on exit, entry and in transit, of foreign and domestic organizations and individuals; and the organization and operation of the customs service.

**Law no. /2013/qh10 Customs Law Draft** - Chpt. V - updates the former Customs Law of 2001, but not yet in force. Customs given powers to prevent and combat smuggling or the illegal transport of goods across borders.

**Criminal Code** – Chpt. XVI Crimes of Infringing Upon the Economic Management Order

- Art. 153 Smuggling- penalty imprisonment 6 months-3 years, or fine of 10million – 100 million dong

- Art. 154 – illegal cross-border transportation of goods or currencies – penalties non-custodial reform of up to 2 years, or imprisonment of 3 months – 2 years or fine 5 million – 20 million dong

- Art.159 – conducting business illegally, i.e. without registration or license as required by law – penalty fine of five million - fifty million dong or noncustodial reform for up to two years.

- Art. 161 – (1) tax evasion in the amount of fifty - one hundred and fifty million dong – penalty fine of between one time and five times the evaded tax amount or to non-custodial reform for up to two years. (2) Evading tax in the amount of one hundred million- five hundred million dong or repeating such crime, the offenders shall be subject to a fine of between one time and five times the evaded tax amount or to a prison term of 6 months – 3 years. (3) Evading tax more than five hundred million dong or in other particularly serious circumstances, penalty imprisonment 2-7 years. (4) offenders may also be subject to a fine of between one time and three times the evaded tax amount.

- Art.162 – deceiving customers

- Art.164 – counterfeiting/trading in stamps/tickets - fine 5 million - 50 million dong or imprisonment 6 months - 3 years.

## Appendix 5: International Agencies and Contacts

This table indicates agencies and their contacts that Governments may contact to receive technical assistance or advise on issues directly or indirectly related to the implementation of policies in the field of countering illicit trade in tobacco products.

### 1. INTERNATIONAL ORGANIZATIONS

#### International Monetary Fund (IMF)

Fiscal Affairs Department  
1900 Pennsylvania Ave NW  
Washington, DC, 20431  
Tel: + 1 (202) 623-7000  
Fax: + 1 (202) 623-4661  
Website: [www.imf.org](http://www.imf.org)

#### United Nation Office of Drugs and Crime (UNODC)

Vienna International Centre  
PO Box 500  
A 1400 Vienna  
Austria  
Tel: + (43) (1) 26060  
Fax: + (43) (1) 263-3389  
Email: [info@unodc.org](mailto:info@unodc.org)  
Website: <http://www.unodc.org/unodc/en/organized-crime/emerging-crimes.html>

#### World Economic Forum (WEF)

3 East 54th Street, 18th Floor,  
New York, NY 10022, USA  
Contact Numbers:  
Tel: +1 212 703-2300  
Fax: +1 212 703-2399  
Email: [forumusa@weforum.org](mailto:forumusa@weforum.org)  
Website: [www.weforum.org](http://www.weforum.org)

#### INTERPOL

General Secretariat  
Trafficking in illicit goods  
200, quai Charles de Gaulle  
69006 Lyon  
France  
Fax: +33 (0)4 72 44 71 63  
Website: [www.interpol.int](http://www.interpol.int)

#### World Bank

1818 H Street, NW  
Washington, DC 20433 USA  
Tel: (202) 473-1000  
Fax: (202) 477-6391  
Website: [www.worldbank.org](http://www.worldbank.org)

#### World Health Organization (WHO)

Avenue Appia 20  
1211 Geneva 27  
Switzerland  
Tel: + 41 22 791 21 11  
Fax: + 41 22 791 31 11  
Website: [www.who.int](http://www.who.int)

#### World Trade Organization (WTO)

Intellectual Property Division  
Centre William Rappard,  
Rue de Lausanne 154,  
CH-1211 Geneva 21,  
Switzerland.  
Tel: +41 (0)22 739 51 11  
Fax: +41 (0)22 731 42 06  
Email: [enquiries@wto.org](mailto:enquiries@wto.org)  
Website: [www.wto.org](http://www.wto.org)

#### Organization for Economic Cooperation and Development (OECD)

2, rue André Pascal  
75775 Paris Cedex 16  
France  
Tel: +33 1 45 24 82 00  
Fax: +33 1 45 24 85 00  
Website: [www.oecd.org](http://www.oecd.org)

#### World Customs Organization (WCO)

Enforcement and compliance  
Rue du Marché, 30  
B-1210 Brussels  
Belgium  
Tel: +32 (0)2 209 92 11  
Fax: +32 (0)2 209 92 62  
Website: [www.wcoomd.org](http://www.wcoomd.org)

#### World Intellectual Property Organization (WIPO)

34, chemin des Colombettes  
CH-1211 Geneva 20, Switzerland  
Tel: +41 22 338 9111  
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## Abbreviations and acronyms

AQIM	Al-Qaeda in the Maghreb
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives (US Department of Justice)
BAT	British American Tobacco
COP	Conference of the Parties
DNP	Duty Not Paid
EAPCCO	Eastern Africa Police Chiefs Cooperation Organization
EC	European Commission
EPZ	Export Processing Zone
EU	European Union
WHO FCTC	Framework Convention on Tobacco Control
FDI	Foreign Direct Investment
FTZ	Free Trade Zone
FZ	Free Zone
ICTSD	International Centre for Trade and Sustainable Development
INB	Intergovernmental Negotiating Body
ISO	International Organization for Standardization
ITI	Imperial Tobacco International
ITTP	Illicit Trade in Tobacco Products
JTI	Japan Tobacco International
MERCOSUR	Mercado Común del Sur
MLA	Mutual Legal Assistance
NGO	Non-Governmental Organization
OCG	Organized Crime Group
OECD	Organization for Economic Cooperation and Development
OLAF	European Anti-Fraud Office
PMI	Philip Morris International
RKC	Revised Kyoto Convention
SADC	South African Development Community
SARPCCO	South African Regional Police Chiefs Cooperation Organization
SEZ	Special Economic Zone
UCC	Uniform Code Council
UIM	Unique Identification Markings
UNCAC	United Nations Convention against Corruption
UNCTAD	United Nations Conference on Trade and Development
UNODC	United Nations Office of Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
WHO	World Health Organization





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- 
- <sup>31</sup> WHO FCTC COP Rules of Procedure. Available at [http://www.who.int/fctc/cop/rules\\_procedure/en/index.html](http://www.who.int/fctc/cop/rules_procedure/en/index.html)
- <sup>32</sup> Part I, Art. 1(13) of the Protocol states: “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.
- <sup>33</sup> Part I, Art. 1(8)(a) of the Protocol states: “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.
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- <sup>40</sup> Open standards are publically available standards with associated usage rights.
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- <sup>46</sup> WCO Brochure: “The WCO in brief”; WCO Annual Report 2012-2013; WCO Strategic Plan (2013/2014 to 2015/2016); further reading on the WCO website. Available at <http://www.wcoomd.org/en/about-us.aspx>
- <sup>47</sup> WHO FCTC implementation Database. Available at <http://apps.who.int/fctc/reporting/database/>
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- <sup>49</sup> WIPO Lex database. Available at <http://www.wipo.int/wipolex/en/>



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# Illicit Trade: Converging Criminal Networks



# **Illicit Trade: Converging Criminal Networks**

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## *Preface*

The OECD Task Force on Charting Illicit Trade (TF-CIT) was established to advance the resilience of our economies and societies to the odious global threat: illicit trade perpetrated by criminal entrepreneurs and transnational illicit networks that enables the global illegal economy to thrive in the dark side of globalization. In too many places around the world, criminals have built their illicit empires on dirty money and laundered funds to infiltrate and corrupt government institutions. In this shadowy, illegal economy traffickers and narcotics kingpins act as CEOs and venture capitalists while they build their empires of destruction, jeopardizing public health, emaciating communities' human capital, eroding our collective security, and destabilizing fragile governments. The breadth and scale of these illicit markets are vast; various international organizations estimate the scale of illicit trade is thriving with hundreds of billions of dollars in illicit commerce that includes trafficking in narcotics, persons, endangered wildlife, illegally-logged timber, counterfeit consumer goods and medications, hazardous and toxic waste, stolen antiquities and art, illicitly-traded cigarettes, and other illicitly-traded goods and commodities.

The OECD TF-CIT focuses on evidence-based research and advanced analytics to assist policy-makers map and understand the market vulnerabilities exploited and created by illicit trade. Mapping the harms and impacts of illicit trade and the licit-illicit complex system will help us pinpoint large-scale disruptions to illicit markets and identify tools to reinforce the most vulnerable points of entry to the illegal economy. Quantitative metrics better inform policy makers, allowing them to drive criminal entrepreneurs out of business, reduce the incentives for communities to resort to illegal commercial activity, mitigate opportunities for organized crime to taint our financial system with their ill-gotten gains, and help governments sustain legitimate markets so that businesses that respect regulations can thrive. Pragmatic mapping tools will also be useful for policy-makers and law enforcement to not only engage in upstream and downstream coordinated mitigation and disruptions of the illicit trade, but also address gaps in surveillance and monitoring systems to develop more effective early detection and warning systems of the new harms and risks of illicit trade to the formal economy.

The importance and timeliness of this OECD initiative reflects the growing threat posed by transnational organized crime and illicit networks, which has expanded in size, scope, and menace, destabilizing globalized economies and markets alike and created insecurity in communities around the world. As criminal entrepreneurs and transnational illicit networks hijack the technological, financial, and communications advances of globalization for illicit gains, they continue to present new harms to the governance and security of all nations. The proliferation of these threatening networks and the convergence of their illicit activities threaten not only the interdependent commercial, transportation, and transactional systems that facilitate free trade and the movement of



people throughout the global economy, but are jeopardizing governance structures, economic development, security, and supply chain integrity.

To mitigate this global risk, public and private sector decision makers need a firmer grasp on the magnitude and nature of its impacts on economic activities, and a clearer understanding of the conditions that enable it. We must continue to strengthen cross-border cooperation to tackle illicit trade and increasingly inter-connected global challenges, and help communities to fully seize the benefits of open trade to achieve great sustainable development and security. Of course, such cooperation should not impede the rules of the global trading system, but rather be consistent with them and work to the advantage of legitimate businesses engaging in international trade. To this end, the OECD TF-CIT can provide a key advisory function in the design of successful policies and processes to increase economic and societal resilience to this threat.

The work of the TF-CIT is only beginning. The next steps are to focus attention on countering the dark side of globalisation through co-ordinated efforts to improve enforcement policies. The work will explore how enhanced information sharing can strengthen the risk analysis conducted by customs and police, which is so crucial to focusing their limited resources on the areas where criminal trade fraud and is most likely to occur. Ultimately, the international public-private partnerships and regional dialogues that accompany the TF-CIT efforts will help inform policy communities around the world about the harms and impacts of illicit trade. These outreach efforts should provide fertile ground for public and private sector decision makers better to reinforce their prevention and mitigation efforts in strategic markets, and thereby fulfil the promise of better policies for better lives, and nurturing legitimate growth economies, investment frontiers, and sustainable futures for all communities.

David Luna

*Chair of the Task Force on Charting Illicit Trade*



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## Executive Summary

Illicit trade is a worldwide phenomenon. Globalisation has provided opportunities for criminal networks to expand the scope and scale of their operations, with serious negative consequences for the economy, the environment and society. Illicit trade also undermines good governance, the rule of law and citizens' trust in government, and can ultimately threaten political stability.

This report provides analysis of some of the main areas of illicit trade, including trafficking in persons, wildlife, counterfeit medicines, narcotics, tobacco, alcohol and sports betting. It looks at what drives and facilitates such activity, estimates the volume of trade and amount of revenue it generates, maps the pathways of illicit goods from production to consumer, describes the shortcomings of current policies for reducing or deterring illicit trade, and suggests avenues for improvement.

### Understanding illicit trade

It is important to clearly define and measure illicit trade, and understand the context that allows it to flourish. However, countries – and sometimes regions within countries – do not always agree on what goods can be legally traded, and there is even greater variance in the application of quality standards and the protection of intellectual property rights. These differences can make cross-country measurement of illicit trade as a whole very difficult, which is why this report takes a sectoral approach.

Our increasingly interconnected economies and societies have allowed organised crime to expand alongside the exponential growth in legitimate international trade. Criminal networks exploit differences in regulatory and tax regimes to move goods and services across borders. While exact measurements can be difficult given the clandestine nature of illicit transactions, one estimate puts the profits of international organised crime as high as USD 870 billion, or 1.5% of global GDP. Calculating and tracking the money made from these activities is important as it can provide crucial information to law enforcement. More data and information sharing is needed to develop a clearer understanding of illicit trade and how to combat it.

A more holistic view of the cost of illicit trade also takes into account its harmful impacts on consumers, the environment, tax revenues and jobs. Traffic in humans and narcotics, for example, also exact a very heavy social toll. Illicit trade can also be closely linked to criminal violence and terrorism. Costs in terms of law enforcement, incarceration and rehabilitation should also be taken into account. Finally, illicit trade can cause longer-term damage to the rule of law, public trust, human capital and public health, as well as deter foreign investment.

### Trafficking in persons

According to estimates by the International Labour Organisation (ILO), 20.9 million people are forced into slavery worldwide causing immense, long-term damage to individuals, communities, and nations. Trafficked persons tend to flow from poorer regions to richer regions and from conflict regions to more stable regions. Governments need to give priority to implementing laws for preventing trafficking, protecting victims and prosecuting both traffickers and the corrupt public officials who assist them.

### Illicit trade in wildlife

Demand for elephant ivory and rhino horn has driven dramatic growth in illegal wildlife markets in recent years due primarily to a growing consumer base in East Asia. Taken together, all forms of wildlife trafficking constitutes one of the most lucrative forms of illicit trade, and the sector has more than doubled since 2007. Monitoring and enforcement in source countries can be effective means to reduce poaching, but training and information systems are needed to build adequate capacity.

### Counterfeit medicines

The trade in counterfeit medicine is a huge industry, generating as much as USD 200 billion a year in tangible goods alone according to OECD's study of 2005 data, which is soon to be updated. It has a direct negative impact on health, depriving users of appropriate treatment and contributing to global microbial resistance. Pharmaceutical companies also suffer a loss in revenue and reputation, and increased costs for security. Successfully combatting counterfeiting will require more extensive information sharing across agencies and nations. Finally, the development and adoption of an international public health treaty would be a significant step toward protecting patients and public health globally.

### Tobacco products

The illicit trade in tobacco is perhaps the most widespread and most documented sector in the shadow economy. It has been estimated that 570 billion illicit cigarettes were consumed worldwide in 2011. Illicit tobacco is an important source of revenue for criminal networks, and deprives government services of excise tax revenues at the same time. To counter the illicit trade in tobacco products, governments developing a multi-faceted approach, including: building partnerships, increasing data validity and reliability, launching educational and public awareness campaigns, increasing capacity-building efforts, and prioritising countering illicit tobacco products and its associated crimes.

### Narcotics

The global narcotics trade is thought to be the single largest black market in the world, and is a source of revenue for international criminal organization. In addition to the negative impact on human health and well-being caused by the narcotics themselves, the criminal violence that accompanies all aspects of drug trafficking erodes state institutions and is often difficult to reverse. Tackling the narcotics trade effectively will



require not only punitive approaches and sanctions but also state building, economic development and good governance practices.

### **Alcohol**

It is estimated that billions of dollars from trafficking and illegal trade in alcoholic beverages flow through the global economy each year, distorting local economies, diminishing government and legitimate business revenues, and in some cases posing a serious health risk to consumers. It is estimated that illicit sources account for 25% of total worldwide adult alcoholic consumption. Contributing factors include the higher cost of legal products from taxes, weak laws, lack of enforcement and social acceptance of contraband in some countries.

### **Sports manipulation**

The globalisation of sports has led to an increase in unregulated sports betting, which is increasingly used for money laundering and has been connected to corruption in sports (match-rigging). An internationally co-ordinated, pro-active response is needed, including initiatives targeting bettors and offenders, police action and co-operation with financial institutions. It is also important to communicate on the subject of sports integrity to all stakeholders, including the public and the media.



## Chapter 1

### Illicit trade: convergence of criminal networks

By: Jack Radisch\*

*This chapter discusses the global characteristics of illicit trade, providing context about its growth, and highlighting expert estimates about such major sectors as trafficking in narcotics, persons, wildlife and several categories of counterfeit goods. It describes the policy implications of transnational organized crime as a lynchpin in the convergence of illegal markets, and outlines the challenges in current policy responses to reduce or deter illicit trade, and suggests how enhancement and leveraging of existing information sources could help efforts to counter this global scourge.*

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1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

In 2014, the OECD Council adopted the Recommendation on the Governance of Critical Risks, as a comprehensive set of strategic guidance for governments to contend with major risks of the 21st century (OECD, 2014). The Recommendation has been officially agreed at Ministerial level by the 34 Member countries of the Organisation for Economic Co-operation and Development, as well as adopted by Colombia, Costa Rica, Morocco, Tunisia and Latvia.

An important provision of the Recommendation reflects the concern amongst countries over steady-state risks, such as the international scale of organized criminal networks, and the dynamism of the illicit trade they engage in. The recommendation calls for *mapping the activities of actors in the illegal economy and enable a fuller understanding of the connections between different forms of illicit activities, in order to increase economic and societal resilience to transnational criminal and terrorist networks.*<sup>1</sup> The current report follows on that call and presents sectoral analyses, drawing on cutting edge expertise from the Task Force on Charting Illicit Trade. The task force convenes experts from governments, research institutes, civil society and the private sector to further the understanding and raise awareness of this global risk to legitimate businesses and institutions.

Criminal networks are active on every continent and in every major economy (Albanese, 2015). The illicit trade they engage in has adverse economic, social, environmental and even political impacts - it is holistically destructive to sustainable development. Trafficking in narcotics, arms and especially humans have obviously corrosive social effects. Illicit trade in counterfeits undermines the model of investment in research and development that is essential to high value added knowledge economies. Wildlife trafficking destroys biodiversity, diminishes the sustainability of eco-tourism, and can trigger the spread of zoonotic disease. Most importantly, illicit trade undermines good governance, erodes trust in government and the Rule of Law. It eventually creates threats to political stability as its economic actors use bribery and undue influence to deflect unwanted attention, protect their illegal market share and undermine the public sector integrity.

This introductory chapter presents an overview of trends in illicit trade and discusses their policy implications. The findings show that that organized crime and illicit trade in the era of globalisation have taken on strategic significance, which is corroborated by several National Risk Assessments in OECD countries. The subsequent chapters provide sectoral analysis in the illicit trade of humans (Chapter 2), wildlife (Chapter 3), counterfeit medicines (Chapter 4), narcotics (Chapter 5), tobacco products (Chapter 6), alcohol (Chapter 7) and illegal betting on rigged sports (Chapter 8). The chapters constitute a snapshot of each sector, drawing on including: the author's best estimate of the size of the illegal market, maps of the main pathways from production to consumption, and a reflection on the governance gaps that allow illicit trade in the sector to thrive. This synthesis chapter is designed to bridge understanding across the various sectors of illicit trade, focusing on the structural issues that enabled it to emerge as a global risk.

## Can illicit trade be measured?

Black markets have come and gone throughout history and their transactions are unrecorded. Globalisation has changed the geographic scope, volume and range of goods traded in illegal markets, and implicitly the magnitude and gravity of their negative social, economic and even political impacts. Expounding the fundamental characteristics of illicit trade and the economic context that has enabled it to grow supports considerations of the policy options available to reduce it, and helps inform priorities for tactical programmes to dismantle criminal networks.

### *What is illicit trade?*

Considered in its broadest sense, illicit trade is an exchange in the control/ possession of a good or service that a legislature deems illegal, because the object of exchange is dangerous or morally repugnant. Strictly speaking it is inaccurate to speak of sale or purchase (of a legal interest in a prohibited good), because these transactions are not legally enforceable; a vendor has no remedy for non-payment, and a buyer cannot compel a vendor to deliver. One objective of this study was to gather the best available measurements of such dangerous or offensive commercial activity, and also to raise awareness of its impacts. It is difficult to estimate with precision any activity that is intentionally conducted in a clandestine manner, and an even greater challenge to measure their socio-economic impacts. To quantify any phenomenon first entails defining it, and second agreeing on a common set of metrics, such as turnover generated over a specified period of time, or the number of deaths or injuries it causes.

Illegal markets are characterized as including at least four separate categories of commodities and services (Williams, 2015):<sup>2</sup>

1. Prohibited goods or services such as narcotics and commercial sex.
2. Irregular sale of regulated commodities, such as antiquities or fauna and flora, goods that infringe upon intellectual property rights, and goods that do not conform to applicable local standards.
3. The sale of excise goods outside their intended destination market without paying the local excise tax, such as cigarettes and alcohol.
4. The sale of stolen goods, such as cars and electronics.

Despite international conventions that attempt to harmonize laws on prohibited or non-conforming goods, divergence on what goods should be banned persists across countries, and differences are even more pronounced in relation to applicable quality standards and issues of protectable intellectual property rights. The same good may be considered contraband by one country, but perfectly acceptable merchandise in another. The acceptance or prohibition of markets for many goods or services changes over time along with the mores of societies. Indeed, the legality of trading in certain goods even varies within countries.

For example, in recent years a few jurisdictions in OECD countries have regulated the production, distribution and sale of some classes of narcotics, as well as commercial sex. Marijuana can now be legally produced and sold in the state of Colorado in the United States, and the regulated marijuana industry generated USD 700 million in revenue in 2014 (Colorado Department of Revenue, 2015). Likewise, the German trade union

"Ver.di" is cited as having estimated that prostitution accounts for about EUR 14.5 billion in annual revenues as a legal activity in that country (Der Spiegel, 2013).

If a vendor arranges delivery to a buyer out of the state, or a buyer takes marijuana purchased in Colorado out of the state for re-sale, the transaction is illegal. For the purpose of a global study on measuring illicit markets, would the turnover from a transaction be counted when the marijuana is cultivated, marketed, sold and delivered in Colorado, but consumed in a foreign jurisdiction? Any study that aims to produce a comprehensive measurement of illicit markets would need to account for such variances due to legal supply, or its result will overestimate the size of the illegal market. Likewise such a study would have to be extremely well attuned to new forms of illegal markets and recently prohibited goods, or else it risks underestimating the totality of illicit markets.

Changes in policy regarding acceptable or prohibited forms of commerce also make it exceedingly difficult to conduct accurate time series of global estimates for some illegal markets. These divergences raise a fundamental problem of definition that impedes comprehensive and comparable cross-country measurements of illicit trade. For these reasons, this publication explicitly refrains itself from developing one comprehensive aggregate measurement for all forms of illicit trade. It presents an overview of different sectors of illicit trade and asked its experts to select the best estimate for each. For these reasons, this publication explicitly refrains itself from developing one comprehensive aggregate measurement for all forms of illicit trade. It offers a state of the art overview of different sectors of illicit trade, further to a dialogue with expert communities and country representatives.

### ***What are the drivers behind global illicit trade?***

Global trends of hyper-mobility, intensified use of cyberspace, urbanisation and population growth, are producing more interconnected societies and economies (OECD, 2011). This often exposes them to events that begin far away, but have knock-on effects that cross national borders. Under these same conditions, transnational organized crime has expanded its activities and entered new markets, while spreading political destabilization and institutional decay.

It is worth placing transnational organized crime in historical context to distinguish this phenomenon in its modern form from the international forms that have been present for well over a century. Historically, the identity of organized crime involved group with ethnic and regional ties. Over the past 140 years several such groups have expanded internationally during broader ethnic diasporas, often triggered by political and economic upheavals. To appreciate the magnitude of the challenges that illicit trade presents and what measures can be taken realistically to reduce or deter criminal actors, one must contextualize it within the growth and centres of legal markets over the past 30 years.

Globalisation presents opportunities to enter new markets and reduce risks to their commercial portfolios by diversifying into profitable activities with low probability of being detected, such as dealing in counterfeits and cybercrime (UNICRI, 2014). Their networks are serviced by, "alliances and illegal production/distribution chains that evolved during the 1970s for trafficking black-market products, such as narcotic substances and smuggling of tobacco and alcohol (UNICRI, 2014). To reap benefits of operating in far-away markets, criminal groups adopted new types of activity and trade to overcome the challenge of connecting production to distant consumers. These new

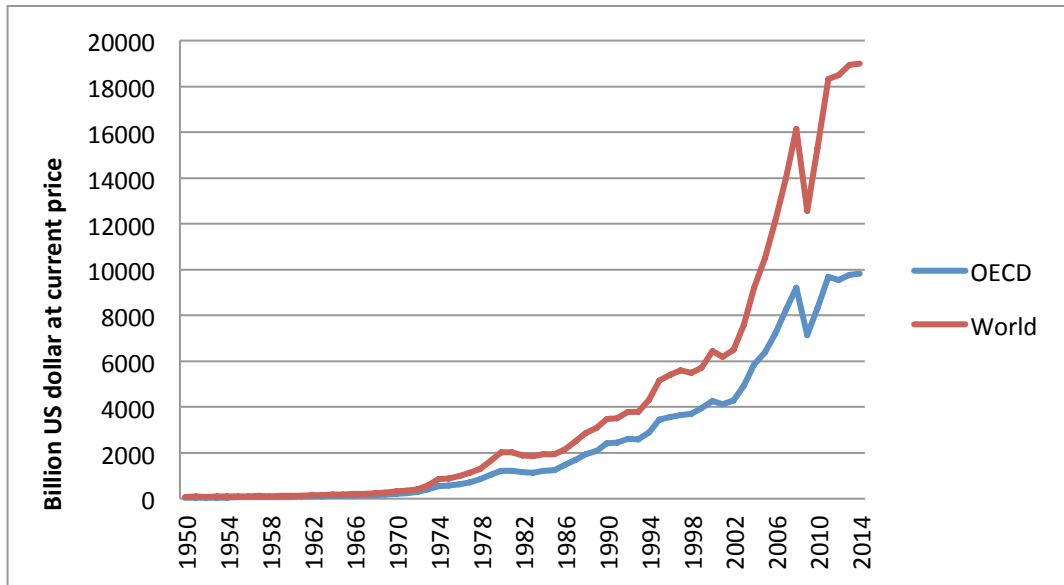
synergies created economies of scale and other efficiencies common to legitimate trade, and the opportunity to diversify into new illicit markets (UNICRI, 2014).

The main drivers of growth in illicit trade are high profits to be won by traffickers who can successfully deliver to black markets under the expanding shadow of globalisation. The profit opportunities in some newer sectors of illicit trade are surprisingly high, e.g. some reports claim the sale of rhino horn trades at USD 60 000 per kilo, but the criminal sentences compared to narcotics trafficking, for example, are far less severe. Criminal organisations actively analyse opportunities to enter new black markets, balancing the potential rewards, with the existing penalties to diversify the range of their illicit activities accordingly. The business models for traffickers seek to develop economic synergies by leveraging their networks in transportation and money laundering, which equips them to deal in everything from counterfeit automobile parts to human parts.

Black markets tend to emerge spontaneously under circumstances where governments impose price ceilings or the regulatory environment creates insurmountable barriers to conduct commerce inside the formal sector. While localized black markets for regulated classes of goods are a nuisance, deprive governments of tax revenue and often lead to the consumption of sub-standard products that cause physical injury, they are not generally perceived as a source of political instability or industrial decline. In the context of globalised trade, however, the stakes involved go far beyond nuisance.

Illicit Trade needs to be presented within the context of global market trends. Globalisation has been a boon to economic growth and living standards in most countries thanks in large part to increasing liberalization of world trade and the cross border integration of value-added economic activity. The highly codified system of international trade regulations and standards, and lower costs of long distance transport and communication, has enabled the dollar value of world merchandise exports to increase from \$296 billion in 1950 to \$18.8 trillion in 2013 (Figure 1.1) (WTO, 2014). Consumers and other end users of goods-in-trade benefit from a robust body of international agreements, which promote the reduction of import tariffs, export subsidies, import quotas, taxes, and non-tariff barriers. This policy framework for the global trading system is complemented at the operational level by interconnected networks, such as shipping, airlines, rail and roads, information, telecommunications and payment systems, all of which enable the enhanced mobility of people, goods, capital and data. These strides in technological advances and policy coordination enable the production and delivery of highly desirable economic and societal benefits.

Figure 1.1. Trend in volume of world trade - USD billion



New technologies have enabled exponential growth in the volume of legitimate international trade, but they have not eliminated local differences in economic opportunities, changed moral attitudes toward different sorts of economic activity, or increased the capacity of all law enforcement agencies around the world. The liberalisation of trade and relatively low cost of transcontinental supply chains have opened new opportunities for “deviant globalization”, a portion of the global economy that meets the demand for goods and services that are illegal or considered repugnant in one place by using a supply from some other part of the world where morals are different or law enforcement is less effective (Gilman, N. et al, 2013). The challenge for law enforcement is to keep up with the speed and massive volume of global markets and trade flows. It cannot control or inspect all shipments, and it operates with an incomplete and sometimes falsified picture of global trade and value chains.

### *Measurements of illicit market revenues*

Illicit trade is motivated by profit-making like any commercial activity. Several international organisations have measured the proceeds of organized crime for different product classes and according to different methodologies, each resulting in a range of estimates. These estimates are generally qualified with the caveat that the hidden nature of criminal transactions makes it difficult for researchers to measure the volumes of transactions and values of business turnover with precision. Available metrics are usually proxies and often depend on information gathered indirectly through law enforcement seizures, arrests, court decisions, whistle-blowers, informants or inadvertent discovery.

According to UNODC, the profits that transnational organized crime derives from such shadow industries have been estimated to be as high as USD 870 billion, equivalent to 1.5 percent of global GDP (UNODC, 2011). It also estimates that more than half of the proceeds were able to be laundered through the global financial system. The largest source of income for transnational crime is drug trafficking which accounts for around half of global proceeds of crime, followed by counterfeiting with a share of nearly 40



percent of total profits. A recent report by the World Economic Forum republished estimates on the annual revenue for 12 types of illicit trade (WEF, 2015). These estimates had been gathered by Global Financial Integrity in 2011, which added them together to arrive at a slightly lower total value for the shadow economy (see Table 1.1 and Figure 1.2). The World Economic Forum report points out that the underlying data used for each sector was first published between 5-10 years ago, or in some cases the methodology used deliberately counts only a portion of the sector in question. For example, the OECD figure on counterfeit and pirated goods is based on data from 2005 and only represents the value of international trade in tangible goods, excluding commerce in counterfeits within countries as well as digital products and online services. The OECD Task Force on Charting Illicit Trade is due to publish a revised estimate of trade in counterfeit goods in 2016 based on updated data.

Measuring the monetary value of illicit markets provides a broad indication of the extent to which traffickers are enriched by this activity. Such measures often use country level seizure data in their methodology to extrapolate the total quantity of smuggled goods in a particular sector, and make assumptions about what percentage of contraband is actually seized; the so-called interception rate. Critics contend that such rates are arbitrarily selected and that slight changes to a rate can lead to large differences in range values.

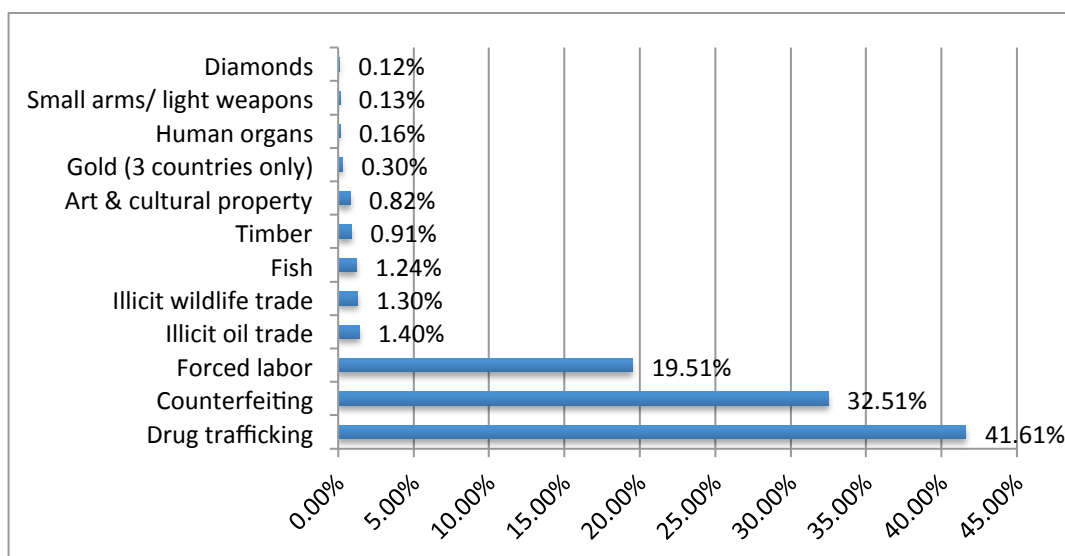
In addition to the available estimates on the size of illegal markets, a vast literature documents the harmful impacts of illicit trade, including injuries to consumers, degradation to environmental systems and biodiversity, erosion of government tax revenues and elimination of jobs in legitimate industries. These negative externalities on economic stability, social welfare, deterioration of public health and public safety and environmental degradation provide a more holistic view of the ills of illicit trade than simply measuring the size of criminal profits (Picard, J., 2013). It is important to consider not only the capital that illicit trade generates for criminal networks, but also the consequences.

For example in destination countries for trafficked persons the impacts include depressed salaries, poor working conditions, increased work injuries and economic development based sex tourism. Industries suffer lost sales and lost jobs, and governments lose out on expected tax revenues, which has an impact on the quality of public services. The effects of illicit trade are also felt in the costs of law enforcement, incarceration and rehabilitation. Over the longer term illicit trade also undermines trust in government and declining trust in public institutions, undermines the rule-of-law, erodes human capital, deters foreign investment and deteriorates public health. Nonetheless, the growing wealth of criminal networks is important to quantify and qualify. Market analysis can provide insights on how to cure the problem at its sources, whereas analysis of effects can only offer guidance on temporary remedies to victims. If research can estimate how much money these networks make, where the money comes from and where it goes to, law enforcement efforts will be much better informed both in strategic and tactical decisions to dismantle the networks.

**Table 1.1. Estimated revenues for illicit trade by sector**

Illicit activities (total) 770 billion	Figures (billions USD)
Drug trafficking	320.0
Counterfeiting	250.0
Forced labour by private enterprise	150.0
Illicit oil trade	10.8
Illicit wildlife trade	10.0
Fish	9.5
Timber	7.0
Art & cultural property	6.3
Gold (3 countries only)	2.3
Human organs	1.2
Small arms/ light weapons	1.0
Diamonds	0.9

Source: Global Financial Integrity (2011).

**Figure 1.2. Revenues of illicit trade (by % of total revenues)**

Source: Author, data taken from (UNODC, 2005), (OECD, 2008), (ILO, 2005), (Raymond Baker, 2005), (Coalition Against Wildlife Trafficking, 2009), (High Seas Task Force report, 2010), (Seneca Creek report, 2009), (UN Crime Prevention & Criminal Justice, 2010), (Small Arms Survey, 2002), (Kimberley process statistics, 2009).

### An overview of key sectors

The chapters in this report provide estimates of the market size in several major sectors in illicit trade based on publicly available sources. The recurrent theme in illicit trade is the concept of arbitrage, i.e. taking advantage of a price difference between two

or more markets. Whether the margin is a difference in unpaid excise tax, or selling cocaine in a major consumer market at 100 times the price per gram of the price in a source country, illicit trade comes down to procuring a product at low price and managing its transportation and storage until it is sold at a higher price.

### ***Trafficking in persons***

Governments face significant struggle in controlling trafficked flows of people, and the harms to individuals and economies that result, such as forced labour or the human organ trade. Figure 1.3 presents the International Labour Organisation estimate that 20.9 million people are forced into labour worldwide (ILO, 2014). Almost 19 million victims are exploited by private individuals or firms, which is claimed to generate USD 150 billion in illegal profits per year (ILO, 2014). Modern slavery is considered by many to be the most repugnant form of deviant globalisation, but it does not shock the sensitivities of all cultures, which explains the sources of many human trafficking flows. Sexual exploitation cases account for most cases of forced labour in Europe and the Americas, while in Africa and the Middle East the main purpose of trafficking in persons is forced labour.

Human trafficking is overwhelmingly an international phenomenon, with 73 percent of all reported victims trafficked across borders. According to the International Labour Organisation nearly two-thirds of forced sexual workers are trafficked across borders, a fact which underscores the role of transnational networks (ILO, 2014). Beyond the obvious deprivation of basic human rights, this form of illicit trade has long lasting impacts on the health, well-being and productivity of individuals, and it depletes important sources of human capital in emerging economies.

The legal prohibition of human trafficking has increased in the past ten years, but implementation of these laws is weak in terms of prevention, protection of victims and the prosecution of offenders. Governments that do not vigorously enforce the laws against trafficking in persons are tacitly contributing to the competitive advantage of firms that use forced labour. Priority should be placed on implementation of laws against human trafficking, including efforts to identify and prosecute corrupt public officials who facilitate this illicit trade for organised criminal groups.

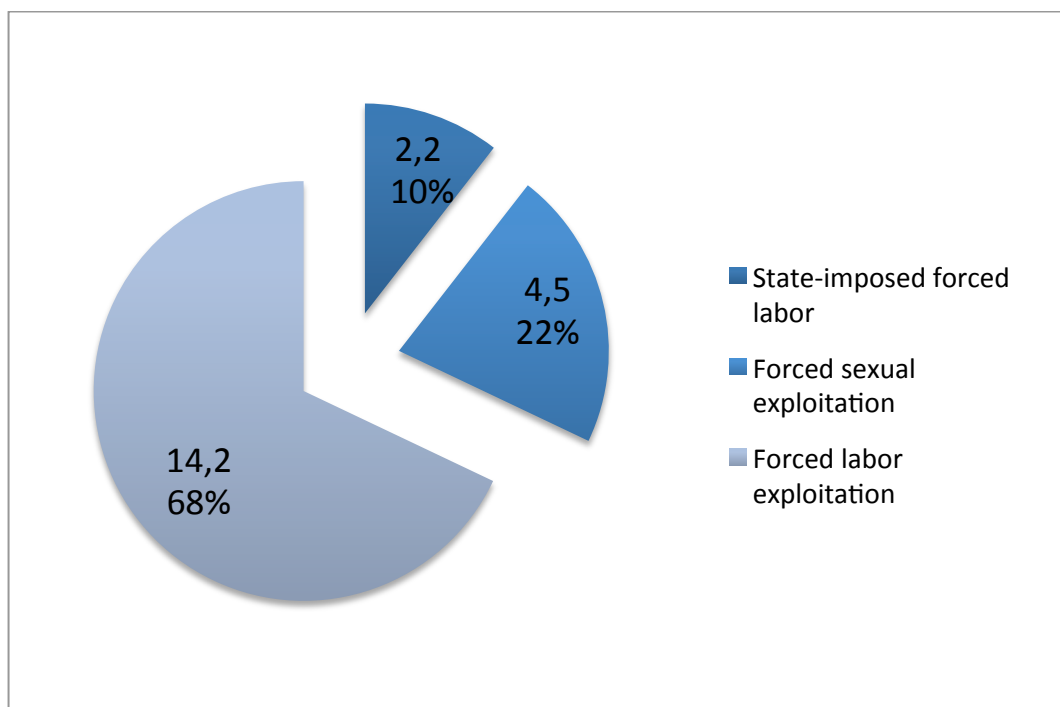
### ***Illicit trade in wildlife***

Trafficking of endangered wildlife is another important sector, with specific implications for Sub-Saharan Africa. Wildlife trafficking involves the commercial sale of endangered species and their parts, products and derivatives. The networks involved in wildlife trafficking between sub-Sahara Africa and Asia are of particular concern from a security policy perspective due to their associations with listed terrorist organisations. Behind the steep rise in poaching of elephants and rhinos over the past 15 years is the growing demand from a growing middle class in Asia that wants to purchase status objects and traditional medicine. Elephant tusks and rhino horns are the raw materials for some of the most popular items, such as ivory jewellery and sculpting artefacts. (Joossens, L. et al., 2010).

The United Nation's Convention on International Trade in Endangered Species (CITES) has stated that 1,215 rhinos were killed in South Africa in 2014, a record high and ten-times the number of rhinos killed for their horn in 2009. In the last three years, poachers have killed 100,000 African elephants. The slaughter of wildlife is not just a

matter of conserving biodiversity, in some countries the reserves where these animals live are important sources of tourism revenues and employment. Further, while the economic impacts of wildlife trafficking may be local, the illegal trade in bush meat is a potentially global risk, due to the spread of zoonotic diseases (Smith, K.M., 2012). During the 2014 Ebola outbreak, it was estimated that 7,500 tons of illegal meat enters United Kingdom each year.

**Figure 1.3. Millions of people in forced labour**



Source: ILO (2014), *Profits and poverty: The economics of Forced Labour*, International Labour Organisation, Geneva.

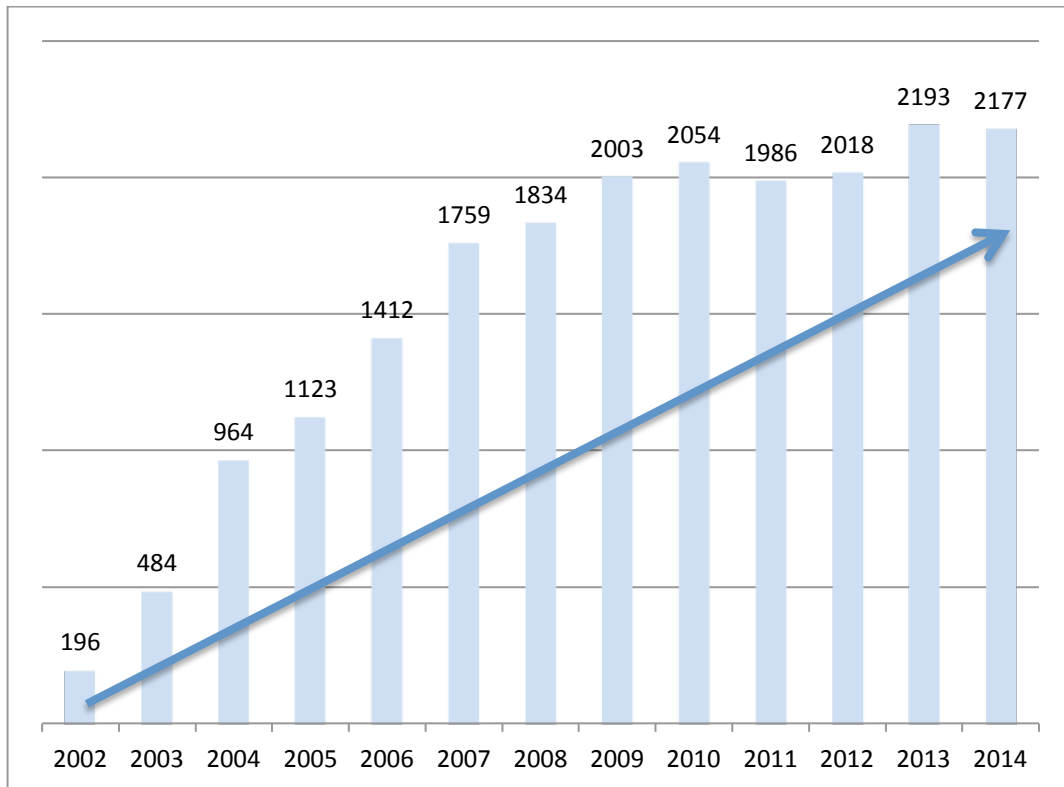
### **Counterfeit medicines**

The issue of counterfeit medicine is also a very significant economic, health and social concern. According to an official of the World Customs Organization (WCO), counterfeit pharmaceuticals are now a USD 200 billion-a-year industry (Irish, J., 2010). The World Customs Organization's 2013 report on Illicit Trade reported 24 092 seizures of intellectual property-offending goods, and more than half of these were related to illegal pharmaceuticals (WCO, 2013).

Counterfeit medicines have a direct impact on human health, since the user is not receiving the benefit of the prescribed treatment. Moreover, counterfeit pharmaceuticals undermine the fight against infectious diseases by contributing to global microbial resistance and more virulent forms of disease. The prevalence of counterfeit medicine hinders the innovation model that is key to economic growth in OECD countries, jeopardizing the expansion of research and development within existing legal companies and foreign investments. In some severe cases the expansion of counterfeit medicine has even led to the closure of law-abiding companies. Raising awareness about the risks of

counterfeit pharmaceuticals could sensitize consumers to the complex issues associated with intellectual property in this area.

**Figure 1.4. Pharmaceutical crime- incidents of counterfeiting, illegal diversion and theft**



Source: Pharmaceutical Security Institute (2015).

### ***Illegal narcotics***

Global trade in illegal narcotics is generally considered to be the single largest black market worldwide and finances notorious transnational criminal organisations. Ten years ago the United Nations Office on Drugs and Crime estimated that the illegal trade in narcotics generated USD 321.6 billion per year in revenue (UNODC, 2005). The largest retail sales in illegal drugs come from the sale of cannabis herbs, followed by cocaine and opiates. Aside from retail revenues, it is important to assess the economic impact of the harms caused by drug use.

Different methods are used to produce an estimate of these harms in monetary terms, such as the “cost of illness” approach, which concentrates on economic losses, or multi-criteria decision analyses, which additionally focus on the physical, psychological and social aspects of illegal drug substances. Addictions lead to important drains on public resources, including costs of policing petty crimes, incarceration and rehabilitation. UNODC has estimated that between 162 and 324 million people used cannabis, opioids, cocaine or an amphetamine-type stimulant group at least once in the year 2012, which equals around 3.5 and 7.0 percent of the global adult population. The distribution of users, however, is concentrated in advanced economies, while the main raw materials for

opiates and cocaine come from emerging or developing countries (UNODC, 2010). Competition to distribute illegal narcotics is notoriously violent, and has led to hundreds of thousands of violent deaths, including many bystanders. The use of drug trafficking is also a well-known means to finance the activities of organizations whose objective is to overthrow established political orders through violence, and is thus considered a major risk to the rule of law.

### *Tobacco products*

Illicit trade in tobacco represents a multifaceted crime which may involve counterfeiting, cross-border smuggling and tax evasion, and which has also been identified as a source of revenue for terrorist activities in several areas. Cigarettes present high profit margins and are among the most commonly traded products on the black market due to the relative ease of production and movement, along with low detection rates and penalties. Estimates of the global value and volume of the illicit trade in tobacco products are as high as 11.6%, with developing countries registering a higher average share (around 16.8 percent) than advanced economies (around 9.8 % on average).

Table 1.2 illustrates the opportunity for tax arbitrage by smuggling cigarettes into Turkey from many surrounding countries. Ukraine is one of the cheapest cigarette selling countries in the region. The excess production of cigarettes is estimated to exceed 40 billion sticks, which is either legally or illegally imported to other countries, and especially Turkey. Harmonizing the cigarette prices in the region has been discussed by the Black Sea Economic Cooperation Organization.

**Table 1.2. Arbitrage opportunities for trafficking in cigarettes**

Country	Price per pack of cigarettes (Euros)
Turkey	3.40
Armenia	1.30
Bulgaria	2.60
Georgia	1.30
Greece	4.00
Iraq	1.00
Iran	2.00
Romania	2.80
Syrian Arab Republic	1.10
Ukraine	1.20

Perhaps the most significant economic impact, and consequently social impact, is the loss of government revenue from the collection of taxes and duties, since governments need taxation revenue to fund public programs. It has been estimated that annual government revenue losses of unpaid taxes on cigarettes reached USD 40 billion in 2010, a figure comparable to the 2014 sales of Goldman Sachs Group or UBS. In the European Union alone the consumption of illicit cigarettes increased over the recent years and reached 11.1% of the total market in 2012, which equates to EUR 12.5 billion in lost tax revenues across EU member states.

### *Alcohol beverages*

Illicit trade also affects the alcohol beverages industry, which as an excise good also suffers from the smuggling of products across borders to take advantage of tax arbitrage (see Table 1.3). The direct impacts of illegal alcohol therefore are lost tax payments, but it should be noted that the WHO estimates that non-commercial sources account for nearly 25% of total worldwide adult alcohol consumption (WHO, 2014). Illicit alcohol is a serious public health problem. Fatal cases of poisoning occur around the world every year due to the ingestion of illicit alcohol, and tests of seized illicit alcohol very often reveal that it does not meet regulatory standards. Low-income countries, where illicit alcohol beverages are often priced at below market, have a higher proportion of unrecorded alcohol consumption than high-income countries prices.

**Table 1.3 Arbitrage opportunities for trafficking in alcohol**

Country	Alcohol price index (base 100)
Turkey	100
Armenia	54
Bulgaria	52
Georgia	46
Greece	104
Iraq	59
Lebanon	77
Romania	63
Syrian Arab Republic	50
Ukraine	34

As illustrated in Table 1.3, excise taxes on alcohol can lead to a so-called “tax-opportunity” which increases the potential revenue of the illicit alcohol market. Whether a tax differential on paper translates into a profit opportunity on the ground depends on various factors, such as geography and law enforcement capacity. Comparisons among countries with similar income and enforcement status present an intriguing case for analysis, for example between Sweden and Finland. Finland reports a lower share of unrecorded APC than Sweden despite higher excise tax on alcohol.

### *Sports manipulation as economic crime*

Another aspect of the underground economy that has developed recently concerns unregulated sports betting, and the associated abuses of rigged sporting events. The attraction to engage in the black market for betting is rooted once again in profit derived from regulatory arbitrage. Illegal sports books typically offer better returns on the same event compared to a regulated parlour. As a consequence, governments lose tax revenue on the unaccounted for earnings, and legal bookmakers are submitted to the pressure of an unfair competitor who avoid significant costs of regulatory compliance. The findings report on the involvement of illegal betting operations in match-rigging, i.e. changing the result of a sports competition by threat or payment to players, team management or officials, to secure a pre-ordained result (Sorbonne-ICCS, 2014). When bookmakers

know the final outcome in advance they can influence the odds and maximize profit for organized criminal networks.

## Understanding the broader challenges

### *The convergence of market sectors creates a global threat*

Organized criminal groups in past tended to manage a fairly limited range of illegal goods and services that could be procured and delivered locally: e.g. stolen merchandise, extortion, prostitution and illegal bookmaking. There are many historical examples of smuggling prohibited goods across international borders and through long distance supply chains, but crime as an industry seems to have transformed in the 1970's with the steep increase of international trade in illegal narcotics. The mastery of smuggling networks enabled previously parochial organizations to expand and enter a broad range of illicit markets, converging several forms of trafficking into full range service. Convergence is seen in more than 30% of organized crime groups active in Europe are involved in more than one type of crime (Europol, 2014). If the trafficking route is functioning without detection and can accommodate different classes of products, the opportunity to maximize benefits is a rationale to move all types of contraband.

While the analysis presented in this report highlights examples of criminal networks and their involvement in different illicit markets. Trafficking in persons have been linked, for example, to drug trafficking, illegal and undeclared fishing, environmental crimes, arms trafficking, maritime piracy, and tobacco smuggling. A convergence of trafficking in people and illegal drugs is observed due not only to risk optimisation, but also because drug dependencies create victim who are easy to target. Transnational marine resources crimes have been observed to be connected to trafficking in persons again due to convenience, i.e. the ease of abusing fishing vessels for multiple criminal purposes. Law enforcement agencies have found that the same distribution chains for trafficking in counterfeit tobacco are at times used for counterfeit pharmaceuticals and counterfeit currency, and that the proceeds of trafficking in tobacco have been used for the training of terrorist cells. An important observation in the analysis of the report is the link between terrorist organisations and the illicit trade in tobacco products, wildlife trafficking and counterfeit household goods. Connections between terrorist organisations and illicit markets in counterfeit medicines and alcohol are reportedly weaker.

Criminal networks have acquired a global outlook for new illicit markets. From their perspective national borders with prohibitive laws and regulations are market barriers that most people cannot navigate, which creates a business opportunity to meet a demand and earn a profit. Illicit networks depend on and benefit from the same technologies and innovations that help legal private industry navigate globalisation. They have been known to adopt the latest technology to commit crimes, such as cyber extortion (Financial Times 2013) and to communicate in business operations, such as recruiting, exchanging tools of the trade, and even to attract and communicate with new clients. Facilitators use social media tools linked to Facebook accounts to identify clients and connect them with secure payment systems for passage from Turkey to Greece (Cook, L., 2015, Euractiv, 2015).

This level of sophistication presents a substantial challenge to government law enforcement agencies and international institutions that are often unable to cooperate as rapidly as criminals can adapt their business practices to avoid identification. In addition



to their comparative agility, criminal enterprises are increasingly involved in one or many phases of illicit commerce (production, distribution, sale, purchase or barter, or transfer of proceeds), depending on the profits to be made. For example, most counterfeits sold in the European Union are still produced outside of it, however, evidence of coordination between criminal different criminal organisations in Europe shows a new pattern of cost effective production of counterfeit goods inside the European Union (Europol, 2015). Certainly this avoids most customs controls and enjoys lower transport costs.

### *The importance of known flows/hubs of illicit trade*

Hubs of illicit trade are generally classified as a source, transit point or destination. Each type of location plays an important role in illicit markets, but a location does not always fit just one classification. As many goods in a global economy, production may take place in several phases along a value chain. Furthermore, the destination points are not only a location for consumption, but illegal financial transactions to keep the wheels of the industries turning. If the producers and movers of prohibited products are not paid, then future supply will stop. The most obvious supply side and demand side policy measures to reduce or deter illicit trade apply only to first source or final destination countries, for example burning crops on the supply side or consumer education and rehabilitation on the demand side. Depending on the product, however, transit hub points are the most challenging link in the supply chain to impact with public policy.

Numerous locations possess the characteristics that appeal to criminal enterprises as transit hubs to move products from source countries to consumer markets. The ideal qualities sought are a developed infrastructure to accommodate international trade such as large ports or airports and weak governance (i.e. official corruption, incomplete or weak legislation, non-transparent financial institutions) unfavourable economic conditions, and weak law enforcement capacity (lack of respect for the rule of law in society, and poorly guarded national borders). Such conditions enable traffickers to operate "under the radar" as law enforcement perceives more pressing priorities. The analysis provides examples of such places based on the extensive secondary literature. To create a centre for operations, illicit networks only need one jurisdiction to lower its guard in the enforcement of its laws. Several weak or failed States lack the will or capacity to prevent international trafficking of prohibited goods. Some countries have been accused with more than lacking capacity or negligence, but are rather complicit in allowing their territory to be used as a transit point (Nahim, 2011).

The raw materials used to produce some of the most profitable prohibited goods can only be efficiently mass produced in specific climates, such as coca leaf or the opium poppy. The leading source countries for coca leaf are all located in South America: Plurinational State of Bolivia (hereafter "Bolivia"), Colombia, Ecuador and Peru. One characteristic common among all of the world's major opium- and coca-producing states are that they are either ravaged by conflict, unable to control their entire territory, or experiencing varying degrees of political instability. These routes and hubs obviously facilitate the illicit flow of many different commodities as well, including narcotics but also contraband such as weapons and humans.

The law enforcement community has called for increased attention to the flows, routes and hubs along which trafficking organisations operate and illegal goods are smuggled and trafficked. Specific trading routes across countries change quickly to avoid detection by law enforcement, and there is a need to develop faster information exchange

to identify hubs, routes and hotspots so that law enforcement is not constantly outmanoeuvred.

## Conclusion

Illicit trade is a global risk with roots in the diverging prohibitions of many countries. These divergences are legal in the first instance, but underneath this formalistic view are differences in capacity to enforce laws, poverty traps that create economic pressures to look for any source of income, and sometimes fundamentally different mores. The effort to reduce or deter illicit trade involves complex and sometimes competing issues of public policy, such as deterring the consumption of certain goods while protecting economic, human and social objectives. International dialogue to build the understanding of these issues is a necessary step toward solving this major global challenge.

The first step is to understand the types of illegal markets, the trafficking routes used, and the methods that criminal entrepreneurs employ. Countries can learn from each other's successes by studying the methods used to identify suspicious activity and the commercial means abused to make illicit trade possible, whether in transport, money laundering or corruption. Criminal organisations are sophisticated analysts of legal regimes and regulations, and are constantly on the look-out for arbitrage opportunities. Taking the profit out of crime and exposing its financiers and masterminds is the key to dismantling the networks that form its operational backbone.

Successful disruption of illicit trade requires concerted, multi-stakeholder efforts at national and international level. This includes law enforcement, both domestically and internationally. Due to its impact on revenue collection, this is an area of high relevance for customs authorities. Countries could strengthen their efforts to enhance the availability of seizure information through input into the WCO CEN database, and support similar initiatives that would enhance the work of customs officials, such as the Enforcement Database of the European Observatory for the Harmonisation of the Internal Market.

Combating illicit trade at national level is a shared responsibility which requires a whole of society approach involving, relevant government agencies, the manufacturers and distributors of impacted industries, consumers and the general public. Governments have to create the appropriate environment for the participation of all concerned partners. Similarly, cooperation and collaboration is needed between the various government agencies such as the customs, police and regulatory bodies for impacted industries. For example, the United States has established an inter-departmental group on illicit trade in tobacco drawing on experts in taxation, health regulations, intellectual property, customs, diplomatic efforts, counter-terrorism, transnational organised crime, postal systems and inspectors, prosecutors and traditional law enforcement personnel.

A multi-stakeholder effort also leverages the expertise of companies that have business and reputational risks at stake when their products are counterfeited. Federating the efforts of multi-nationals and NGOs with extensive data on the volumes, flows, sources and destinations of illicit goods could play a stronger role in contributing data to support the research and mapping efforts of international organisations.

The OECD has created a platform for knowledge sharing and for identifying good practices, through the Task Force on Charting Illicit Trade (<http://www.oecd-tfcit.org/index.html>). It has also attempted to federate the efforts of international

organisations and NGOs with extensive data on the volumes, flows, sources and destinations of illicit goods. Making these data bases accessible for public research and public policy objectives would further strengthen the overall objective of mapping trafficking routes, and hubs of illicit trade, which is useful to target capacity building in law enforcement and good governance.

Mapping the financial flows emanating from illicit trade has wider implications related to the global development agenda. Illegal transfers of money and capital out of developing countries strip domestic resources that need to be mobilized locally to finance public services. “The most immediate impact of illicit financial flows is a reduction in domestic expenditure and investment, both public and private. This means fewer hospitals and schools, fewer police officers on the street, fewer roads and bridges.” Identifying the structure of the financial and trade systems that are abused to abet capital flight would help to develop policies to tighten loopholes, and establish red flag indicators prior to the infiltration of the financial sectors by criminal proceeds.

Criminal penalties against various forms of illicit trade are relatively weak, and encourage criminal organisations to diversify their activities. In many unregulated countries (with no specific regulation and no quality control for pharmaceutical products) there is also a lack of legislative and executive powers to prosecute pharmaceutical criminality i.e. the legal impact of counterfeiting pharmaceuticals is comparable to counterfeiting other mass-market goods. Initiatives such as the Medicrime convention treat the counterfeiting of medicines as criminal fraud against ill people, the most vulnerable of our societies, and the undermining of the public trust in the capacity of governments to provide effective health services.

One of the obstacles to preventing or combatting illicit trade is the gaps in international cooperation, reflecting a “prisoner’s dilemma”, with a collective incapacity to take on the necessary collective action. While a number of international initiatives have been established, there is scope for further improving cooperation among public authorities with responsibility for the detection, arrest and prosecution of traffickers. These cases often require coordination between law enforcement authorities that are separate administrative bodies, and entail the gathering of evidence from affected individuals and companies. Regional agreements and internationally agreed principals on mutual police assistance, extraditions and the sharing of evidence, such as those set forth by the G7 Roma-Lyon Group, should be made mandatory and monitored by an international organisation for their implementation.

## Notes

<sup>1</sup> See Council Recommendation on the Governance of Critical Risks, p.6, Principle 3.2.i

<sup>2</sup> Annotations added by the author in italics.

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## Chapter 2

### Trafficking in persons: Trends and patterns

By Kristina Kangaspunta\* and Andy Guth\*\*

*It is estimated that thousands of people have lost their lives attempting to migrate to Europe in 2015. The migrant crisis has drawn unprecedented attention to the dangers of human smuggling, but it has done little to improve understanding that the crimes of “human trafficking” and “smuggling of migrants” are distinct forms of organized crime. Smuggling is a crime against the state, involving facilitation of illegal crossing of borders for a fee. Trafficking is a crime against a person, involving the ongoing exploitation of another human being in forced labour or forced prostitution.*

*This chapter provides aggregate information about the profiles of trafficked persons worldwide, the numbers of persons trafficked, where they come from and where they go, some of the most oft cited estimates about the market value of trafficked persons. The social harms of this criminal activity are readily apparent, thus the chapter outlines some of the economic harms to source and destination countries.*

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The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

The hidden character of human trafficking makes it difficult to accurately measure its volume and value on a global scale. Various methodologies have provided a range of figures, but some of the most widely accepted estimates and respected methodologies come from the International Labor Organization (ILO).

The ILO contends that approximately 20.9 million people are victims of forced labour in recent years. This number does not include trafficking for the removal of organs, forced marriage or forced adoption, unless these subsequently lead to forced labour. The United Nations Office on Drugs and Crime (UNODC, 2012) contends that 0.3% of human trafficking occurs for the purpose of organ removal. On the basis of these two figures, it is estimated that approximately 21 million people are the victims of trafficking at any given moment. Women and girls make up 11.4 million (55%) of those in forced labour, while men and boys make up 9.5 million (45%). Adults make up 15.4 million (74%) of forced labour, while children under the age of 18 make up 5.5 million (26%) (ILO, 2012).

The ILO contends that approximately USD 150 billion in profits are generated annually from these 20.9 million people (ILO, 2015).

## Defining trafficking in persons

The United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, aims to prevent and combat trafficking in persons, to protect and assist victims and to promote international co-operation to prevent trafficking. It defines trafficking in persons as follows:

- a) *“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*
- b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*
- c) *The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.*
- d) *“Child” shall mean any person under 18 years of age (United Nations, 2004).*

The above definition suggests three constituent elements:

- The *act* (what is done)
  - Recruitment, transportation, transfer, harbouring or receipt of persons.



- The *means* (how it is done)
  - Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.
- The *purpose* (why it is done)
  - For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs (UNODC, 2008).

It is often difficult to draw the line between trafficking in persons and other instances of irregular migration, particularly when people are moving to find better living conditions. Confusion is particularly common between trafficking in persons and the smuggling of migrants. Even though there are grey areas in which it is difficult to define a situation unambiguously as trafficking, there is an important distinction between trafficking and smuggling of migrants and their implications.

The United Nations' Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, aims to prevent and combat the smuggling of migrants, protect the rights of smuggled migrants and promote international co-operation to prevent smuggling. It defines smuggling of migrants as follows:

*“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (United Nations, 2004).*

The main differences in the definitions of trafficking in persons and smuggling of migrants concern the issues of consent, border crossing, exploitation and source of profit.

- Consent: While smuggled migrants generally consent to being smuggled, trafficking victims have either never consented or, if they initially gave their consent, it is rendered meaningless by the traffickers' actions.
- Border crossing: Smuggling facilitates a migrant's illegal border crossing and entry into another country. Trafficking in persons does not require a border crossing and may or may not involve crossing a border. Trafficking in persons may occur within the borders of one country or across borders, from one country to another. The legality or illegality of the border crossing is irrelevant in the trafficking of persons.
- Exploitation: The relationship between the smuggler and smuggled migrant usually ends after the border crossing; the smuggler does not intend to exploit the smuggled person after arriving at the destination. Trafficking always involves continued exploitation of victims after arrival at their destination.
- Source of profit: Smugglers generate their profits from the fees for moving people. Traffickers profit through the exploitation of the victim.

While it can be difficult to distinguish between human trafficking and human smuggling, the consequences of mistakenly identifying a victim of trafficking as a

smuggled migrant often prevents the trafficked person from being treated in a way that respects victims' rights for support and protection (Kangaspunta, 2011).

### ***Different types of trafficking in persons***

Information on trafficking cases and victims is largely gathered by police or other authorities, NGO workers or other service providers, or is detected by researchers or the media. Many cases presumably go unreported, limiting the available data to the few cases that do come to light.

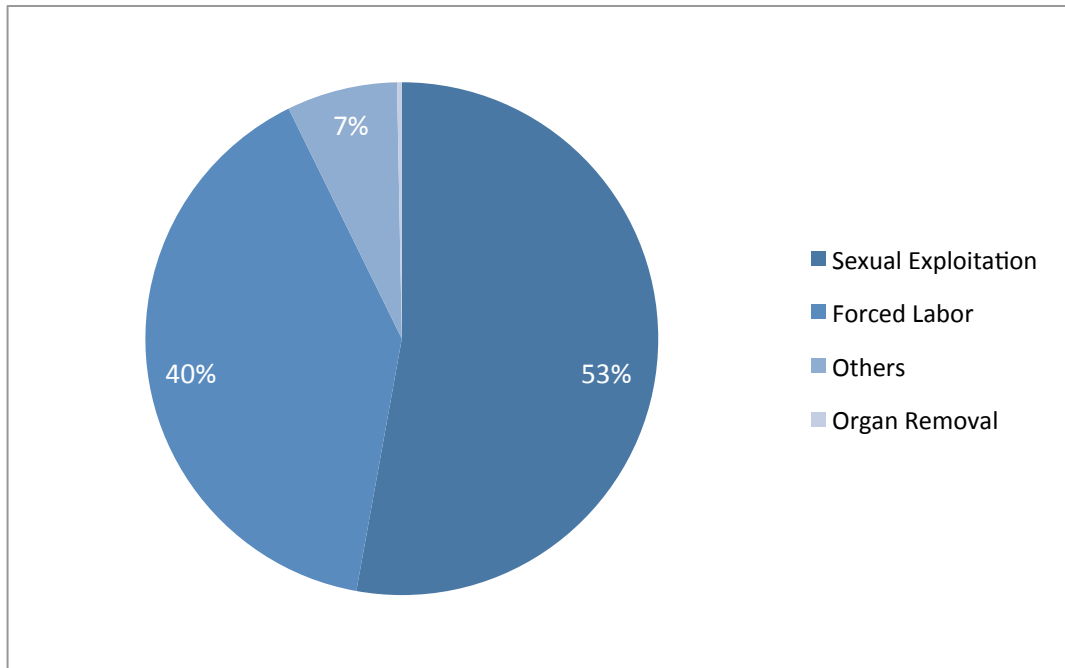
Trafficking in persons is categorised under various criteria, e.g. form of exploitation, victim profiles and the countries involved (Smith and Kangaspunta, 2011).

#### *a. Form of exploitation*

Trafficked victims are typically exploited sexually or through forced labour. Once again, it is important to note that the covert nature of human trafficking makes it difficult to provide reliable estimates. Ideally, various methodologies would produce similar results, but this is often not the case (Dank et al., 2014). For example, the ILO and UNODC produce different estimates as a result of using different sources of data. The UNODC focuses on government reports and government reporting, and the ILO focuses first on media reports, but also includes reports from (in decreasing order of frequency) NGOs, governments, international organisations, academia, the ILO, trade unions and employer organisations (UNODC, 2014).

The ILO estimates that of the 20.9 million people in forced labour, 18.7 million (90%) are exploited by private entities. Of the 18.7 million exploited by private entities, 4.5 million (22%) are sexually exploited and 14.2 million (68%) are exploited in other forced labour activities (e.g. agriculture, domestic work and manufacturing industries). The other 2.2 million (10%) are exploited by a state or political entity whose living and or working conditions the ILO deems substandard. These include certain work prisons, forced state military work or forced work with rebel groups (ILO, 2012).

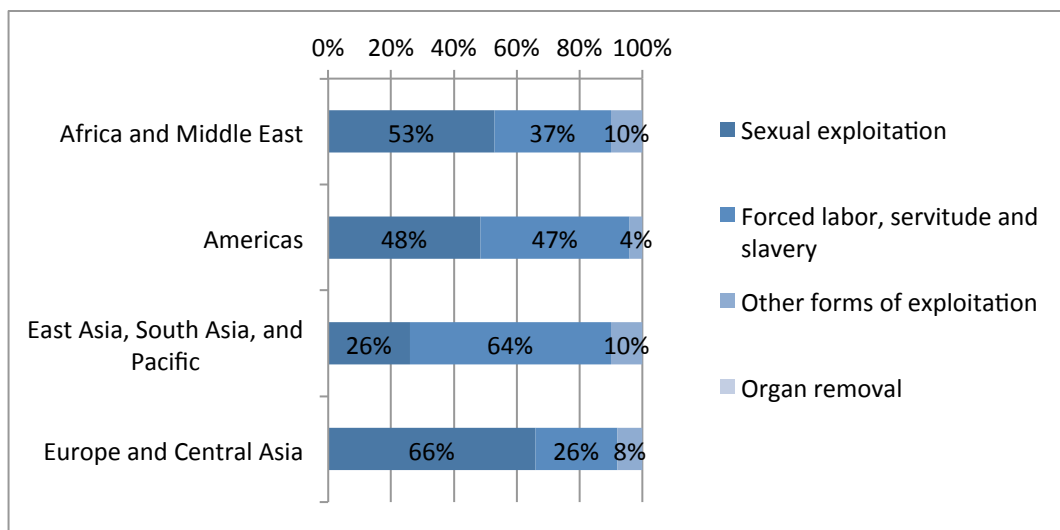
The UNODC estimates that 53% of detected trafficked victims are sexually exploited, while 40% are exploited in forced labour activities. However, it also contends that the percentage of reported forced labour trafficking cases is trending up, rising from 32% of reported trafficking cases in 2007 to 40% in 2011 (UNODC, 2014).

**Figure 2.1. Forms of exploitation among all detected trafficking victims worldwide (2011)**

Source: UNODC (2012), *Global Report on Trafficking in Persons 2012*, United Nations, New York, [www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

In addition to sexual exploitation, forced labour and organ removal, ten other forms of trafficking are often differentiated and reported by national authorities. These include trafficking for: mixed exploitation in forced labour and sexual exploitation; committing crimes; begging; pornography (including internet pornography); forced marriages; benefit fraud; sale of infants or children; illegal adoption; armed combat; and for rituals (UNODC, 2014).

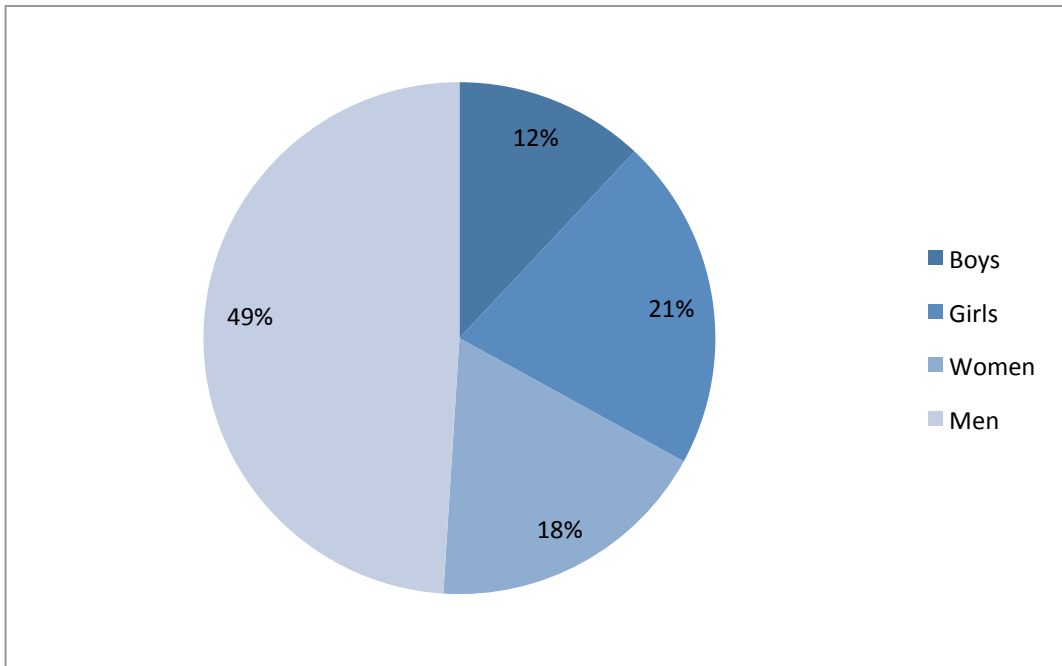
The percentages of different types of trafficking vary by region and by percentage of child exploitation.

**Figure 2.2. Forms of exploitation among detected trafficking victims, by region (2010-2012 or more recent)**

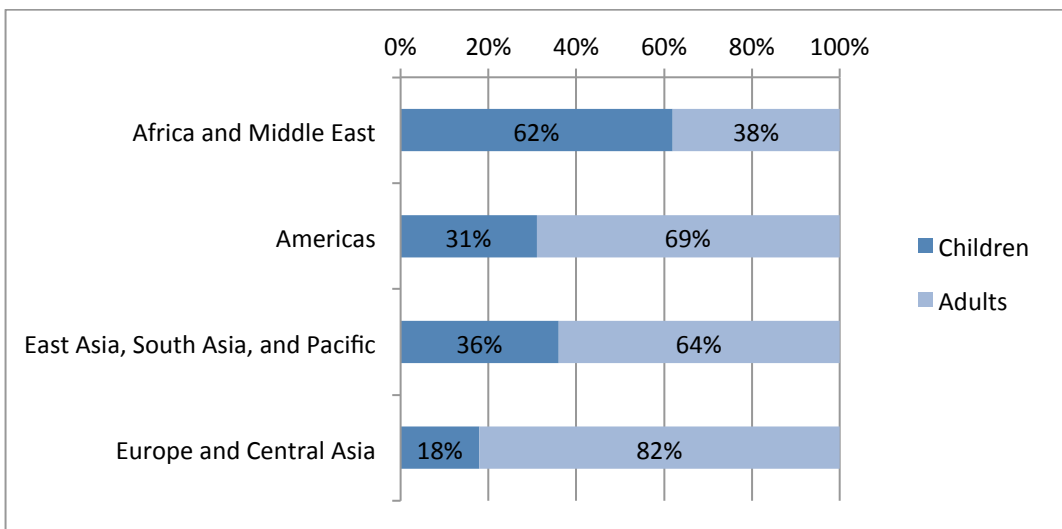
Source: UNODC (2012), *Global Report on Trafficking in Persons 2012*, United Nations, New York, p.34, [www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

### b. Profile of victims

The gender and age of victims is often used to categorise human trafficking (e.g. trafficking in women, men or children). The most frequently detected group of trafficking victims is adult women. While the global percentage for this group has dropped, it is being overtaken by trafficking in girls under the age of 18 (UNODC, 2014). Note: the figure below, based on UNODC data, illustrates a significant difference with ILO data in terms of the proportion of women trafficked to men. The ILO contends that the proportions are closer to 55% women and girls and 45% men and boys, as opposed to the 70% of women and girls and 30% of men and boys shown below (ILO, 2012).

**Figure 2.3. Gender and age profile of trafficking victims detected globally (2011)**

Source: UNODC (2012), *Global Report on Trafficking in Persons 2012*, New York, p.29  
[www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

**Figure 2.4. Percentages of children and adults among the detected victims of trafficking in persons, (2010-2012)**

Source: UNODC (2012), *Global Report on Trafficking in Persons 2012*. United Nations, New York, p.31  
[http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

Trafficking in men is often not detected as frequently as trafficking in women, and men are often treated differently from their female counterparts. In recent years, however,

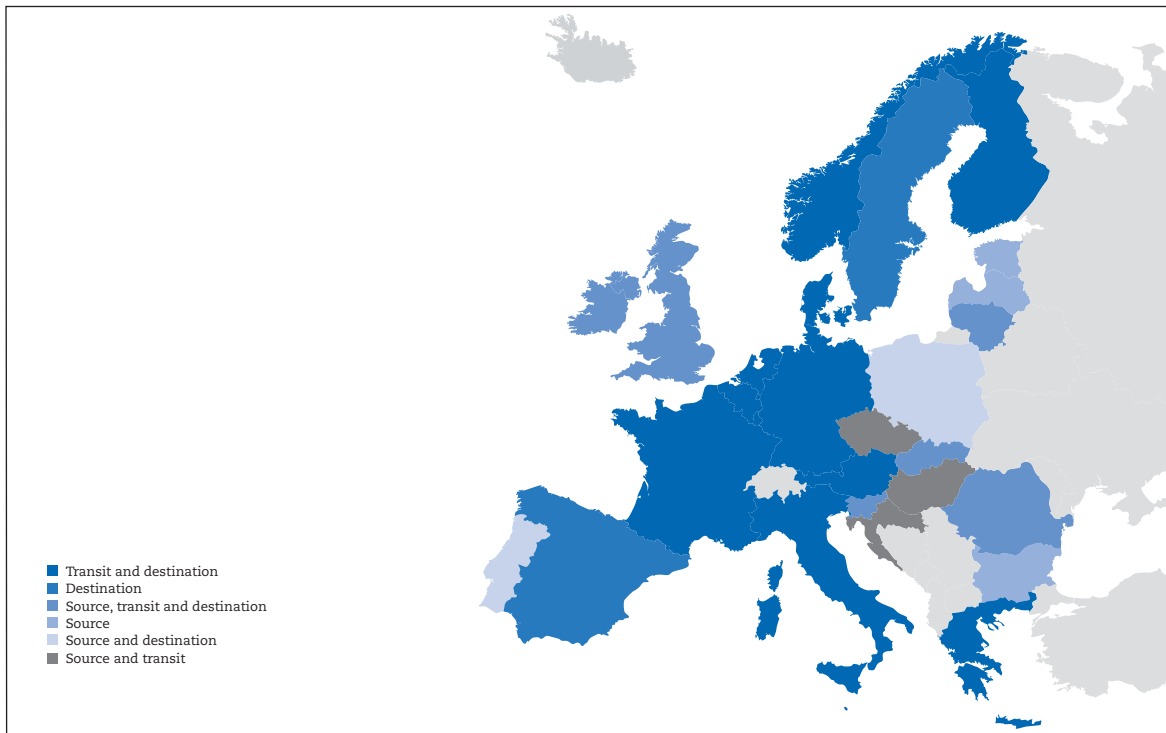
a greater number of male trafficking cases have been detected, suggesting a possible increase in the knowledge of trafficking by those likely to uncover it (e.g. police, NGO workers, investigative reporters) (Zingerle and Dzhamalis, 2014).

*c. Type of countries*

Trafficking in persons is also categorised by country (e.g. origin, transit and/or destination country). Each of these categories may be present in most countries, although the distribution in the trafficking flows varies by country (U.S. Department of State, 2014).

In a 2012 Eurojust report, countries were asked whether they consider themselves an origin, transit or destination country. Few countries considered themselves to represent only one type of trafficking, and the majority identified themselves as a combination of different types. Most considered themselves transit and or destination countries, few considering themselves origin countries.

**Figure 2.5. Map of selected European countries and territories indicating whether they are predominantly a location of origin, transit or destination of human trafficking**



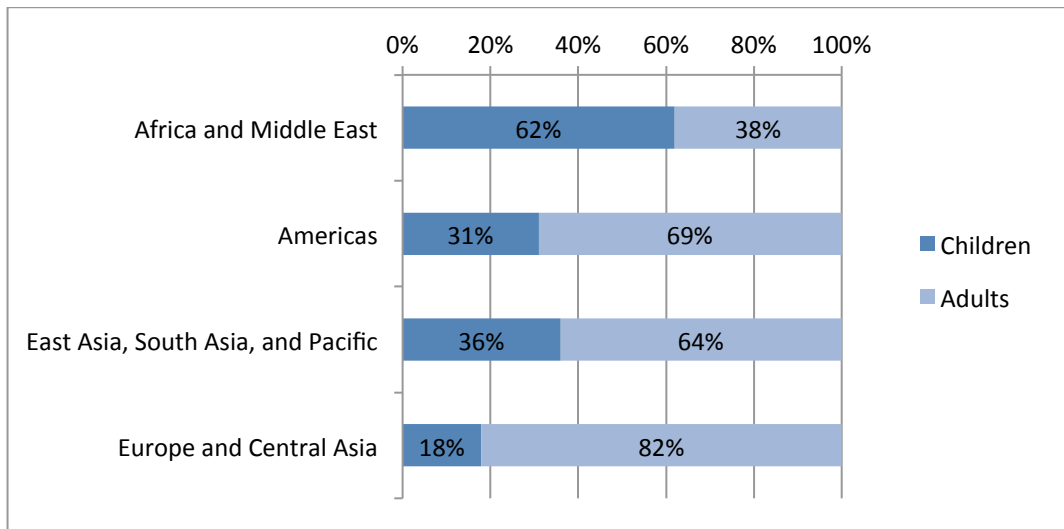
Source: Eurojust (2012), *Strategic Project on Eurojust's Action against Trafficking in Human Beings*, October, [www.eurojust.europa.eu/doclibrary/Eurojustframework/Casework/Eurojust%20action%20against%20trafficking%20in%20human%20beings%20\(October%202012\)/THB-report-2012-10-18-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojustframework/Casework/Eurojust%20action%20against%20trafficking%20in%20human%20beings%20(October%202012)/THB-report-2012-10-18-EN.pdf).

## Flows and hubs of trafficking in persons

Trafficking victims of 152 nationalities were detected in 124 countries worldwide from 2010 to 2012. During the same period, at least 510 distinct trafficking flows were identified. Trafficking “flows” are defined as groups of at least five detected victims being transported from one origin country to one destination country. They also include domestic trafficking, in which the origin and destination country are the same (UNODC, 2014).

Trafficked persons tend to flow from poorer regions to richer regions and from conflict regions to more stable regions. This holds true with domestic, intra-regional and trans-regional trafficking. Given the increased complexity of trafficking individuals trans-regionally (e.g. international transportation, local transportation, lodging and supervision), the majority of trafficked cases tend to occur locally, i.e. domestically or within the same sub-region. Approximately 66% of all detected victims are trafficked across borders (UNODC, 2014). However, cross-border trafficking involves more choke points (e.g. airports, seaports, border checkpoints), which make it easier to detect trafficking cases. These numbers must be interpreted with caution, since detecting domestic trafficking cases is often more difficult.

**Figure 2.6. Breakdown of trafficking flows by geographical reach (2010-2012 or more recent)**



Source: UNODC, *Global Report on Trafficking in Persons 2012*, United Nations, New York, p.29 [www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

Regional differences are significant. On the one hand, in East Asia and the Pacific, Eastern Europe and Central Asia, South Asia, sub-Saharan Africa and South America, between 94%-99% of the detected victims originate from within their respective region or country (1%-6% originate from outside their respective regions). In North America, Central America and the Caribbean as well as Western and Central Europe between 58%-61% of detected victims originate from within their respective sub-region or country (39%-42% originate from outside their respective sub-region). Only in the sub-regions of North Africa and the Middle East do fewer detected victims originate from within the

sub-region compared to outside the region. In these regions, 32% of all detected victims originate from within, while 68% originate from outside the sub-region (UNODC, 2014).

According to the United Nations data, the Middle East is largely a destination region, with more inbound trafficking than any other region in the world. The Middle East and North Africa have also become an important source of victims of human smuggling and trafficking since the violence that followed the Arab Spring. East Asia (especially Southeast Asia) is largely the source region, with victims detected in more countries worldwide than any other region. Other major source regions include South Asia, sub-Saharan Africa and South America (UNODC, 2014).

Eastern Europe and Central Asia are also large source regions, but, unlike East Asia, whose victims are often found worldwide, victims from Eastern Europe and Central Asia are typically found within the broader region of Europe and Central Asia. This suggests that Eastern Europe and Central Asia are significant source regions for Western Europe (UNODC, 2014).

The most frequently mentioned source countries in Europe by other European countries are listed in Table 2.1:

**Table 2.1. Most frequently mentioned source countries of trafficking victims in selected European countries**

Country	Times mentioned
Romania	16
Nigeria	13
Bulgaria	9
China (People's Republic of)	8
Ukraine	7
Russia	6
Brazil	4
Viet Nam	4
Albania	3
Thailand	3
Hungary	3
Belarus	3
Estonia	3

Source: Eurojust (2012), *Strategic Project on Eurojust's Action against Trafficking in Human Beings*, [www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Eurojust action against trafficking in human beings \(October 2012\)/THB-report-2012-10-18-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Eurojust%20action%20against%20trafficking%20in%20human%20beings%20(October%202012)/THB-report-2012-10-18-EN.pdf).

Table 2.1 gives only a partial picture of the situation in Europe today. Many source countries for Europe are former European colonies (e.g. Morocco and Algeria in North Africa; Brazil, the Dominican Republic and Columbia in Latin America). The Arab Spring also increased migration flows from North Africa to Western Europe, as many sub-Saharan Africans working in North Africa began to leave for Europe (Shelley, 2014).

Europe's main sources of child trafficking are Eastern Europe, North Africa and Asia, while others are trafficked from the Middle East and the Indian subcontinent through Turkey and the Balkans (UNICEF and Innocenti Research Centre, 2008). South America is not a major source of child trafficking to Europe. This is likely to be due to the distance



and difficulty of trans-regional logistics across oceans and additional choke points of detection, by comparison with domestic and sub-regional distances and detection points.

### Consequences of human trafficking

The covert nature of human trafficking makes it difficult to assess the full impact it has on society (Dixon, 2008). Its consequences and costs emerge at the individual, community, national, regional and global levels. It affects source, transit and destination countries; democratic, transitional and authoritarian regimes; and countries in conflict. Trafficking undermines states' control over their borders and over who lives in their country (Shelley, 2010).

The economic and labour consequences in destination countries include depressed salaries; poor working conditions; increased work injuries; economic development based on trafficking (e.g. sex tourism); increased income inequality; an expansion of the illicit economy; a drain on the resources used for prevention, prosecution and punishment of offenders and treatment and support of victims; diversion of the economic benefits of the victims' labour from them and their families, communities and governments to criminals and corrupt officials; loss of remittances to the source country; reduced foreign investment; and so on (Dixon, 2008).

Macro-economic trends appear to affect human trafficking. In many countries, a correlation has been observed between a rise in unemployment in a given country and the number of reports about victims of human trafficking from those countries. The worsening economy in Russia has been accompanied by an increase in trafficking from Central Asia, as well as the departure of migrants back to their source countries. Other studies found that a decrease in unemployment rates in Russia and the Ukraine was correlated with a reduction in the number of Russian and Ukrainian victims detected in the Netherlands. The same correlation was found in relation to a decrease in Thailand's unemployment rate and a decrease in Thai victims detected in Germany, as well as a decrease in Indonesia's unemployment rate and a decrease in the number of Indonesian victims detected in Japan. An increase in Russia's GDP per capita was correlated with a decrease in Russian victims detected in Germany. The same correlation was found in relation to Lithuanian GDP per capita and the detection of Lithuanian victims in Germany. Finally, an increase in unemployment rates in Hungary was correlated with an increase in Hungarian victims detected in the Netherlands. The same correlation was found in relation to an increase in the unemployment rate in Bulgaria and an increase in Bulgarian victims detected in the Netherlands (UNODC, 2012).

Individual consequences include physical and psychological abuse and scarring; death; torture; education foregone at a crucial age; inability to fully function in society as an adult; inability to marry and/or have children; stigmatisation by the community; increased debt; disease; forced marriage; suicide; food and sleep deprivation; and being forced to kill family members (Shelley, 2014).

Family consequences include traumatised family members of victims; familial bonds broken due to family members trafficking other family members; and financial losses to smugglers who betrayed the victims and their families (Shelley, 2014).

Social consequences include increased discrimination against members of ethnic minorities trafficked into a new society; increased violence due to discrimination; loss of child-bearing women and young men; abduction of children as soldiers; medical expenses

paid by the state; and introduction of counterfeit goods into the licit economy (Shelley, 2014).

Political consequences include undermining of the rule of law; increased corruption that facilitates the trafficking; providing funds to warring parties, which increases conflict; decreased stability; national security threats; reduction in human rights and freedoms; and funding insurgents and terrorists, which undermines political stability (Shelley, 2014).

Health consequences include death, illness and disease; hazardous work conditions; psychological damage; mental health issues; flashbacks; suicidal tendencies; drug addiction; unwanted pregnancies and forced abortions; broken and surgically removed limbs to increase income from begging; dehydration; and organ removal (WHO, 2013).

### **Convergence with different forms of trafficking and transnational organised crime**

Trafficking in persons is linked to multiple other crimes, such as kidnapping, fraud, document forgery, assault, rape, false imprisonment, breaking immigration and border laws, corruption of government officials, money laundering and tax evasion (Aronowitz, 2009).

Corruption contributes to all phases of trafficking. It aids recruitment by allowing traffickers to operate sham and unauthorised recruitment agencies. It facilitates transport and transfer by allowing traffickers to use fake documents, issuing visas to unqualified individuals, and evading inspections of vehicles, documents and people. It aids the harbouring and receipt of people by allowing traffickers to obtain fake work permits and birth certificates and to continue to operate businesses of exploitation (APEC, 2013).

Transnational organised crime groups involved in trafficking are organised in various ways. Some are large, pyramidal structures such as the Japanese Yakuza and other Asian groups, but most are decentralised structures with loose associations in which different groups specialise in particular areas. For example, some may specialise in recruitment, others in transport or forged documents. These various groups employ not only criminals, but formerly trafficked victims, to recruit others; military and law enforcement personnel and border guards for protection against arrest, help in maintaining the victims, and ease of transport; border guards, travel agents for ease in transport and communication between recruiters, transporters and receivers of victims; nightclub owners for the receipt, holding, display and sale of victims; judges, lawyers and government officials for protection against prosecution; doctors to attend to the victims' diseases, physical and sexual assaults and help them recover enough to become marketable again, lawyers, government officials and others. It is often difficult to detect how closely associated individuals are with a network, what level of knowledge they have about the operation, and in turn, whether they are technically part of the organised crime group. For example, some associations may involve long-term friendships, while others are one-time business transactions.

Criminal and terrorist organisations have diversified beyond the drug trade and into human trafficking. The two trades naturally intersect with each other, and drugs are used to recruit, retain and exploit victims. Victims may also be forced to act as drug couriers while then are being transported (Shelley, 2012).

Transnational organised crime groups have been observed to force victims onto fishing boats, where they are forced to perform other criminal acts, e.g. drug trafficking, human trafficking, weapons trafficking, acts of terrorism, illegal fishing, environmental crimes and so on (UNODC, 2011).

### Responses to trafficking in persons

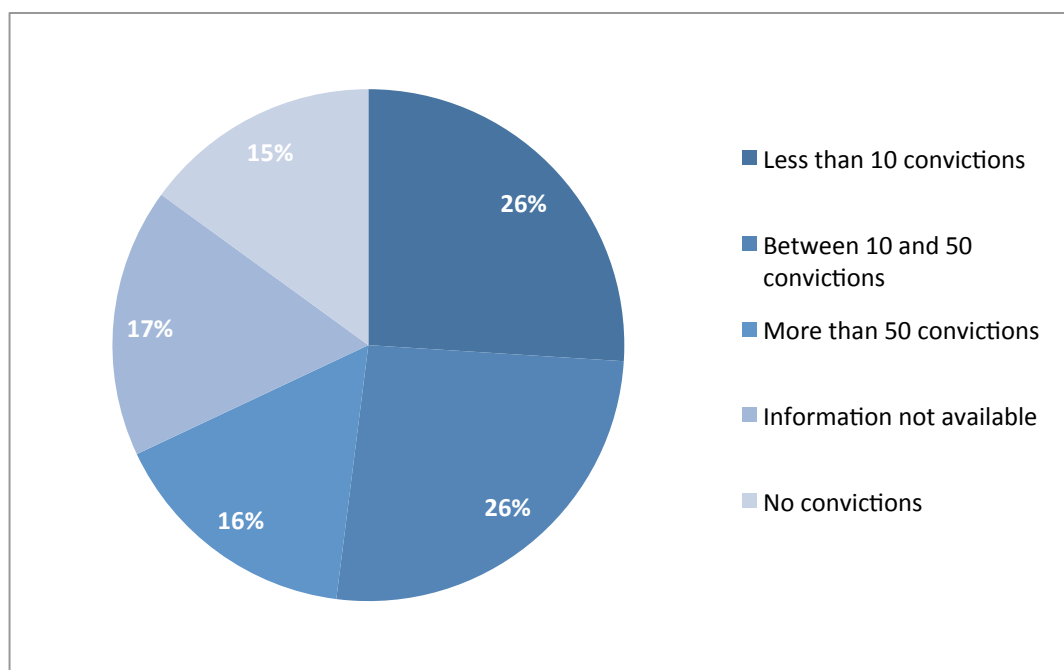
Prevention, protection and prosecution (or the 3P paradigm) serve as the basis of societies' response to trafficking in persons. The 3P Anti-trafficking Policy Index measures the 3P paradigm for 188 countries, using a 1-5 scale for each category (1 representing the lowest level of policy performance and 5 representing the highest). The overall scale then ranges from 1-15. In 2013, only two countries received a perfect score of 15, Spain and Poland. Conversely, the Syrian Arab Republic (hereafter "Syria") and the Democratic People's Republic of Korea received the lowest score of 1 for each of the three policy areas, for a total score of 3 (Cho, 2014).

North America, as well as Europe and Central Asia, taken together, are the most advanced regions in implementing the 3P paradigm, with average score of 12.67 and 11.79 respectively. Oceania, the Middle East and Africa are the worst-performing regions, with an average respective score of 7.36, 8.26 and 8.37 (Cho, 2014).

Legislative responses include countries that have adopted statutes that specifically criminalise trafficking in persons. Whereas in 2003, only 42% of countries worldwide had such a statute, by 2014, 95% of countries had criminalised human trafficking, of which 85% criminalised all aspects of trafficking, as specified in the UN Trafficking in Persons Protocol. Africa and the Middle East are the regions most in need of strengthening their legislation (United Nations, 2004).

The response of the criminal justice systems in the majority of countries has been a relatively consistent and discouraging trend of very low rates of conviction, especially given the apparent scale of the issue. Adequate legislation has not yet resulted in increased prosecution and conviction of traffickers (United Nations, 2004). Globally, the number of trafficking operators is not known but, it is estimated that on average, 45% of individuals investigated or suspected by law enforcement as being traffickers are prosecuted. Of that 45%, 53% are eventually convicted. In other words, the global first-instance conviction rate of traffickers is roughly 24%: about every 1 in 4 potential traffickers investigated is actually convicted (UNODC, 2014).

The Western and Central Europe region has a high first-instance prosecution and conviction rate, with about 60% of individuals investigated or suspected by law enforcement as being traffickers being prosecuted. Of that 60%, 50% are eventually convicted. In other words, Western and Central Europe's first-instance conviction rate of traffickers is about 30% or about 1 in 3. The Western Hemisphere has a first-instance prosecution rate of 25%. Of the 25% prosecuted, 40% are eventually convicted. In other words, the Western Hemisphere's first-instance conviction rate of traffickers is about 10% or about 1 in 10. The United Arab Emirates and Israel report similar first-instance conviction rates at around 40% (UNODC, 2014).

**Figure 2.7. Number of convictions recorded per year, percentage of countries/territories (2010-2012)**

Source: UNODC (2012), *Global Report on Trafficking in Persons 2012*, United Nations, New York, p.29, [www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf).

Demand responses focus on the demand from consumers, employers and business owners for cheap labour, cheap consumer goods and services, and sex services. Educating societies about the consequences of human trafficking and their connection to it helps expose the hidden nature of the activity and create an educated consumer and employer (ICAT, 2014).

## Conclusion

The consequences of trafficking in persons to the individual, community, national, regional and global levels are enormous. The adoption of legislation criminalising the trade has been successful in the past ten years; however, implementation of the laws to prevent, protect and prosecute offenders is lagging far behind. Greater focus and resources are needed to implement the laws. This often begins with addressing the issue of corruption. There are strong connections between trafficking in persons and various other crimes, in particular the links with organised criminal groups and corrupt government employees.

## Annex 2.1<sup>1</sup>

### Methodology on measuring the underground commercial sex economy

Three different international organizations gather data on the number of trafficked persons but little research has been conducted to estimate the economic value of human trafficking. There is a gap in current research concerning the valuation of human trafficking markets around the world, which if filled, would benefit policy-makers in making informed decisions to counteract trafficking in persons. The ILO appraisal of 2.5 million trafficked labourers led to an estimate of USD 31.6 billion in global profits from human trafficking. Although this tentative estimate already shed some light on the scale of this illicit activity the results of the study have become outdated; the estimation of 2.5 million people trafficked around the world dates back to 2005. Various other efforts to estimate the economic value of human trafficking do not clearly state their calculation methodology or rely heavily on anecdotal evidence to derive their economic valuation.

Due to the above mentioned lack of empirical measures, the Urban Institute developed a rigorous approach to help evaluate the value of a major market segment in human trafficking- the underground commercial sex industry (Dank, M. et al. 2014). Unlike other approaches to estimating illegal activities, the methodology does not depend on prevalence estimates. The research design appraises the size of the underground commercial sex economy in seven major urban areas of the United States using qualitative as well as quantitative data. Data sources for their report include individual interviews with all stakeholders involved in the illicit activities (law enforcement agencies, convicted sex traffickers and sex workers) and eight different national datasets. Seven cities were chosen: Atlanta, Dallas, Denver, Miami, San Diego, Seattle and Washington DC, based on such factors as size, number of convictions of human trafficking, expert recommendations, existence of a federally funded human trafficking task force, cooperativeness of local law enforcement institutions, availability of data, geographic location and reputation for holding « pimp circuits ». Two time periods were chosen (2003 and 2007). The time periods were chosen to maximize the number of computable proxy ratios of collected sex industry data.

The assumption behind this methodology is that sufficient relative information describing illegal markets across time and regions can give indications about the absolute value of the market. For that, proxy variables that linearly capture the extent of illegal activities are collected in order to provide enough relative information to infer absolute sizes. Formally this is done by setting up a simultaneous linear system of equations along with additional constraint equations that describe relative relationships of illegal markets across time and regions. Eventually, a unique solution for the monetary value of the illegal industry is determined by minimizing discrepancies over the feasible set of solutions.

At first, a “Law of Cash Conservation” is postulated which describes the position of fiat money within dynamically stable systems over finite time intervals. Equation (1) formally states this “Law of Cash Conservation”:

$$z(c, t) = s(c, t) + d(c, t) + w(c, t) + o(c, t) \quad (1)$$

This equation holds for a given closed region and a defined time interval. It states that the total value of all cash exchanged ( $z(c, t)$ ) as part of commercial transactions for region  $c$  and time  $t$  equals all the total cash exchanged towards the purchase of underground commercial sex ( $s(c, t)$ ), drugs ( $d(c, t)$ ), guns ( $g(c, t)$ ) and all other exchanges of cash for goods and services ( $o(c, t)$ ) in region  $c$  and time  $t$ . This tautological statement implies that all cash flows can be unambiguously characterized to either one of the four proposed categories and that they are in a state of dynamic equilibrium within region  $c$  and during  $[t, t + \delta)$ . The monetary size of each sector is described by  $s$ ,  $d$ ,  $w$  and  $o$ .

Applied to  $n$  regions and  $m$  time intervals, this conservation law yields  $L(n, m)$ , a simultaneous linear system of equations that describes underground the sex, drug and weapons economies in  $n$  disjoint regions and  $m$  disjoint time intervals.

$$L(n, m) \stackrel{\text{def}}{=} \{ z(c_i, t_j) = s(c_i, t_j) + d(c_i, t_j) + w(c_i, t_j) + o(c_i, t_j) | i = 0, 1, \dots, n - 1; j = 0, 1, \dots, m - 1 \} \quad (2)$$

Notably,  $nm$  linear equations cannot uniquely determine  $5nm$  unknown variables; the system is underspecified and therefore needs additional constraints to uniquely determine the variables that describe the illegal sex, drug and weapons economy sizes. This is where proxies for the sex, drugs, weapons and total industry are used to serve as additional constraints for the linear programme. Additional constraints are specified as proxy ratios across two geographical regions and two time periods. The construction of cross-city and cross-time proxy ratios which serve as additional constraints relies on the assumption that there exists a linear relationship between the proxy and the real variable. For instance, it means for the sex industry, where  $s^*(c_i, t_j)$  represents the proxy variable:

$$\frac{s^*(c_i, t_j)}{s^*(c_j, t_k)} \approx \frac{s(c_i, t_j)}{s(c_j, t_k)} \text{ and } \frac{s^*(c_i, t_j)}{s^*(c_h, t_j)} \approx \frac{s(c_i, t_j)}{s(c_h, t_k)} \quad (3)$$

#### Linear Proxy $s^*(c_i, t_j)$ :

The suggested proxy for the size of the underground sex industry is defined as the mean weekly gross cash intake per pimp:

$$s^*(c_j, t_j) \stackrel{\text{def}}{=} I(c_j, t_j) \times G(c_j) \quad (4)$$

109 interviews with convicted pimps and sex workers were conducted to quantify  $I(c_j, t_j)$ , the mean weekly gross cash intake per pimp in region  $c$  and time  $t$ . Surveyed participants working in the underground sex industry were denoted  $p_k$ . The estimation of pimp size in a specific region,  $G(c_j)$ , is less straight-forward considering that extrapolating the percentage of surveyed pimps and sex workers that have worked or deemed region  $c_i$  as “home-city” to the whole city captures two biases; one pertaining to the effectiveness of law enforcement and the other associated with costs of travelling when working in other cities. To control this enforcement and distance related biases Newton’s Gravity Model is applied on the survey data to estimate  $G(c_j)$ . This implies that sex workers are attracted to work in a city other than their “home-city” depending on their own willingness, the “mass” of the city  $c_i$  and the distance between city  $c_i$  and “home”. The sex workers willingness to work in multiple cities is defined as  $M(p_k)$ . The “mass” of the city  $c_i$  is the city’s ability to attract sex workers and therefore can act as a proxy for

pimp size,  $G(c_j)$ . It is denoted as  $M(c_i)$ . According to the Gravity Model, this attraction to work in a “non-home” city,  $A_{ik}$ , is defined as follows:

$$A_{ik} \propto \frac{M(p_k) \times M(c_i)}{d(h(p_k), c_i)^\lambda} \quad (5)$$

The attraction force between sex worker participant  $p_k$  and city  $c_i$  is proportional to  $M(p_k)$  and  $M(c_i)$  and is inversely proportional to the inter-city distances,  $d(h(p_k), c_i)$ . The propensity of pimps to work in multiple cities is measured as the absolute number of non-home cities that a participant has worked in which is identified from survey data. The authors seek to estimate  $M(c_i)$  through a standard logistic regression to find proxies of pimp sizes in each city  $c_i$ . The standard logistic regression modelled city indicator variables, inter-city distances, and the total number of non-home cities that a participant worked in as explanatory variables for the participants’ choice to work in city  $c_i$ . The adjusted coefficients of city indicators yield the “mass” estimates for cities. After normalizing the city “mass” estimates by their median, the proxy for relative pimp population size is obtained which is then be plugged into equation (4). This results in the final proxy values for  $s^*(c_j, t_j)$  that is used to set up constraint equations.

#### **Linear proxies $d^*(c_i, t_j)$ , $w^*(c_i, t_j)$ and $o^*(c_i, t_j)$ :**

In contrast to the sex industry, multiple proxies are utilized to create proxy ratios for the remaining three sectors. Regarding the drug industry, seven different proxy variables for the years 2000 to 2010 and for all 7 cities were aggregated to create the final values for  $d^*(c_i, t_j)$ . The authors used a simple linear regression model to aggregate all 7 different proxies into one single  $d^*(c_i, t_j)$  for each city  $c_i$  and time  $t_j$ . As all the proxies are measured in different units all variables are normalized by the city-year with the most complete data. The following linear model was estimated for each city:

$$\tilde{d}_{it}^k = \alpha_i + \beta_i t \quad (6)$$

$\tilde{d}_{it}^k$  pertains to the normalized proxy variable and  $t$  accounts for the respective time trends. The fitted values of the regression yield the values for  $d^*(c_i, t_j)$ . The same methodology was applied to the remaining two industries.

#### **Estimating total cash in circulation $z(c_i, t_j)$ :**

As city-level currency data is not publicly available, estimates for total currency in circulation on city-level,  $z(c_i, t_j)$ , had to be derived from the average national currency-GDP ratio between 2000 and 2012:

$$CityCurrency_{it} = \left( \frac{NationalCurrency}{NationalGDP} \right) \times CityGDP_{it} \quad (7)$$

Despite its simple concept, these estimates do not differ significantly to regression estimates that also control for variation over time and economic conditions.

#### **Solving the linear programme:**

The system of linear  $nm$  equations is solved under constraint equations entailing cross-city and cross-time proxy ratios of  $s^*(c_i, t_j)$ ,  $d^*(c_i, t_j)$ ,  $w^*(c_i, t_j)$  and  $o^*(c_i, t_j)$  as shown in equation (3). To account for inaccuracy in proxy estimators, they authors

introduced a slack margin of 20 percent for sex proxies and of 1 percent for all other proxies. The constraint equations for the sex industry, for example, are as follows:

$$\begin{array}{ll}
 \textit{Constraint equations} & \textit{Constraint equations} \\
 \textit{across cities} & \textit{across time} \\
 \frac{s(c_i, t_j)}{s(c_h, t_j)} > (1 - \epsilon_s) \frac{s^*(c_i, t_j)}{s^*(c_h, t_j)} & \frac{s(c_i, t_j)}{s(c_i, t_k)} > (1 - \epsilon_s) \frac{s^*(c_i, t_j)}{s^*(c_i, t_k)} \\
 \frac{s(c_i, t_j)}{s(c_h, t_j)} < (1 + \epsilon_s) \frac{s^*(c_i, t_j)}{s^*(c_h, t_j)} & \frac{s(c_i, t_j)}{s(c_i, t_k)} < (1 + \epsilon_s) \frac{s^*(c_i, t_j)}{s^*(c_i, t_k)}
 \end{array} \tag{8}$$

Furthermore, it is assumed that each industry must contain at least 0.1 percent of all currency in that region and timeframe. The resulting linear programme,  $L(n, m)$ , including its constraint inequalities describes a feasible set of solutions that can determine the unknown variables  $s$ ,  $d$ ,  $w$  and  $o$ . To find a unique solution within this feasible subset, an objective function must be specified that can be minimized over this subset. The objective function is defined as the average relative divergence from the conservation law. By minimizing the objective function within the feasible set of solutions, a unique solution point is found that minimizes the absolute normalized discrepancies to the Law of Conservation. Finally, the Mixed Integer Linear Programming solver by Michel Berkelaar, `lp_solve`, is utilized to solve this linear program which yields solutions for  $s(c_i, t_j)$ ,  $d(c_i, t_j)$ ,  $w(c_i, t_j)$  and  $o(c_i, t_j)$  for all cities and time periods that were previously defined. The values obtained from for  $s(c_i, t_j)$  represent the monetary value of the underground sex economy.

### Limitations of the methodology

As the solution of the linear programme relies mainly on proxy data weaknesses of the methodology lay in the accuracy of the proxies. Depending on the availability of surveys and other main economic indicators this methodology might not be suitable for some countries as this approach necessitates a large amount of different datasets over different time periods and regions.

## Notes

<sup>1</sup> This Annex, prepared by Ms. Melissa Li of the OECD Secretariat, summarises the methodology used in the Urban Institute report on measuring the underground commercial sex economy.



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## Chapter 3

### Wildlife trafficking trends in sub-Saharan Africa

By A.J. Clarke and Adriana Babic \*

*Demand for elephant ivory and rhino horn has driven dramatic growth in illegal wildlife markets in recent years due primarily to a growing consumer base in East Asia. All forms of wildlife trafficking taken together constitute one of the most lucrative forms of illicit trade, according to some estimates, and the sector has more than doubled since 2007. This chapter points to publicly available reports on population declines, trafficking routes and the quantity of wildlife contraband reported. It highlights reports on the geographic hubs and hotspots of wildlife trafficking routes, and argues that monitoring and enforcement in source countries can be effective means to reduce poaching, but capacities are low and need support in the form of training and information systems. It presents the Information Sharing Platform built for the OECD Task Force on Charting Illicit Trade, and encourages stakeholders to join this to reinforce collective action to counter illicit trade in wildlife.*

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The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

Similar to many forms of illicit trade, trafficking in endangered wildlife species is a low risk and high reward business. The low rate of detection and arrests emboldens criminal entrepreneurs to enter this illegal market where criminal penalties in many countries are too weak to offset the growing rewards. Massive seizures of ivory have been cited as evidence that organized crime is now involved in exploiting these positive cost/benefit conditions, as the logistical resources required to trade at such scales is beyond the capacity of individuals. Such criminal organisations may exploit existing networks and trafficking routes developed for their illicit activities in trafficking drugs, arms and humans to also move endangered species.

The aim of this chapter is to highlight recent characteristics of wildlife trafficking in sub-Saharan Africa. It first provides background about the recent trends on wildlife population declines, and the quantity of wildlife contraband reported, before pointing to reports on the geographic hubs and hotspots of wildlife trafficking routes. While poaching and wildlife trafficking occurs on every continent, a spike in the scale of poaching the African elephant and black rhino, in particular, calls for action to stem the role of transnational organized crime in these illegal markets, and to develop strategies to counter it before the species are lost to extinction.

The monitoring of wildlife trafficking in sub-Saharan Africa is a daunting undertaking. Governments often have little resource for rangers to protect the stocks of endangered wildlife species in their territories. It is a challenge to patrol expansive tracts of land, and violent confrontation with poachers can regularly occur. It is important to enhance the capacity to map wildlife trafficking routes along a global supply chain, from the poachers to the points of distribution. The CITES treaty established a program for ‘monitoring the illegal killing and hunting of elephants’ (MIKE) to systematically gather information on poaching and trends in the population of elephants in Africa and Asia. While MIKE is primarily a conservation tool to help keep accurate track of numbers, the information could also be used to map poaching activity. A key lesson learned from MIKE is the need to gain the trust and buy-in of local populations to act as an information network that reports the illegal killing of elephant in wildlife non-protected areas.

To combat trafficking, it is not enough map poaching incidents. It is important to empower law enforcement agencies to intervene throughout the supply chain, at land crossings, air and maritime ports, and to equip and train them to use screening technology. It is also important to research the motivations of the various actors along the supply chain, to identify and supply adequate substitutes or fine-tune penalties that alter incentives. Analysis of wildlife seizures and data collected on spatial and temporal trafficking trends can help to inform the design of more effective conservation regimes, including how to improve the allocation of available resources more efficiently and shape law enforcement actions more effectively. The OECD Task Force on Charting Illicit Trade Information Sharing Platform has already begun to aggregate publicly available information sources to map wildlife trafficking hotspots.<sup>1</sup>

## Types, quantity and estimated market value of trafficked wildlife

Among the most prominent types of wildlife parts trafficked in sub-Saharan Africa are elephant ivory, rhinoceros horn and bushmeat. Global demand for ivory and especially rhinoceros horn has increased in recent years, primarily due to growing

demand in the People’s Republic of China (hereafter “China”), Thailand and Viet Nam (Wittmeyer, G. et al. 2014). Consistently high economic growth in these countries has fuelled consumers to seek the same status goods that only elites could afford previously, such as works of art from ivory and the use of rhino horn in traditional medicine (TRAFFIC, 2013).<sup>2</sup> Wildlife trafficking is now the fifth most lucrative criminal activity, after the global trade in narcotics, arms, counterfeits and humans, and has more than doubled since 2007.

Wildlife products are surprisingly valuable. The cost of ivory depends on the form in which it is sold, though prices as high as USD 2 100 per kilogramme have been reported (Vigne & Martin 2014). Gorillas are valued at USD 400 000, and rhino horns can earn traffickers up to USD 65 000 per kilogramme. While the full extent of the wildlife trafficking industry in Sub-Saharan Africa is unknown, the deleterious effects of poaching on local ecosystems and wildlife populations are gruesomely visible.

In the first decade of the 21st century, a significant increase in elephant poaching and ivory markets began in coastal East African countries including Kenya, United Republic of Tanzania (hereafter “Tanzania”) and Mozambique. Endangered wildlife in coastal East Africa includes marine turtles, African elephants, black and white rhinoceroses, great white and whale sharks. Each of these endangered species is targeted for international trade in Asia, due to the growth in demand for ivory and other illegal wildlife products (CITES Secretariat/IUCN/SSC African Elephant Specialist Group/Traffic International 2013).

Illegal wildlife trafficking is facilitated by inadequate enforcement of anti-poaching laws as well as the coastal geography, which makes transporting illegal wildlife easier. With hundreds of miles of coastline and many active ports with limited customs agency resources, law enforcement has great difficulty intercepting the traffickers before large-scale shipments are sent to international markets in Asia. It is impossible for customs and border police to monitor, control, and secure against the modern day volume of illegal trafficking, but the use of advanced technologies can aid such agencies in deterring the flow of illicit trade and smuggling operations (Bau, 2014).<sup>3</sup>

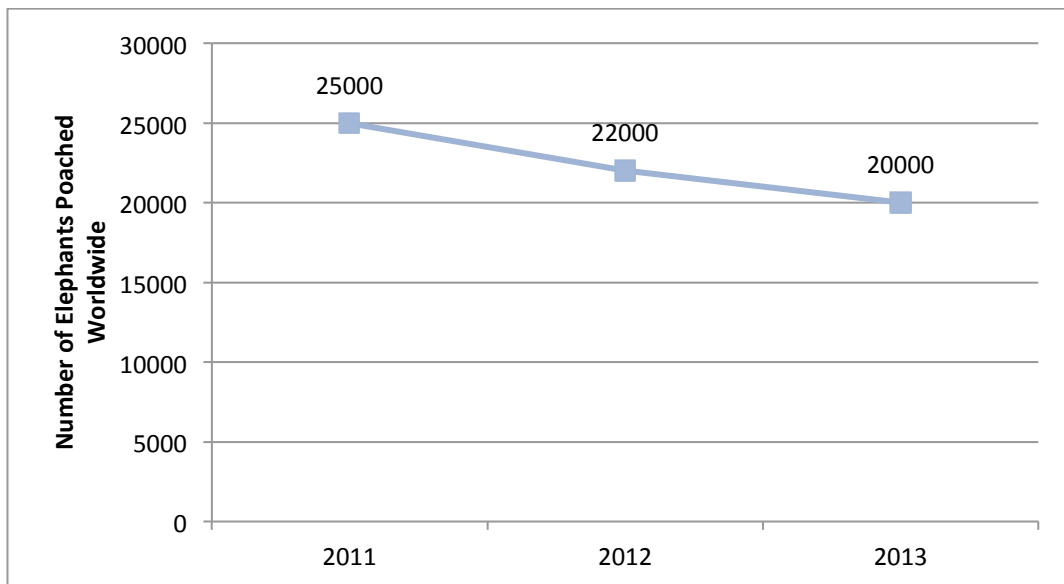
Bushmeat, meat from non-domesticated mammals, reptiles, amphibians and birds, does not receive as much publicity as the more well-known segments of trafficked wildlife parts. This is perhaps due to its relatively localised production, distribution and consumption mainly within African countries close to the ranges where the hunted species live. Bushmeat comes from endangered wildlife such as mountain gorillas, bonobo, chimpanzees and forest elephants, as well as non-threatened species of monkeys and antelope. Bushmeat poaching has depleted the populations of gorillas, chimpanzees and other apes and has also been linked to the spread of infectious disease. The commercial bushmeat trade is the leading cause of wildlife loss in the Congo Basin, which includes Cameroon, the Central African Republic, Democratic Republic of the Congo (the DRC), Equatorial Guinea and Gabon. In the DRC alone, over 1 million tons of bushmeat is consumed each year (Stanford 2014). Since bushmeat is the only profitable export in remote areas of the Congo Basin, it is the primary source of income for many families (World Wildlife Fund n.d.).

### ***Quantifying wildlife poaching and trafficking in sub-Saharan Africa***

At the end of 2013, the population of African elephants was estimated at 500 000, a decline of 95% over the last century (Carrington 2014). Even though poaching has been

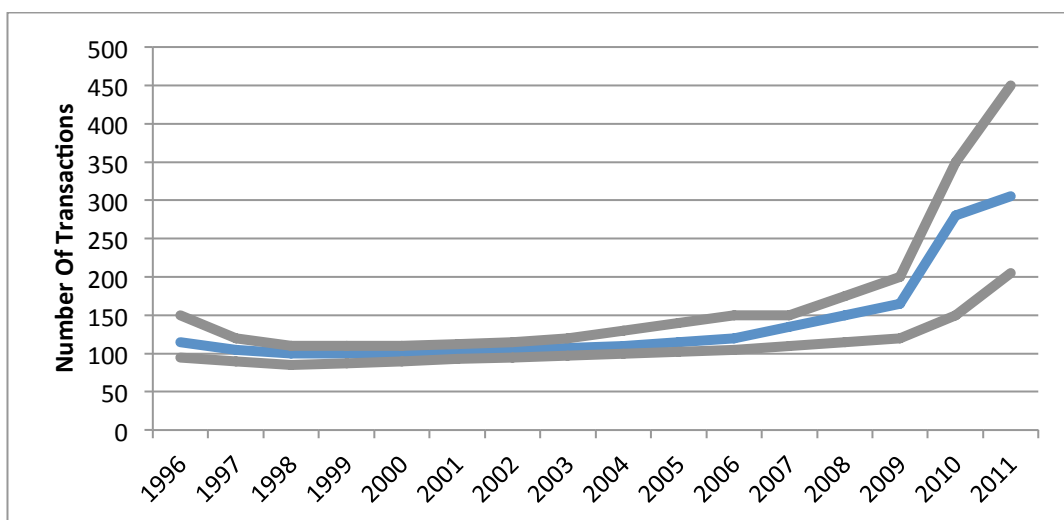
slightly decreased in recent years (see Figure 3.1), the elephant population in Central Africa has declined by 64% in the past decade. In 2013, at least 20 000 elephants were slaughtered worldwide by poachers for their ivory tusks. From 2010 to 2012, poachers killed more than 100 000 African elephants. The number of elephants killed was slightly less than the 22 000 elephants killed in 2012 and the 25 000 poached in 2011. Transactions in ivory had remained at a relatively stable level from 1998-2006, but a sharp increase occurred subsequently in the years leading up to 2011 (Figure 3.2). These numbers do not forebode a sustainable future for elephants.

**Figure 3.1. Number of elephants poached worldwide (2011-2013)**



*Source:* Scriber, B. (2014), “100 000 elephants killed by poachers in just three years, landmark analysis finds”, National Geographic, 18 August.

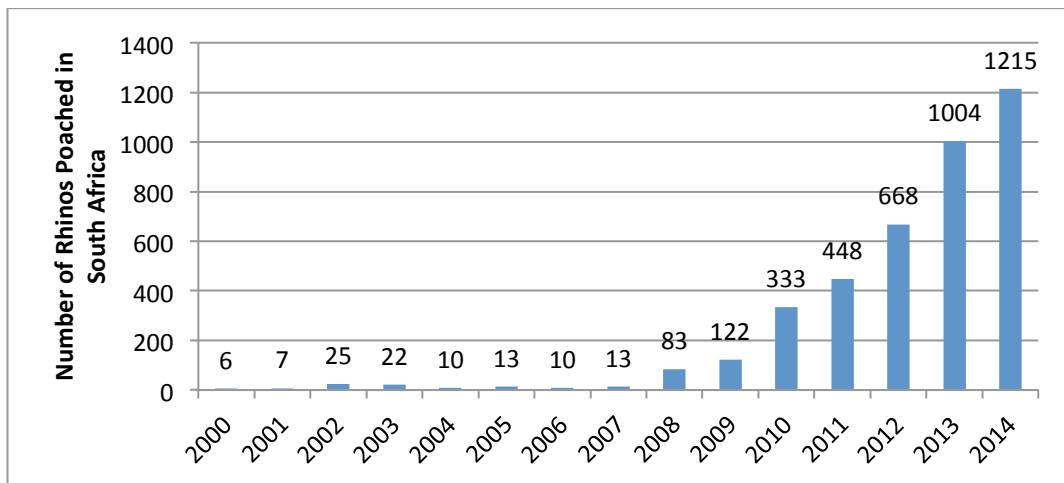
**Figure 3.2. Ivory Transaction Index (1996-2010)**



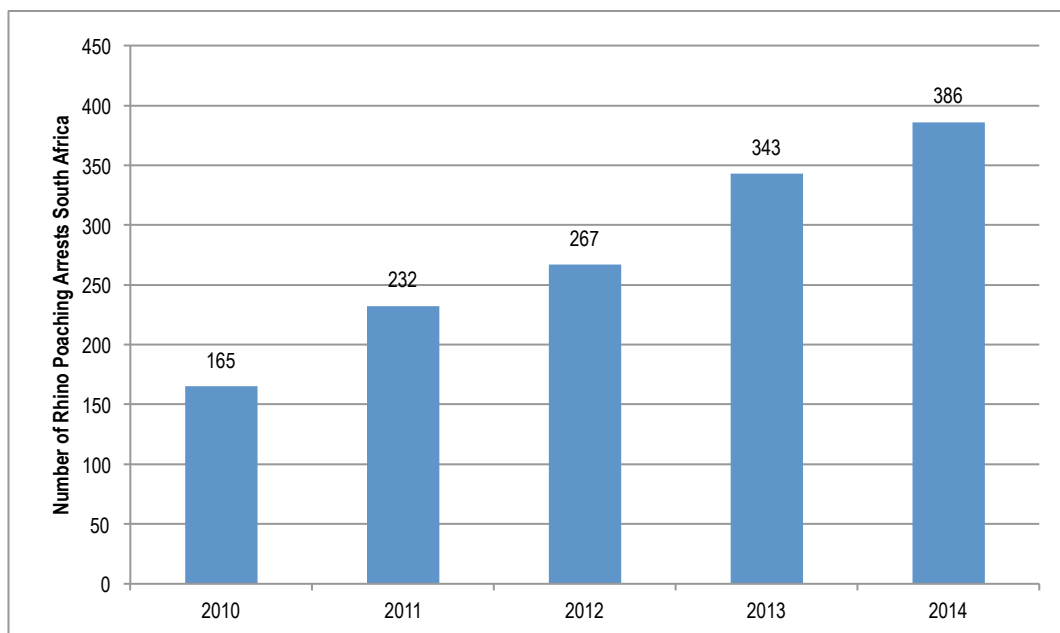
*Source:* Nellemann, C. et al. (2013), *Elephants in the Dust: The African Elephant Crisis*, Birkeland Trykkeri, Birkeland, Norway.

In 2013, for the first time, the number of large seizures of ivory made in Africa exceeded the seizures made in Asia. Three African countries – Kenya, Tanzania and Uganda – accounted for 80% of those seizures. While the quantity of individual seizures has fallen since 2012, the total amount of ivory seized (measured in weight) has increased (Milliken 2014). Experts consider these large-scale seizures as indicative of the involvement of transnational organised crime in the illicit ivory trade. Such large-scale seizures could be a fruitful area for future analysis of the overall illicit wildlife market, using them to uncover new intelligence on current routes, illicit actors and consumers. Indeed, the law enforcement agencies involved in combatting wildlife trafficking seemingly need a boost wherever it can come from. As Figures 3.3 and 3.4 indicate, the rise in the number of rhino poaching arrests is outstripped by the increases in rhinos poached. The fear is that the average number of rhinos poached per year will only decrease once there are too few rhinos left to ensure survival of the species. Reports have recorded concern among conservationists and informants about the inability of the South African police and justice systems to successfully arrest and prosecute rhino poachers. Official documentation records at least 1 164 arrests in South Africa in connection with rhino poaching since 2010. It is unclear how many arrests led to formal charges, but the reported conviction rate for rhino crimes is less than five percent and even as low as 2.6% in 2010 (MacLeod, F. 2014a).

**Figure 3.3. Recorded number of rhinos poached in South Africa (2000-2014)**



*Source:* Department of Environmental Affairs, South Africa (2015) “Rhino poaching statistics update”, available at [www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching\\_statistics](http://www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching_statistics), accessed 13 August 2015.

**Figure 3.4. Rhino poaching arrests in South Africa (2010-2014)**

Source: Department of Environmental Affairs, South Africa (2015), “Rhino poaching statistics update”, available at [www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching\\_statistics](http://www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching_statistics), accessed 13 August 2015.

### Estimated market value of wildlife trafficking

The main wildlife trade-monitoring network, i.e., ‘Trade Records Analysis of Flora and Fauna in Commerce’ (TRAFFIC), estimates the illegal wildlife trade (excluding timber and fisheries) at between USD 5 billion to USD 20 billion per year (Milliken 2014). Table 3.1 presents estimated prices for exotic animals as reported by Havoscope (2015).

**Table 3.1. Illustrative prices for live animals and animal parts**

Exotic animals and parts	Price
Chimpanzees (live)	USD 50
Elephants	USD 28 200
Gorillas	USD 400 000
Ivory	USD 850 per kilogramme in Asia
Ivory with carvings	USD 3 000 per kilo
Rhino horns	USD 97 000 per kilo
Rhino horns (crushed for medicine powder)	USD 10 in Viet Nam
Shark fins	USD 100 per kilo

Source: Havoscope 2015

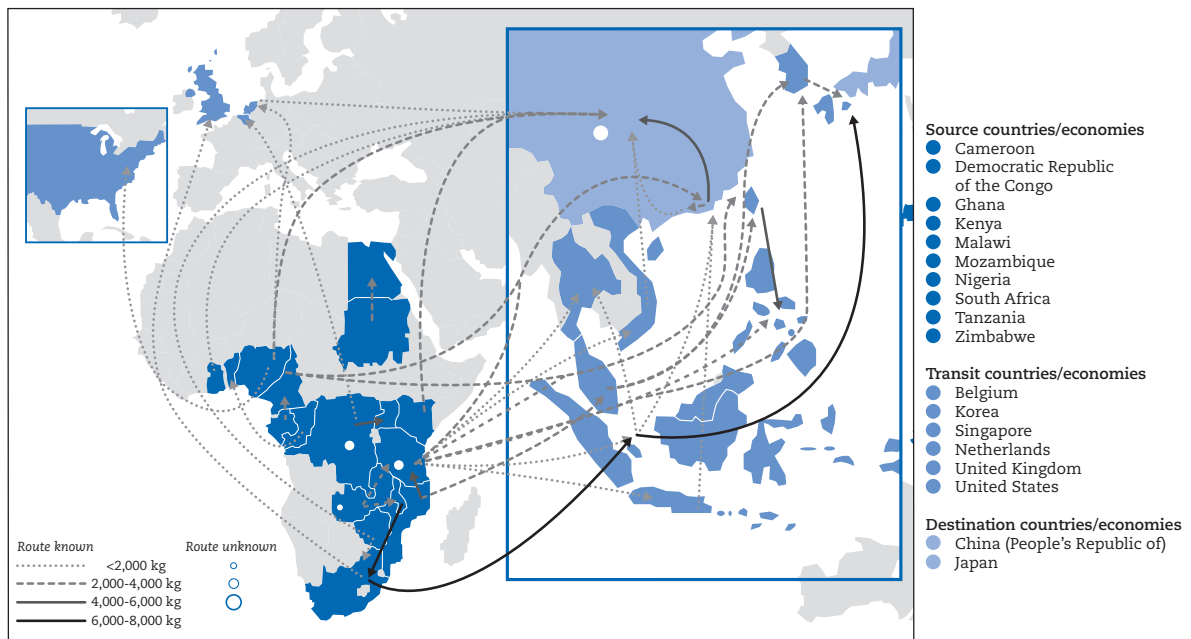


## Identification of wildlife trafficking routes

Accurate identification of wildlife trafficking routes would help law enforcement agencies to target their effort. The routes change over time, however, and the inability to forecast these movements indicates the insufficiency of most methodologies to collect timely information about the market actors in the supply and distribution chains. Information gathered during seizures provides an indication of points of exit or entry, but these can vary considerably, and only the country of origin, transit country or destination country can be deduced. Law enforcement agencies that provide intelligence on wildlife trafficking help enrich the aggregate data pool, though it is necessary to put that information into context and understand the value of the gaps in data as well as the data provided. Also, “it is important to understand that the absence of a particular trade route does not necessarily mean that there were no large-scale ivory movements along such a route, but rather that such trade was not detected by local law enforcement agencies, or that a part of the trade route was not recorded in the data at hand” (IUCN/SSC 2013). It is imperative to approach data collection and analysis strategically in attempting to determine the routes along which illegal wildlife trade occurs.

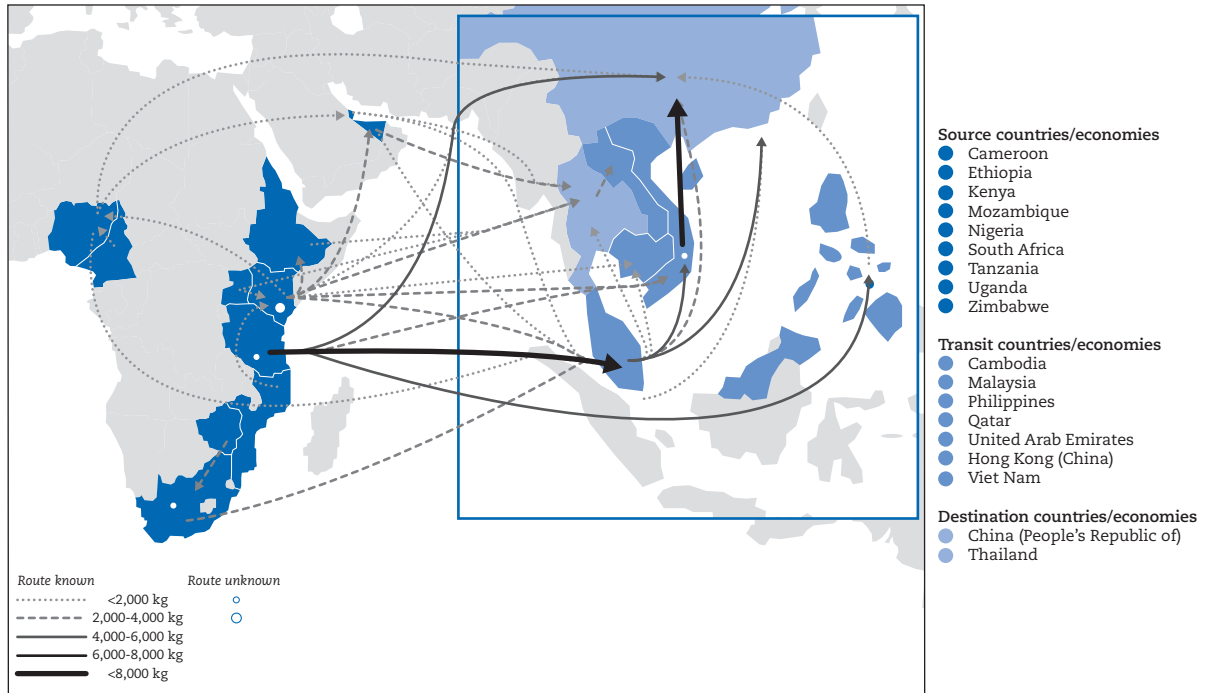
Figure 3.5 depicts regional and international ivory trafficking routes that originated in Central and Western Africa during the period 2000–2008. Specific locations included Douala, Cameroon, Lagos, Nigeria, and Accra, Ghana, by sea, and from the DRC by air. Tanzania, Kenya and Mozambique also emerged in this period as exporters of ivory, but the South African port of Durban was the largest exporter during the period. Other noteworthy trends show that there is movement of ivory within several countries in Africa, with a major unregulated ivory trafficking market identified between the Sudan and Egypt (IUCN/SSC 2013).

**Figure 3.5. Trade routes for large-scale (>500kg) seizures of ivory (2000-2008)**



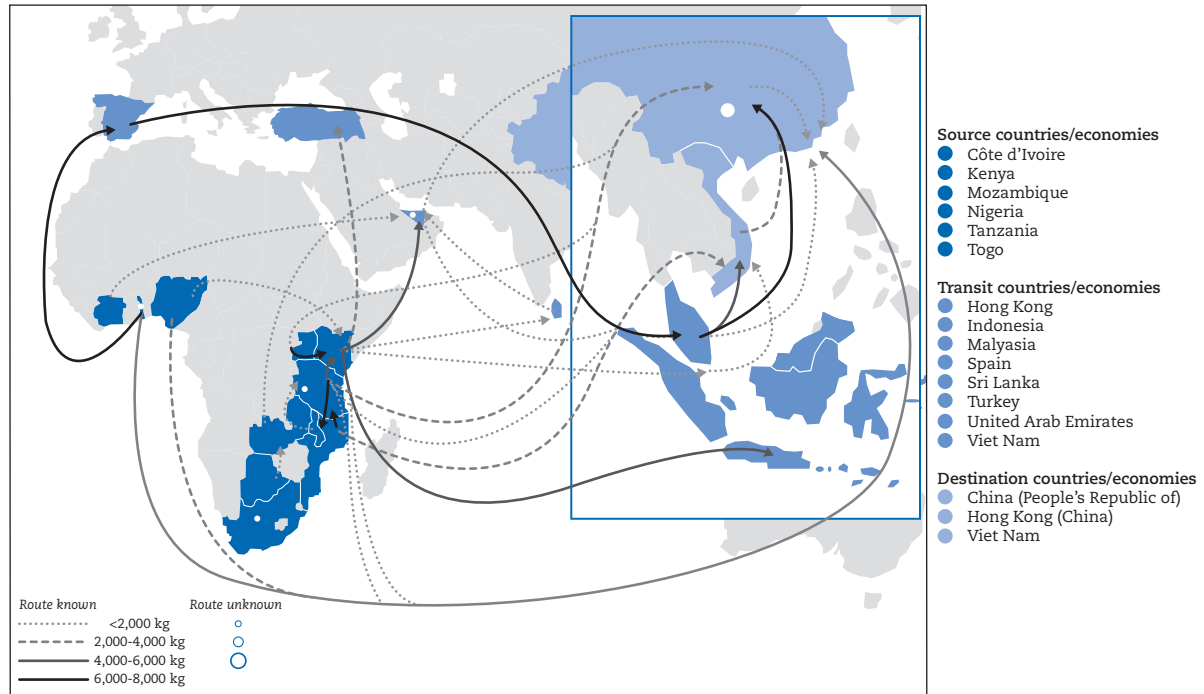
*Source:* CITES Secretariat, IUCN/SSC African Elephant Specialist Group and Traffic International (2013), “Status of African elephant populations and levels of illegal killing and the illegal ivory trade: A report to the African Elephant Summit”, s.l.: s.n.

**Figure 3.6. Trade routes for large-scale (>500kg) seizures of ivory (2009-2011)**



*Source:* CITES Secretariat, IUCN/SSC African Elephant Specialist Group and Traffic International (2013), “Status of African elephant populations and levels of illegal killing and the illegal ivory trade: A report to the African Elephant Summit”, s.l.: s.n.

Figure 3.6 shows a shift to the eastern coast of Africa from 2009-2011, with the Indian Ocean ports of Dar es Salaam and Zanzibar in Tanzania acting as major exporters. Even in 2012-2013, data shows that Tanzania is still heavily involved in the trade, but Kenya’s port of Mombasa becomes the leading conduit through which major flows of ivory exit Africa. The highest importers of illegal ivory remained China and Thailand (Nellemann et al. 2013). Though shipments to the destination countries are sometimes direct, ivory has also been tracked as first passing through Malaysia, the Philippines, Viet Nam, Cambodia, the United Arab Emirates, Spain and/or Turkey on its way to East Asian end-use markets (IUCN/SSC 2013).

**Figure 3.7. Trade routes for large-scale (>500kg) seizures of ivory (2012-2013)**

*Source:* CITES Secretariat, IUCN/SSC African Elephant Specialist Group and Traffic International (2013), “Status of African elephant populations and levels of illegal killing and the illegal ivory trade: A report to the African Elephant Summit”, s.l.: s.n.

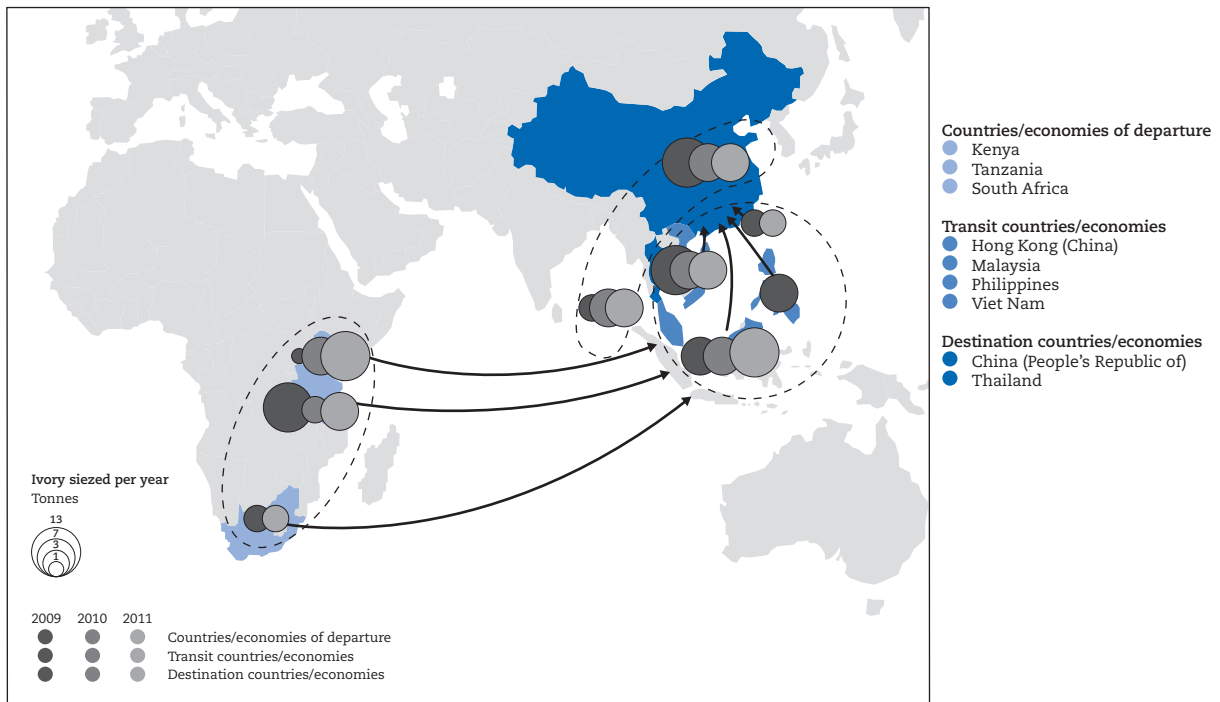
Comparing the routes presented in Figures 3.5-3.7 reveals significant change in the main points of export from the African continent. If port seizures are an accurate proxy for the illegal trade of ivory overall, then the trade is surprisingly flexible over extremely long distances. As noted above, the main exit hubs were South Africa and Tanzania in 2008, but in 2012 massive seizures of ivory began to take place in the west coast country of Togo, transiting through Western Europe en route to Malaysia. The figures above also indicate a short-term shift in shipments destined to Singapore as a transit hub (see Figure 3.6), whereas the centre of transit activity had been Malaysia previously, and would become so again in 2012. While the cause of these changes cannot be determined by a simple comparison, one hypothesis is that interdiction efforts were reinforced in South Africa and Singapore, which compelled trafficking networks to adapt. Enhanced law enforcement is part of the global solution to this global problem. Table 3.2 presents reported cases by law enforcement actions in a transit country (the United States) to bring traffickers of rhinoceros horns to justice. In these cases the intended route was from South Africa to the United States, then on to a terminal point in Asia.

**Table 3.2. International criminal cases of rhino horn trafficking**

Year	Trafficking route	Description of incident
Feb-12	Route was South Africa to United States, intended for China.	Arrest on charges of trafficking in endangered black rhinoceros horn over the period of a week in Los Angeles, Newark, New Jersey and New York.
Jan-13	United States to China.	The owner of an antique business in China was sentenced to serve 70 months in prison for heading an illegal wildlife smuggling conspiracy in which 30 rhinoceros horns and numerous objects made from rhino horn and elephant ivory, worth more than USD 4.5 million. Arrest was made in Florida in January 2013.
Feb-13	Route was South Africa to United States, intended for China.	Antiques dealer sentenced in New York City for crimes relating to illegal trafficking of endangered rhinoceros horns.
Sep-13	United States	Trafficking raw rhinoceros horns from Texas to customers in New York.
Mar-14	United States (Bronx, New York) mailed to Washington state intent to drive across Canadian border.	Arrest for conspiring to smuggle wildlife, including rhinoceros horn, elephant ivory and coral.
Oct-14	Objects smuggled from United States to China.	An auction house located in Boynton Beach, Florida, and the company's president and owner, pleaded guilty in U.S. District Court in Miami, Florida, to an illegal wildlife trafficking and smuggling conspiracy in which the auction house sold rhinoceros horns and objects made from rhinoceros horn, elephant ivory and coral.

Source: United States Department of Justice, Wildlife Trafficking Prosecutions, available at: [www.justice.gov/enrd/african-ivory-smuggling](http://www.justice.gov/enrd/african-ivory-smuggling).

**Figure 3.8. Large-scale ivory seizures**

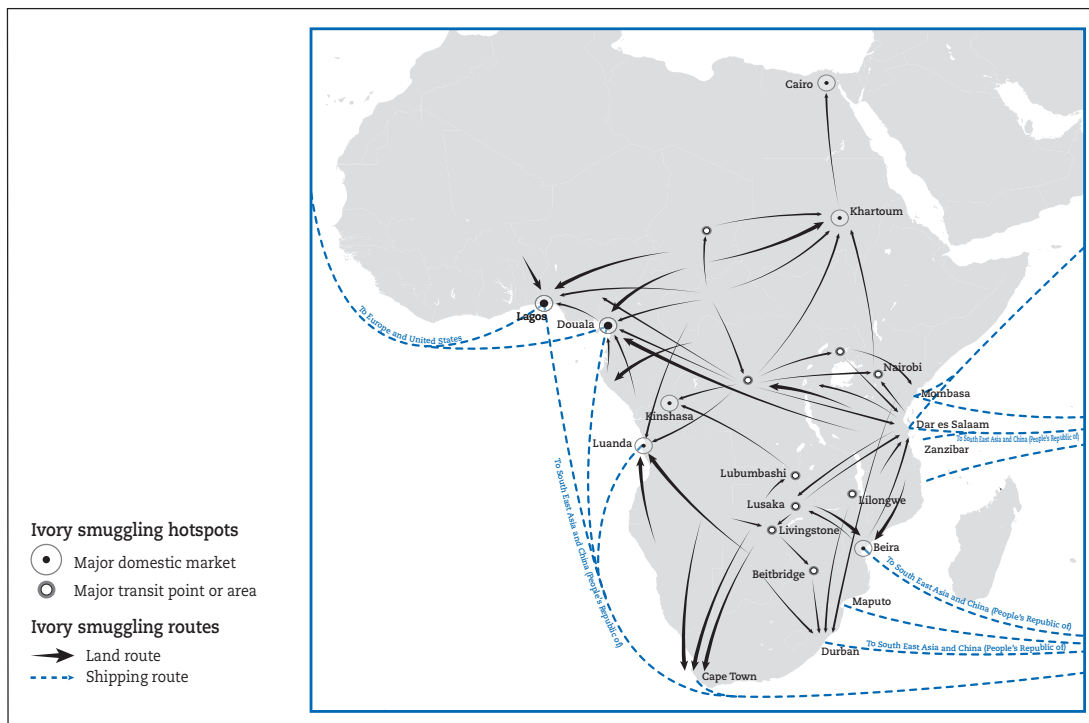


Note: When countries are mentioned it is a reference to economies and territories.

Source: Nellemann, C. et al. (2014), The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources, Birkeland Trykkeri, Birkeland, Norway.

Sub-Saharan African countries that serve in the ivory trafficking trade as a source, transit or port of exit include Cameroon, Congo, the DRC, Ethiopia, Gabon, Mozambique, Uganda and Nigeria. “The Democratic Republic of Congo, Mozambique and Nigeria all have important unregulated domestic ivory markets in their major cities, while Nigeria, Mozambique, Uganda and Cameroon have been implicated in the large-scale movement of ivory” (Nelleman et al. 2014). It is important to examine the trends in ivory seizures, where it comes from, the route it took to arrive at the point of seizure and where it was going. Such information can offer insight into spatial patterns of wildlife trafficking. Data from the report by Nelleman et al. indicates ivory trafficking routes by road from Burkina Faso, Chad, the Central African Republic (CAR), the DRC and even as far east as Tanzania, terminating in Nigeria and Cameroon, with destination points in Europe and the United States. To avoid detection of the point of origin, some wildlife traffickers have been exploring new ports from which to ship their ivory, such as Togo and Côte d’Ivoire. Further evidence of this is suggested by INTERPOL Purple Notices. In one instance in January 2014, an ivory seizure in the port of Lomé, Togo, revealed nearly four tonnes of ivory hidden among teak logs en route to Viet Nam (Interpol 2014). The continued heavy trafficking activity in these East and Southern African countries may also suggest a shift in poaching patterns (IUCN/SSC 2013).

**Figure 3.9. Illegal ivory trafficking routes**



Sources: CITES (2007), “COP14 Proposal 6; Wasser, S., K., et al. (2007), “Using DNA to track the origin of the largest ivory seizure since the 1989 trade ban”; PNAS; Environment Investigation Agency (2007), “How China’s illegal ivory trade is causing a 21st century African elephant disaster, 2007”; UNODC (2010), “Promoting health, security and justice”; GRID-Arendal (2012).

Preliminary data contributed to this report was collected by the International Fund for Animal Welfare (IFAW), covering the period 2002-2011, including information on elephant carcasses found in the Samburu-Laikipia ecosystem in Kenya, just north of Nairobi. A major ivory trafficking route originating in Uganda passes through this region on its way to the major Kenyan port at Mombasa. A strong correlation has been observed between the illegal transit of goods and extremist operations along a largely unregulated transit route in Mauretania. The corridor exists between Nouakchott, Akjoujt, Atar and Zouerate, leading to a large port of entry in West Africa.

### ***Trends in rhino horn trafficking routes***

More than 2,757 rhinos have been poached in South Africa since 2010. South Africa is home to more than 80% of the world's remaining rhino population. China accounted for nearly 80% of the reported seizures of illegal rhino horns in Asia between 2009 and 2013, despite a national ban on the illicit trade (MacLeod, F. 2014b). Like ivory trafficking, rhino horn trafficking is also evolving. Figure 3.10 shows the maritime, air and land routes along which it is transported out of Africa. The mapped trends suggest air routes are the most frequent mode of transport. Air routes originating in South Africa tend to terminate in Asia, where demand for rhino horn is high. According to figures collated by Traffic, 30 seizures of 67 rhino horns weighing 151.93 kilograms were documented in China with trafficking routes varying in every case. Horns poached in Southern Africa were found sometimes to have been shipped in cargo holds from Cape Town or Maputo. A less direct route was also identified as transiting through other African countries first, such as Nigeria, and then shipped among timber or agricultural products to China. In other cases horns were sent by post or shipped to North America or Europe as transit points to China.

With increased information sharing by networks of concerned stakeholders, visualisations of such routes could be overlaid with data on other trends of illicit activity, to identify common routes used for black-market trade and further security threats to sovereign nations.

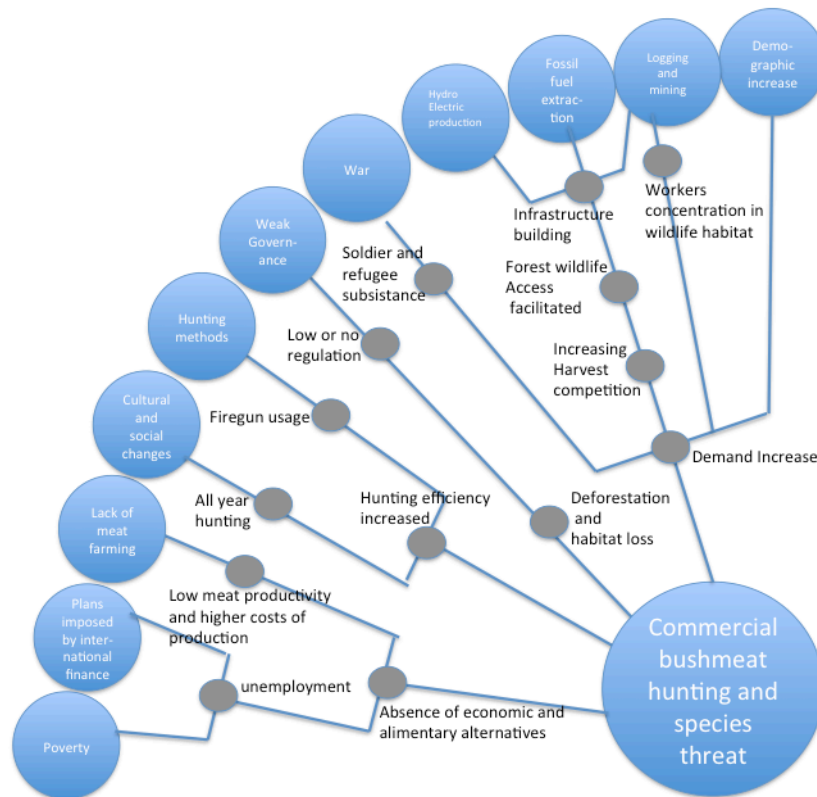
**Figure 3.10. Maritime, air and land routes of the illicit rhino horn trade**

Source: Macleod, F. (2014), "Routes of rhino horn", [www.visionscarto.net/routes-of-rhino-horn](http://www.visionscarto.net/routes-of-rhino-horn), accessed 17 August 2015.

### ***Trends in bushmeat trafficking routes***

Unlike the high-end international market for ivory, bushmeat is primarily produced, traded and consumed in a relatively smaller, local area of operation on the African continent. While "some international trade is suspected to take place in gorilla meat or body parts, this appears to be very limited and seems to take place between neighbouring gorilla range states" (Nellemann, Redmond & Refisch 2010). Apes are poached to be sold into local bushmeat markets, for example one case study describes a three-month observation period that revealed dried and smoked bushmeat products in the Tshuapa-Lomami-Lualaba landscape near the Congo River were being transported via bicycle to the neighboring town of Kindu. Central Africa is an area of high demand for bushmeat – with residents "annually consuming approximately 1.1 million tons of bushmeat," and additional demand from "militias, refugee camps and mining and logging camps" (Nellemann, Redmond & Refisch 2010).

Figure 3.11. The bushmeat chain reaction



Source: Nellemann, C. et al. (2014), *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources*, Birkeland Trykkeri, Birkeland, Norway.

Trends in trafficking routes were also found that suggest main routes from bush meat markets are found along roads within the vicinity of national parks (FA et al. 2013). Macdonald et al. 2012 report that “most markets in our study were within 5 kilometres of a road”, a condition that is also typical of approximately 40% of forests in Central Africa (Wilkie, Sille & Boundzanga 1992). Consequently, the similarity in species sold in the Calabar market and markets around Korup National Park may indicate that animals hunted in Korup can be easily transported to Calabar. The situation is likely to worsen because hunting pressure will grow as road networks expand and the area of forest accessible to hunters increases, as observed in many tropical forest regions (Peres & Lake 2003).

### ***Current trafficking hotspots***

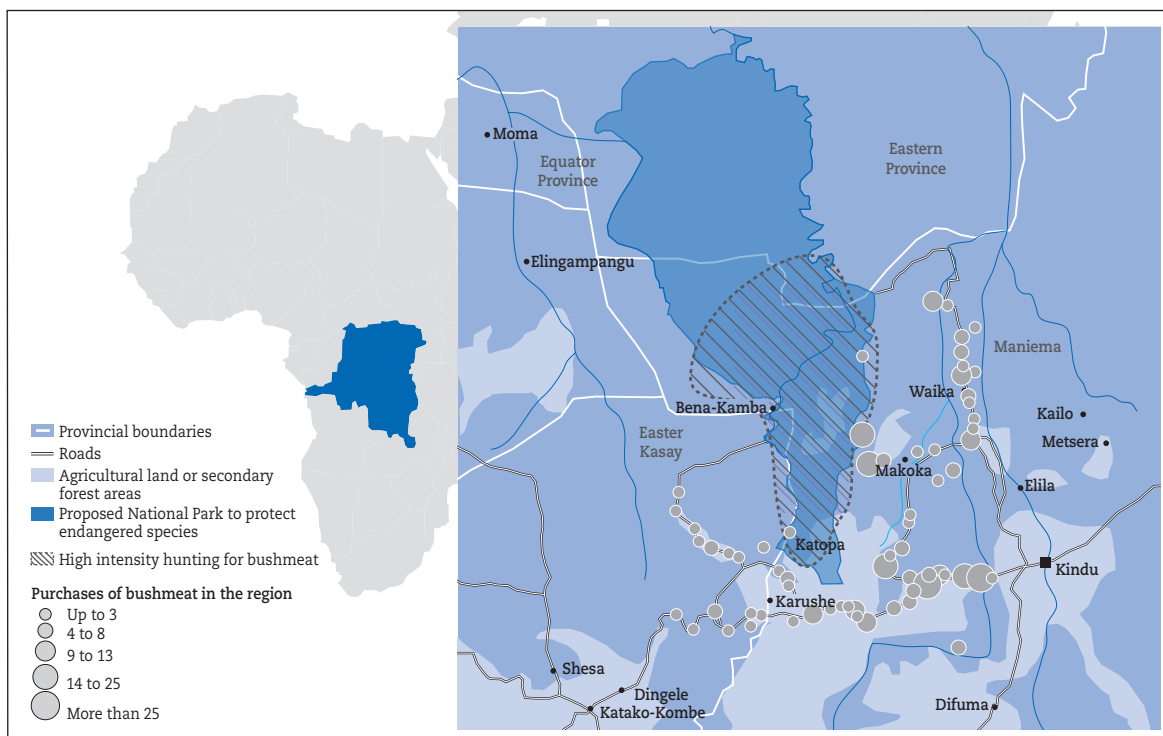
Several reports were aggregated to highlight trafficking hotspots, indicating a high prevalence of trafficking production, distribution and consumption. The “illegal killing was most pervasive in the populations of Central Africa” and the Democratic Republic of the Congo in particular (Wittmeyer et al. 2014). In ‘The Last Stand of the Gorilla’, case studies and anecdotes identify areas like the DRC’s province of Equateur, where the bonobo population is in decline due to poaching to consume bush meat. Routes in Maniema province have been identified as flourishing bush meat trade routes “leading



east to the town of Kindu on the banks of the Congo River” (Nellemann Redmond & Refisch 2010). This indicates that most bush meat poaching incidents are occurring close to protected areas.

Once over-poaching has caused the population of certain species to drop in unprotected areas, where it is commonly known for poaching to occur, hunters will begin targeting wildlife in protected areas, such as in or near national parks. A survey of species sold in bushmeat markets in West and Central Africa, specifically the Cross-Sanaga rivers region in Cameroon and Nigeria, was used to “detect wildlife patterns” in the region (FA et al. 2013).

**Figure 3.12. Bushmeat trade in Tshuapa-Lomami-Lualaba Region, the DRC**



*Source:* Nellemann, C. et al. (2014), *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources*, Birkeland Trykkeri, Birkeland, Norway.

An analysis of data presented in Figure 3.12 provides insight into the production and consumption patterns of bush meat markets (FA et al. 2013). Market groups were identified by the species sold, and mapped according to the distribution of threatened species in that area. Eight geographically distinct market groups were identified with most being sold in proximity to two national parks, Korup National Park in Cameroon and Cross River in Nigeria. The high prevalence of market locations near national parks reveals trafficking hotspots. The results of this study indicated that of all market groups observed, bushmeat trade in threatened species was traded in 98.9% of them. This delineated a “clear zone of higher trade in threatened species extending from Douala in

the southeast to Loum and Manyemen (Cameroon) and Ikom and Abaragba (Nigeria) in the northwest,” overlapping with species from the Cross River and Korup National Parks areas (FA et al. 2013).

Trafficking hotspots in ivory cover a wider area than bushmeat, due to high demand overseas. Data collected in 2006, 2007, 2010 and 2012 identify major domestic ivory markets in Lagos, Nigeria; Douala, Cameroon; Luanda, Angola; Kinshasa, the DRC; Beira, Mozambique; Khartoum, Sudan; and Cairo, Egypt. Known poaching activity accounts for a high percentage of illegally killed elephants in Central and Eastern Africa, with lower rates in Western and Southern Africa. The chief transit points were found in central Chad; Lubumbashi, the DRC, as well as in the centre of the country; Uganda; Nairobi, Kenya; Lilongwe, Malawi; Beitbridge, Zimbabwe (on the border of South Africa) and Lusaka and Livingstone in Zambia (Nellemann et al. 2013).

## Conclusions

Wildlife poaching has undergone a qualitative change in the age of globalization fuelled by global demand and supplied by criminal networks. A coordinated and comprehensive strategy to reduce demand for illegal products and enhance enforcement capacities is needed to adapt to the magnitude of this challenge.<sup>4</sup> Law enforcement agencies need access to strategic intelligence, which will enhance efforts to interpret trends and take timely actions on the ground before the traffickers can adapt. While it is important to build capacity amongst national law enforcement agencies and local monitoring networks, the knowledge and skills to conduct monitoring services and information analysis can also be contracted and imported. To this end it may be necessary to change national legislation to create the legal conditions necessary for dedicated civil society organisations to operate, and to allow them to deploy the best available techniques and technologies. The comprehensive enforcement strategy should lend sustained support to the training of police, military, judicial and customs officers.

One approach to address the information gap that enforcement agencies face in identifying illicit trade routes for wildlife is to support the emerging OECD Task Force on Charting Illicit Trade ‘Information Sharing Platform’ (TF-CIT ISP). This tool establishes a common space where experts from government, NGOs, academia and even industry could tap into near real-time mobile reporting. It offers a rich collection of geo-tagged data that has not historically been available to such agencies. Mapping this open-source data will allow for greater visibility of the wildlife trafficking trade by all concerned stakeholders, whether national and local governments of the countries impacted. If, for example, an instance of poaching occurs in a high-trafficking area where all but one country are taking measures to reduce illegal poaching and trade, the resistant country and its hotspots can be more easily identified.

Using this data for presentations and reports will allow rapid feedback for policy and enforcement changes. The data can be used to support real-time enforcement. Countries, industries and individuals affected by wildlife trafficking and illicit trade in other goods will gain a heightened awareness of illegal activity in their regions. This will allow them to realise the larger impact these activities have on their business and communities, and give them a greater say in policies to combat illicit trade.

Several presentations of geo-spatial data depicting the trends in wildlife trafficking have been made at meetings of the OECD Task Force on Charting Illicit Trade.<sup>5</sup> These

hotspot images were aggregated from various open-source publications and information contributed to the OECD TF-CIT Information Sharing Platform (ISP). Not much raw open-source data is at present available. This suggests that there is more that could be achieved by the ISP and its partners, which are seeking to provide timely data for analysis from multiple sources and from granular data tracked as incidents come to light. New technology, like the International Fund for Animal Welfare's mobile reporting app, can pass on trafficking data to a platform that centrally aggregates rich information, so that a broader group of organisations, and possibly law enforcement, can use it. For example, some countries may have a strong political will to participate in this type of partnership, but may be hindered by limited resources. Use of local ad hoc task forces in counter-narcotics in South and Central America has had considerable success following this approach to intelligence gathering on trafficking activities.

Countries that have resources to help policy partners need to ensure they are co-ordinating with agencies that have the proper authority to disseminate data, so that such task forces can focus on the use rather than collection of information. More frequent reporting and collecting of data can help make enforcement more successful. Awareness of these issues has encouraged non-governmental organisations (NGOs) to develop applications to assist in this effort. The time and resources needed to roll out an enterprise tool can often prevent organisations from making timely contributions. A group like the ISP has much to offer on this score. First, it can offer engineering advice and powerful platform scalability to optimise the functionality of an NGO's specific skills and focus. It can also help facilitate the rollout of reporting applications and functionalities that can be used for analysis and enforcement. Willing host nations can thus be introduced to a rich source of immediately available information that is far more accessible than in the past.

Stakeholders will be able to find a sense of community and trust in contributing to a common pool of information. They will also be more collectively informed about the disparate data, and benefit from a forum where data analysis can be explored and shared. The platform could serve as a resource for research to inform public policy. The volume and granularity of trafficking details could be used to update routine engagements, providing the latest information for meetings with policy partners. Dynamic tools used by the platform can provide this information for reporting, analysis and presentations to influence policy related to trends, hotspots and changes in illicit trade.

Because this data would be collected and shared in its raw format, its potential value would be greater, because it can be organised, mosaicked and analysed and yield more information than if it were shared in a pre-processed format. This more flexible format makes it possible to produce relevant analysis for specific policy research. High-level group policies are needed, that can be agreed upon collectively, to avoid instances like the example noted earlier, so that neglectful countries that do not subscribe to co-operative policies in trafficking can sabotage the efforts to combat illicit trade by neighbouring nations. Modern web and mobile tools make it possible to use targeted search terms that provide information based on general rather than specific questions. Providing a real-time collection of participatory information related to illicit trade can engage a broader base of contributors. National policy could also benefit from the dynamic views that allow for a "story-telling" approach to presentations. This simple means of relaying the information could reinforce commitment to the prevention of cross-border illegal activity. If policies are collectively implemented and sanctions broadly enforced, for example in the level of sentencing imposed on illicit trade, their impact can be broadcast across different countries in a region.

Lessons learned in data collection with countries that have a strong willingness to participate and share information will provide examples of best practices. These can be applied in areas where the nexus of illicit trade funds extremist groups. Groups like Boko Haram heavily leverage the illicit trade apparatus in Africa to finance their operations. The human trafficking and kidnapping for ransom in Nigeria, for instance, is associated with the illegal fishing trade down the Kamadougou River in the northeastern area of Nigeria via Boko Haram. Similar activity by the Lord's Resistance Army has been identified where it operates in Uganda, South Sudan and areas of the DRC. Extremist groups like these work to control ports of entry across porous borders in bucolic areas of Africa, which further contributes to the convergence of illicit trade that directly finances national security threats to the region and the rest of the world.

The amount of information related to illicit trade varies greatly, but the aggregated data can provide new context for a growing challenge throughout the world. Further information sharing and new technology can offer deeper insight into the impact of current policies for deterring illicit trade. They could also help craft policy that casts a broader net in the areas where illicit trade intersects with other criminal activity.

The opportunities for analysis depend on acquisition of more detailed and broad data. For example, technology platforms now support real-time reporting, rather than yearly reports, to present visual information overlaid with display data on other illicit enterprises. This analysis would produce concrete and timely metrics, and reveal nexuses among activity that may not have been evident in the past. The aggregation of mobile reporting is just scratching the surface of potential value of the data analytics. A combination of crowd-sourced information from varying areas of illicit trade in different regions of the world, blended with private information sharing, would provide insights that allow for more effective policies to combat a range of illicit trade that shares common logistical shipping routes and transporters.

## Notes

<sup>1</sup> The OECD Task Force on Charting Illicit Trade Information Sharing Platform can be accessed at: <http://www.oecd-tfcit.org/index.html>.

<sup>2</sup> A consumer research study, conducted in 2013, surveyed 720 individuals in Hanoi and Ho Chi Minh City and discovered that rhino horn users value this item because of its significance from a social point of view. Buyers and users of rhino horn form a powerful social network consisting of important individuals with whom it is crucial to maintain good relationships. Rhino horns are sometimes bought for the sole purpose of being gifted to others; to family members, business colleagues or people in positions of authority. Those purchasing rhino horn believe that owning rhino horn, as well as being able to purchase it for others, reaffirms their social status and strengthens the bonds among peers within their particular network.

- <sup>3</sup> Such technologies include such unmanned aerial vehicles (UAV), embedded sensor and actuator solutions in transport assets, cargo shipment data mining with risk analytics, next generation surveillance cameras, x-ray technologies and robotics.
- <sup>4</sup> For evidence that such efforts can work see the renunciation by leading traditional Chinese medicine companies of the use of endangered plants and animals protected by national legislation and CITES in medicinal products. [www.traffic.org/home/2015/10/15/chinese-tcm-industry-says-no-to-illegal-wildlife-trade.html](http://www.traffic.org/home/2015/10/15/chinese-tcm-industry-says-no-to-illegal-wildlife-trade.html).
- <sup>5</sup> See a presentation on the OECD TF-CIT Information Sharing Platform at: [www.slideshare.net/fullscreen/OECD-GOV/thermopylae-tfcit2015/1](http://www.slideshare.net/fullscreen/OECD-GOV/thermopylae-tfcit2015/1).

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## Chapter 4

### Illicit trade in counterfeit medicines

By Professor Kristina Lybecker \*

*This chapter presents an assessment of illicit trade in counterfeit medicines, which in the 21<sup>st</sup> century has changed starkly in its geographical scope and pervasiveness across different product classes. Masquerading as curative medicines, counterfeit pharmaceuticals are increasingly prevalent and profitable. In addressing the threat of counterfeit drugs, there is obvious scope for benefiting both consumers and international pharmaceutical firms.*

*Pharmaceutical counterfeiting has been identified over thirty years ago but went undiscussed. The industry now not only readily concedes counterfeiting is a threat to its business, in some cases it publicly addresses the strategies and anti-counterfeiting technologies in use and development. Acknowledging the problem enables better partnering with governments, health advocates and other supply-chain entities, since the incentives are aligned to prevent counterfeiting. In light of the more public and more aggressive campaigns against counterfeiting, it is important to examine the extent of the problem, what is known about counterfeit production and distribution, the links to organised crime and the policy responses that have been particularly effective. This paper reviews each of these in turn, as well as new policy initiatives that appear promising.*

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The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

The legal debate over the correct definition of counterfeit medicines and the appropriate terminology has inhibited progress in combating counterfeiting and improving the quality of available medicines. As noted by the World Health Organization, the lack of a universally accepted definition has thwarted progress toward understanding the extent of the problem and facilitating the exchange of information between countries. To address this, the WHO developed the following definition:

*“A counterfeit medicine is one which is deliberately and fraudulently mislabelled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging.” (WHO, 2015)*

This paper adopts the definition and terminology used by the World Health Organization. While this is certainly the most widely-cited definition and as close as we can come to an agreed upon definition, the definitions utilized by individual countries and agencies do vary. Appendix I illustrates this dilemma and provides the definitions used across a selection of countries.

Based on confidential counterfeiting reports received between January 1999 and October 2000, the World Health Organization grouped the counterfeits into six categories:

- products without active ingredients (32.1%)
- products with incorrect quantities of active ingredients (20.2%)
- products with wrong ingredients (21.4%)
- products with correct quantities of active ingredients but with fake packaging (15.6%)
- copies of an original product (1%)
- products with high levels of impurities and contaminants (8.5%)

According to the WHO and its definition of pharmaceutical counterfeiting, products in each of these categories are considered counterfeit drugs (WHO, 2015). Fundamentally, pharmaceutical counterfeiting is an issue of deception, in packaging, ingredients, origin, manufacturing and quality.<sup>1</sup>

Beyond the definition provided by the WHO, which is used here, it is critical to clarify the language and terminology used. “Branded” drugs are those that are produced by the innovator company holding the patent (whether expired or not) on the drug. “Generic” drugs are those produced by other, non-innovator, companies either before or after patent expiry. Generics are assumed to be quality products whether they are patent-infringing and produced before the expiration of the patent or produced post-expiry. It is essential to recognise that patent infringement is not the issue.

In 2006, the World Health Organization created a global initiative, the International Medical Products Anti-Counterfeiting Taskforce (IMPACT) to provide a global approach to solving the problems of pharmaceutical counterfeiting. Unfortunately, the initiative was derailed by linguistic disputes over the definition of counterfeit drugs. “The Indian

and Brazilian Governments and some non-governmental organisations have opposed the work of IMPACT. The principal reason is they believe it would confuse quality and intellectual property rights issues and thus undermine access to legitimate and much lower-cost generic medicines consumed mostly in poor areas” (The Lancet, 2012). This struggle over language and the paralysis that resulted are indicative of the tremendous challenges that characterise the battle to combat pharmaceutical counterfeiting.

Given the debate over definitions and the nuances surrounding intellectual property rights and quality issues, it is instructive to clarify the difference between falsified and substandard medicines. Due the link between intellectual property considerations and the term “counterfeit”, there is a trend toward using the term “falsified”. As described by Paul Newton, head of the Wellcome Trust-Mahosot Hospital-Oxford Tropical Medicine Research Collaboration, falsified medicines are deliberately fraudulently produced and frequently, though not always, lack the active pharmaceutical ingredients. In contrast, substandard medicines are legitimately produced by the authorised manufacturer, but “do not meet national pharmacopeial standards because of errors in the quality or quantity of raw materials or in manufacturing” (Newton, 2012). The distinction is of particular importance, since the origins and solutions are radically different for counterfeit and substandard medicines. The first is a deliberate criminal attempt to deceive, while the latter results from poor quality control.

Again, this paper adopts the definition and terminology used by the World Health Organization. While the word “counterfeiting” is utilised, it is critical to recognise that this goes beyond the issue of intellectual property theft; it is a purposeful and fraudulent act. Fundamentally, counterfeit medicines are neither regulated or quality controlled and should therefore be expected to be substandard as they move outside the safety of established, regulated supply chains.

### Dimensions of the problem

Dr. Paul Newton concisely captures the challenge of determining the scope of the problem, “There are no data that allow anything more than (badly) informed guesses as to the global extent of the problem. ... The paucity of reliable data means that it is difficult to know whether the problem is getting better or worse, how the epidemiology of substandard and falsified medicines differ and whether interventions are effective” (Newton, 2012).

While a variety of estimates exist on the magnitude of the global counterfeit pharmaceutical trade, the veracity of the data utilised is highly questionable. Many estimates seem to be pulled from thin air, while those most cited and those from the most reliable sources have uncertain origins and questionable methodologies. Capturing the dimensions of the problem is further complicated by several factors: linguistic disagreements as described above, the inability to pool data, the paucity of epidemiologically rigorous studies, the expense of sophisticated testing, biased sampling in collection and an extensive pharmaceutical grey market outside legitimate supply chains (IOM, 2013).

Although one may find many estimates about what percentage of drugs worldwide are counterfeit, the origins of such statistics are often uncertain, as is the methodology used to make the calculation. Perhaps the most widely cited statistic on counterfeit medicines originates from the World Health Organization, which estimates that 10% of

the global market for pharmaceuticals is comprised of counterfeits. Reports place the share in some developing countries at as high as 50-70%.<sup>2</sup> Despite the widespread use of this figure, its origins are uncertain, leaving numerous unanswered questions regarding the methodology used to make the calculation. In a WIPO/OECD workshop in 2005, Harvey Bale, director general of the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), stated that the WHO estimate of 10% global counterfeits is statistically unlikely. Noting that 85% of the world pharmaceutical market is in developed economies where counterfeits comprise less than 0.2% of the market, the incidence of counterfeits in the remaining 15% of the world would necessarily have to be 66% to justify the figure of 10% (Bale, 2005).

Perhaps the best counterfeiting data in the world is maintained by the Pharmaceutical Security Institute (PSI). While its data is not publicly available, it is worthwhile to examine the source of this data, especially for perspective on the challenges surrounding the collection and analysis of counterfeiting data. The PSI data are collected from member company incident reports, government reporting and open-source documents. While this is arguably the best global database on counterfeit pharmaceuticals, it remains far from comprehensive, especially for a thorough understanding of the production and distribution of counterfeit drugs (see Appendix II for additional information on the data collection by the PSI).

While reports on counterfeiting incidents are plentiful, the magnitude of the problem is difficult to estimate. Pharmaceutical counterfeiting is a pervasive problem, affecting nations of every size and income level and drugs of every description. Given that the value of medicines is extremely high relative to their bulk, and demand is mostly price-inelastic over a wide price range<sup>3</sup>, the problem of counterfeiting has assumed enormous proportions. In addition, the significant size of the global pharmaceutical market and the margin between manufacturing costs and market price create a substantial economic incentive (Lybecker, 2007). According to the 176-nation World Customs Organization (WCO), counterfeit drugs are now a USD 200 billion-a-year industry. Christophe Zimmermann, anti-counterfeiting and piracy co-ordinator of the WCO, states that “We now have more fakes than real drugs in the market. In 2007-2008 alone, it rose 596% (Irish, 2010).” In the World Customs Organization’s 2013 report, there were 24 092 reports of seizures of intellectual property-offending goods, and more than half of these were related to illegal pharmaceuticals (WCO, 2014).

As described above, the challenges of measuring the extent of the counterfeit medicine trade are numerous. A glimpse of the data available from a large collection of studies also points to the variations across drugs and countries over time. Table 4.1, below, depicts the share of anti-malarial medication that failed chemical assay analysis in Africa.

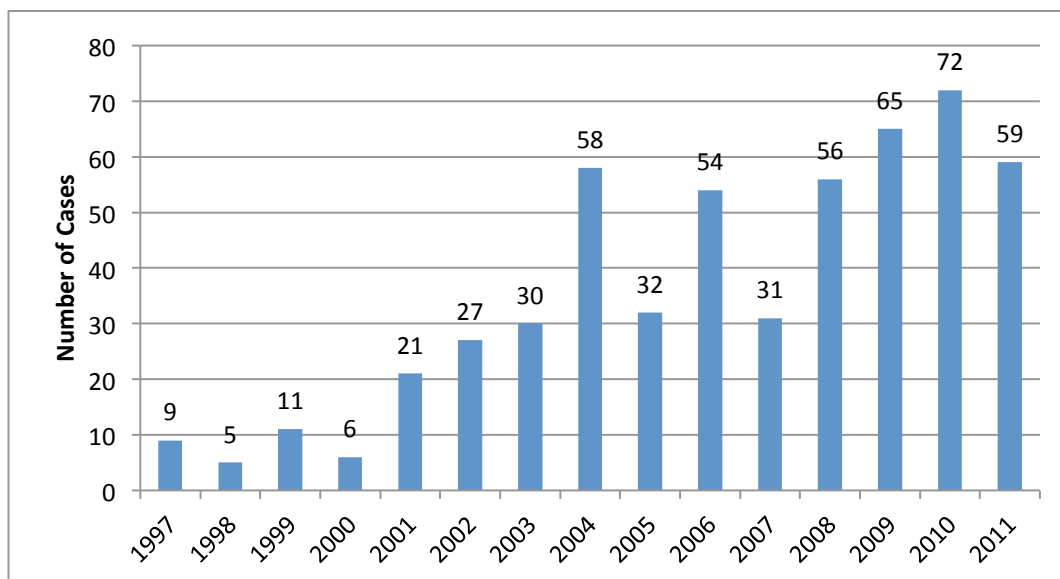
**Table 4.1. Percentage of anti-malarial medication that failed chemical assay analysis in Africa**

Location	Date of sample collection or study publication	Failed chemical analysis
Uganda	2001	57 out of 92 (62%)
Cameroon	2001	112 out of 284 (39%)
Kenya	2002	47 out of 116 (41%)
Kenya	2001-2005	11 out of 41 (27%)
Lao People's Democratic Republic	2003	27 out of 30 (90%)
Kenya and Democratic Republic of the Congo	2004	9 out of 24 (38%)
Burkina Faso	2006	32 out of 77 (42%)
Madagascar, Senegal, Uganda	2008	64 out of 197 (32%)
Nigeria	2009	60 out of 225 (27%)
Burkina Faso, Chad, Cameroon, Democratic Republic of the Congo, Ghana, Kenya, Nigeria, Rwanda, Senegal	2002-2010	35 out of 59 (59%)

*Source:* UNODC (2013), “Transnational organized crime in East Asia and the Pacific: A threat assessment,” April 2, p. 132. United Nations Office on Drugs and Crime, Vienna, [www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf).

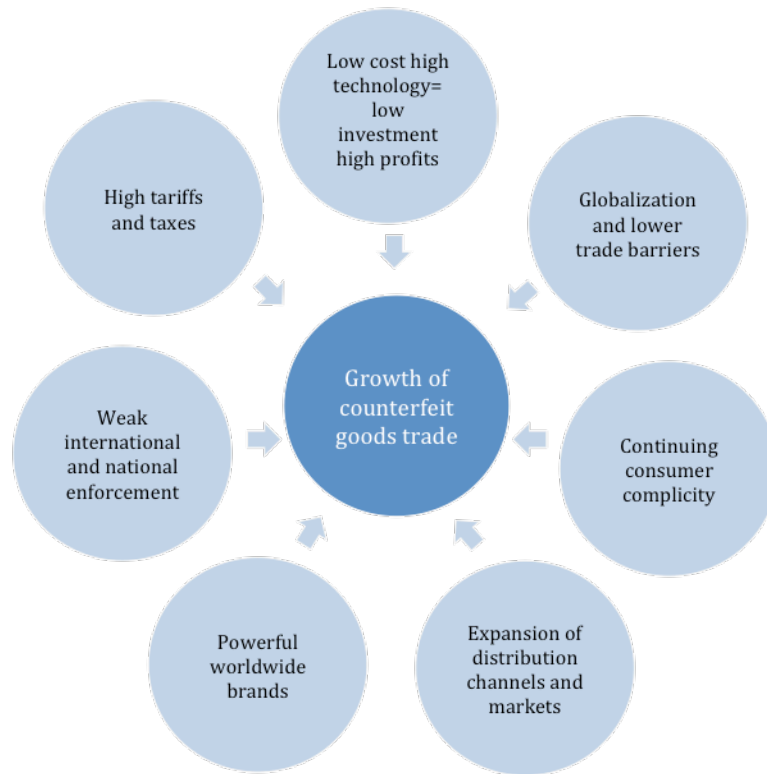
It is critical to recognise that the problem of counterfeit medicine extends to both innovative branded and generic versions of prescription drugs, as well as to over-the-counter (OTC) medicines. In a May 2014 interview, Samuel Louis, former deputy criminal chief for the US Department of Justice, described the first US investigations into OTC drug fraud, stating, “in the last six months, there have been two instances of counterfeit OTC sites being investigated, one in New York and one in Texas. We hadn’t seen this before, but it seems to be on the rise.” Louis described an individual with ties to China who was manufacturing large quantities of medicines, including OTC drugs, in an upscale Texas neighbourhood. He continues, noting that local manufacturing and the unlikelihood of consumers to report failed treatment “due to the placebo effect of the less serious nature of an OTC drug not working” handicap the battle against pharmaceutical counterfeiting (Stanton, 2014a).

Nevertheless, it is clear that the problem is increasing and has become increasingly widespread, as evidenced by Figure 4.1 below. The FDA has investigated an increasing number of cases since 1997. According to the FDA, the most commonly investigated products are solid oral dosage forms (pills, tablets). The top five brand-name products implicated in the ten highest-volume cases have been identified (USDFA, 2011a). Although limited to the cases opened by the US Food and Drug Administration’s Office of Criminal Investigations, the data are indicative of a global trend.

**Figure 4.1 Counterfeit drug cases opened by FDA’s Office of Criminal Investigations per fiscal year**

Source: Bernstein, Ilisa B.G. (2012), “FDA Efforts: Counterfeit Drugs,” Director, Office of Compliance, Center for Drug Evaluation and Research, US Food and Drug Administration, APhA Annual Meeting, New Orleans, [www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm299777.pdf](http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm299777.pdf).

The growth of the counterfeit goods trade generally, and the counterfeit medicines trade in particular, can be traced to a number of factors. According to the work of Chaudhry and Zimmerman, Figure 4.2 below concisely depicts a number of these contributing features. While these characteristics generally apply to the trade in counterfeit goods, several of the specific factors that are particularly important to the trade in counterfeit medicines are omitted. These would include: governance issues, consumer awareness and education, and the rise of internet sales. The factors most important to counterfeit medicines specifically are explored in depth below.

**Figure 4.2 Factors that affect the counterfeit trade of drugs**

Source: Chaudhry, P.E. and A. Zimmerman (2013), *Protecting Your Intellectual Property Rights: Understanding the Role of Management, Governments, Consumers and Pirates*, Springer, New York, p.23.

In the case of the market for pharmaceuticals specifically, the prevalence of counterfeits may also be traced to the complicated configuration of the supply chain. Figure 4.3 points to the convoluted nature of the legal, and highly regulated, US pharmaceutical supply chain and distribution system. Counterfeiters succeed in this context by fragmenting the supply chain as much as possible through secondary wholesalers,<sup>4</sup> who are less conscientious about the sourcing of their materials than the so-called “Big Five” wholesalers in the United States. While these five wholesalers distribute 90% of the medicines, the remaining 10% pass through a system of smaller secondary wholesalers who are most easily targeted by counterfeiters (USFDA, 2011b). These firms fill demand in cases of spot shortages and also serve as an additional source of revenue for the primary wholesalers through pharmaceutical trading. The loosely regulated secondary market is comprised of about 7 000 firms that purchase excess stock from wholesalers, pharmacies and sometimes unscrupulous brokers (Lybecker, 2008).

As evidenced in the following quote, counterfeiters increasingly use the secondary market to insert bogus drugs into the supply chain, selling to the secondary market at irresistibly low prices. “It is often through a secondary market that counterfeit, adulterated or improperly stored and handled products make their way into the distribution channel. ... The secondary market products are generally products purchased from any source other than from the original manufacturer and are commonly referred to





product transshipments, free-trade zones, Internet purchases and mail-order prescriptions increase the risk (Lybecker, 2008).

According to the WHO, more than 50% of the medicines purchased over the internet from illegal sites that conceal their physical addresses are counterfeit (WHO, 2010a). A 2008 report by researchers from the European Alliance for Access to Safe Medicines concluded that more than 60% of the drugs sold by online pharmacies are counterfeit or substandard. Of additional concern is the fact that more than 90% of the online pharmacies included in the study did not require an authorised prescription for the purchase of the medicines (Mayor, 2008). This figure is echoed in a recent investigation by the National Association of Boards of Pharmacy which examined 10 400 websites selling prescription medicines to patients in the United States. They found that 97% operated “outside the law, by supplying medicine without a prescription or selling non-FDA-approved and controlled drugs” (Barry, 2014). Finally, additional confirmation of this figure comes from the US-based National Association of Boards of Pharmacy (NABP). Of the websites identified as “Not Recommended by National Association Boards of Pharmacy in 2014, 99% dispensed prescription drugs without a valid prescription (National Association of Boards of Pharmacy, 2015). The challenge of regulating online pharmacies is immense. According to the National Association of Boards of Pharmacy, at any one time there are approximately 40,000-50,000 active online drug sellers (ASOP, 2014). Moreover, researchers at the University of California San Diego estimate that the largest illegal online drug sellers generate between USD 1 million and USD 2.5 million in sales every month (PhRMA, 2012).

Drawing on data from LegitScript, the Alliance for Safe Online Pharmacies identifies the top ten rogue-friendly registrars on the internet, as seen in Table 4.2 below. Again China appears prominently on the list.

**Table 4.2 Top Ten Rogue-friendly Registrars on the Internet**

Registrar	Country	Approximate Market Share
TodayNIC	China (People’s Republic of)	18
BizCN	China (People’s Republic of)	13
Nanjing Imperious	Israel/China (People’s Republic of)	12
WebNic	Malaysia	9
Rebel	Canada	7
IPMirror	Singapore	6
Dattatec	Argentina	5
EvoPlus	Canada	5
PakNIC	Pakistan	4
1API	Germany	4

*Note:* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* Baney, L. (2014), *The problem of rogue internet ‘pharmacies’: Risks to public health*, slide deck from the Alliance for Safe Online Pharmacies, [safeonlinerx.com/wp-content/uploads/2014/07/ASOP-101-presentation-07-2014.pdf](http://safeonlinerx.com/wp-content/uploads/2014/07/ASOP-101-presentation-07-2014.pdf).

As is the case with other counterfeit goods, some free-trade zones are known to be key trans-shipment points for counterfeit medicines. These free-trade zones are characterised by relaxed regulations, which allow counterfeiters to repackage their goods and conceal the point of origin (UNODC, 2013). It is believed that the free-trade zones present entry channels that are then used to penetrate the legitimate supply chain.

Parallel trade also facilitates the penetration of counterfeit medicines into the legitimate supply chain. Parallel trade essentially amounts to a drug that is sold in a given country, which, having moved through the various stages of the ordinary distribution chain, is then again acquired by a major distributor and is returned to the parallel distribution chain. The medicine is then transferred to a different, more lucrative, market by means of parallel intermediaries/distributors. On average it is estimated that a drug within the parallel market may be subject to 20 to 30 intermediary transactions. Not surprisingly, the drawn-out distribution chain creates a problem of verifiability with respect to the source from which each intermediary receives the product. Within the European Union, there is no mechanism for verifying the licenses of parallel importers. In like manner, there is no obligation for anyone within the parallel distribution process to record product batch identification numbers. Given the multitude of hands through which any single product passes, it is basically impossible to trace the trade route and origin of a marketed drug before it reaches the final consumer (UNICRI, 2012).

Given this distribution complexity, parallel trade may pose health risks to patients even in cases that do not involve counterfeit products. For example, given that the batch identification number may have been removed or modified during repackaging, a pharmaceutical company would find it virtually impossible to recall a batch of medicines that, for whatever reason, should not reach the consumer. Through the exploitation of these weak points, counterfeit drugs may permeate the legitimate distribution chain with relative ease (UNICRI, 2012).

The production, sale and distribution of counterfeit drugs are truly a global phenomenon. In the context of a single falsified medicine, the production trail may wind through dozens of countries: the ingredients are produced in multiple locations, the product is manufactured in another, labelling is produced in one country and applied in another, the finished product is routed through numerous countries to disguise the drug's origins, and finally, the product is shipped or reshipped from an economy with a secure pharmaceutical supply chain, to provide the appearance of legitimacy. Intelligence reports note that falsified medicines may change hands more than 30 times before reaching the patient (Lewis, 2009). In discussions with numerous industry experts, security professionals and advocates from patient-safety groups, every individual described a similar process and the frightening complexity of the globalisation of this trade.

As with many other aspects of this problem, it is difficult to pin down the source economies and hubs of the counterfeit medicine trade. Moreover, it is important to recognise that even within the economies most frequently linked to counterfeiters, the authorities in these economies are frequently great assets in the battle against counterfeiting. According to the Pharmaceutical Security Institute, in 2010, the top five origins of counterfeit medicines detected are China (196), India (67), Paraguay (18), Pakistan (14) and the United Kingdom (10). However, as law enforcement and regulatory pressures have increased within China, critical aspects of the production process have moved to other economies, such as the Democratic People's Republic of Korea, Myanmar and Viet Nam (UNODC, 2013).

According to the European Commission’s Taxation and Customs Union, Syria has long been a hub for counterfeit medicine trafficking to Europe and the Middle East. Its estimates indicate that 37% of the counterfeit pharmaceuticals seized at European Union borders in 2008 originated in Syria. Europol also notes that the western part of the Balkans is also a hub for counterfeit products originating in China and arriving via the Black Sea through ports on the Adriatic or Ionian Seas (Przyswa, 2013). The case of counterfeit Avastin is illustrative of this complexity. Counterfeit versions of the cancer drug were discovered in the United States in 2012. The origins of the counterfeit version remain unknown, but the falsified medicine passed through Turkey, Switzerland, Denmark and the United Kingdom before making its way into the United States via a Canadian-based firm.

According to the US Department of Homeland Security, the number of intellectual property rights seizures by US Customs and Border Protection continues to grow. In 2012, “Pharmaceuticals/Personal Care” seizures numbered 2 350 (9% of the total), while in 2013, they numbered 2 215 (8% of the total). The Manufacturer’s Suggested Retail Price (MSRP) for this commodity class was USD 82.99 million (7% of the total) in 2012 and USD 79.6 million (5% of the total) in 2013. The executive summary for 2013 notes that while the People’s Republic of China remains the principal source economy for counterfeit and pirated goods, seizures were made from 73 other economies during 2013 (United States Department of Homeland Security, 2014).

It is important to examine counterfeiting statistics in light of both the extent of the problem and the effectiveness of enforcement. That is, are more cases reported because the counterfeiting problem is more widespread or because enforcement is more effective? When it comes to counterfeiting data, this distinction is extremely important, as described by the Institute of Medicine: “The data do not suggest anything about the relative burden of the problem in different countries, however. Indeed, countries with lax enforcement attract illegal manufacturers, and countries with vigorous law enforcement repel them. (IOM, 2013)” A 2007 US Government Accountability Office study points to the limitations of utilising Customs seizure as a measure of the size and growth of the counterfeit market. Variation across locations confirms the uncertainty surrounding prevalence vs. effective enforcement in measures of the extent of the problem. The GAO study reports some ports discovering 100 times the quantity of illicit goods relative to other ports. Notably, only ten ports accounted for fully 25% of seizure value and 84% of penalty cases between 2001 and 2007 (USGAO, 2007).

Finally, evidence of the difficulty in measuring the scope of the counterfeiting problem is visible in the creative methods being utilised. In order to study the success of rogue online pharmacies in the Netherlands, Dutch researchers measured the levels of sildenafil, the active ingredient in a well-known erectile dysfunction treatment, in sewage in three cities in the Netherlands: Amsterdam, Eindhoven and Utrecht. They estimated the consumption of legally dispensed sildenafil from the national dispensary and compared it with that found in the sewage loads, concluding that at least 60% of the sewage loads of sildenafil could not be explained by legitimate prescriptions (Venhuis et al., 2014).

### ***Recent incidents of significant magnitude***

In May 2014, INTERPOL-co-ordinated law enforcement agents seized 8.4 million doses of counterfeit and unlicensed<sup>5</sup> medicines in United Kingdom, worth an estimated

GBP 18.6 million. India was the source of 72% of the illicit medicines, and China was the source of another 11% (Hirschler, 2014).

Customs officials in the port of Le Havre, France, discovered more than 2.4 million units of counterfeit drugs in February of 2014. The seizure, the largest counterfeit drug haul discovered to be destined for the European Union, included fake aspirin and anti-diarrheal medicines containing sugar in place of active pharmaceutical ingredients (API) (Stanton, 2014b).

In June of 2012, customs officials in Luanda, Angola, discovered 1.4 million packets of a counterfeit Swiss-made malaria drug. The discovery led to one of the world's largest seizures of counterfeit medicines (Faucon et al., 2013). This discovery echoes other discoveries of counterfeit malaria drugs. A study published in June 2012 by *The Lancet* medical journal found that 35% of malaria drug samples tested in sub-Saharan Africa failed chemical analysis (Nayyar et al., 2012).

In a case in San Juan, Puerto Rico, 23 individuals and three corporations were indicted in a drug diversion case involving more than USD 440 million worth of pharmaceuticals. Between 2007 and 2011, the organisation supplied misbranded, adulterated, sub-potent, improperly handled and counterfeit pharmaceuticals to patients throughout the United States (United States Department of Justice, 2012).

In 2012, two New York pharmacists were discovered to have purchased an estimated USD 274 million worth of illegally obtained, potentially expired HIV/AIDS medications through a counterfeit drug network. The operation had been in existence since 2008 (Interpol, 2014a).

While the incidents reported here are among the most recent and sizeable, numerous sources provide excellent compilations of counterfeiting cases, documented seizures and convincing anecdotal evidence (see the sources cited below for specifics and examples).<sup>6</sup>

## Adverse consequences

### *Adverse economic consequences*

The adverse consequences of pharmaceutical counterfeiting are principally felt by consumers, who ingest the spurious drugs, and by the pharmaceutical manufacturers, both innovative branded and generic firms.<sup>7</sup> Again, it is important to note the counterfeiters target all types of drugs: innovative originator drugs, generic, those requiring a prescription and over-the-counter treatments. No medicine is safe from their reach and potential damage.

### *Squandered health resources*

Counterfeit pharmaceuticals may also result in squandered health resources, for the individual patient, for international humanitarian organisations and NGOs and for national government programmes. Counterfeiters divert resources away from genuine treatment, in essence stealing scarce resources from limited health budgets. Counterfeit medicines not only reduce access to efficacious treatments, but endanger existing drug supplies. Regrettably, the lower prices of the counterfeits encourage purchases by both consumers and health providers. In a study of fake antimalarial drugs in Cambodia, researchers found that “fakes were frequently preferred by patients and village health providers because of the lower price” (Rozenaal, 2001). For the majority of pharmacies

in developing countries, their “budgets are tight, and they buy any drugs which are cheap. In rural areas, chronic drug shortages sometimes beg the question whether to take the risk even with suspected counterfeits” (VSO, 1998).

The potential wasted resources are a significant burden on families, especially in poor countries. In the poorest economies, where medicines rank second only to food as a household expense, resources devoted to spurious medicines come at tremendous opportunity cost. In addition, the increased burden of additional treatment can impose significant hardship (Cameron et al., 2008).

Unfortunately, not even the largest and most cautious actors on the global stage are immune to the threat of counterfeit medicines. The problem permeates drug donations and purchases by the world’s biggest charitable organisations. In November 2013, the World Health Organization issued a drug alert addressing falsified batches of a fixed dose artemisinin-based therapy used to treat malaria being circulated in Cameroon. At least four batches of the counterfeit version were identified, some of which featured the logo of the Affordable Medicines Facility, a malaria programme financed by the Global Fund (The Global Fund, 2013). Counterfeiters insert their drugs into the supply chain at every opportunity, even when drugs are sold at cost to humanitarian organisations.

### *To the pharmaceutical industry*

**Lost sales and revenues:** While the greatest concern of the pharmaceutical industry is the damage counterfeiters do to patient health and well-being, the damage translates into economic terms as well. For the pharmaceutical industry, counterfeiters most directly threaten product sales and revenues. Consider the following case from China, “a flood of unauthorised copies of a drug produced by an international pharmaceutical company caused a drop in annual sales in China to about USD 242 000. After counterfeiting was halted, sales reportedly climbed to USD 1.2 million” (Beach, 2001). In 2003, the estimated annual turnover of India’s pharmaceutical industry is approximately USD 4.2 billion, but counterfeiters rob legitimate producers of close to USD 1 billion annually (BBC News, 2003). The National Association of Boards of Pharmacy calculate that counterfeit drugs generated an estimated USD 75 billion in revenue in 2010 (Gillette, 2013). In El Salvador, INQUIFAR, the association of pharmaceutical companies, has denounced the extensive availability of counterfeit drugs in the domestic market. According to a local manufacturer, counterfeit medicines currently generates economic losses of around USD 40 million per year to the country’s pharmaceutical industry (WHO, 2006). In addition, in Indonesia, the International Pharmaceutical Manufacturers Group (IPMG) estimates that pirated drugs constitute 25% of Indonesia’s USD 2 billion pharmaceutical market. “According to IPMG’s vice chairman, those fake drugs hit foreign pharmaceutical companies’ bottom lines and pose a potential serious public health threat. (WHO, 2006)” Finally, the Association of Colombian Pharmaceutical Industries (ASINFAR) estimates that nearly 5% (USD 60 million) of a total of an annual USD 1 300 million, stem from contraband, counterfeiting or adulteration (WHO, 2006).

In this context, it is essential to recognise that it is impossible to know the extent of economic damage done by pharmaceutical counterfeiters. Given that counterfeit versions are frequently sold at prices much lower than legitimate medicines, additional information about the price sensitivity of consumers is required before one can determine whether each purchase of a counterfeit drug would have been a legitimate sale under

other circumstances. In like manner, a calculation of lost revenue is also impossible to come by.

**Additional costs of security and anti-counterfeiting technology:** In addition, counterfeiting raises the costs of legitimate pharmaceutical manufacturers, by forcing them to incorporate anti-counterfeiting technologies into their products and packaging. Firms will incorporate overt, covert and forensic technologies as necessitated by the risk and sophistication of counterfeiters. Many firms also monitor their products in the markets of counterfeit-prone countries and conduct their own investigations into reported counterfeiting incidents. As noted in a recent report by the Institute of Medicine, multinational pharmaceutical companies have invested in security departments that work globally with regulators and law enforcement agencies. These departments collect 80% of the evidence used in criminal prosecution (IOM, 2013). For example, a tip from Pfizer led to an investigation in China that dismantled an operation that spanned 11 economies, including those of United Kingdom, the United States and Israel (Sommerville, 2005). As this incident shows, counterfeiters may also threaten sales in other markets through parallel imports, transshipment and internet sales (Lybecker, 2007).

**Reputational damage and liability:** For the legitimate pharmaceutical firm, not only are revenues reduced and costs increased by counterfeiters, but the firm risks unquantifiable damage to brand and reputation. Essentially, there is an externality associated with counterfeiting that is borne by the pharmaceutical firm, which others in the supply chain do not account for. While no one entity “owns” the problem of pharmaceutical counterfeiting, the pharmaceutical manufacturer bears the additional cost of reputational loss. Counterfeiting puts the firm’s reputation for safety and quality at risk and subjects it to potential liability if consumers are harmed by counterfeit versions of their drugs. In a study on internet piracy and copyright enforcement, the authors find that the “coincidence of consumer and (innovative) firm interests informs who should bear the costs of enforcement. Since enforcement is in the interest of both parties, private enforcement by the firm through civil penalties is inadequate. (Harbaugh and Khemka, 2000)” In essence, consumer surplus is likely to be increasing in enforcement. Given that consumers benefit from added enforcement, private enforcement is inadequate. The same is probably true of pharmaceutical counterfeiting (Lybecker, 2008).

“Legal scholars have begun to suggest that manufacturers may have an obligation under civil tort law to take steps to prevent counterfeiting . . . [Further, they] may be held liable for injuries suffered by innocent purchasers of the defective product imitations if certain conditions are met. (Kontnik, 1998)” These conditions would include: *i*) if the counterfeiting and injury were foreseeable, *ii*) the firm had a role in creating the risk, and *iii*) it failed to take reasonable action to reduce that risk (LePark, 2002).

**Decrease in innovation:** The prevalence of counterfeit medicine will also impact pharmaceutical innovation. First, counterfeiting reduces the resources available to the firm for research and development.<sup>8</sup> Recent estimates place the fixed costs of drug development at more than USD 2.6 billion (Tufts Center for the Study of Drug Development, 2014). Granted, this is a highly controversial number, but even if the cost is half that amount, it remains a significant investment. The development a new drug is an inherently risky and expensive venture. If the potential returns on this investment are reduced by counterfeiting, it is not surprising that the incentives to invest are also reduced. The prevalence of pharmaceutical counterfeiting will decrease work on the diseases endemic to these areas.

This problem is particularly pronounced in developing countries. Diseases endemic to regions with high levels of counterfeiting are less attractive research targets. Counterfeiting reduces the profitability of developing country markets, curbing the incentives to target research and developing funds to diseases endemic to poor countries and making it very difficult to attract foreign investment. Sadly, less than 10% of global health research expenditures are dedicated to conditions that account for more than 90% of preventable mortality, conditions that are most prevalent in developing economies. Consider that of the “1 556 new drugs approved between 1975 and 2004, only 21 (1.3%) were specifically developed for tropical diseases and tuberculosis, even though these diseases account for 11.4% of the global disease burden” (DNDi, n.d.). Notably, five of these 21 drugs emerged from veterinary research (Pogge, 2005). Unfortunately the high prevalence of counterfeiting in these markets reduces their attractiveness even further. Accordingly, research efforts and resources are devoted to other endeavours.

### *To the government*

Pharmaceutical counterfeiting also imposes a variety of costs on national governments. These take primarily three forms: the loss of corporate taxes and VAT paid to the government, the increased regulatory and enforcement cost of securing the supply chain, and the higher cost of health care due to the adverse effects of fake drugs. As in the case of many of the other economic costs of pharmaceutical counterfeiting, it is impossible to calculate the extent of lost tax revenues. Given the extent of the trade, the losses can be assumed to be significant.

**Regulatory and enforcement costs:** Regulatory and enforcement expenses are also difficult to calculate. In most cases, the expenses associated with the regulation and enforcement of counterfeit pharmaceutical will be included in the overarching budget of the regulatory and enforcement entities. There may be some costs that are separable (see the following example), but by and large, it is impossible to tease out the costs specific to counterfeit goods in general, not to mention counterfeit medicines in particular. However, for some perspective, consider the following description by the Institute of Medicine. Advances in modern science now provide immensely powerful and expensive forensic chemistry techniques that can give investigators information on the unique fingerprints manufacturers leave on their products and packaging. Such an analysis may also provide prosecutors the evidence necessary to tie falsified drugs to particular sources, but at a significant cost. Forensic chemistry assays cost USD 5 000 to USD 15 000 per test on average. While extremely sensitive and accurate, these tests are nowhere practical for routine product quality market surveillance and may be entirely out of reach in the low- and middle-income countries most affected by the pharmaceutical counterfeiting (IOM, 2013). Not surprisingly, these expenses add up quickly, and can be an insurmountable barrier for regulators from poor countries.

**Loss of confidence/trust in governments and public health programmes:** Genuine harm, even among a small number of patients, can lead to a loss of confidence in government programmes, health care systems and non-governmental health programmes. Incidents of therapeutic failure and drug resistance can destroy the credibility and success of health programmes. As reported in a recent study in *PLoS Medicine*, patients across a range of developing economies have poor perceptions of the health care system, especially the technical competence and clinical skills of the staff and the availability of medicines (Berendes et al., 2011). Counterfeit and substandard medicines will only further undermine consumers’ trust.

A delegation from the Institute of Medicine (IOM), on visiting Brazil, heard study participants consistently attribute their lack of confidence in the health care system to unplanned pregnancies following a 1998 lapse in the quality of oral contraceptives (Goering, 1998). The Brazilian drugs regulatory authority, Anvisa, was created in response to this crisis and other medicine quality problems. As noted by the IOM, “Rumors about contraceptive quality linger in Brazil, a kind of urban folklore. They are evidence, however, that fake medicine can do long-term damage to the reputation of the health system. (IOM, 2013)”

**Increased health care costs:** Counterfeit medicines also result in higher health care costs, as patients may require additional treatment due to the potential adverse effects of spurious drugs. For example, consider the case of a patient who, following a liver transplant, required injections for anemia. After eight weeks of injections, the patient was still not responding to treatment. Upon investigation, the treating physicians discovered that the medicine used was counterfeit. Physicians and health care providers rarely suspect counterfeit or substandard drugs as the reason for a patient’s poor therapeutic response. Accordingly, they most frequently respond by ordering more tests or repeating the course of treatment (IOM, 2013)”.

**Decrease in foreign investment:** Finally, the prevalence of counterfeit medicines in a national market may reduce, discourage or prevent foreign investment, as potential investors judge that their interests will not be protected. Though impossible to establish what might have been, the consequences may be significant: lost opportunities for economic growth and development as well as unrealised improvements in the national health care system (UNICRI, 2012).

### ***Additional adverse impacts***

Beyond the significant adverse economic consequences of the illicit trade in pharmaceutical counterfeiting, several additional adverse impacts must also be taken into account. It is important to fully recognise the environmental, social, public health and fiscal implications.

#### *Patient health and safety*

A significant body of work confirms that counterfeit pharmaceuticals are increasingly prevalent and pose a serious and growing threat to public health, especially in developing countries. While counterfeit drugs are a less visible barrier to affordable access to medicines, they are perhaps a more insidious threat to public health than high drug prices will ever be. Consumers rely on drugs that provide no medicinal value and frequently result in therapeutic failure. The severity of the health risk associated with fraudulent drugs can vary greatly, from inconvenience to unwanted pregnancies to fatality. Tracing illness and death to counterfeit drugs is obviously very difficult, but even the limited evidence available suggests that the scope of the problem is considerable. As noted above in the discussion of the dimensions of the problem, numerous sources provide excellent compilations of counterfeiting cases, documented seizures and convincing anecdotal evidence.<sup>9</sup>

As with many of the statistics and calculations within this work, the scope and cost of the impact of counterfeit drugs on patient health and safety is seemingly impossible to measure. Patients who take counterfeit drugs are subject to prolonged illness, disability, death, treatment failure, as well as the potential for additional complications, depending



on the composition of the falsified medicine.<sup>10</sup> Individuals may also suffer lost income due to absenteeism from work due to their worsening clinical condition or disability.

While estimates do exist, the extent to which they differ is indicative of the measurement challenge presented. INTERPOL estimates that more than 1 million people die each year from counterfeit drugs (Southwick, 2013). While counterfeit drugs seem to primarily originate in Asia, Asian patients are also significantly victimised by the problem. A 2005 study published in *PLoS Medicine* estimates that 192 000 people are killed in China each year by counterfeit medicines (Cockburn et al., 2005). According to work done by the International Policy Network, an estimated 700 000 deaths from malaria and tuberculosis are attributable to fake drugs (Harris et al., 2009). The World Health Organization presents a much more modest number, noting that malaria claims 1 million lives annually and as many as 200 000 may be attributable to counterfeit medicines. This could be avoided if the medicines available were effective, of good quality and used correctly (WHO, 2003). Even this number is double that presented by academic researchers Amir Attaran and Roger Bate, who claim that each year, more than 100 000 people around the world may die from substandard and counterfeit medications (Gillette, 2013).

While definitive estimates are impossible to come by, anecdotal evidence of the harm done to patients by counterfeit medicines is plentiful and may be found in virtually every country. Consider the following examples:

A counterfeit version of the blood thinner heparin was discovered in the United States in 2008. In this case, the counterfeit contained none of the active ingredient, which had been replaced with a cheaper substance that caused patients to have adverse reactions. The result was a nationwide recall of heparin. The medication, whose counterfeit active ingredient came from China, is suspected as the cause of as many as 81 deaths (Toscano, 2011).

More than 500 children around the world died from counterfeit cough syrup that was tainted with ethylene glycol, an industrial solvent, in place of propylene glycol, in pediatric paracetamol formulations (Liang, 2002).

During the meningitis epidemic in Niger in 1995, more than 50 000 people were vaccinated with counterfeit medicine, resulting in 2 500 deaths (WHO, 2013).

As described below, counterfeits can also kill through the resistance they create. Among Rwandan refugees, an outbreak of cholera and bacillary dysentery revealed resistance to multiple first-line antibiotics in clinical isolates of *Vibrio cholerae* and *Shigella dysenteriae* contributed to high death rates (Goma Epidemiology Group, 1995).

In 2010, a Pennsylvania woman pleaded guilty to the illegal importation and distribution of 4 million fake diet pills, containing unapproved drugs and carcinogens. The pills “caused significant side-effects in some individuals, including nausea, vomiting, elevated blood pressure, heart attacks and strokes” (Partnership for Safe Medicines, 2010).

To date, no research has quantified the proportion of child deaths attributable to falsified and substandard medicines. However, a recent report from the Institute of Medicine presents a table linking the most common causes of child death and to verified reports of substandard medicines. Regrettably, the list includes pneumonia and diarrheal diseases, as well as malaria (IOM, 2013).

In September of 2012, the Tennessee Department of Health notified the Centers for Disease Control and Prevention (CDC) about an outbreak of meningitis caused by fungal infection through a contaminated epidural steroid injection from the New England Compounding Pharmacy Center in Framingham, Massachusetts. By early 2013, the CDC traced 693 illnesses and 45 deaths in 19 states to the contaminated drug (IOM, 2013).

In a 2002 incident in Florida, investigators discovered that criminals relabeled up to 110 000 bottles of low-dose Epogen, an anemia drug, to create counterfeit high-dose Epogen and Procrit. As a result, patients received insufficient levels of life-preserving therapy and suffered painful side-effects (Pew Charitable Trusts, 2014).

In December 2011, counterfeit heart medication was given to up to 40 000 patients in Lahore, Pakistan. The drug resulted in the rapid depletion of white blood cells and platelets and led to the deaths of more than 100 patients (BBC, 2012).

Eleven people died in Ontario, Canada, in 2005, after being prescribed a counterfeit version of Norvasc, a Pfizer heart medication, containing only talcum powder (Partnership for Safe Medicines, 2005).

An extensive list of counterfeit medicine incidents is available for review at the Partnership for Safe Medicines website.<sup>11</sup>

Finally, Neal Patel of the Royal Pharmaceutical Society notes that internet sales of counterfeit medicines are characterised by an informational health risk as well: “The user has no information about the ingredients, dosage instructions or potential side-effects, so patients would not be receiving proper health care advice (Wise, 2013).”

### *Resistance*

Counterfeit pharmaceuticals containing a greatly reduced dose of the active constituent unarguably contribute to global microbial resistance and more virulent forms of disease, undermining the fight against infectious diseases. The danger is twofold: actual microbial resistance as well as false reports of drug resistance.

First, anti-infective medicines containing trace or inadequate amounts of the stated active ingredient will engender drug resistance. When pathogens are exposed to sub-therapeutic amounts of active ingredient, the more resistant pathogens will multiply while the susceptible pathogens are eliminated. As a result, future patients will more frequently be infected with pathogens that are resistant to the active ingredient in the poor quality medicine. For diseases that are treated with combination drug therapies, such as HIV, TB and malaria, when one active ingredient is present in inadequate concentrations, the pathogens also risk becoming co-resistant to the partner drugs (Newton, 2012). In the case of anti-malarials, the evidence “strongly suggests that under-dosing is an important contributor to resistance. Therefore if patients consume co-circulating falsified and substandard medicines sequentially, so that heavy parasite burdens encounter low drug concentrations, the risks of engendering resistance are high” (Newton et al., 2014). Moreover, the use of counterfeit anti-malarials, and the subsequent failure of patients to improve, led to false reports of drug resistant strains of malaria (Newton, 2006a).

To put this in perspective, consider the following specific cases. In the case of artemisinin derivative-based combination therapies (ACTs) for malaria, while they once showed great promise for controlling malaria in Africa, poor-quality versions are already widespread on the continent (Bate, 2008; Newton, 2006b, 2008). It is believed that the

wide use of monotherapy, substandard artesunate and fake artesunate containing sub-therapeutic quantities of artemisinin and artesunate in Southeast Asia have probably contributed to the *plasmodium falciparum* artesunate resistance has recently been described on the Thailand–Cambodia border (Newton, 2008). And in the case of HIV, the CDC reports that HIV surveillance sites in 2007 found that 1 in 6 newly diagnosed infections were drug-resistant (Dahl, 2014). In addition, experts believe that the high incidence of typhoid antibiotic resistance in Myanmar may have been caused by the high prevalence of counterfeit and substandard chloramphenicol and cotrimoxazole (UNICRI, 2012). A similar situation exists with tuberculosis. Studies show that poor-quality tuberculosis (TB) drugs are a neglected link between TB treatment, therapeutic failure and the increasing burden of TB drug resistance (Laing, 2004). The XDR-TB strain (extremely drug-resistant tuberculosis) is now confirmed in 49 countries, from Peru to Nepal (Harris et al., 2009). The World Health Organization estimates that 5% of new tuberculosis infections between the years of 2003 and 2007 were resistant to multiple drugs, with the rate as high as 35% in some countries (WHO, 2008).

### *Labour exploitation*

Labour exploitation is also a potential issue, since jobs in the production of counterfeit goods are frequently unregulated and low paid. Working conditions are also questionable, and workers may be placed in vulnerable positions without the enforcement of safety and security regulations (UNODC, 2014). Quality-control processes and verification add expense to manufacture, as does maintaining sterile water filtration and air handling systems (IOM, 2013). Given that these are costs that counterfeiters are unwilling to invest in, it is not surprising that workers suffer the consequences.

### *Environmental damage*

While the legitimate pharmaceutical industry collaborates with the relevant local, state and federal agencies to comply with environmental regulations and reduce the environmental impact of the research and manufacturing process for new medicines, the same does not hold true of counterfeit manufacturers. As legitimate producers work to lessen their environmental footprint, counterfeiters reap the financial benefits of dirty production, taking every environmental shortcut imaginable. In the context of manufacturing, counterfeit producers disregard the impact that chemical compounds may have on the environment: disposing of toxic dyes and chemicals without regulatory oversight, as well as ignoring the treatment of wastewater streams.

In addition, the increasing volume of seized counterfeit goods presents an environmental challenge, since destruction may be a costly, waste-generating process (OECD, 2007). Authorities note that seized counterfeit electronic goods and counterfeit chemicals and pharmaceuticals are particularly difficult to dispose of in an environmentally friendly manner (Soentgen, 2012, UNODC, 2015). Consider the numbers from the European Union alone. In 2011, customs authorities seized more than 115 million counterfeit items, a 15% increase in goods seized over 2010. Ultimately, over 75% of these items were destroyed, clear evidence of the magnitude of the challenge of disposing of counterfeit goods (Soentgen, 2012). Not surprisingly, the environmental costs of counterfeiting are often underestimated.

## Policy responses

At a fundamental level, many economies rely heavily, if not exclusively, on existing legislation to combat the trade in counterfeit medicines. Most frequently enforcement authorities rely on criminal laws and intellectual property rights laws. Unfortunately, this is woefully inadequate. “Rather than examining pharmaceutical crime as a specific type of crime requiring specialised legislation, many countries continue to place it under the category of intellectual property crime or use existing criminal law on narcotics or fraud. As a result, [a significant proportion of experts believe that] countries do not possess the necessary legal apparatus to effectively target the issue, while others argued that penalties were far too low for the offences committed. (Interpol, 2014)” As noted in *The Lancet*, “there is no global system for the mandatory reporting, assessment and dissemination of information on suspicious medicines. ... It is extraordinary that, in 2014, such systems are widely in place for suspicious aircraft parts, but not for suspicious medicines. (Newton et al., 2014)”

A review of existing public policies is complicated by the secrecy that surrounds such programmes, especially the successful ones. This review examines efforts that may be considered “great successes” and also describes policies that hold “great promise”. The extent to which these policies may be adopted or implemented by other agencies and in other places remains unknown. Overall, two recommendations clearly emerge as priorities in combating counterfeit medicines: more extensive information sharing across agencies and economies, and the development and adoption of an international public health treaty.

### *Great successes*

#### *Nigeria’s NAFDAC*

The most prominent success story in the fight against counterfeit medicines is that of Nigeria and its National Agency for Food and Drug Administration and Control (NAFDAC). The agency is a pioneer in the fight against spurious medicines in West Africa. When Dora Akunyili assumed the position of Director-General of NAFDAC in 2001, an estimated 80% of the medicines sold within Nigeria were counterfeit or substandard. In 2002, within the six principal drug markets across Nigeria, 68% of medicines were unregistered by the agency. The study was repeated in 2003 with an 80% reduction in the number of unregistered medicines. By 2006, the share of counterfeit drugs had dropped from 41% (2001) to 16% (2006) (UNICRI, 2012).

The efforts to combat pharmaceutical counterfeiting in Nigeria began with a single policy: restricting pharmaceutical imports to only two airports and two seaports, each staffed by NAFDAC officials. This was followed by the discovery of several Chinese and Indian drug manufacturers suspected of producing and exporting fake drugs in Nigeria, which resulted in the termination of the importation of those products. NAFDAC then established independent contracts with regulatory authorities in China and India to oversee exports to Nigeria.

As described by UNICRI, the efforts undertaken since 2001 have markedly improved the security of the Nigerian pharmaceutical supply chain, including: “meticulous border controls; drafting of prohibition lists regarding substances’ import; accompanying certification documents for imported drugs; raids to assess the quality of the medicines

produced and distributed; and the boost of the national pharmaceutical industry, both improved the situation within Nigeria, as well as the image of the country abroad. (UNICRI, 2012).” Today, every medicine produced and circulated within the country bears a registration number in order to verify authenticity, and domestic pharmaceutical producers are now held to strict manufacturing requirements.

Nigeria’s success stands in stark contrast to much of the rest of Africa. The World Health Organization estimates that a mere 7% of sub-Saharan economies have a “moderately functioning MRA” (Medicines Regulatory Authority) (Newton et al., 2014).

### *Operation Pangea*

The INTERPOL-co-ordinated Operation Pangea is a rare example of inter-agency co-ordination resulting in success. Operation Pangea VII included close to 200 enforcement agencies across 111 countries<sup>12</sup>, targeting the individuals and criminal networks operating illicit online pharmacies to sell counterfeit medicines. The operation produced 237 arrests worldwide and the seizure of 9.4 million fake and illicit medicines (valued at nearly USD 36 million). In addition, 19 000 advertisements for illicit pharmacies via social media platforms were removed, more than 10 600 websites were shut down and 1 235 investigations were launched (Interpol, 2014). “Operation Pangea VII was co-ordinated by INTERPOL, with the World Customs Organization (WCO), the Permanent Forum of International Pharmaceutical Crime (PFIPC), the Heads of Medicines Agencies Working Group of Enforcement Officers (WGEO), the Pharmaceutical Security Institute (PSI) and Europol. The operation was supported by efforts from MasterCard, Visa, Microsoft, PayPal, G2 Web Services and LegitScript. (Imber, 2014)”

While the operation is an undeniable success, it can only be considered a short-term fix. The battle against illicit online pharmacies is an ongoing one. As noted by Ilisa Bernstein, director of the Office of Compliance in the FDA’s Center for Drug Evaluation and Research. “This is a drop in the bucket. We don’t know how many websites are out there, but there are a lot more. We may have some impact on [these websites], but they can pop up days or weeks later using another URL and another way to deceive consumers. (Shelton, 2012)”

However, the importance and value of sharing information internationally across agencies cannot be overestimated. As described by the recent report of the Institute of Medicine, “the modern pharmaceutical supply chain is complex. Drug manufacturers source chemicals from around the world, and different factories process ingredients into a final formulation that is packaged, repacked and sold in many different countries. The chances that a drug quality problem in one country affects that country alone decrease when products travel along global supply chains. The interconnectedness of the drug supply chain makes it imperative that countries share information on falsified and substandard drugs. (IOM, 2013)”

### *Uganda’s community health workers*

Two village-level organisations in Uganda, Living Goods and BRAC, equip community health workers with a supply of medicines to sell to the community. Using a micro-franchising business model similar to that of Avon Ladies, local women receive training and then purchase a bag of medicines to sell to their neighbors. Remarkably, these sales seem to reduce other retailers’ sale of counterfeit drugs. In an evaluation of the malaria medicines sold by pharmacies in four districts in which BRAC and Living Goods

operate, the Abdul Latif Jameel Poverty Action Lab at MIT,<sup>13</sup> found that before the arrival of the community health workers, 37% of pharmacies sold counterfeit malaria drugs, and approximately 20% of drugs sold were fake. However, after BRAC and Living Goods arrived and the villages gained access to reliable medicines, the quantity of counterfeit or substandard drugs sold in pharmacies fell by 50%. “You can get away with selling fake or low quality drugs, because villagers have nothing to compare it to,” said Yanagizawa-Drott, one of the study’s authors. “When an NGO comes in and sells a high-quality drug – there is now some ability for consumers to observe quality. (Rosenberg, 2014)”

### *Product verification technology*

Sproxil was founded in 2009 to empower consumers to avoid counterfeit drugs with a simple text message. They now operate in five countries across three continents. Sproxil founders recognised two facts: first, the trade in counterfeit medicines is worse in developing economies where regulatory oversight is limited and enforcement resources are scarce; second, mobile phone technology has been enthusiastically embraced, especially in emerging markets. Taking account of both, Sproxil’s Mobile Product Authentication (MPA) provides consumers with the assurance that they are purchasing genuine medicine (Sproxil, 2015).

Prior to purchasing a Sproxil-verified medicine, the consumer scratches off a label to reveal a unique code that can be texted to a toll-free number. Seconds later, a text message response either confirms that the medicine is real or alerts the consumer that the product is counterfeit. Sproxil has produced tens of millions of scratch-off labels for large pharmaceutical firms operating in India and Africa, and claims close to 15 million product verifications. While a mere 10% of consumers actually text for verification, Sproxil reports that “sales of the drugs it verifies tend to go up, probably because consumers are more confident that they are getting the real thing. This innovative strategy is not known to have led to the shutdown of any counterfeit drug manufacturers, who can easily move their fakes to new stores or copy different products. (Hoffman, 2011)” However, Nigerian inspectors report that they are finding fewer counterfeit drugs on pharmacy shelves since Sproxil was introduced. Nigeria now requires verification for all malaria medicines.

Additional policy options are emerging as technology advances to combat counterfeiting. In April 2013, the US Food and Drug Administration announced that it would begin testing a handheld device, CD-3, to detect counterfeit and substandard malaria drugs in Africa. The device detects product quality by illuminating the drugs with a variety of wavelengths of light, allowing for the detection of differences in both products and packaging. Developed by the FDA’s Forensic Chemistry Center, the CD-3 has been successfully used in investigations of product tampering, screening cosmetics, foods, medical devices and cigarettes (McCarthy, 2013).

### *The Medicrime Convention*

In October 2011, a dozen countries<sup>14</sup> signed on to the Council of Europe’s Medicrime Convention, the first major international treaty to make dealing in counterfeit drugs and devices a criminal offense. The convention, which took three years to draft, requires signatories to have the necessary criminal law in place to detect, enforce and punish such crimes. Accordingly, it is a criminal offense to “manufacture, supply, offer to supply or

traffic in counterfeit medical products; to falsify documents, to manufacture and supply medical products without authorisation; and to market drugs without complying with industry standards”. The penalties will be assigned by individual economies. It is hoped that the convention will strengthen international co-operation and information sharing (Watson, 2011). Notably, in the 2014 INTERPOL report on pharmaceutical counterfeiting, numerous European countries positively commented on the Medicrime Convention (Interpol, 2014). In the four years since the signing of the Medicrime Convention, very few countries have adopted it and even fewer have ratified the convention, evidence that this channel for combating counterfeit drugs is likely to face an arduous process.

### *Wholesaler behaviour*

Through strategic contracting and supply restrictions, pharmaceutical manufacturers are also reining in their wholesalers and distributors. In late 2003, one of the main US based pharmaceutical companies decided that it would no longer sell its products (pharmaceuticals or medical devices) to US wholesalers that buy its products from other sources. Their wholesalers must agree to “spot audits of their warehouses and records by its inspectors. ... If company investigators determine that a distributor isn’t living up to the agreement, the company would stop shipping its products to the wholesaler. (Hensley, 2003)” This effort was followed in April 2004 by another large US based pharmaceutical company putting in place a policy that requires wholesalers to source all of their product needs directly from it. To facilitate consumer access to approved wholesalers, they then posted the names of those wholesalers who agreed to their Terms and Conditions of Sale on a corporate website (Abbot Laboratories, 2004).

These efforts have had an impact on wholesaler policies as well. In May 2005, one of the “big three” US wholesalers, announced that it would discontinue buying and selling drugs among secondary wholesalers, in effect eliminating its pharmaceutical-trading business. Some observers regard this as an “effort to exit from a business blamed for allowing counterfeit drugs to reach consumers. (Tesoriero, 2005)” Whether these changes are an effort to comply with manufacturer requests or an independent attempt to curtail counterfeiting, the result is enhanced safety of the pharmaceutical supply chain through a closure of entry points for counterfeits (Lybecker, 2008).

### *WHO’s Rapid Alert System*

As noted above, “there is no global system for the mandatory reporting, assessment and dissemination of information on suspicious medicines. ... It is extraordinary that, in 2014, such systems are widely in place for suspicious aircraft parts, but not for suspicious medicines. WHO’s new Rapid Alert System facilitates information sharing on poor-quality medicines between medicines regulatory authorities (MRAs). It should be mandatory and included in the international health regulations. (Newton et al., 2014)”

In order to compile a complete picture of the scope of the problem of counterfeit medicines, thorough and novel surveillance is essential. A surveillance model should promote systematic investigation of drug quality failures to build evidence for changing policy. In light of the increasing complexity, geographic extent and scale of medical products affected, WHO has initiated a project specifically focused on building global capacity for a more systematic approach to the surveillance, monitoring and alerting of Substandard/Spurious/Falsely labelled/Falsified/Counterfeit (SSFFC) medical products.

Following a successful four-month study, completed in ten countries,<sup>15</sup> the World Health Organization refined and improved the system. To date, seven workshops have trained 200 personnel from 80 member states in the use of the system (WHO, 2010b).

Numerous agencies, including the Institute of Medicine, have remarked on the great promise of the system for use in developing countries (IOM, 2013). The WHO describes the long-term objective of the programmes follows: “to significantly improve the quantity, quality and analysis of data on the incidence of SSFFC Medical products through the creation of a global surveillance and monitoring system. The system is designed to provide stakeholders with a sound and validated basis to develop and collaborate on strategies for radically reducing the incidence of SSFFC products, by identifying the vulnerabilities in supply chains, measuring the harm caused and facilitating the more efficient exchange of information between countries in order to protect patients and consumers (WHO, 2010b)”

At the most fundamental level, reports from patients can assist in identifying counterfeit drugs. “For example, a patient on olanzapine, who had taken to polishing his tablets, reported that the colour in the coating was rubbing off. When the drug’s ineffectiveness was also deduced, this led directly to identification and action on a major counterfeit operation. (Raine, 2012)”

#### *The Global Steering Committee for Quality Assurance of Health Products*

Emerging from the efforts of the Global Fund, the Global Steering Committee (GSC) is envisioned as an effort to harness the collective strengths of multilateral and bilateral organisations, national authorities, non-governmental organisations and manufacturers, to facilitate an enhanced assurance framework for both quality and the integrity of the supply chain of medicines and other health products. At the GSC’s inaugural meeting in November 2014, representatives from a number of organisations attended, including Gavi, the Global Fund, the United Nations Development Program (UNDP), UNITAID, the United States President’s Malaria Initiative (PMI), the United States Agency for International Development (USAID), The United States Food and Drug Agency (USFDA), The World Bank and The World Health Organization (WHO).

Norbert Hauser, the former inspector general of the Global Fund, will serve as the initial GSC Chair. He will oversee the primary functions of the GSC, which fall into four key intervention areas, including: Guidance and Resources, Data Sharing, Knowledge Sharing and Stakeholder co-ordination and Advocacy (The Global Fund, 2015). As is the case with several of the other initiatives described in this section, the Global Steering Committee possesses great potential for significant impact in the battle against counterfeit medicines.<sup>16</sup>

#### *Pharmacy domain*

The National Association of Boards of Pharmacy (NABP)<sup>17</sup> is launched the “.pharmacy” domain name, December 2014, in the hopes of establishing a safe place within cyberspace for consumers to purchase and get facts about medications. The NABP has partnered with the International Pharmaceutical Federation (FIP), the Alliance for Safe Online Pharmacies (ASOP), the European Alliance for Access to Safe Medicines, Gilead Sciences, state boards of pharmacy and several large pharmaceutical companies in the domain initiative. “We were approached by various stakeholders in the pharmacy community that saw a problem with rogue [internet] pharmacies and counterfeit drugs,”



explained NABP Executive Director Carmen A. Catizone. “If it’s outside the US, then we will have memoranda of understanding or agreements with regulators of countries around the world. And they will vet, for us, the legitimate pharmacies. (American Journal of Health-System Pharmacy, 2014)”

### Raising the cost of distributing counterfeit drugs

Anti-counterfeiting strategies can be broadly classified into three categories: technological changes in products and packaging, co-operation across the supply chain, and co-operation in enforcement. The technological adjustments are principally made to make replication more difficult and costly. Co-operation efforts across the supply chain aim to raise the costs of distributing counterfeit drugs and inserting them into the supply chain. Enforcement co-operation seeks to increase the likelihood of detection and the probability of prosecution (Lybecker, 2008).

Given two factors, the “credence goods” characteristics of pharmaceuticals and the sophistication of counterfeits, it is difficult to educate consumers to identify counterfeit drugs.<sup>18</sup> Legitimate producers thus find it difficult to increase the demand for genuine products and to reduce the demand for counterfeits. Consequently, they utilise supply-side strategies. Specifically, they aim to increase one of the two components of the marginal cost of counterfeiting: the constant cost of production and distribution of counterfeit drugs, the probability of detection and the monetary penalty. The following examples are illustrative of these efforts, as pursued through a variety of means (Lybecker, 2008).

- Consumer groups in India have pressured Parliament to change the penalty for counterfeiting to the death penalty (BBC News, 2003).
- In Cambodia, strategies against counterfeit anti-malarials consisted of “public warnings describing fakes ... a poster and radio education campaign has educated patients to distinguish fake tablets (Newton et al., 2002)”.
- The Nigerian government has joined with registered manufacturers to destroy expired medicines, preventing counterfeiters from using them and raising the cost of obtaining authentic-looking packaging (Naik, 2004).
- Dora Akunyili, the head of Nigeria’s National Agency for Food and Drug Administration and Control (NAFDAC), has used high-school essay contests to publicise the dangers of counterfeit drugs (Naik, 2004).

### *Need for an international public health treaty*

Remarkably, the production of counterfeit medicines or medical products is not an international crime, and current definitions and laws are inconsistent. An international public health convention or treaty would greatly benefit law enforcement authorities in combating criminal networks and counterfeiting operations. The lack of consensus and a legally binding force inhibits true progress.<sup>19</sup>

### Links to transnational organised crime

As is the case with many of the most critical elements of this paper, more is unknown than is known about the links to transnational organised crime. Anecdotal evidence of the

link is quite plentiful, but the illegal nature of the business, as well as the secrecy maintained by law enforcement, make it virtually impossible to fully understand, not to mention measure, the extent of the trade. A 2014 INTERPOL study provides the most up-to-date information and comprehensive perspective on pharmaceutical crime and organised criminal groups. INTERPOL's Medical Product Counterfeiting and Pharmaceutical Crime (MPCPC) Sub-Directorate has prepared an analysis of available data, dating from 2008 to the present, to establish the extent of organised criminal groups' (OCGs') activity in the realm of pharmaceutical crime (Interpol, 2014a).<sup>20</sup>

As acknowledged in the INTERPOL report, there are significant intelligence gaps in the information surrounding the extent of organised criminal involvement in pharmaceutical crime. However, a recent Europol threat assessment concludes that there are "a wide variety of actors, operating within the pharmaceutical crime arena, encompassing both OCGs and individual criminals, both of which are involved at any point in the supply chain" (Interpol, 2014a). It is essential to keep this in mind when reflecting on the primary findings of this and other evaluations of pharmaceutical crime. The primary findings of the INTERPOL report point to the involvement of both traditionally structured hierarchical crime groups as well as highly organised, yet generally informal, networks of illicit online pharmacies and finally, small groups with only 3 to 10 members (Interpol, 2014a).

The results from INTERPOL, as well as from other agencies, do provide some regional perspective. Regional involvement of OCGs was captured as follows:

- In North America and Europe, numerous investigations in the United States, Canada and Sweden have linked biker gangs to the production and distribution of counterfeit medicines, in particular erectile dysfunction (ED) medications and steroids (Interpol, 2014a).
- In September of 2014, police in the European nations of Austria, Belgium, France, Hungary, Slovak Republic, Spain and the United Kingdom co-ordinated a seizure of millions of units of counterfeit pharmaceuticals from China and Singapore worth an estimated USD 13 million. Europol stated that the operation targeted "an organised crime group behind the supply and online distribution of counterfeit medicines – mainly erectile dysfunction pills – and their money-laundering activities. (MacDonald, 2014)"<sup>21</sup>
- According to Alastair Jeffrey, the head of enforcement at Britain's Medicines and Healthcare Products Regulatory Agency (MHRA), criminal gangs have become adept at utilising social media, greater internet access and smartphones to sell so-called lifestyle drugs to a mass market at minimal risk and cost. Criminals have branched out into counterfeit prescription drugs because the profits are higher and the risks are lower relative to narcotics such as cocaine, heroin and cannabis. The director of the International Institute of Research Against Counterfeit Medicines, Bernard Leroy, claims that for every euro invested, criminal gangs can make EUR 200 to EUR 500 (Sample, 2014).
- In May of 2014, Domenico DiGiorgio, director for the prevention of counterfeiting at the pharmaceutical watchdog Italian Medicines Agency, asserted that a highly organised criminal ring is responsible for the distribution of stolen and counterfeit cancer drugs throughout Western Europe. Contaminated vials of Roche Holding AG's cancer drug Herceptin reappeared in the United Kingdom,

Germany and Finland after being stolen in Italy. The criminal ring is believed to involve the Camorra (an Italian organised crime syndicate originating in Naples), as well as Russia-based Eastern European networks. “One pharmaceutical company official said that, on average, five cargoes of the company’s products disappeared every month in Italy, with truck drivers offering what he termed hazy explanations for the incidents. (Faucon and Plumridge, 2014)”

- In November 2013, Canadian authorities began an organised crime investigation named “Project Forseti”, targeting two gangs, the Hells Angels and the Fallen Saints (Customs Today Report, 2015). In January of 2015, police in the provinces of Saskatchewan and Alberta seized guns and drugs, including significant amounts of counterfeit oxycontin. The counterfeit versions of oxycontin have been traced to at least three deaths (CBC News, 2015).
- In the context of South and Central America, all respondents to the INTERPOL questionnaire indicated a growing number of active groups, cases, seizures and arrests since 2008 (Interpol, 2014b). In Mexico, dating as far back as 2001, law enforcement officials have believed that “most, if not all, of the pharmacies located along the [US-Mexican] border, are owned and operated by Mexican organised crime groups. In Latin America, crime syndicates bring together manufacturing and printing skills and often link them with existing pharmaceutical distributors. (Christian, 2001)”
- In Eastern Europe, OCGs are seemingly increasingly involved in the manufacture and supply of doping substances (Interpol, 2014a).
- Not surprisingly, the greatest OCG activity appears to be in Asia. The INTERPOL report describes numerous incidents. In 2009, an OCG with likely Triad connections distributed counterfeit ED medications, operating primarily through local nightclubs and brothels in Malaysia. In 2011-2012, an organised crime group was discovered to be responsible for delivering counterfeit and diverted human growth hormone products to numerous local subcontractors in China. In 2013, law enforcement identified a counterfeiting operation based in China that shipped cargo to Jordan from where it was distributed around the Middle East (Interpol, 2014a). The OCG connection dates back more than a decade. In India, according to Ranjit Roy Chaudhury, president of the Delhi Society for the Promotion of the Use of Rational Drugs, it “started as a cottage industry, but others found it to be easy money, and now there are highly organised cartels involved”. Moreover, Dilip Shah, secretary general of the Indian Pharmaceutical Alliance notes that “some local drug manufactures make legitimate products during the day and run a night shift to make counterfeits. (Saywell and McManus, 2002)”

The problem is further complicated by possible collusion between drug regulatory officials and manufacturers of fake medicines. According to Ranjit Shahani, president of the Organization of Pharmaceuticals Producers of India, “the makers and distributors of fake drugs get tipped off just before raids, and all evidence vanishes. (Madur, 2003)”

A 2012 study by the United Nations Interregional Crime and Justice Research Institute (UNICRI) suggests that criminal networks use similar routes and methods to transport counterfeit medicines as they do to traffic in drugs, firearms and people (UNICRI, 2012). According to both Europol and UNODC, evidence suggests that OCGs involved in the production of synthetic drugs are able to easily access the materials and

expertise needed to also produce counterfeit medicines. In both Europe and Southeast Asia, authorities cite evidence of “criminal manufacturers of amphetamine-type substances [that] have been involved in the production and distribution of counterfeit medicines (Interpol, 2014a).

Finally, it is impossible to ignore the question of correlation or causality. A recent study on the theft of medicines from Italian hospitals notes that between 2006 and 2013, 1 in 10 Italian hospitals experienced a theft of pharmaceuticals: “Southern Italy and the eastern Italian regions are more exposed to thefts of medicines because of the greater activity of organised crime groups – both Italian mafia-type and foreign OCGs, especially Eastern European ones – and their proximity to Eastern Europe and Greece, which appear to be destinations for stolen goods”. Using the Mafia Presence Index, the authors claim to find a positive and statistically significant correlation between thefts and the presence of mafia groups (Riccardi et al., 2014). While the finding is suggestive, it is impossible to definitively specify whether this is an issue of correlation or causality.

While the INTERPOL report identifies several concerning trends, it is important to emphasise that the report’s bottom line is that “there is no conclusive evidence of an established connection between OCGs operating within the pharmaceutical crime area and terrorism” (Interpol, 2014a).

## Conclusions

Globalisation and international trade agreements have greatly contributed to the interconnectedness of national economies and supply chains. While these factors and advancing technology have facilitated the globalisation of pharmaceutical counterfeiting, firms have turned to managing co-operation across each link of the supply chain, as well as across national boundaries, to establish legitimacy in every market and stem the flow of counterfeit products (Lybecker, 2008). The battle is not theirs alone.

As this report starkly illustrates, counterfeit pharmaceuticals are increasingly prevalent and increasingly profitable. In addressing the threat of counterfeit drugs, there is obvious scope for benefiting both consumers and international pharmaceutical firms. Acknowledging the problems and challenges of pharmaceutical counterfeiting has benefited all stakeholders, because it allows them to better partner with governments, health advocates and other anti-counterfeiting stakeholders. In light of the more public and more aggressive campaign against counterfeiting, it is important to examine extent of the problem, what is known about counterfeit production and distribution and links to organised crime and the policy responses that have been particularly effective.

This paper has reviewed each of these elements in turn and concludes with three modest points. First, a great deal remains unknown and unmeasurable. Irrespective of the anti-counterfeiting policies under consideration, better data would be invaluable. Investments in mechanisms and methodologies that would facilitate such collection should be a priority. Second, efforts should be made to encourage more extensive information sharing across agencies and nations. The value of co-operative efforts cannot be overstated. The greatest victories in the battle against counterfeiting come with successful co-operation and the largest failures may frequently be traced to its absence. Finally, the development and adoption of an international public health treaty would be a significant step toward protecting patients and public health globally. Universal consensus on the reprehensible nature of counterfeit medicines and agreed-upon legal norms could be a tremendous weapon in defeating counterfeit manufacturers and distributors.

## Annex 4.1

As noted above, the definition of a counterfeit drug will vary across countries and law enforcement authorities. To illustrate, the following text from the World Health Organization is included. These paragraphs are taken from the WHO website posting on “General information on counterfeit medicines”. ([www.who.int/medicines/services/counterfeit/overview/en/](http://www.who.int/medicines/services/counterfeit/overview/en/))

### Definitions of counterfeit drugs by WHO member states

The following definitions by WHO member states demonstrate that the nature of the problem of counterfeit drugs varies from country to country. In some countries, the issue is more complex and there is no distinction between counterfeit and substandard drugs.

Available reports indicate that in developing countries a wide spectrum of types of counterfeit drugs, ranging from the precise copy of a genuine product to the extreme case of a drug product with none of the correct active ingredient exist. Consequently, counterfeit drug is defined broadly in order to cover drug products that have been copied or forged, as well as certain substandard products, particularly those intentionally made to be substandard.

In the Nigerian Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Decree; a fake drug is defined as:

- “any drug product which is not what it purports to be; or
- any drug or drug product which is so colored, coated, powdered or polished that the damage is concealed or which is made to appear to be better or of greater therapeutic value than it really is, which is not labeled in the prescribed manner or which label or container or anything accompanying the drug bears any statement, design or device which makes a false claim for the drug or which is false or misleading; or
- any drug or drug product whose container is so made, formed or filled as to be misleading; or
- any drug product whose label does not bear adequate directions for use and such adequate warning against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of use; or
- any drug product which is not registered by the Agency in accordance with the provisions of the Food, Drugs and Related Products (Registration, etc.) Decree 1993, as amended.”

The Pakistan Manual of Drug Laws defines a counterfeit drug as: “.a drug, the label or outer packing of which is an imitation of, resembles or so resembles as to be calculated to deceive, the label or outer packing of a drug manufacturer.”

In the Philippines, the Republic Act No. 82036 refers to counterfeit drug/medicine to mean:

“medicinal products with correct ingredients but not in the amounts as provided there under, wrong ingredients, without active ingredients, with insufficient quantity of active ingredients, which results in the reduction of the drug's safety, efficacy, quality, strength or purity. It is a drug which is deliberately and fraudulently mislabelled with respect to identity and/or source or with fake packaging, and can apply to both branded and generic products. It shall also refer to:

- The drug itself, or the container or labelling thereof or any part of such drug, container or labelling bearing without authorisation the trademark, trade name or other identification mark or imprint or any likeness to that which is owned or registered in the Bureau of Patent, Trademark and Technology Transfer in the name of another natural or juridical person.
- A drug product refilled in containers by unauthorised persons if the legitimate labels or marks are used.
- An unregistered imported drug product, except drugs brought in the country for personal use as confirmed and justified by accompanying medical records.
- A drug which contains no amount of or a different active ingredient, or less than 80% of the active ingredient it purports to possess, as distinguished from an adulterated drug including reduction or loss of efficacy due to expiration.”

The United States Federal Food, Drug and Cosmetic Act defines a counterfeit drug as “a drug which, or the containers or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.”

## Annex 4.2

### Discussion of the Collection of Pharmaceutical Counterfeiting Data by the PSI (Pharmaceutical Security Institute)

Perhaps the best counterfeiting data in the world is in the hands of the Pharmaceutical Security Institute (PSI). While its data is not publicly available, it is worthwhile to examine the source of this data, especially for perspective on the challenges surrounding the collection and analysis of counterfeiting data.

PSI maintains a secure database to which member companies report cases of fraudulent manufacture, mislabelling of drugs and fraudulent packaging. The database is organised into incidents, “discrete event[s] triggered by the discovery of counterfeit, illegally diverted or stolen pharmaceuticals” (IOM, 2013). While incidents can vary in size; sometimes, small amounts of a single product are affected, at other times, large quantities of many products, the PSI exclusively tracks incidents of more than 1 000 units (Kubic, 2015).<sup>22</sup>

As described by Tom Kubic, president and CEO of the PSI, some countries with significant problems never appear in incident reports given an absence of political will for action. On the other hand, some countries with transparent and accountable governments consistently appear in the ranking of numbers of seizures by countries. Based on PSI incident reports, Table 4.3, below, ranks the ten countries most often cited. These nations account for 56% of illegal manufacture, trade, or sale and 47% of diversion cases catalogued in the PSI database in 2011. Every therapeutic class of drugs is represented in the incident reports, though those most often implicated are genito-urinary, anti-infective and cardiovascular drugs (IOM, 2013).

Notably, the data from PSI suggest that pharmaceutical counterfeiting primarily impacts low- and middle-income countries. While North America and Europe are characterised by higher cost of living, higher incomes and greater access to medicines, these regions make up almost two-thirds of the world’s combined pharmaceutical sales but account for only a quarter of global trade in illegal medicines. Given that PSI data originate from the investigations of multinational, innovator pharmaceutical companies, one would expect a bias in these data toward developed country markets, the locations where member companies earn the majority of their profits. However, even a cursory examination of the PSI data suggests a significant problem with counterfeit medicines in low- and middle-income countries (IOM, 2013).

**Table 4.3. Ten countries most named in PSI incident reports (2011)**

Country	Counterfeit	Diversion	Theft	Total Incidents
China (People's Republic of)	504	8	0	512
United States	145	62	8	215
India	95	23	0	118
Brazil	47	47	3	97
Colombia	62	32	0	94
Japan	81	0	0	81
United Kingdom	61	17	2	80
Germany	64	10	0	74
Uzbekistan	35	37	0	72
Pakistan	64	7	0	71

Source: IOM (2013), “Countering the Problem of Falsified and Substandard Drugs”, in Gillian J. Buckley and Lawrence O. Gostin (eds.), *Committee on Understanding the Global Public Health Implications of Substandard, Falsified and Counterfeit Medical Products*, Board on Global Health, Institute of Medicine, National Academy of Science, [www.nap.edu/catalog/18272/countering-the-problem-of-falsified-and-substandard-drugs](http://www.nap.edu/catalog/18272/countering-the-problem-of-falsified-and-substandard-drugs), pp. 95-104.

The PSI data are gleaned from member company incident reports, government reporting and open-source documents. This is arguably the most comprehensive global database on counterfeit pharmaceuticals and yet far from what we would hope to have for a thorough understanding of the production and distribution of counterfeit drugs. Regrettably, even the best information leaves much to be desired.

## Notes

- <sup>1</sup> The expansiveness of this definition is clear in the WHO’s materials on Spurious/Falsely-Labeled/Falsified/Counterfeit (SFFC) medicines. According to the WHO’s website, “SFFC medicines are found everywhere in the world. They range from random mixtures of harmful toxic substances to inactive, ineffective preparations. Some contain a declared, active ingredient and look so similar to the genuine product that they deceive health professionals as well as patients. But in every case, the source of a SFFC medicine is unknown and its content unreliable. SFFC medicines are always illegal. They can result in treatment failure or even death”, available at: [www.who.int/mediacentre/factsheets/fs275/en/](http://www.who.int/mediacentre/factsheets/fs275/en/).
- <sup>2</sup> In the context of the WHO’s findings in its analysis of counterfeit pharmaceuticals, consider the follow dated, though likely still rather representative, information. “Between January 1999 and October 2000 alone, 46 confidential reports relating to such drugs were received by WHO from 20 countries. About 60% of these reports came from developing countries, whereas the remaining 40% were reported by developed countries. Although the reports received have not been validated and may not be useful for quantitative purposes, the information clearly shows that the problem exists. The data also reflects that only a few countries are willing to provide information about cases detected. The drugs counterfeited included antibiotics, hormones, analgesics, steroids and antihistamines. These drugs form almost 60% of the products reported. In terms of types of counterfeits and their magnitude, the products reported can be grouped into six categories: *i*) products without active



ingredients (32.1%); *ii*) products with incorrect quantities of active ingredients (20.2%); *iii*) products with wrong ingredients (21.4%), *iv*) products with correct quantities of active ingredients but with fake packaging (15.6%); *v*) copies of an original product (1%); and *vi*) products with high levels of impurities and contaminants (8.5%).” Source: World Health Organization (2015), “General information on counterfeit medicines,” WHO website posting, available at [www.who.int/medicines/services/counterfeit/overview/en/](http://www.who.int/medicines/services/counterfeit/overview/en/) Last accessed 18 February 2015.

- <sup>3</sup> Notably, the demand for over-the-counter drugs is quite elastic. Thanks for an anonymous reviewer for pointing out this important distinction.
- <sup>4</sup> According to the US FDA, “Secondary wholesalers generally do not offer a full line of pharmaceutical products but specialize in purchasing and selling selected discounted drug products. Pharmaceutical manufacturers occasionally offer drug products for sale, such as when they strive to meet a quarterly sales goal or wish to sell off inventory in advance of a price increase . . . While any distributor might be able to take advantage of manufacturer sale prices, secondary wholesalers are distinguished by their willingness to risk substantial capital in buying and trading discounted drugs. Their activities are built around the rapid turnover of discounted drugs in a fashion similar to that of discounters in other industries.” United States Food and Drug Administration (USFDA). “1.3 Major Categories of Wholesalers,” web posting, 25 May 2011, available at [www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticAct/FDCA/SignificantAmendmentsToTheFDCA/PrescriptionDrugMarketingActof1987/ucm256477.htm](http://www.fda.gov/RegulatoryInformation/Legislation/FederalFoodDrugandCosmeticAct/FDCA/SignificantAmendmentsToTheFDCA/PrescriptionDrugMarketingActof1987/ucm256477.htm).
- <sup>5</sup> An unlicensed medicine is a medicine or therapeutic agent that is not licensed in the country in which it is being prescribed. In this case, while their sale is illegal in the United Kingdom, they are distinct from counterfeit drugs, in that the product and packaging are exactly what they are supposed to be.
- <sup>6</sup> Excellent sources include: Lybecker, K.M. (2000), “Product Piracy: The Sale of Counterfeit Pharmaceuticals in Developing Countries,” Doctoral dissertation, Berkeley, California: Department of Economics, University of California, Berkeley, December; United Nations Interregional Crime and Justice Research Institute (UNICRI) (2012), “Counterfeit Medicines and Organized Crime,” Turin, 2012, available at [www.unicri.it/topics/counterfeiting/medicines/report/Ctf\\_medicines\\_and\\_o\\_c\\_advance\\_unedited2013.pdf](http://www.unicri.it/topics/counterfeiting/medicines/report/Ctf_medicines_and_o_c_advance_unedited2013.pdf); Przyśwa, Eric (2013), “Counterfeit Medicines and Criminal Organisations,” International Institute of Research Against Counterfeit Medicines, September, available at [www.iracm.com/wp-content/uploads/2014/02/Contrefacon-de-Medicaments-et-Organisations-Criminelles-EN.pdf](http://www.iracm.com/wp-content/uploads/2014/02/Contrefacon-de-Medicaments-et-Organisations-Criminelles-EN.pdf); Institute of Medicine (IOM). Countering the Problem of Falsified and Substandard Drugs, Gillian J. Buckley and Lawrence O. Gostin, editors, Committee on Understanding the Global Public Health Implications of Substandard, Falsified and Counterfeit Medical Products, Board on Global Health, Institute of Medicine, National Academy of Science, 2013, available at [www.nap.edu/catalog/18272/countering-the-problem-of-falsified-and-substandard-drugs](http://www.nap.edu/catalog/18272/countering-the-problem-of-falsified-and-substandard-drugs); INTERPOL Pharmaceutical Crime Sub-Directorate. “Pharmaceutical Crime and Organized Criminal Groups: An Analysis of the involvement of organized criminal groups in pharmaceutical crime since 2008,” July 17, 2014, available at [www.interpol.int](http://www.interpol.int).
- <sup>7</sup> The following WHO taxonomy “branded” drugs are those that are produced by the innovator company holding the patent (whether expired or not) on the drug. “Generic” drugs are those produced by other, non-innovator, companies either before or after patent expiry.
- <sup>8</sup> Admittedly, many experts claim that the industry is crying wolf, exaggerating the impact of pharmaceutical counterfeiting. Unfortunately, given that this calculation relies upon measurements of what might have happened, it is impossible to verify either the industry’s or the experts’ positions. In this context, it is important to recognise that both parties have a vested interest in their own claims.
- <sup>9</sup> Please see the sources mentioned in the earlier footnote for an excellent summary of incidents.
- <sup>10</sup> According to C. Legris, as cited by UNICRI, “Side-effects can be classified into six main categories with respect to the presence or not – and if so, to what degree – of APIs (for example, under-dosed antibiotics present bigger chances for the consumers to develop drug resistance with serious repercussions, while total absence of APIs increases the mortality incidence due to complete therapeutic failure); composition-related problems (difference between the APIs contained in the drug and the one illustrated on the package, which will undoubtedly lead to under- or overdose, as the type, combination and/or quantity of the substance indicated on the package does not reflect the

reality); the presence of toxic, chemical or completely inappropriate microbiological substances that are dangerous for the human organism; stability-related problems that are related to the abusive extension of the expiration date of a medicine, which can lead to highly toxic products or to products with considerably decreased therapeutic capacity; excipients' bioavailability-related problems due to an inefficient control of fabrication or miscalculation of the effects of the mixture of the excipients with the APIs; and finally, problems generated by the interaction between the medicines and its container because of the inferior quality of the latter." United Nations Interregional Crime and Justice Research Institute (UNICRI). "Counterfeit Medicines and Organized Crime," Turin, 2012, available at [www.unicri.it/topics/counterfeiting/medicines/report/Cf\\_medicines\\_and\\_oc\\_advance\\_unedited2013.pdf](http://www.unicri.it/topics/counterfeiting/medicines/report/Cf_medicines_and_oc_advance_unedited2013.pdf).

- <sup>11</sup> This information can be accessed at [www.safemedicines.org/counterfeit-drug-incident-encyclopedia.html](http://www.safemedicines.org/counterfeit-drug-incident-encyclopedia.html).
- <sup>12</sup> The participating countries and territories included: Albania; Angola; Argentina; Armenia; Australia; Austria; Azerbaijan; Bahamas; Belarus; Belgium; Benin; Bhutan; Bolivia; Bosnia & Herzegovina; Bulgaria; Burkina Faso; Cameroon; Canada; Cabo Verde; Chile; China (People's Republic of); Colombia; Costa Rica; Côte d'Ivoire; Croatia; Cyprus; Czech Republic; Denmark; Djibouti; Democratic Republic of the Congo; El Salvador; Estonia; Finland; France; Gambia; Georgia; Germany; Greece; Guyana; Honduras; Hong Kong, China; Hungary; Iceland; India; Indonesia; Iran; Iraq; Ireland; Israel; Italy; Japan; Jordan; Kazakhstan; Kenya; Korea; Kyrgyzstan; Latvia; Lebanon; Lichtenstein; Lithuania; Malawi; Malaysia; Malta; Mauritius; Mexico; Mongolia; Montenegro; Morocco; Namibia; Netherlands; New Zealand; Nicaragua; Northern Ireland, United Kingdom; Norway; Pakistan; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Russia; Rwanda; Samoa; San Marino; Saudi Arabia; Senegal; Serbia; Seychelles; Singapore; Slovak Republic; Slovenia; South Africa; Spain; Sri Lanka; Swaziland; Sweden; Switzerland; Tajikistan; Thailand; Tunisia; Turkey; Uganda; Ukraine; United Arab Emirates; United Kingdom; Uruguay; United States; Uzbekistan; Venezuela; Viet Nam; Zambia; Zimbabwe.
- <sup>13</sup> An economist-driven endeavour that evaluates development projects.
- <sup>14</sup> The twelve signatory countries and territories are Austria, Cyprus, Finland, France, Germany, Iceland, Israel, Italy, Portugal, Russia, Switzerland and Ukraine.
- <sup>15</sup> The countries involved in the 2012-2013 pilot study included: Cambodia, Croatia, Georgia, Indonesia, Kyrgyzstan, Malaysia, the Philippines, Russia, Ukraine and Viet Nam.
- <sup>16</sup> This sentiment was repeated over and over in confidential personal conversations with experts from the pharmaceutical industry, as well as other stakeholders.
- <sup>17</sup> NABP represents a coalition of US and international pharmacy groups and associations, with the goals of providing a trusted Internet space for consumers and preventing the dot-pharmacy domain from being associated with fraudulent activity.
- <sup>18</sup> A notable exception is that of anti-malarials in Southeast Asia. In Cambodia, a 1999 countrywide survey found that 60% of the antimalarial mefloquine tablets were counterfeit. Following this finding, a "poster and radio education campaign has educated patients to distinguish fake tablets and has driven the sale of counterfeit anti-malarials further underground." (Source: Newton, Paul N., Nicholas J. White, Jan A. Rozendaal, and Michael D. Green. "Murder by Fake Drugs," *British Medical Journal*, Vol. 324, 6 April 2002, pp. 800-801.)
- <sup>19</sup> This argument is articulately presented in a recent piece in *The Lancet* (cited below), but the same proposal or sentiment came up in numerous conversations that I had with industry leaders in product security positions with large pharmaceutical firms. Newton, Paul N., Patricia Taberero, Prabha Dwivedi, Maria J Culzoni, Maria Eugenia Monge, Isabel Swamidoss, Dallas Mildenhall, Michael D. Green, Richard Jahnke, Miguel dos Santos de Oliveira, Julia, Simao, Nicholas J. White and Facundo M Fernandez. "Falsified medicines in Africa: All talk, no action," *The Lancet*, September 2014, Vol. 2, pp. e509-e510.
- <sup>20</sup> Three primary sources of information were utilised in the creation of the INTERPOL report: questionnaire responses, INTERPOL's database system (ICIS), and open source media articles. The questionnaire was provided to all 190 of INTERPOL's Member Countries in addition to the Permanent Forum on International Pharmaceutical Crime (PFIPC), the Heads of Medicines Agencies Working Group of

Enforcement Officers (HMA WGEO), the Pharmaceutical Security Institute (PSI) and multinational pharmaceutical firms. A total of eight pharmaceutical companies responded to the questionnaire.

<sup>21</sup> MacDonald, Gareth. “Gangsters imported fake drugs from Asia says Europol,” in-Pharma Technologist.com, 2 September 2014, available at [www.in-pharmatechnologist.com/Regulatory-Safety/Gangsters-imported-fake-drugs-from-Asia-says-Europol](http://www.in-pharmatechnologist.com/Regulatory-Safety/Gangsters-imported-fake-drugs-from-Asia-says-Europol).

<sup>22</sup> Tom Kubic, personal communication with the author on 24 February 2015.

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## Chapter 5

### A brief overview of illicit trade in tobacco products

By Dr. Sharon Melzer and Chris Martin\*

*The illicit trade in tobacco is perhaps the most widespread and most documented sector in the shadow economy. It has been estimated that 570 billion illicit cigarettes were consumed worldwide in 2011. Illicit tobacco is therefore an important source of revenue for criminal networks, and it deprives government services of excise tax revenues at the same time. This chapter describes the different types of illicit tobacco products, explains some of the methods for measuring the markets and suggests measures that could be taken to impede this criminal activity.*

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The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

1. Note by Turkey:

The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

The global illicit trade in tobacco products presents a range of economic and social harms that should concern policy makers, ranging from adverse impacts on public health to tax evasion and the financing of terrorist groups. In Europe alone, its annual turnover has been estimated to be between EUR 7.8 billion to EUR 10.5 billion, which is higher than the nominal GDP of nearly one-quarter of the world's sovereign nations. If only 20% of these estimated revenues accrued to criminal networks as profits, the sum would still exceed the nominal GDP of some 15% of the sovereign nations in the world. These figures provide some scale to compare the economic resources of criminal networks to the many small, but sovereign, states that may be susceptible to abuse as transit points for illicit trade.

The drivers and trends of illicit trade in tobacco products are highlighted in this paper, to provide a backdrop for considering policy options to reduce it. Its attractiveness as a criminal enterprise is due not only to the potential for profits, but the leniency with which criminal sanctions are applied, by comparison with trafficking in drugs, arms or persons. Entering or expanding an illicit tobacco market therefore has strategic value for criminal enterprises, since it strengthens the financial base for extending illegal activity into additional markets at relatively low risk.

Illicit trade in tobacco products is a chain of illegal activities that may include unlicensed production, smuggling, fraudulent marketing and tax evasion. Often, illicit trade requires money laundering, corruption and various frauds and related crimes, to move the illicit goods and money through various transit and financial systems. Each link in this chain of illegality causes direct or indirect harm: the sale of illicit tobacco products deprives governments of revenue in excise and value added or general sales taxes. It also deprives legitimate manufacturers, suppliers and distributors of revenues, often provides financial support to corrupt officials, undermines investment in innovation and reduces formal employment. In addition, it raises concerns for public health world-wide and security in fragile states, as its proceeds are often reinvested to finance further criminal or terrorist organisations (Shelley, 2009).

Illicit trade in tobacco products also leads to impacts that are harder to quantify, such as loss of public trust in the integrity of key government and business sectors. Poor product performance and the unregulated manufacturing processes behind counterfeits greatly reduce the integrity of well-established brands, eroding public trust in legitimate manufacturers, who are mistakenly blamed by duped consumers. Likewise, the profits that accrue to the dominant market actors enable them financially to expand into complementary criminal operations (including extortion, bribery and weapons trafficking) and can even challenge states for supremacy, through their funding of terrorism and insurgencies.

This chapter will introduce the terminology, measurement and data collection methodologies, key issues and drivers, connections to serious organised crime and terrorism, existing legal frameworks and suggestions for countering the illicit trade. It gives an overview of a complex criminal market that can have serious impacts on security, governance, societies and economies.



## Tobacco – the legal market

The value of the global tobacco market is estimated at USD 744.2 billion in 2014, with cigarettes accounting for 91% of all tobacco products. The volume of cigarettes has declined by 0.4%, but value has increased by 6.1% over 2013. The average price increased by 6.6% to USD 2.63 per pack of 20 cigarettes. Prices around the world differ significantly from region to region, with Middle East/Africa having the lowest prices per pack (below USD 2 per pack) and Australasia the highest (USD 13). The price differentials generate smuggling from low-cost regions/countries to high-cost regions/countries (Euromonitor, 2014, Euromonitor, 2015). The global tobacco market is dominated by four companies that, combined, account for approximately 64% of the legal tobacco market (MarketLine, 2014).

In general, a “tobacco product” is any product that is made from tobacco and intended for human consumption.<sup>1</sup> Most tobacco consumption is in the form of cigarettes (more than 80%) (FAO, 2003).<sup>2</sup> Tobacco, one of the three main components of a cigarette, is a flowering plant grown in more than 120 countries and is the most widely cultivated non-food crop.<sup>3</sup> Each type of tobacco is generally defined by the curing method applied to it. Flue-cured tobacco is used mainly in the manufacture of cigarettes; the most common and popular type is Virginia, which is grown in Argentina, Brazil, China, India, Tanzania and the United States, among other countries. Air-cured tobacco can be light or dark. Dark air-cured tobaccos are mainly used in the production of chewing tobacco and snuff. Fire-cured tobacco is used mostly for pipe tobacco mixtures, snuff and chewing tobacco. Oriental tobaccos, or “Out of sun-cured tobaccos” originate in Bulgaria, Greece, the Former Yugoslav Republic of Macedonia and Turkey (International Tobacco Growers Association, n.d.; Phillip Morris International, 2015). Since tobacco is grown world wide and the curing methods vary, monitoring its cultivation as a means of controlling the supply chain is not feasible; the product can be grown outside the legal market’s supervision and regulation with ease.<sup>4</sup>

Tobacco tends to be a legal product. In most circumstances, the product is cultivated, processed, manufactured into a “tobacco product,” and distributed through legal channels. In many jurisdictions, tobacco is highly regulated from seed to final retail sale. The product can be, and often is, taxed; the taxation level and point of taxation varies between jurisdictions. The companies tend to know their farmers, processors and suppliers (including suppliers for filters, cigarette papers and packaging) to ensure the desired quality and characteristics of their specific products. The manufacturer can only control the product to a certain point. At some point in the distribution channel, the cigarettes and other tobacco products (OTP) are disseminated through systems of transit companies, wholesalers and retailers. Just over half of legal tobacco products are sold to the consumer through independent retailers, grocery stores/supermarkets, convenience stores and gas/petrol stations, with the rest sold through other legal outlets (MarketLine, 2014).

The World Health Organization (WHO) estimates that one in every ten cigarettes smoked is illicit, suggesting that a majority of the cigarette market, and even the larger tobacco market, is legal (WHO, 2015a). The fact that tobacco tends to be a legal, regulated and taxed product is one of the first characteristics of the illicit market in tobacco products, which tends to distinguish itself from other forms of illicit trade. The legality, taxation and regulation of a majority of the market set parameters for the illicit market.

## The illicit tobacco market

Illicit actors have exploited the commodity for their own financial gains and created a lucrative black market in tobacco products. The profit potential has enticed a variety of illicit actors, from small-scale bootleggers to transnational organised crime and terrorist organizations.

The illicit trade in tobacco products includes various types of illicit tobacco products. Typically, the products fall under five broad categories: 1) contraband, 2) counterfeit, 3) “cheap whites” or “illicit whites,” and 4) loose and/or raw tobacco. Mirroring the legal market, a significant percentage of illicit tobacco is in the form of cigarettes. Illicit tobacco products also take the form of cigars, cigarillos, shisha (tobacco for smoking in a hookah), raw or loose tobacco and smokeless tobacco (e.g. chewing tobacco and snuff).

**Contraband** tobacco products are produced legally, but have been diverted after manufacture into an illegal market. A tobacco product, usually cigarettes, becomes contraband when the appropriate taxes, duties and fees are not paid. The diversion of supply from manufacturer to licensed retailer can occur via bootlegging (including Internet sales) or large-scale smuggling operations. Legal definitions of contraband vary by government. For the United States, at the federal level, “contraband cigarettes” refers to more than 10 000 cigarettes that do not bear required state or local tax stamps (Title 18, United States Code, Section 2342) (ATF, 2015).

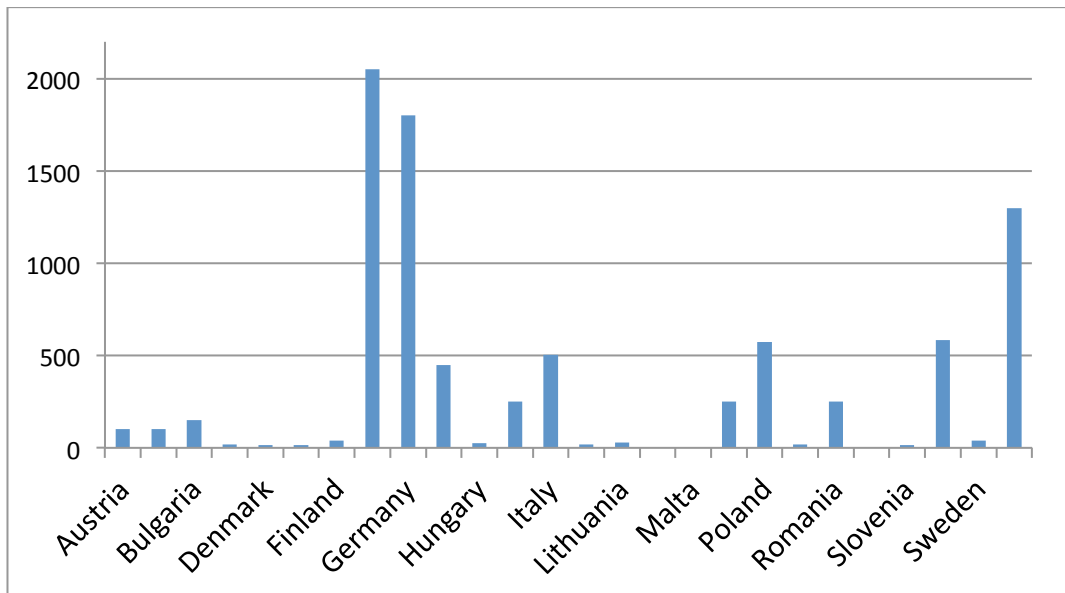
- **Counterfeit** tobacco products are illegally produced and bear false manufacturing labels, unauthorised trademarks or trade names. The manufacturing sophistication and the product quality can vary. The quality of the packaging has increased with various technologies, and the product can be difficult to distinguish. Not only do counterfeit tobacco products infringe upon intellectual property rights, they do not always meet standards set out by health regulations, and appropriate taxes are not usually paid. Moreover, counterfeit products tend to have higher levels of certain carcinogens and may contain sand, plastic, faeces, asbestos, mould and other harmful ingredients (von Lampe, 2006). Cigarettes tend to be the most counterfeited tobacco product. China has criminalised the production of counterfeit cigarettes, but illegal factories located in China tend to be the largest supplier of counterfeit cigarettes (Shen, Antonopoulos and von Lampe, 2010).
- **“Cheap whites” or “illicit whites” (sometimes referred to as “off-brand”)** are cigarettes legally produced in one jurisdiction for the sole purpose of being exported and illegally sold in a jurisdiction where they have no legitimate market. These cigarettes may not meet the health and manufacturing regulations of the destination country, nor are the appropriate duties paid in the destination country. In the country of production, appropriate taxes may be paid and the cigarettes may be lawfully exported (INTERPOL, 2014a). According to INTERPOL, well-known sources of illicit white production are located in Belarus, Viet Nam, Indonesia, Philippines, India, Cambodia, Paraguay, Ukraine, Russia, Montenegro, United Arab Emirates (UAE), Kenya and a number of free-trade zones (INTERPOL, 2014a).
- **Loose tobacco** is a term applied to tobacco that is often used for cigarettes. Loose tobacco may be used to illegally manufacture cigarettes or other tobacco products, such as “roll-your-own” tobacco, without payment of tax. Illicit loose tobacco can be misbranded or adulterated and may not meet regulatory standards. In Australia,



it is often sold in plastic bags so that users may roll their own cigarettes, at half the price of legal cigarettes (Bittoun, 2004). Raw tobacco, or unmanufactured tobacco, “is any part of the tobacco plant (leaf, stem, etc.) that has been harvested from the ground but does not yet meet the definition of ‘other smoking tobacco’ or ‘hand-rolling tobacco’” (HMRC, 2014a).

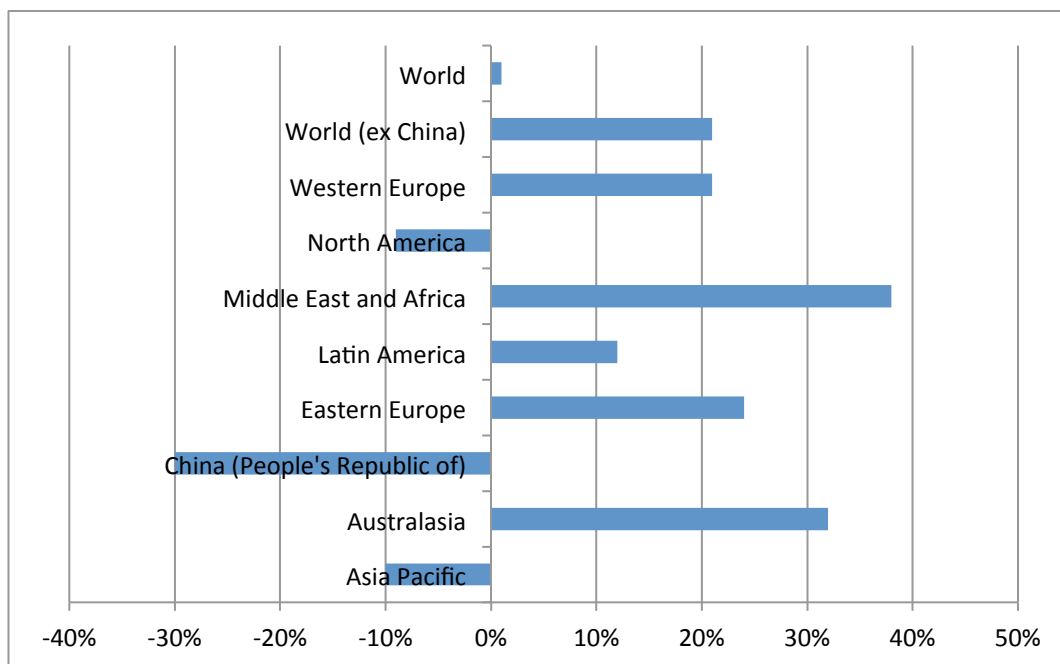
Governments, academics and private companies have used various methodologies to estimate the magnitude of the black market for tobacco products at local, national and regional levels. Two common estimates involve the percentage of the market that is illicit (e.g. illicit penetration rates) or the estimated tax losses caused by the illicit trade in tobacco products (e.g. tax-gap analysis). According to the WHO, one in every ten cigarettes and many other tobacco products consumed in the world are illegal (WHO, 2015a).<sup>5</sup> A recent analysis conducted by Transcrime estimated the European Union’s illicit market for tobacco products to yield between EUR 7.8 billion and EUR 10.5 billion annually (Transcrime, 2015). Figure 5.1, generated by using Transcrime’s data, illustrates the estimated proceeds of the illicit trade in tobacco products for 28 European Union countries. Euromonitor estimated the 2014 illicit market to be approximately 500.8 billion sticks (Euromonitor, 2015).<sup>6</sup> As displayed in Figure 5.2, Euromonitor also tracks regional illicit tobacco markets over time. As illustrated, many of the regional markets are seeing an increase in illicit cigarette trade. The Middle East and Africa region showed the largest growth in volume of illicit cigarettes over the five-year period. Euromonitor attributes this growth to political situations and conditions in the region. The North America, China and Asia Pacific regions showed decreases during the same five-year period (2009-2014) (Euromonitor, 2015).

**Figure 5.1. Estimated proceeds of the market for illicit trade in tobacco products, EU 28 (2013)**



*Note:* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

*Source:* TRANSCRIME (2015), “European outlook on the illicit trade in tobacco products”, Trento: Transcrime – Università degli Studi di Trento, p. 12.

**Figure 5.2. World illicit trade in cigarettes by volume growth, 2009-2014**

*Note:* Where it says “ex China” above this means that in the bar it excludes the People’s Republic of China data, as they have a big decrease in illicit tobacco product.

*Source:* Euromonitor International (2015), “Global Tobacco: Key findings, Part I – Cigarettes, the ongoing quest for value, July, “Regional trends in illicit trade: Historic”, p. 25.

The United Kingdom’s illicit cigarette market estimate for 2013-2014 is 10%, consistent with the WHO estimate; this is a significant reduction from the 2000-2001 estimate of 22%. A similar reduction was found in hand-rolling tobacco, falling from 61% to 39%. This translates into a significant reduction in tax loss for the British government. During the same measurement points, 2000-2001 and 2013-2014, the estimated tax losses decreased from GBP 3.4 billion to GBP 2.1 billion (HMRC, 2015a). While the reduction illustrates that the illicit market can be reduced through various initiatives, the GBP 2.1 billion in estimated tax losses is still significant and is on par with the lower estimates for tax losses to individual states within the United States. A recent academic estimate places the United States’ illicit market between 8.5% and 21%, causing approximately USD 3 billion to USD 7 billion in tax losses to individual states. It should be noted that a majority of the illicit cigarette market in the United States’ market is contraband cigarettes moved between states; because federal taxes on contraband cigarettes are usually paid, federal tax loss is not included in the above-mentioned estimates (Reuter and Majmundar, 2015).

The United Kingdom has seen a shift in consumption of tobacco products both downwards as regards legal products and from cigarettes to hand rolling tobacco. Concerns about an increasing risk of evasion of duty through raw tobacco being freely and legally imported and then processed into illicit smoking products, led to the Government of the United Kingdom issuing a consultation paper in October 2014. The public consultation covered proposals to introduce additional controls on raw tobacco.

The industry and health groups welcomed the proposals, confirming the Government's view that a registration scheme is the correct way forward. (HMRC, 2015b).

Illicit markets vary from country to country and over time, suggesting that various factors influence the illicit market. Those factors could include the availability of legal products, taxation, disposable income, law enforcement efforts and good governance. The WHO states that the factors that influence levels of illicit trade “include the ease and cost of operating in a country, tobacco industry participation, how well-organized the crime networks are, the tax administration system’s efficiency and honesty and the likelihood of being caught and punished” (WHO, 2015a). The potential profits, and the low risks associated with being caught and convicted of a crime, entice criminals to engage in a variety of illegal schemes and methods of moving tobacco products into jurisdictions in violation of national legislation.

Criminals smuggle cigarettes by any means available: personal vehicles, luggage, postal services, boats, cargo trains, donkeys and shipping containers (Melzer, 2010). Law enforcement must be vigilant to monitor traditional vulnerabilities and methods as well as detect new trends in smuggling. The illegal tobacco products can be shipped by themselves or with cover loads, such as furniture, food, fertilizer or clothing (WCO, 2014a). The World Customs Organization (WCO) noted that smugglers have used modified cars, trucks and train cars to move cigarettes across borders. A Mercedes-Benz was modified so that it could smuggle 318 cartons of cigarettes into Singapore. In Latvia, officials have uncovered modified trucks (lorries) with false walls and floors to conceal illicit cigarettes. In Zimbabwe, officials found more than 15 million cigarettes hidden within four train cars that gave the appearance of full loads of timber (WCO, 2014b). In *Illicit Trade Report 2013*, the WCO states that “an emerging trend that is worth pointing out is the appearance of ‘mail’ as a new concealment method for large quantities” (WCO, 2014b).

Smugglers have used various types of vessels to smuggle cigarettes. In 2012, French and Spanish Customs, during a joint operation, intercepted a yacht containing more than 12 tons of illicit cigarettes (Douanes et Droits Indirects, n.d.). In 2013, Garda Síochána, the National Police Service of Ireland, seized nearly 1 million individual “plain-packaging” packs of cigarettes. The illicit cigarettes were manufactured in Viet Nam and destined for the Irish market. The shipment was uncovered when al-Qaeda operatives launched two rockets at the vessel as it sailed along Egypt’s Suez Canal, causing a fire in the shipping container. The shipment was declared as “furniture,” but contained illegal cigarettes. Authorities conducted a controlled delivery and arrested the importers (Cusack, 2013a, 2013b). The WCO noted that the use of aptly named cigarette boats to shuttle illicit cigarettes across the Adriatic Sea from Montenegro to Italy has been revived. They report that the Italian *Guardia di Finanza* conducted an investigation that discovered the “existence of a criminal association comprised of Montenegrin and Italian citizens engaged in international cigarette smuggling, using powerful boats leaving from the Montenegrin island of Sveti Nikola to land on the Adriatic coast” (WCO, 2014b).

### Box 5.1. Case study: Poland’s illicit smoking tobacco

In recent years, Poland has experienced annual tax increases on all tobacco products, driven mainly by the need to meet EU excise tax requirements. In particular, these affected smoking tobacco and the alignment of pipe and fine-cut tobacco taxation. The non-duty paid share of the smoking tobacco market increased to 50% in 2012. While the duty paid volume decreased from 5.272 tons in 2009 to 4.081 tons in 2010 and to 3.546 tons in 2011 (DG TAXUD EU Excise Tables), the sales of cigarette paper and tubes grew continuously over the same period. From the non-duty paid part of the smoking tobacco market, some 60% were counterfeit and some of the counterfeit used well-known cigarette brand names for fine-cut tobacco. The remaining 40% of non-duty paid smoking tobacco was sold as “unmanufactured tobacco leaves” not subject to any excise duty.

The leaves have been sold in specialised premises or convenience shops. The consumers use noodle or tea-cutting machines, or simply document shredders, to manufacture their own smoking tobacco. Due to the increasing size of the problem, the Polish Government included “dried tobacco” into excisable tobacco products. Unfortunately, due to the misconceived definition, “dried tobacco is dry tobacco,” the trade wets the tobacco leaves before sale and offers simple equipment to its customers to re-dry it again.

Similar problems with illicit fine-cut tobacco or tobacco leaves have arisen in a large number of countries where tobacco products are not affordable for many consumers (Greece, Hungary, Australia, Slovak Republic, Turkey and many others).

*Source:* Allen, E. (2013), *The Illicit Trade in Tobacco Products and How to Tackle* (Second Edition), International Tax and Investment Center (ITIC), p. 16.

## Measurement and data collection methodologies

The illicit market in tobacco is difficult to measure. In some ways, this is a unique illicit market, in that the product tends to be legal and most of the tobacco market is a legal, regulated market. Unlike *Erythroxylum coca*, the plant required for cocaine, growing tobacco tends to be a legal activity that spans the globe. Unlike the production of methamphetamines or Ecstasy, the production of cigarettes also tends to be legal and is fairly simple. The market becomes illegal when taxation, intellectual property, importation and health policies and regulations are violated.

When the tobacco product enters the black market, the clandestine nature eludes the watchful eyes of governments, and accurate statistics are not possible. Merriman, Yurekli and Chaloupka, when they attempted to measure the market in 2000, concluded that “smuggling is inherently difficult to study with econometric methodology. Because of its illegal nature, the dependent variable, cigarette smuggling, generally has to be inferred rather than be directly observed. Inferences about smuggling require some confidence about what variables influence the demand for cigarettes in the absence of smuggling and whether illegal behaviour, like smuggling, may be influenced by economic incentives” (Merriman et al., 2000).<sup>7</sup>

When discussing the measurement of the illicit market, the unit of measurement becomes the primary question and one that is not standardised. The three general categories for the unit of measurement are *i)* billion sticks, *ii)* the percentage of the market that is illegal (e.g. illicit penetration rates) and *iii)* the tax gap or tax loss. Different

types of analyses will utilise different units of measurement. Operationalising the unit of measurement is complicated, and no one method of data collection provides an accurate and reliable estimate of the illicit market. For example, while an “in billion sticks” measurement is appropriate for certain analyses, it excludes all other forms of tobacco. Researchers and analysts like to use this variable because the number of cigarettes sold in a pack or bag can vary greatly, and cigarettes are the most popular form of illicit tobacco products.<sup>8</sup> The percentage of the illicit market can be restricted to cigarettes or include other forms of tobacco. Likewise, using a tax gap or a tax loss estimate does not directly measure the profits made by transnational organised crime groups or small-time smugglers; it can provide a ceiling for the potential profits, but it does not measure their actual revenues. A tax-gap analysis can provide a range for potential or estimated tax losses for a government, with caveats on the analysis usually noted.

To date, governments, academics, industry and advocates have not been able to design a measurement and data collection strategy that would consistently measure the illicit tobacco market with accuracy, validity and reliability. Recently, several prominent academics with extensive knowledge of illicit tobacco markets and its complexities concluded that:

*“It is difficult to measure the size of the illicit tobacco market precisely. Multiple methods have been used to estimate its size, including trade gap analysis; differences in self-reported consumption and tax-paid sales; econometric modelling; population surveys; empty pack collections; pack observation, return and swap studies; and expert opinion. These methods are not easily comparable: they differ in sample sizes, time periods covered and scientific rigor, and they yield different estimates and have different sources of error. Another limitation is the difficulty of separating tax avoidance from evasion, a distinction that is important for law enforcement and policy purposes” (Reuter and Majmundar, 2015).*

Nevertheless, various attempts to measure or estimate the size of the illicit tobacco market have been conducted. Scholars attempt to measure the worldwide market using three different methods and econometric models, mostly involving import and export records, as well as population estimates and other independent variables. Researchers caution that their methods and data can be problematic, such as not including smuggled cigarettes that do not cross international borders or only capturing bootlegging and not wholesale smuggling (Merriman et al., 2000).

A recent methodological guide on the subject has been published by Tobacconomics, a research group housed at the University of Illinois at Chicago. The guide builds upon prior literature, provides a comprehensive overview and analysis of the various methodologies, and systematically evaluates recent literature concerning cigarette tax avoidance and evasion. The researcher identified 11 methodologies for estimating the illicit trade in association with taxation, which are: survey of tobacco users (self-report studies), examination of cigarette packs directly from the consumer, discarded empty pack surveys, examination of cigarette packs from retailers, gap analysis of the difference between legal sales and reported consumption, econometric modelling, analysis of taxes paid and estimated consumption, analysis of the gap between the estimated taxes and actual taxes collected, informant interviews, tobacco trade analysis and analysing data concerning illicit tobacco seizures (Ross, 2015). Each of these methodologies has its own limitations. For many of the methods analysed, the author stresses the need for an

appropriate sampling frame. The guide concludes with the recommendation of using a multi-method approach to increase the validity of the results. The correct multi-method approach will minimise inherent limitations of the various methods, while allowing for the triangulation of the results.

A committee of academics, under the umbrella of the National Academies, a private, non-profit, research organisation, also examined the illicit market in tobacco products; although they were not limited to only measuring tax avoidance and evasion. They concluded that there are seven common research methodologies to measure the size of the illicit market in tobacco products, which could be placed within three typologies: residual methods, direct measurement and expert opinion. According to this committee, “For tobacco, three basic residual approaches have been used: one based on the trade gap, one that compares tax-paid sales and self-reported consumption measures, and one that uses econometric modelling” (Reuter and Majmundar, 2015). The direct measure method involves data collection strategies such as population surveys (including self-report surveys and interviews with consumers), empty pack surveys, pack swaps, etc. Expert opinions can add value to determining the market size, but have their own set of biases, such as the expert’s own perspectives and interests, as well as weighing information from the various data sources differently. The committee considered experts to be “customs and law enforcement officials, industry representatives, researchers, tobacco control professionals and other informed parties” (Reuter and Majmundar, 2015).

The Empty Pack Survey (EPS) method has been used by academics and industry to determine the level of illicit tobacco in a given market. Academic studies tend to focus on a city or state, with New York City and Chicago being popular venues in the United States for such analysis.<sup>9</sup> The EPS methodology can be applied at the national level but tends to be expensive, increases sampling concerns and tends to require the assistance of a government or large corporation. The tobacco industry, through KPMG and the Project Sun and Project Star reports, have utilised the EPS methodology in over 100 countries as part of their methodology for country-level estimates; sampling plans are verified for statistical relevance, quota are proportional to population, results are verified for statistical significance and sampling in places of mass confluence is avoided. Appendix I has a more complete discussion of KPMG’s methodology, which utilises EPS to produce the Project Sun and Project Star reports.

Like all data collection methods, EPS has its strengths and weakness. Strengths of this method can include its reliance on physical evidence and that the pack has the possibility of indicating whether or not it is a counterfeit product. A weakness concerns sampling basis and small sample sizes (Reuter and Majmundar, 2015; Calderoni, 2014). For example, there may be statistically significant differences between a sample population that discards their cigarette packs in public and one that discards them in private, as well as the types of venues and neighbourhoods that are sampled. That said, the EPS data collection method does try to address some of the weakness of customer and self-report studies, which are biased by the tendency for humans to not disclose criminal or deviant behaviour. In illicit tobacco studies, the respondents might not be aware that they had purchased or consumed illegal products.

For domestic markets, in addition to the empty pack surveys and other methods mentioned above, some jurisdictions calculate “tax gaps” to estimate tax losses related to the illicit trade in tobacco products. Her Majesty’s Revenue and Customs (HMRC) in the United Kingdom calculates tax gaps for a range of tax regimes including excise duties

and Value Added Tax. This extends to the estimation of tax losses attributed to tobacco and alcohol fraud. It uses a “top-down” methodology. HMRC analysts estimate the total consumption within the United Kingdom, and then subtract the estimated legitimate consumption. Total consumption is estimated by using data from surveys, an “uplift factor” to account for underreporting, and United Kingdom duty paid and legal cross-border/duty free shopping data. They provide a range for the tax gap, to allow for common methodological issues, such as sampling error and under/over reporting. The revenue losses are determined by using the illicit market calculations and adding them to the financial data (price data, duty and VAT data) (HMRC, 2014b).

While conducting cross-country analyses concerning the size of the market, researchers and analysts tend to use readily available data sources, such as prior versions of the Tobacco Atlas from the American Cancer Society, Euromonitor’s estimates and the KPMG data from the Project Star and Project Sun reports. Oxford Economics publishes a report similar to KPMG’s reports for Asia. These sources tend to use a variety of data collection methodologies to generate their estimates. Table 5.1 illustrates the Tobacco Atlas, KPMG’s Project Star Report and Euromonitor estimates for the illicit cigarette market, by OECD country, in 2012. Unfortunately, Tobacco Atlas V did not include estimates for the illicit cigarette market by country. The data for 2012 is the most current year for which all three sources produced an estimate.

The methodology, such as Euromonitor’s data and estimates, can be proprietary.<sup>10</sup> The American Cancer Society provides its data sources in an appendix and can vary by country, making it difficult for cross-country analyses.<sup>11</sup> KPMG uses a mixture of data collections to estimate the size of illicit markets within a given country, including *i)* empty pack surveys, *ii)* pack swap surveys, *iii)* consumer surveys, *iv)* mystery shopping, *v)* rolling paper analysis and *vi)* seizure data. Some of its data collection methods include empty pack surveys (EPS), market research, legal domestic consumption, consumer research and various other methods. In addition, KPMG used a “yellow bag survey” conducted by IPSOS in Germany and collected 10 000 packs per month from a sample of waste disposal centres, combining it with an additional street collection to complete the assessment (KPMG, 2013).<sup>12</sup> The academic literature has been debating the use and validity of industry-sponsored data. Some researchers have critiqued its use; they have called on industry to be more transparent with their methodologies and stress that the data should be used with caution. Others conclude that, in some countries and analysis, industry-sponsored data is the only data that lends insight into the non-domestic consumption of illicit tobacco on a regular and annual basis (Gilmore et al., 2013; Reuter and Majmundar, 2015; Calderoni, 2014).

**Table 5.1. Comparison of illicit cigarette penetration, in percentages, for OECD countries in 2012**

Country	Tobacco Atlas IV	KPMG	Euromonitor	Country	Tobacco Atlas IV	KPMG	Euromonitor
Australia	3.4	No data	4.1	Japan	0.1	No data	0.0
Austria	13.6	9.7	16.9	Korea	0.4	No data	0.4
Belgium	5.0	7.5	3.7	Luxembourg	No data	2.0	No data
Canada	14.0	No data	17.6	Mexico	6.1	15.6	18.6
Chile	1.6	No data	3.3	Netherlands	9.5	11.0	10.9
Czech Republic	10.0	2.2	9.5	New Zealand	3.2	No data	1.3
Denmark	1.0	2.4	1.1	Norway	4.1	No data	4.9
Estonia	36.2	19.7	21.7	Poland	8.5	13.0	24.1
Finland	5.8	16.9	6.0	Portugal	6.3	2.8	9.0
France	12.8	15.7	15.0	Slovak Republic	15.0	0.8	19.8
Germany	8.4	11.1	7.8	Slovenia	8.1	6.7	8.7
Greece	7.0	13.4	12.8	Spain	1.0	7.5	8.2
Hungary	12.4	4.1	7.0	Sweden	15.4	11.9	10.4
Iceland	No data	No data	No data	Switzerland	5.0	No data	5.9
Ireland	33.2	19.1	29.7	Turkey	15.7	No data	15.6
Israel	2.8	No data	2.9	United Kingdom	11.0	16.4	11.7
Italy	2.4	8.5	5.8	United States	6.4	No data	7.1

*Note:* The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

### Box 5.2. Measuring tax gaps

Her Majesty's Revenue and Customs (HMRC) in the United Kingdom produces an annual estimate of the "tax gap", that is, the difference between the amount of tax that should, in theory be collected, against what is actually received. HMRC uses a range of internal and external data and different analytical techniques to produce best estimates.<sup>1</sup> The findings are further refined through estimates of the gap by type of tax and the composition of the associated behaviours (such as error, evasion, hidden economy and criminal attack).

An assessment of the UK's tax gap methodologies was carried out by the International Monetary Fund in August 2013. It concluded that "HMRC's tax gap analysis program is comprehensive in tax coverage and effectively addresses its multiple dimensions". The tax gap for 2012-13 is estimated to be GBP 34 billion, which is 6.8% of all tax liabilities. The report found that the illicit market share for cigarettes was 9% with a tax gap market share of 36% with a tax gap of £ 900 million. The estimates are produced using a top down methodology, that is, total consumption is estimated from which legitimate consumption is subtracted, the remainder being the illicit market. Since the launch of the Tackling Tobacco Smuggling strategy in 2000 HMRC estimates that revenue losses have reduced from GBP 3.4 billion to GBP 2.1 billion.

For more information on measuring tax gaps and HMRC's Methodological annex, please visit: [www.gov.uk/government/statistics/measuring-tax-gaps](http://www.gov.uk/government/statistics/measuring-tax-gaps).

*Sources:* HMRC (2014b), Measuring tax gaps 2014 edition. An Official Statistics release 16 October 2014. HMRC (2015a), Tackling illicit tobacco: From leaf to light. The HMRC and Border Force strategy to tackle tobacco smuggling.



As displayed in the table from the Committee on the Illicit Tobacco Market: Collection and Analysis of the International Experience's *Understanding the U.S. Illicit Tobacco Market: Characteristics, Policy Context and Lessons from International*, each methodology has its own strengths and weaknesses, including challenges that concern data collection, reliability and validity. Collecting the data needed to estimate a value for the measurement can be done in several ways. Often, these data sources are combined and weighted to estimate a value for a given market. For domestic analysis, researchers and analysts may use government data, such as tax gaps, as well as the above listed methodologies. It is important to note that all data and data collection methods will have their own strengths and weaknesses.

Accurate tracking and measurement is fundamental to designing appropriate policies that attempt to combat the illicit trade in tobacco products. In addition to the challenges listed above, the clandestine and criminal nature of the trade does not allow itself to be easily measured. Criminals and terrorists who traffic in illicit tobacco do not report their transactions to authorities, use methods to conceal their shipments and activities, do not declare profits on their tax returns, launder their proceeds and so on. As a result, many studies derive their estimates of illicit trade in tobacco from reported seizures, econometric proxies, consumer/market surveys and a variety of other methods that do not yield an accurate estimate. While agreement on a single method remains elusive, there are various methods of measuring the illicit trade in tobacco that, when taken jointly, provide a rough measure of the global scale and prevalence of the illicit trade in tobacco products.

### Drivers and facilitators of the illicit trade in tobacco products

Factors that influence the illicit trade in tobacco products can be determined by econometric modelling and/or qualitative assessments. These analyses can be conducted at the micro or macro levels. When analysing the situation via econometric modelling, researchers tend to first measure size of the illicit market and then build the models with variables that are hypothesised to impact the illicit market (factors that facilitate or hinder the illicit trade). The variables in the model will be dependent on the specific analysis and theoretical framework; common variables can include purchasing price, proximity to borders, Internet penetration, taxation levels, smoking prevalence rates, sales per capita, GDP per capita or estimated disposable income, unemployment rates, corruption, presence of organised crime networks, perceived legitimacy of the tax, rule of law/good governance indexes, prosecution rates, punishments and variables measuring law enforcement actions/effectiveness (including border security and seizure rates). The illicit trade in tobacco cannot be attributed to one or two factors; it is the combination of factors, or variables, that interact with each other to allow or hinder the illicit trade. These factors vary over time and jurisdiction, allowing for trend and cross-country/state analyses.

The legitimacy of the taxation, as viewed by the consumer and society, can influence the demand and purchase of illicit tobacco. Research conducted in Edinburgh, Scotland, focused on the attitudes of smokers concerning illicit tobacco products. Some respondents indicated that the smugglers were providing a service, that smuggling was a “reasonable response” to the price, taxation levels on tobacco products were excessive, the taxation encouraged smuggling, and “nearly all respondents expressed dissatisfaction with the price of legal tobacco products. It was thought to be unjust and directed against people on low incomes” (Wiltshire et al., 2001). Additional research conducted in the United

Kingdom revealed that 60%-69% of illicit tobacco buyers claim that cheaper illicit tobacco makes it possible for them to smoke when they otherwise could not afford to purchase legal cigarettes. Although the same survey indicated that only 15%-28% of the respondents were comfortable with illicit tobacco products and 18%-20% of the respondents stated they buy illicit tobacco products (All Party Parliamentary Group on Smoking and Health, 2013). Another study, conducted in Nottingham, United Kingdom, showed similar results for the support of smugglers and the purchase of illicit tobacco products, with the notable exceptions of counterfeit products and smugglers selling to children; respondents did not care for the counterfeit products and selling to children was not supported. Overall, respondents felt the smugglers assisted the local economy and taxation rates were unfair (Stead et al., 2013). Similar views can be found in New York and New York City. When New York increased taxation rates for cigarettes in 2002, smokers in Harlem started to openly buy their cigarettes from the “\$5 Man” to avoid the price increase. Smugglers received the same admiration from respondents as they did in the Edinburgh study: “a justifiable and appreciated response” (Shelley et al. 2007).

Often cross-border shopping, tourism and other forms of the illicit trade, perpetrated by consumers or smaller-scale smugglers, are attributed to the final price per pack and the proximity of cheaper cigarettes. As mentioned above, the perceived legitimacy of the tax can be associated with this type of illicit trade. For small-scale smuggling within the United States, one study found that while most smokers purchased their product within their state, some consumers were willing to travel up to 3 miles (approximately 4.8 kilometres) to save USD 1 per pack, and heavy smokers were more likely to travel to a low-tax jurisdiction to buy their cigarettes. They also concluded that a state’s cigarette sales are impacted by other state’s taxation levels (Chiou and Muehlegger, 2008). Another study concerning the United States found that “13% and 25% of consumers purchase cigarettes in a lower-price state or Native American Reservation” (Lovenheim, 2008).<sup>13</sup>

Research on small-scale smuggling within 23 European countries, published in 2000, indicated that “the greater the incentives for illegal importation, the lower were recorded sales. Similarly, the greater the incentives for illegal exportation, the higher were recorded sales. We estimated that, in a typical European country, bootlegged cigarettes accounted for about 3% of domestic consumption” (Merriman et al., 2000). It should be noted that the researchers used “frequency of travel between countries” instead of proximity for their cross-border shopping analysis. For cross-border shopping, the jurisdiction where the product is purchased and sold may not be adjacent to each other. In the United States, cigarettes are frequently purchased in Virginia with the intent of selling them in New York. In the United Kingdom, cross-border shoppers and small-scale smugglers will travel to several countries in continental Europe, purchase tobacco products with lower taxes and then return to the United Kingdom.

Corruption is often discussed as a facilitator for various forms of illicit trade, including the illicit trade in tobacco products. Several studies in the early 2000s examined corruption in regards to cigarette smuggling. They found corruption to be a significant factor, as well as the presence of organised crime, public acceptance, informal distribution networks and widespread street selling (cigarettes and other goods) helped large-scale smuggling organisations (Merriman et al., 2000). In later research, the analysis indicated that the state’s ability to govern, in many sections of society, affects cigarette smuggling. A state’s ability to govern effectively and score low on the Fund for

Peace’s “failed state index” (now called the Fragile States Index) is related to a reduction in the percentage of the cigarette market that is illegal (Melzer, 2010).

Corruption, border security, law enforcement effectiveness, and other variables related to the ability to effectively govern, all affect large-scale smuggling operations. Various forms of illicit tobacco being moved in large-scale smuggling operations tend to be moved in 40-foot shipping containers, with false bills of lading and can be linked to other crimes, such as trade-based money laundering schemes. The ability of governments to detect the illegal product is linked to its ability to govern and secure its borders.

Academic research that leans more toward qualitative assessments has also examined key variables for both small- and large-scale smuggling operations. The literature, usually found within criminology, tends to categorise the factors that facilitate cigarette smuggling into five broad categories: *i)* price differentials between duty-free and the legal retail prices; *ii)* price differentials in retail prices or taxation rates between jurisdictions; *iii)* the existence of corruption among border and customs officials, *iv)* the long-term involvement of organised crime groups in the cigarette trade and other illicit markets; and *v)* the oversupplying of tobacco products to key markets, or the production of a tobacco product that exceeds the consumption rates for the brand’s legal market (Beare, 2002; Joossens and Raw, 2008; van Duyne, 2003; von Lampe, 2005, 2006).<sup>14</sup>

## Free trade zones

Free trade zones (FTZs) have been linked to the illicit trade in tobacco products, possibly as a facilitator or as an important trade and economic zone that is being exploited by criminals. As the magnitude of smuggling has changed around the globe, attention has turned to the role of FTZs, which, paradoxically, were created to facilitate legitimate business and economic growth, but have turned out to be vulnerable to illicit activity and transnational crime. The FTZ offers a preferential environment for manufacturing, wholesale, warehousing, import and export facilities, and goods introduced into a zone can undergo a range of economic operations, including assembly, processing, repackaging and transshipment. This environment can be exploited by criminals and organised crime.

FTZs have proliferated in recent years. The 2010 Financial Action Task Force (FATF) report *Money- Laundering Vulnerabilities of Free Trade Zones* stated that there were “approximately 3 000 FTZ in 135 countries around the world, with a total turnover of billions of US dollars” (FATF, 2010a).

FATF acknowledged that FTZs are central to the integrated global economy. They stimulate economic growth and play a central role in business for many countries and leading manufacturers. However, the 2010 report also carries the warning that standards, oversight and regulations governing FTZs have not kept up with the pace of these developments, and that as a result, illicit actors have been able to take advantage of inadequate oversight and the lack of transparency in zones to launder the proceeds of crime, finance terrorism, facilitate the proliferation of weapons of mass destruction (WMD) and smuggle contraband. Although the conditions for establishing FTZs may be regulated by the local customs or relevant management authority, the extent of customs controls or interventions is often insufficient or absent.

In October 2014, the WCO announced the results of its first global operation against the illicit trade in tobacco. The operation, codenamed *Gryphon*, confirmed that FTZs play

an important role in the smuggling of cigarettes. “Consignments arriving in these zones are subsequently repacked into other containers, enabling the illicit cigarettes to be lost or disappear. They then leave the zone as low-value goods (e.g. textiles) either mis-declared or concealed in other shipments” (WCO, 2014a).

The issue of illicit whites, or cheap whites, has caught the attention of policy makers, researchers, international organisations and industry. The KPMG Project Sun analysis reported that illicit whites are an increasing component of counterfeit and contraband in the EU, with an exponential growth in the category from virtually zero in 2006 to 37% in 2014 (KPMG, 2015). FATF also drew attention to FTZs in its Illicit Tobacco Trade Report, June 2012. It highlights the financial incentive to source product in a lower-priced market and transport, distribute and sell in a higher-priced market. The report examines the illicit whites phenomenon, describing the product thus:

*“Cheap whites are factory-made cigarettes produced with the approval of a licensing authority in that jurisdiction. These are sometimes known as illicit whites, but this is an incorrect term, as they are produced legally” (FATF, 2010b).*

Meanwhile, the concentration of cigarette manufacturers operating in the FTZs in the United Arab Emirates (UAE) continues to grow. The 2013 European Union (EU) strategy “Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products” claims “whilst in the past, the UAE appeared mainly as a point of transshipment, current information clearly points to its new role as an important production location for other brands, particularly in its free zones” (Communication from the European Commission to the Council and the European Parliament, 2013).

The characteristics relied upon in the promotion of Jebel Ali factories include their ability to produce their own brands, as well as contract manufacturing, the utilisation of technologically advanced machinery, round-the-clock operations with high yield and logistical proximity of plant, port and time to market. The growing prosperity of the Jebel Ali Free Zone is illustrated by a 7% growth in trade in the first six months of 2014. Cigarettes were the number one non-oil export, valued at AE 2.2 billion, or 19% of the total exports from the free zones in the same period (Bouyamourn, 2015). Unlike in the UAE, where 51% of a business must be owned by UAE nationals, companies located in the FTZ may have 100% foreign ownership.

In Central America, Insight Crime reported claims that an FTZ in the Corozal district of Belize has become a hub for the illicit cigarette trade in the region, highlighting how lax customs controls create criminal opportunities, with regional distribution of cigarettes from India, China, Switzerland, Paraguay and Panama (Cawley, 2013).

In common with Jebel Ali, the Colón Free Trade Zone (CFTZ) occupies a strategic trading position, geographically situated at the Atlantic gateway to the Panama Canal, with access to both the Atlantic and the Pacific. The CFTZ is the world’s second-largest and handles more than USD 16 billion in imports and re-exports each year.

The U.S. Department of State International Narcotics Control Strategy Report 2015 posits that the Colón FTZ continues to be vulnerable to illicit financial activities and abuse by criminal groups, due primarily to weak customs enforcement and limited oversight of trade and financial transactions (U.S. Department of State, 2015). Bulk cash is easily introduced into the country by declaring that it is for use in the CFTZ, but there is no official verification process to confirm its end use for lawful business in the free

zone. Furthermore, the lack of integration of the CFTZ's electronic cargo tracking system with Panamanian Customs hinders timely analysis.

### Supply chain management

To counteract some of the facilitators and vulnerabilities listed above is to attempt to control the supply chains related to tobacco products. When discussing supply chains, the conversation can include everything from tobacco in the field to specialised filters and papers for cigarette production, to the packaging of the cigarettes and monitoring the completed product until it reaches the end consumer.

Accordingly, several countries use the regulation of supply chains as an approach to reduce illicit trade in tobacco. The European Union, through the European Commission's European Anti-Fraud Office (OLAF) and its OLAF Cigarettes Task Group, has entered into legally binding agreements with four significant major tobacco manufacturers. The agreement delineates the steps the four manufacturers must follow to ensure that their products do not enter the black market.<sup>15</sup> Stating the obvious, illicit manufacturers and manufacturers producing cigarettes for the illicit market in Europe are not bound by these agreements. There are specific actions that are required by these agreements, such as requirements to track and trace the movement of tobacco products and executing stringent due diligence with vendors of tobacco products. These measures are also promoted by international treaties, such as the WHO Framework Convention on Tobacco Control (FCTC) and its Protocol to Eliminate the Illicit Trade in Tobacco Products, and by regional regulations (the European Union's Tobacco Products Directive), national laws and actions of governments with UN agencies. Research has shown that while the overall level of illicit tobacco has decreased in Europe, illicit whites' percentage of the illicit market has increased, and accounts for 33% of all illicit tobacco sales (KPMG, 2014). Since 2006, the market share of illicit whites has steadily increased in Europe, with an average of 27.9% in 2013 (Transcrime, 2015).

One of the most effective means to control diversion of tobacco products into illegal channels is tracking and tracing the product from manufacture to end retailer. This activity is present in many industries, from logistics to pharmaceuticals. It provides law enforcement information so they may authenticate the origin and verify the flow of products. According to the European Commission, the tobacco industry's tracking and tracing systems "have allowed OLAF and the Member States rapidly to recreate the route taken by genuine smuggled cigarettes from the factory into the hands of the smugglers" (European Commission, 2006).

The core of "track and trace" is providing unit packs with unique identifiers. These have to contain a set of dynamically changing data and must be able to be applied on the packs in high-speed manufacturing environments (up to 20 000 units a minute). The data in the unique identifiers is readable by various types of industry-grade scanners, and is expected to be exchangeable between different data management systems in a standardised manner. Under their agreements with the European Union, tobacco manufacturers developed a suite of technology solutions to address this challenge, which has been operating across national borders for more than 10 years.

Another effective means to curb the diversion of genuine cigarettes from the legitimate supply chain is the establishment of know-your-customer policies and practices along the supply chain. The FCTC and its protocol provides a solid framework to

establish due diligence regulations that have a proven potential to decrease the black market of cigarettes. As mentioned earlier, stringent due diligence is required from tobacco manufacturers under their agreements with the European Union.

On top of “track and trace” and due diligence policies, the FCTC and its protocol also calls for the establishment of licensing, “the manufacturing, import and export of tobacco products and manufacturing equipment, and establishing a global tracking and tracing regime to assist in the investigation of illicit trade” (WHO, 2015b). Some governments have already started to utilise these regulatory options to control certain areas of illicit trade. The Ukrainian Parliament adopted a set of anti-illicit tobacco regulations in August 2014, one of them being a licensing requirement for manufacturing equipment. This provision has significantly contributed to better controls of unregistered manufacturers that were predominantly producing for the illegal market. Another example of the effective use of licensing is the amendment of the Excise Law by the Polish Parliament. This law, adopted in August 2015, was designed to establish better controls of tobacco traders’ operations. Reportedly, lawmakers have high hopes that the newly introduced licensing regulation will contribute to curbing criminal activities related to trading in raw tobacco, which has become a major issue in Poland in recent years.

The focus of attention in supply-chain management solutions tends to be on finished products, such as cigarettes. Recently, attention has moved to the precursor ingredients for cigarettes. The control of the production and supply of key components in cigarettes presents a structured approach to the reduction of illicit trade. Small-scale production of illegal cigarettes may use “rolling machines”, but to produce cigarettes in large quantities, illegal manufactures need specialised machinery similar to those used by legal manufactures. The major manufacturers take measures to ensure their manufacturing equipment is not used for the illicit production of cigarettes (Reuter and Majmundar, 2015).<sup>16</sup>

The three components – tobacco, filter and paper – required to produce a cigarettes are more difficult to monitor than manufacturing equipment. As stated above, tobacco is legal to grow in more than 120 countries. According to the 2015 Tobacco Atlas, tobacco cultivation occurred on approximately 4.3 million hectares of land world wide, resulting in approximately 7.5 million tons of tobacco leaf (American Cancer Society, 2014). The raw tobacco market is highly fragmented, easily accessible and is unregulated in some countries. Given that millions of farmers grow tobacco all over the world, implementing rigorous supply-side controls in the effort to prohibit illicit manufacturing of tobacco products would be a challenge. Likewise, attempting to control paper and its use in illicit cigarette production would be difficult. While cigarette paper is a unique type of paper that only a few manufacturers produce, the product can be easily substituted in the production of illegal cigarettes (Reuter and Majmundar, 2015).<sup>17</sup> Controls on the supply of cigarette components have therefore focused on filters.

The most commonly used cigarette filter is made with a wood-pulp-based synthetic fibre called “cellulose acetate”. The cellulose acetate is transformed into “acetate tow” and is produced by very few companies world wide. Cellulose acetate can be used in highlighters, pens, markers, oil filters and medical devices, and it is extensively used to produce cigarette filters (Eastman Estron, n.d.).<sup>18</sup> According to the Committee on the Illicit Tobacco Market (2015), “more than 80% of world production [of acetate tow] is reportedly used in the manufacture of cigarettes” (Reuter and Majmundar, 2015).<sup>19</sup> The

use of an acetate tow filter is preferred in cigarette manufacturing, and there appears to be no consumer-preferred substitute.

Producing acetate tow requires large-scale capital investments, and the product is difficult to produce. The barriers for entering into the acetate tow production industry are high, and the industry is highly concentrated. There are five primary manufacturers of acetate tow, and they supply nearly all of the product required by the tobacco industry. On these grounds, the Committee on the Illicit Tobacco Market (2015) concluded that “acetate tow could be controlled to make illegal manufacturing of cigarettes more difficult” (Reuter and Majmundar, 2015).<sup>20</sup> The committee also noted that controlling the acetate tow filter supply chain could have an impact on counterfeit cigarettes, because they must look like the real product. It added that “the tracking and tracing of acetate tow also could be facilitated by the fact that it has a unique code in the harmonised tariff schedules of Brazil, Canada, China, the European Union and the United States” (Reuter and Majmundar, 2015).<sup>21</sup>

The Global Acetate Manufacturers’ Association (GAMA) has taken measures, such as know-your-customer procedures, to curb illicit trade. In 2006, GAMA introduced its voluntary system and includes know-your-customer audits every two years. Not all manufacturers are members of GAMA, and the GAMA system is voluntary. It is speculated that acetate tow is currently being supplied to certain countries where estimated supply greatly exceeds anticipated demand. The excess is thought to be used for the production of cigarettes, which are then smuggled internationally. The international community may have responded to the need to monitor acetate tow when, in 2014, the WCO introduced a new category, “artificial filament tow” to its International Convention on the Harmonized Commodity Description and Doing System (1983), Amendments to the Nomenclature, Appended as an Annex to the Convention. A subcategory to “artificial filament tow” includes cellulose acetate, and its inclusion could assist the global efforts to detect and reduce the amount of acetate tow filters being used in illicit production. The new coding scheme will enter into force in 2017 (WCO, 2014c).

### Tackling demand for illicit tobacco products

While global efforts to reduce illegal trade in tobacco products have focused on enforcement, to stem supplies, there are a few examples, such as those from Canada and the United Kingdom, of attempts by authorities to reduce demand. The Royal Canadian Mounted Police (RCMP) included illicit tobacco in its Contraband Tobacco Enforcement Strategy Progress Report (May 2008-May 2009). Its strategy included disrupting organised crime with traditional law enforcement efforts, as well as a public awareness campaign about the illicit market in tobacco products. Priority 5 of its strategy included “Heighten awareness about the public safety and health consequences of the illicit tobacco trade” (RCMP, 2010). To that end, the RCMP’s strategy included releasing declassified versions of intelligence assessments on illicit tobacco and the bad actors associated with it, such as organised crime. Additionally, the strategy included briefing police chiefs and developing public service announcements concerning the harms associated with illicit tobacco. It is notable that the RCMP educated the population who benefits from the illicit trade in tobacco products. More important, the RCMP concluded that key government and enforcement decision-makers needed to have an awareness of the nature, harms and reach of illicit tobacco (RCMP, 2010).



Sustained efforts to reduce demand for illegal tobacco products have been made by the Health and Local Authorities in the United Kingdom on the basis that illicit tobacco undermines the effect of tobacco control strategies. The first efforts took place in the north of England and were funded by the Health Authority. The public awareness campaign focused on two key messages: “IT [illicit tobacco] made it easier for children to start smoking, and that IT brought crime into the community” (McNeill et al., 2013). A mixed-method evaluation of this public awareness campaign, including interviewing stakeholders at the time of the campaign and a year later, concluded:

*“To our knowledge, this is the first assessment, globally, of any programme developed to reduce the demand as well as the supply of IT. Indeed, the main preoccupation of IT work in the past has been on supply, but the large numbers of buyers (and small sellers) identified across the sociodemographic spectrum highlights the limited likely impact of approaches focusing purely on supply. Misperceptions about IT were also observed, which militated against an appreciation of the wider harms of tobacco smuggling arising from its links to organised crime, irrespective of the financial and health costs. The resultant Get Some Answers campaign was based on evidence collected by the Programme that the messages that would influence demand were those focussing on the harm IT causes children and the criminality that IT brought into communities. Awareness and the volume of calls concerning supply increased, although only small attitudinal shifts were observed, mostly in the preferred direction. The one channel of IT supply that reportedly increased, namely shops, could be a consequence of some of the imagery about street sellers shown in the campaign. The sale of IT through shops is of concern, but retailers in England can currently be fined for doing this” (McNeill et al., 2013).*

Studies on demand reduction tend to focus on smoking overall and are not limited to illicit products. For example, Australia’s National Tobacco Strategy 2012-2018 includes very little about tackling demand for illegal products, as the focus seems to be on reducing smoking overall by means of a number of regulations on supply, workplace smoking bans, public campaigns to stop smoking and assistance in giving up smoking. There is no mention of any specific programme to reduce demand for illicit products. The focus is on maintaining enforcement and international co-operation to stem supplies (Commonwealth of Australia, 2012). Demand reduction policies for tobacco can have an impact on the demand for illicit tobacco products. However, demand reduction strategies could be more effective if illicit tobacco was included as part of the strategy.

### **Box 5.3. Public awareness campaign in Nova Scotia**

In 2008, Crimestoppers started a public awareness campaign to combat illicit tobacco in Nova Scotia, Canada. Crimestoppers is a non-governmental organisation that allows the public to provide anonymous tips to law enforcement about illegal activities (<http://crimestoppers.ns.ca/category/illegal-tobacco/>). This public awareness campaign featured television spots and Internet clips that focused on illicit tobacco. The initial phase of the campaign aimed to educate the public that selling illicit cigarettes was subject to penalties. Later phases of this campaign emphasised the link between illicit tobacco and organised crime and the negative impact illicit tobacco can have on the local community. These spots have aired during hockey games, providing wide exposure to the public. According to data provided by Crimestoppers, the number of tobacco-related tips has nearly tripled since the start of this campaign, from 213 from 1 January 2000 to 31 December 2008 to 609 from 1 January 2009 to 31 December 2014.



## Links with organised crime and terrorist groups

In terms of circumventing law enforcement while making substantial profits, cigarettes are an ideal product for criminal groups. This is a product that has high consumer demand, is lightweight and is highly profitable, due to the relatively low cost of production and the high price at point of sale, due in most part to high levels of domestic taxation. If and when the illegal products are discovered, the risk of a lengthy prison sentence is low. Therefore, the illicit trade in tobacco products is enticing for organised crime and terrorist organisations, and has been for decades. There are numerous historic and contemporary examples of serious organised crime groups and terror organisations linked to the illicit trade in tobacco products.<sup>22</sup>

In the 1980s, illicit tobacco started to become a revenue source for certain actors in North Africa. Lacher contends that “Cigarette smuggling in particular has greatly contributed to the emergence of the practices and networks that have allowed drug trafficking to grow” (Lacher, 2012). The links of a senior commander of Al-Qaeda in the Islamic Maghreb (AQIM), Mokhtar Belmokhtar, to cigarettes smuggling is so commonly assumed that his moniker is “Mr. Marlboro”. AQIM realises enormous profits, either by charging a “tax” for the safe passage of cigarettes or by facilitating their transport (Doward, 2013). When AQIM ousted Belmokhtar for prioritising financial gains over the group’s ideological and religious objectives, he founded a new terrorist group, Katibat El-Mulathameen (“the Signed-in-Blood Battalion”), and continued engaging in the trafficking of tobacco products (INTERPOL, 2014a). However, AQIM is not the only terrorist group that raises funds through the illicit trade in tobacco. More than a decade ago, a commentary in *Police Chief* drew attention to not only the immense profits and relatively low penalties associated with cigarette smuggling, but also the link to numerous terror organisations, such as Hezbollah, the Real IRA (RIRA), Al-Qaeda, Hamas, the Kurdistan Workers’ Party (PKK) and Egyptian and Palestinian Islamic Jihad (Billingslea, 2004). In 2009, the International Consortium of Investigative Journalists reported that the Taliban, renowned for its heroin trafficking, also profits from illicit tobacco. Estimates indicate that revenue from illicit cigarette “trade accounts for as much as 20% of funding for militant groups in this region, second only to heroin production” (Willson, 2009).

More contemporary examples of illicit tobacco funding terrorism and organised crime may be found in and near Syria and Iraq. It has been estimated that cigarette smuggling has increased by 135% since the Syrian civil war began (Gingeras, 2014). Chris Rawley, vice-president of the Center for International Maritime Security (CIMSEC), documented a particular cigarette smuggling network that involves both the Assad regime and the Islamic State of Iraq and the Levant (ISIL, also known as IS, ISIS and Daesh) and could account for the increase of illicit tobacco in Turkey. Cigarettes were loaded on a ship in Bulgaria, moved across the Black Sea, through the Strait of Bosphorus and then either to Syria or to the Persian Gulf by way of the Red Sea. The illicit cigarettes were then offloaded and sold in Syria or smuggled into Turkey. They eventually entered ISIL-controlled territory; the group profited from this illicit trade by “taxing” the transportation of these cigarettes as they pass through various transshipment points. According to Rawley, “The product and profit not only support ISIL and their organised crime network, but other Al-Qaeda affiliates and foreign fighters drawn to the region. The illicit tobacco trade is an instrumental part of their funding portfolio, which also includes weapons trafficking and sale of stolen oil.” The cigarette-trafficking routes and taxation

schemes used by ISIL are similar to those used by the PKK before ISIL took over the region (Rawley, 2014).

Academic research has documented the connections between corruption, organised crime and terrorism and their involvement in a variety of illicit trade, including the illicit trade in tobacco. Academics have documented connections between cigarette smuggling in general and to specific terrorist organisations, such as AQIM, the Kosovo Liberation Army (KLA), PKK, RIRA and Hezbollah (Shelley, 2014; Shelley and Melzer, 2008). And more recently, researchers have outlined how ISIL uses illicit trade, including cigarette smuggling, to finance terrorism (Shelley, 2014).

The WHO stated “Cigarette smuggling has also been linked to armed insurgent groups in the Middle East, Africa and other parts of the world. In areas of central and eastern Africa, research has found that rebel groups accused of mass murder, torture and forced recruitment of children have used the illegal trade of tobacco products to finance their activities” (WHO, 2015a). Similarly, and according to the United Nations Office on Drugs and Crime (UNODC), cigarette smuggling in West Africa is a significant revenue source for illicit actors, with illicit cigarettes accounting for approximately 80% of the market and the value estimated at USD 774 million (UNODC, 2009). When looking at the African continent as a whole, the illicit market is approximately 15% (UNODC, 2009). The cigarettes flooding West African markets appear to originate in Europe or Asia. For Asia, the cigarettes originate in Viet Nam and China, flowing through various FTZ. The cigarettes tend to land at West African seaports and make their way into North Africa. The European cigarettes, originate in Luxembourg, Greece and Bulgaria, and transit through Jebel Ali, before arriving at West African seaports (UNODC, 2009). Illicit whites from Dubai also enter the market.<sup>23</sup> INTERPOL has also documented the link between cigarette smuggling and rebel groups in Africa (see Box 5.4.).

#### Box 5.4. Funding the rebels

In 2009, a smuggler pleaded guilty to tax evasion at a court in Eastern Cape Province, South Africa. He was originally arrested at Heathrow Airport in London, following the issue of an INTERPOL red notice for his arrest. He was extradited to South Africa, where he had several businesses to import tobacco and produce cigarettes for both export and domestic sale. The smugglers admitted that, thanks to unpaid taxes and duty, he had received a financial benefit of ZAF 60 million (USD 5.41 million). He was sentenced to pay this back at a rate of ZAF million (USD 90 000) per month.

On 12 December 2008, the United Nations Security Council published a report by its Group of Experts on the Democratic Republic of the Congo (DRC). The report accused the smuggler of channelling money from his companies to a Congolese rebel group called *Congrès National pour la Défense du Peuple* (National Congress for the Defense of the People, or CNDP). The CNDP is one of the rebel groups fighting to control the mineral-rich territory in DRC and has been implicated in human rights violations including murders, the recruitment of child soldiers, mass rape, slavery and torture.

Source: Interpol (2014b), Adapted from *Against Organized Crime: INTERPOL Trafficking and Counterfeiting Casebook 2014*, p. 32, available at: <http://www.interpol.int/News-and-media/News/2014/N2014-057>

The United States has several notable cases involving a connection between cigarette smuggling, organised crimes and terrorist involvement. Operations Smoking Dragon and Royal Charm linked counterfeit cigarettes to organised crime, counterfeit pharmaceuticals, counterfeit currency, surface-to-air missiles, money laundering and various other national security concerns (see Box 5.5 below). In Operation Smokescreen, local and federal authorities spent years meticulously gathering surveillance and evidence on a group of individuals known as the “Charlotte Cell,” who were involved in cigarette smuggling as well as a host of other crimes, including immigration and visa fraud, identity theft, money laundering, bank fraud and mail and wire fraud. The Charlotte, North Carolina, cell of Hezbollah smuggled approximately USD 7.9 million in cigarettes from North Carolina to Michigan. Authorities were able to document that the cell sent some of the proceeds to Hezbollah leaders in Lebanon. The cell also paid for dual-use equipment purchased in Canada and then shipped to Lebanon from Canada because it was illegal to do so in the United States. The cell’s members were convicted of numerous charges, including the transportation of contraband cigarettes and providing material support to a designated foreign terrorist organisation. The conviction originally carried a sentence of 155 years in prison, although the sentence was later reduced to 30 years (Shelley and Melzer, 2008; Swecker, 2012; DHS/ICE, 2011).

In 2013, an investigation by New York state and New York City, as well as federal authorities, investigated a smuggling ring that generated USD 22 million in profits. Dubbed “Operation Tobacco Road”, the investigation found that the group had transported USD 55 million worth of cigarettes from Virginia to New York, where they sold them without paying taxes to the state of New York or New York City. Authorities also uncovered counterfeit tax stamps. The conspiracy involved 16 people, 14 of whom were in the country illegally. Conspirators were charged with enterprise corruption, money laundering, related tax crimes and other crimes. Authorities also uncovered a murder-for-hire conspiracy by two of the men charged. They had planned to murder individuals they believed to be witnesses against them and helping law enforcement with the case (Brand, 2013; State of New York, 2013a, 2013b).

Not all cigarette smuggling schemes are linked to terrorist organisations. In 2012, a UK national and his accomplices attempted to disguise 13 million counterfeit cigarettes as yogurt, ice cream and pizza and smuggle them into the United Kingdom by hiding the cigarettes in lorries and driving them through the ports of Dover and Newhaven (BBC, 2012). “According to HM Revenue and Customs (HMRC), Allison admitted he had been dealing in illicit cigarettes for a number of years, and had lied to investigators to hide his criminal income. His earnings funded gambling, holidays, shares and two flats in Glasgow, Scotland, and if he had successfully smuggled the cigarettes, they would have avoided paying GBP 2.7 million (USD 4.4 million) in duty to the government” (INTERPOL 2014b).

### Box 5.5. Operations Smoking Dragon and Royal Charm (2005)

Operations Smoking Dragon and Royal Charm were multi-year operations conducted in the United States and led by the Federal Bureau of Investigation (FBI) and in co-operation with numerous American and Canadian law enforcement agencies. Smoking Dragon was primarily conducted on the West Coast, while Royal Charm was carried out on the East Coast. Smugglers shipped approximately USD 40 million worth of counterfeit cigarettes and other illegal commodities into the United States from China and the Democratic People's Republic of Korea. Smugglers also shipped Ecstasy, methamphetamines, counterfeit pharmaceuticals, millions of dollars in "Supernotes" (highly deceptive counterfeit currency), and Chinese military-grade weapons, including the QW-2 surface-to-air missiles. The operations led to the indictment of 87 individuals from the United States, Canada, China and Chinese Taipei.

The illicit trade was shipped from China directly to ports in the United States, such as the Port of Newark in New Jersey and the California ports of Los Angeles and Long Beach, and distributed throughout the United States and Canada. False bills of lading for toys, rattan furniture, wicker baskets and other goods were used as an attempt to conceal the 40-foot shipping containers' cargo of counterfeit cigarettes, goods and currency, as well as drugs and weapons. These operations were not the only cases linked to the Democratic People's Republic of Korea. From 2002 to 2005, counterfeit Marlboro cigarettes originating from the Democratic People's Republic of Korea were detected in 1 300 incidents within US jurisdiction.

During this period, US Department of Justice, US Secret Service, Internal Revenue Service (IRS) and other US law enforcement investigated a group who were engaged with the Democratic People's Republic of Korea to manufacture and distribute counterfeit Marlboro cigarettes. During the investigation, these individuals provided agents with counterfeit pharmaceuticals and Supernotes manufactured in the Democratic People's Republic of Korea and smuggled through China. This case culminated in the arrest and conviction of three individuals for criminal conspiracy, smuggling, distribution of counterfeit cigarettes, conspiracy to distribute US securities and money laundering. Over USD 1 million was forfeited as the proceeds of the defendants' illicit activities through the use of an unlicensed money remitter in Hong Kong, China and a *hawala*-type financial system in mainland China. The Hong Kong, China police participated in the financial investigation.

*Sources:*

Adapted from U.S. Department of State (2015) *The Global Illicit Trade in Tobacco: A Threat to National Security*. Washington, DC.

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## Potential responses

In order to combat the illicit trade in tobacco products, governments must work together and with a variety of partners. There are various treaties and agreements that are applicable to combating illicit tobacco. The WHO FCTC and its accompanying protocol, the Protocol to Eliminate Illicit Trade in Tobacco Products, are often cited in anti-illicit trade efforts. Additional international treaties that can be used to fight illicit tobacco include the United Nations Convention on Transnational Organized Crime (UNTOC), the United Nations Convention Against Corruption (UNCAC), the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The various treaties not only highlight the importance of international co-operation but also the vast nature of illicit tobacco and its nexus to other crimes, such as intellectual property rights violations, terrorism, corruption, money laundering and organised crime. The illicit trade in tobacco can only be fought through a synergetic and sometimes creative use of a number of international treaties.

### *Framework Convention on Tobacco Control*

The World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC) entered into force in 2005 and established a wide array of measures on smoking prevention, including Article 15 on combating illicit trade in tobacco products. As of August 2015, there were 180 parties to the FCTC. In response to the growing illegal trade in tobacco products parties to the WHO FCTC negotiated and adopted, in 2012, the Protocol to Eliminate Illicit Trade in Tobacco Products. The Protocol further builds on the provisions of Article 15 aiming to eliminate all forms of illicit trade in tobacco products, through a series of measures to be taken by countries in co-operation with one another. The Protocol defines illicit trade as “any practice or conduct prohibited by law and which relates to the production, shipment, receipt, possession, distribution, sale or purchase, including any practice or conduct intended to facilitate such activity” (WHO, 2013).

Under Article 15 of the FCTC, Parties recognised that elimination of all forms of illicit trade is an essential component of tobacco control. They further agreed to a series of measures to pursue this goal, including:

- Adopting measures to ensure that unit packs of tobacco products are marked to assist Parties in determining origin, point of diversion and final destination and to monitor, document and control the movement and legal status of tobacco products.
- Considering the development of a tracking and tracing regime.
- Monitoring and collecting data on cross-border trade in tobacco products.
- Adopting appropriate penalties and remedies against illicit trade.
- Ensuring all confiscated manufacturing equipment and illicit products are destroyed or disposed of.
- Adopting measures to monitor, document and control tobacco products held or moving under suspension of taxes or duties.

- Enabling the confiscation of proceeds derived from illicit trade.
- Providing relevant data in periodic reports to the Conference of the Parties.
- Promoting co-operation between national, regional and international agencies to combat illicit trade.
- Endeavouring to adopt further measures, including licensing, to control or regulate the production and distribution of tobacco products.

### ***Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol)***

Recognising the importance of international collaboration to combat illicit trade, the Parties to the FCTC established an expert group to build upon Article 15 and develop a template for a Protocol on illicit trade. Once the work of the expert group concluded, an intergovernmental negotiating body was established to draft the Protocol, and after five negotiation sessions, a draft was adopted by the Parties to the FCTC in November 2012. As of August 2015, there were 54 signatories and 9 Parties to the Protocol, which will take effect on the 90th day following the deposit of the 40th instrument of ratification.

The Protocol is an international legal instrument that aims to prevent the diversion of tobacco products from the licit tobacco supply chain and increase penalties for and enforcement against illicit trade. Many of its provisions elaborate upon the initial set of measures agreed to in Article 15 of the FCTC. The Protocol promotes co-operation at the national, regional and international levels and reflects an inclusive approach involving all affected stakeholders and relevant processes (INTERPOL, 2014a). A whole-of-government approach will be required to effectively implement the full range of Protocol requirements. At the national level, Parties will need to designate competent authorities, such as customs and police, to lead implementation of certain provisions.<sup>24</sup>

Three sections that deal specifically with how to combat illicit trade are: Supply Chain Controls (Articles 6-13), Offences (Articles 14-19) and International Co-operation (Articles 20-31). Some examples of the areas covered in these sections are listed below. This list is not intended to be a comprehensive representation of the Protocol. For a full copy of the Protocol and to view all of its articles, please visit [www.who.int/fctc/protocol/](http://www.who.int/fctc/protocol/).

#### *Supply chain controls*

- Licensing for manufacturers, importers and exporters of tobacco products and manufacturing equipment.
- Tracking and tracing of all tobacco products to the first customer who is not affiliated with the manufacturer.
- Record-keeping by all persons in the supply chain of tobacco, tobacco products and manufacturing equipment.

#### *Offences*

- Subjecting offences to effective, proportionate and dissuasive criminal or non-criminal sanctions.
- Considering adoption of measures for seizure payments.

- Ensuring the disposal or destruction of confiscated tobacco, tobacco products and manufacturing equipment.

#### *International co-operation*

- Enforcement information sharing between Parties to combat illicit trade.
- International assistance and co-operation to build capacity and collaborate in combating illicit trade.
- Ensuring the protection of sovereignty in carrying out the obligations of the Protocol.

While the Protocol presents an important policy roadmap for countries seeking to address illicit trade, it will not resolve the problem of illicit trade alone. Controls will only be effective if matched with strong enforcement and prosecution of offenders (FATF, 2010b). One country's efforts to implement the Protocol could be undercut without international collaboration, which is essential to tackling illicit trade, given its transnational nature (INTERPOL, 2014a). Illicit trade is a global phenomenon, which calls for global solutions. One of the most important tools of law enforcement is information exchange and international co-operation.

The FCTC is not the only international treaty that governments can utilise to combat illicit tobacco. Two significant treaties are the UNTOC and UNCAC. Unlike the Protocol, UNTOC and UNCAC are in force and have been ratified by 185 and 176 states respectively, and represent indispensable legal frameworks for current global efforts.<sup>25</sup>

The value of UNTOC and UNCAC in combating illicit tobacco lies in the fact that, while these two treaties were not specifically conceived to address this phenomenon, they tackle its key facilitators, namely: the need for organised criminal groups to plan their activities and their roles in the illegal supply chain (through conspiracies, criminal associations, etc.) and the need they have to resort to corruption practices as an almost unavoidable type of crime to ensure that goods (whether fake or authentic) are manufactured and distributed. Moreover, these treaties also address other crimes often associated with or linked to the illicit trade in tobacco products.

In addition to including facilitators in their scope of application, UNTOC and UNCAC tackle the conditions that make the illicit trade in tobacco products profitable. Both treaties set forth a globally applicable legal framework for, among other things, the criminalisation of the “laundering of proceeds of crime” and the freezing and confiscation of criminal assets. This latter measure is expected to be implemented across borders upon the request of foreign countries.

To ensure that those two treaties become effective tools against the illicit trade in tobacco products, the following considerations could be made:

A number of States parties have not yet take action to fully implement them. It will be important to act through relevant technical assistance organisations (notably UNODC, which have developed several model laws and legal assistance programs) to continue to support States' effort in this direction. The fact that country implementation is “checked” at the international level by two Conferences of Parties (COPs) facilitates efforts aimed at encouraging further efforts in this direction. As a minimum, the two COPs and their various working groups set up thereby should ensure that the attention of the international community remains focused on those two instruments in the years to come. In the context

of UNCAC, the inter-governmental peer-review mechanism established in 2009 to monitor treaty implementation is advancing and constitutes an important platform for dialogue, the exchange of recommendations and good practices;

The possibility of using UNTOC and UNCAC as concrete legal bases for international co-operation against the illicit tobacco trade is largely unknown or unexplored. Awareness-raising campaigns could be launched in this respect among criminal justice officers. INTERPOL's Office of Legal Affairs has been promoting this approach since 2013, through the organisation of training seminars, legal guides and international dialogues across regions.

### ***International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)***

While the Terrorist Financing Convention is not an obvious choice when practitioners seek to identify international legal bases to be employed against illicit tobacco, it could turn out to be useful in circumstances where illicit trade practices are linked to the commission of terrorist acts.

In particular, the international co-operation measures contained in the Terrorist Financing Convention apply to situations where natural or legal persons provide or collect funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [an act of terrorism as defined in the Convention itself with reference, also, to a number of existing counter-terrorism treaties]" (Art. 2).

Crucially, by including in its scope of application "assets of every kind, whether tangible or intangible, movable or immovable, however acquired [...]" (Art 1.1), the definition of "funds" appears broad enough to also include tobacco products. Thus, potentially, the Terrorist Financing Convention could constitute the backbone of international co-operation efforts where the supply of cigarettes ended up supporting terrorist activity, regardless of whether or not a terrorist act is eventually committed.

Where States manage to make the necessary connections between cigarette smuggling and the planning of terrorist acts, this convention could provide an interesting legal basis.

### ***Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)***

The section of TRIPS devoted to criminal enforcement is less developed than the one devoted to civil and administrative enforcement. Still, it offers some relevant elements to guide policy makers in addressing counterfeit cigarettes and tobacco products with requirements and standards contained in other international treaties. For example, TRIPS sets forth a clear-cut obligation for States Parties to apply penal measures (as opposed to simply administrative sanctions) when trademark counterfeiting is committed on a commercial scale. Also, it envisages the seizure, forfeiture and destruction not only of the infringing goods, but also any materials and implements being used. Such materials and implements play a key role in the production of counterfeit tobacco products (Art. 61 TRIPS).



### *INTERPOL's Legal Handbook on Illicit Trade in Tobacco Products – a Guide for Policy-Makers*

This handbook intends to offer the first comprehensive analysis of the international legal framework against illicit tobacco. It provides guidance for policy makers and law enforcement authorities on the effective implementation of key international instruments in this area, with an emphasis on the Tobacco Protocol. It examines the phenomenon in terms of its development over the past few decades, characteristics, forms and legislative and law enforcement responses. The intention is to provide States with guidance and policy recommendations needed to design and implement anti-illicit tobacco policies and strategies from a legal and institutional perspective.

The appendices contain some practical tools, including a country assessment checklist and a table outlining national legislation across various legal areas, including intellectual property, criminal and customs legislation, as well as specific tobacco legislation regarding licensing and marking requirements and the seizure and destruction of illicit goods. The table is designed as a comparative tool for countries to understand how other jurisdictions have treated the same issue.

The full text of the Handbook is currently available in English and Spanish, and can be downloaded from INTERPOL's webpage at: <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Legal-assistance/Legal-publications>.

It is planned for the Handbook to become available in Arabic and French towards the end of 2015.

#### National strategies to tackle illicit trade

Illicit trade in tobacco is a complex criminal phenomenon that undermines countries' fiscal, security/governance, health and economic/regulatory policies:

- **Fiscal:** Deprives governments of tax revenue
- **Security/governance:** Promotes criminality and corruption
- **Health:** Affects consumer health and health care provision
- **Economic/regulatory:** Undercuts the legitimate marketplace and regulatory regimes governing the legitimate industry (FATF, 2010b).

These negative impacts extend far beyond the remit of any single government ministry or agency. As a consequence, governments must ensure that all relevant agencies are aligned around the same objectives and contribute to the fight against illicit trade, in order to address the issue in a comprehensive way (Allen, 2013). In addition to relevant agencies, governments should also involve the private sector and other affected stakeholders in these efforts, to benefit from their expertise and capabilities.<sup>26</sup> Strong political will to tackle illicit trade is also an essential component in any comprehensive approach (Allen, 2013).

A number of countries worldwide have developed whole-of-government approaches to fighting illicit trade in tobacco products. These aim to address the problem in a broad and concerted way, including consultation with affected stakeholders. These national strategies, action plans and/or task forces often seek to bring together relevant agencies

and stakeholders, outline a comprehensive set of enforcement and policy measures and co-ordinate anti-illicit trade efforts between various agencies.

### ***European Union***

The European Commission (EC) announced a bloc-wide strategy and action plan to fight illicit trade in tobacco products in June 2013. The strategy aimed for a “comprehensive approach,” recognising that “the fight against the illicit trade is a cross-cutting issue that is affected by many factors and drivers and in turn involves a broad range of EU and/or national policies” (European Commission, 2013a). The EC’s strategy and action plan called for co-ordinated action by a wide range of national and EU agencies, in order to adopt and enforce measures to decrease incentives, secure the supply chain, address challenges of EU enforcement authorities, enhance co-operation with major source and transit countries and strengthen sanctions (European Commission, 2013b). The strategy also endorsed the creation of co-ordinating bodies to enhance law enforcement co-operation, noting that “the creation of designated task forces, embracing customs and finance guards, police as well as any other law enforcement agency, has proven to be successful” (European Commission, 2013a).

### ***Turkey***

Turkey adopted an Action Plan to Combat Smuggling of Tobacco and Tobacco Products (2011- 2013) in October 2011. The Action Plan aimed to co-ordinate the efforts of the Ministries of Justice, Foreign Affairs, Economy, Customs and Trade, Interior, Finance, Education, Health and Transport, as well as the Land Forces Command, Tobacco and Alcohol Market Regulatory Authority and Revenue Administration. The Action Plan listed the overarching objectives and assigned specific actions and deadlines to various agencies (European Commission, 2013b). Underscoring the high-level political commitment attached to the issue, meetings to discuss the Action Plan were chaired by Turkey’s deputy prime minister for the Economy (Donmez, 2011).

### ***United Kingdom***

The United Kingdom has had a national strategy to combat illicit trade since its first Tackling Tobacco Smuggling Strategy was introduced in 2000 by Her Majesty’s Revenue and Customs (HMRC). This strategy has been renewed periodically to adjust to the changing threat environment and build on progress. Commenting on the strategy’s all-encompassing approach in the 2011 update, HMRC and the UK Border Agency noted that “the renewed strategy is comprehensive, seeking to combine policy and legislative changes, enforcement, collaborative working with stakeholders to address the source, supply and demand for illicit tobacco in the United Kingdom” (HMRC and UK Border Agency, 2011). The strategy reaffirmed the agencies’ commitment to “work with the Department of Health, Trading Standards, Police and other national, regional and local partners to develop joined-up approaches to tackling illicit activity” and European and international governments. In addition to working with public health stakeholders and academics, the strategy also called for the creation of a new anti-illicit joint working group with UK tobacco manufacturers (HMRC, 2011). The March 2015 iteration, Tackling Illicit Tobacco: From Leaf to Light, sets out how HMRC and UK Border Force will continue to target, catch and punish those in the illicit tobacco trade, and describes the aims of creating a hostile environment for tobacco fraud through intelligence sharing

and policy change, and changing perceptions by raising public awareness of the links between illicit tobacco and organised criminality (HMRC, 2015a).

### *Australia*

Australia has established a Tobacco Stakeholder Group to discuss issues of mutual concern in the tobacco industry, including efforts to combat illicit trade. Chaired by an official in the Australian Taxation Office, it also includes officials from the Customs and Border Protection Service, Quarantine and Inspection Service, Department of Health and Ageing and representatives from the major local tobacco companies (Australian Taxation Office, 2015). Participants have used this platform to discuss ongoing government enforcement efforts to combat illicit trade, new policy initiatives (e.g. FCTC Protocol on Illicit Trade) and to share intelligence (Australian Taxation Office 2014).

#### **Box 5.6. The US collaborative effort to combat the illicit trade in tobacco products**

Combating illicit trade in tobacco products requires a collaborative approach drawing on the knowledge and expertise of numerous government agencies, as well as foreign partners. Realising this, the United States Government (USG) created an Interagency Working Group (IWG) in 2014. The IWG consists of agencies within the five departments that have a role in combating illicit tobacco: Treasury, State, Justice, Homeland Security and Health and Human Services. Representatives from these departments provide expertise in the areas of law enforcement, policy, regulation, law, research, and tax administration.

The IWG meets quarterly to facilitate a closer working relationship with not only the partners within the IWG but also international partners. One goal of the IWG is to enhance information-sharing capabilities for future targeted enforcement actions, as well as to learn about the threats related to smuggling illicit tobacco into the United States and best practices to combat illicit tobacco. The IWG will allow a more unified US government course of action to mitigate the importation of illegal cigarettes into the United States.

Experts from the following agencies are involved in the IWG:

- Department of State
  - International Narcotics and Law Enforcement Affairs’ Anti-Crimes Office
  - International Organization/ Economic and Development Affairs (Monitors the WHO FCTC)
  - Diplomatic Security
- Department of Justice
  - Federal Bureau of Investigation (FBI)
  - Bureau of Alcohol Tobacco Firearms and Explosives (ATF)
- Department of Homeland Security
  - Homeland Security Investigations (ICE/HSI)
  - Customs and Border Patrol (CBP)
- Department of Treasury
  - Alcohol and Tobacco Tax and Trade Bureau (TTB)
  - Internal Revenue Service - Criminal Investigation (IRS-CI)
- Department of Health and Human Services
  - Food and Drug Administration – Office of Criminal Investigation (FDA-OCI)
  - HHS Office of Global Affairs
  - Food and Drug Administration (FDA) Center for Tobacco Products

*Source:* Authors

## Industry initiatives

Legitimate manufacturers and suppliers of tobacco products are both affected by the illegal trade of tobacco products. In addition to lost revenues, the illegal trade of tobacco distorts competition in the market and undermines investments in innovation, distribution, brand equity and legal employment (Allen, 2013). Accordingly, the tobacco industry, and in particular some of the largest firms, have various internal programmes, partner-programmes and participate in various initiatives that address curbing the illicit market.

The EU has signed legally binding agreements with four companies to address contraband and counterfeit cigarettes. The agreements were signed between 2004 and 2010 and have a two-pronged approach. The first piece is that the four companies, collectively, pay the participating countries and the EU EUR 2.15 billion. The second piece concerns controlling their products and ensuring that their products are not diverted into the black market. The agreements require the tobacco companies to “supplying only those quantities required by the legitimate market; taking care that they sell to legitimate clients only; [and] implementing a tracking system to help law enforcement authorities if cigarettes are traded illegally” (OLAF, 2015).

Several legitimate manufacturers also maintain various informational and resource-driven webpages and provide assistance to law enforcement. Webpages are geared toward the general public, dissemination of their corporate responsibility or serve as resources for law enforcement.<sup>27</sup> Tobacco companies also participate in law enforcement trainings focused on illicit tobacco, such as a recent one offered to local, state and federal law enforcement officers in the United States and offered by the National White Collar Crime Center.<sup>28</sup>

Tobacco companies have also engaged in capacity building and assistance, such as providing sniffer dogs trained to detect tobacco products to law enforcement.<sup>29</sup> Additionally, industry regularly provides support to law enforcement in a number of jurisdictions, and one company has signed memoranda of understanding with more than 30 countries. In general, the areas of co-operation include information development and sharing, provision of expert evidence and counterfeit recognition trainings to enforcement authorities. In Europe and Canada, one of the largest global manufacturers has entered into formal co-operation agreements that identify best practices and set up a framework for the specific manufacturer and governments to work together to fight the proliferation of illegal tobacco (JTI, 2012). In 2014 alone, one company supplied information that led to the seizure of roughly 1 billion illegal cigarettes, the arrests of many individuals from organised crime groups and the dismantling of illegal factories (JTI, 2015).<sup>30</sup>

Another global manufacturer, which also has agreements with the EU, participates in similar initiatives to counter the illicit trade in tobacco products and engages in supply chain management and know-your-customer requirements. Its Illicit Trade Strategies and Prevention team’s goal is to enhance the understanding of this problem and develop strategies and partnerships to combat the illicit trade in tobacco products. The company has memoranda of understanding with 20 countries, has trained more than 11 000 law enforcement officials and supports public awareness campaigns in 15 countries (Phillip Morris International, 2015).<sup>31</sup>

Industry supports independent research on the illicit trade in tobacco products and cigarette smuggling to inform the policy debate. Representatives also participate in international fora to enhance international co-operation. At least one of the manufacturers

makes significant annual investments in research that attempts to identify the volume and the flows of illicit tobacco. This research is used to help law enforcement block these channels and to help their business in identifying high-risk markets.

According to one tobacco manufacturer, its top anti-illegal trade priority is to prevent criminals and organised crime gangs from diverting its genuine products from the legitimate supply chain (JTI 2015).<sup>32</sup> It has a number of compliance programmes aimed at achieving this objective. For example, their “Know your customer” policy ensures that it is selling products only to reputable customers who are not involved in the diversion of its products into the illegal trade. Its “Know your supplier” programme is aimed at ensuring that their suppliers are not engaged in providing materials, machinery or services to illegal trade operators.<sup>33</sup> This company and the three other manufacturers that have agreements with the EU also have “Know your customer” policies in place, a requirement of their respective agreements.

In addition to the “Know your customer” policies, manufacturers have several initiatives aimed at combating illicit trade. One global manufacturer has been implementing track-and-trace technology on its products at the master case, carton and pack level, to assist in determining the point at which tobacco products have been diverted from their intended route and into illicit channels. By the end of 2015, it will reach 90% coverage capacity of this technology in its world-wide cigarette production. It also has a seizure investigation programme to identify from where genuine products were diverted into the illegal trade and by whom. This programme protects and its customers from conducting business with those involved in the illegal trade. The seizure investigations programme is run at a forensic level, ensuring that the evidential findings of these investigations can be shared and used by partners in law enforcement around the world, including international agencies such as OLAF and Interpol. In addition, the global manufacturer has comprehensive security programmes that specifically lower the risk of product theft during transport, thereby reducing the likelihood of genuine stolen product entering into the illegal market (JTI, 2015).<sup>34</sup> Finally, its compliance team includes an anti-money-laundering policy and programme that is designed to mitigate the risk of having its products used as instruments in the financial systems of money launderers (JTI, 2012).

Another global manufacturer stated that it supports strict regulations and enforcement measures to prevent all forms of illicit trade in tobacco products, including tracking and tracing, labelling, record-keeping requirements and where appropriate, and implementation of strict licensing systems. The company also implemented strong controls in its supply chain, such as track and trace, volume monitoring and customer due diligence procedures. These measures have not only yielded tangible results, but have become the industry standard. For example, between 2006 and 2014, the volume of diverted products belonging to this company that were seized in the EU has dropped by 85% (Georgieva, n.d.).<sup>35</sup> Reportedly, the company has invested over USD 150 million to implement a state-of-the-art tracking and tracing solution to secure its supply chain. With this technology, it has tracked the movement of more than 500 million master cases of its products in over 120 countries, and rolled out technology that enables the verification of the authenticity of individual packs in more than 90 countries. It has also established the Fiscal Compliance Program (FCP), designed to ensure that it does business only with responsible organisations and individuals who share its commitment to comply with relevant fiscal and trading laws (The Business Action to Stop Counterfeiting and Piracy, 2015).

### Additional recommendations for anti-illicit trade initiatives

In addition to multilateral efforts by the international community, individual countries and industry, there are some additional measures that governments could consider when they are creating a strategy to counter the illicit trade in tobacco products. Ideally, strategies will address numerous components of the illicit trade in tobacco and attempt to increase the effectiveness of governance, reduce the ability for individuals to engage in smuggling activities or the consumption of illicit products, and decrease the ease in which illicit actors can exploit the tobacco market and its products. Some preliminary suggestions include capacity building (in particular, programmes and activities aimed at increasing the abilities of law enforcement, border security and prosecutors); increasing the quality, reliability and validity of data concerning illicit tobacco; public awareness and educational campaigns on the threats and harms of illicit tobacco; public awareness and educational campaigns on demand reduction; and supply chain management. Governments may also want to examine the punishments associated with cigarette smuggling and the trade in illicit tobacco, to see if the certainty of punishment and the severity of that punishment correspond with the true harms caused by the criminal activity.

There are numerous ways that governments can improve the effectiveness and abilities of their regulatory and criminal justice systems to decrease illicit tobacco within their jurisdictions.

- Increase the training and awareness of harms and consequences relating to the illicit trade in tobacco products for law enforcement, prosecutors, judges and policy makers. The training needs to be specialised for each type of government official. For law enforcement and customs officials, it would be helpful to develop training that allows the officer to better understand the potential revenues, the weaknesses in the tobacco supply chain, how to access and use the World Customs Organization's and similar organisations' tools to identify trends and exchange information, and how to better utilise intelligence and risk analysis.

Along those lines, specialised trainings should also be developed for the intelligence analysts who assist law enforcement and national security advisors, so they can collect better data, detect trends and analyse the data more efficiently.

For excise control officials, it might be helpful to develop training that allows them to become familiar with the manufacturing process, potential revenue weaknesses, and use credibility techniques, together with audit and physical controls of manufacturing.

Finally, for consumer protection/quality control officials, trainings should focus on identifying illegal products at the retail stage and working with enforcement officials to identify and disrupt distribution chains.

- In addition to training, policy makers and administrators need to increase their political and financial support for law enforcement and prosecutorial efforts relating to countering the illicit trade in tobacco products. This includes the financial aspects of the illicit trade (i.e. money laundering, trade-based money laundering, wire transfers and tracing back the money). Once the case is brought to court and the defendants are found guilty, the punishments need to fit the true harms and costs of the illicit trade in tobacco products. Recommended

punishments, and laws relating to punishment, may need to be reviewed and updated. Finally, to assist in these efforts and acknowledge the international aspects of the illicit trade, governments may also wish to review and update their internal information-sharing agreements, as well as their multilateral and bilateral agreements concerning law enforcement, taxation, intelligence and any other information needed to combat cross-border/transnational illicit tobacco.

- Governments can implement policies and programmes that decrease demand for the illicit products through public awareness and educational campaigns and programing. Governments may wish to involve several ministries or departments, such as Health, Justice and Education. To educate young people, governments may wish to develop age-appropriate, schools programmes so that youths are aware that by purchasing illegal goods, they are funding large- scale criminal organisations and terrorists. They should be informed that in doing so, they are depriving governments of taxes that pay for services, and increasing the health risks, because the products may not meet health regulations. For non-school age programmes, governments may wish to fund demand-reduction campaigns focused on how the illicit trade in tobacco products funds organised crime and terror groups, facilitates corruption, increases interdiction and law enforcement costs and reduces tax collection – taxes needed to pay for other programmes and services. Governments may consider using popular media programmes to feature storylines about smugglers enticing young people into purchasing illegal tobacco products, or the dark side of cigarette smuggling.

To reiterate, governments may wish to enact public awareness campaigns and training programmes geared toward criminal justice personnel, such as law enforcement, prosecutors, judges and policy makers. In addition to the law enforcement suggestions above, governments may also wish to provide the judiciary, including magistrates, with an awareness training module and guidance that can form part of their continuous professional development materials.

- Governments may want to consider “whole-of-government” approaches to countering the illicit trade in tobacco products. As briefly illustrated above, there are numerous causes and facilitators of this complex illicit trade. Therefore, governments may wish to develop tasks forces or other dedicated teams of individuals who not only have an expertise in countering illicit tobacco but also the various components need to effectively counter the illicit trade, such as experts in taxation, health regulations, intellectual property, customs, diplomatic efforts, counter-terrorism, transnational organised crime, postal systems and inspectors, prosecutors and traditional law enforcement personnel.
- Governments should consider increasing the quality and quantity of data concerning the illicit trade in tobacco products. To increase the validity and reliability of the data, governments may want to review their collection procedures, coding systems for criminal cases and to use a mixed-methods approach when calculating their illicit markets. Prosecuting illicit tobacco crimes as “illicit tobacco crimes,” and then including those cases in the official arrest, prosecution and punishment statistics, would help increase the quality and quantity of data. Also, to encourage countries to collect statistics relating to the illicit trade in tobacco products, tobacco seizures should be included in the UN Surveys on Crime Trends and the Operations of Criminal Justice Systems survey.

- Implementing supply chain management policies, including know-your-customer policies on acetate tow and other necessities for cigarette production, could decrease the illicit market and detect oversupplying trends and behaviours. In many instances, the excess cigarettes are smuggled internationally. To date, the measures that have been taken by the acetate tow industry (e.g. know-your-customer procedures), have had limited success in deterring the supply of acetate tow to the illicit tobacco trade. On this premise, governments and other members of the international regulatory and enforcement community could significantly reduce the illicit tobacco trade by persuading or requiring acetate tow suppliers to better control their supply chain. Specifically, suppliers of acetate tow and other key inputs should institute or strengthen internal processes that ensure that they only supply in quantities that are commensurate with demand for legal tobacco products in a specific market. Implementing and following know-your-customer and know-your-market policies, and reporting and record-keeping requirements, are some steps that manufacturers could take to reduce the illegal manufacturing of cigarettes. These standards are commonplace in many industries (including banking), as a means to prevent illicit activities.

The supply of illicit cigarettes could be reduced if suppliers of acetate tow and other key inputs institute or strengthen internal processes that ensure that they only supply in quantities that are commensurate with demand for legal tobacco products in a specific market. In order to secure the supply chain, manufacturers and the international community should create and then follow know-your-customer and know-your-market policies and applicable reporting and record-keeping requirements. These standards are commonplace in many industries (including banking) as a means to prevent illicit activities; the acetate tow manufactures and manufacturers of the other components involved in the production of tobacco products should work toward these best practices.

- Utilising the unique opportunities associated with public private partnerships (PPP) to share information and collaborate on strategies to counter the illicit trade may be of value to governments. In 2008, the OECD defined a public-private partnership as “an agreement between the government and one or more private partners according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners, and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners” (OECD, 2008).

The purpose of a PPP is to facilitate collaboration against a discrete problem set among entities. A PPP may range in focus from the strategic to the tactical, such as a strategic infrastructure that facilitates information sharing and collaboration. At the operational and tactical levels, PPPs are ephemeral and amorphous. Loose coalitions often form around regional problems. Tactical partnerships are even less structured and may only represent one-way information shared between the tobacco industry and law enforcement. Governments have the responsibility to enforce laws, change policy or otherwise act against the problem set. Industry, however, which has no authority to enforce illicit trade laws or change policy, is often the first to identify the problem and subsequently provide information in support of the solution. Industry can and does develop leads, and provides the information to governments. These leads may result in an arrest, seizure,



sanctions or other actions. While government may be prohibited from sharing information regarding an ongoing investigation, it may be able to confirm the utility of information shared by industry, indicating that action has been taken.

The public and policy makers remain largely unaware of the limitations of the best enforcement agencies in the world in tackling this illegal trade, with an average seizure rate in the EU, in 2011, of under 10%. More than 95% of cargo world wide is not scanned and, in Europe, only about 2% of all container traffic is physically examined (Allen, 2013). Whilst enforcement can always be improved, and many agencies do an outstanding job, as long as the profits for criminals and demand for cheap illegal products remain high, the criminals and terrorists will continue to operate in this field. comprehensive cross-government and stakeholder strategy covering all enforcement stakeholders, to tackle supply and covering all health, education and consumer protection administrations to tackle demand appears to have the best chance of success in reducing illegal trade in tobacco products.

## Conclusion

Strengthening public policies to counter illicit trade in tobacco products, whether at the source, in transit, or in destination markets is a key component of improving regulatory compliance, peaceful and prosperous communities and public governance. As briefly described in this chapter, the illicit trade in tobacco products involves a combination of many factors, some of which cannot be easily quantified or measured. Nevertheless, the harms caused by this illicit trade can be substantial, and the illicit actors vary from small-scale smugglers to large-scale criminal operations funding serious organised crime and terrorism. To counter the illicit trade in tobacco products, governments should consider in their crime strategies developing a multi-method approach, including: building partnerships, increasing data validity and reliability, launching educational and public awareness campaigns, increasing capacity building efforts, and prioritising countering illicit tobacco products and its associated crimes.

## Notes

<sup>1</sup> <http://www.fda.gov/TobaccoProducts/ResourcesforYou/ucm335294.htm>; Broadly, all tobacco products can be split in two large groups: smoking and non-smoking. A smokeless tobacco product is a tobacco product that does not involve a combustion process. Tobacco products for smoking mean tobacco products other than a smokeless tobacco product, and include cigarettes, cigars, cigarillos, roll-your-own tobacco and pipe tobacco. Chewing or nasal tobacco, tobacco for oral use such as snuff and water-pipe tobacco are smokeless tobacco products. There is also a developing market of novel products that contain tobacco but do not fall into any of the traditional categories. Article 2. Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC: [http://ec.europa.eu/health/tobacco/docs/dir\\_201440\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/dir_201440_en.pdf)

- <sup>2</sup> Projections of tobacco production, consumption and trade to the year 2010. Food and Agriculture Organization of the UN. Rome, 2003. <http://www.fao.org/docrep/006/y4956e/y4956e04.htm>. Other smoking tobacco (roll-your-own tobacco and pipe tobacco) is mainly consumed in Middle East/Africa, Western Europe and North America, with Belgium and Netherlands being the countries with highest (over 40%) proportion of cigarette equivalent sales. Smokeless tobacco has significant a share of consumption in the regions like Scandinavia, South Asia (including India, which is the world's largest smokeless tobacco market), or other countries like Sudan, Madagascar or Turkmenistan. The size of the smokeless tobacco market in high-income countries remains relatively stable. <http://www.tobaccoatlas.org/topic/smokeless-tobacco/>.
- <sup>3</sup> The other two components are the acetate tow filter and cigarette paper.
- <sup>4</sup> There are two major types of tobacco blends. Blended cigarettes use a mixture of Virginia, Burley and oriental tobaccos. This type is very popular in the US, most of Europe, Latin America and many Asian countries. Virginia cigarettes are primarily composed of Virginia tobacco, but sometimes contain small amounts of other tobaccos as well. This type is popular in most of the British Commonwealth countries and China. Euromonitor reports that more than half of cigarettes sold in 2013 are Virginia blend, with the rest being American Blend (40%) and other blends.
- <sup>5</sup> According to the World Health Organization (WHO) one in every ten cigarettes and many other tobacco products consumed in the world are illegal, see <http://www.who.int/ctc/mediacentre/news/2015/wtd2015/en/>. p. 2.
- <sup>6</sup> The estimate was based on their 80-country sample, which represents approximately 90% of the world-wide market. Euromonitor International. Global Tobacco: Key Findings Part 1 - Cigarettes - the ongoing quest for value. July 2015, p. 25.
- <sup>7</sup> They attempted to measure the worldwide market using three different methods and econometric models, mostly involving import and export records as well as population estimates and other independent variables. Merriman, et al. caution that their methods and data can be problematic, such as not including smuggled cigarettes that do not cross international borders or only capturing bootlegging and not wholesale smuggling. Merriman, et. al. (2000).
- <sup>8</sup> There are many formats of cigarettes sold worldwide. They can be categorised by tar content, cigarette length and thickness, type of filter, pack format, number of cigarettes in pack, presence of menthol, etc. The vast majority of cigarettes is sold in packs of 20 sticks, however, consumer packaging of less or more than 20 sticks is also widespread. According to Euromonitor, 90% of cigarettes are sold in the 20-stick format, followed by 10s (which covers almost all the Indian market), 16s and 19s. According to the recently approved EU TPDII, as of May 2017 all packs of cigarettes sold in European Union should contain at least 20 sticks.
- <sup>9</sup> Please see the following studies for specific information on their findings, Chernick, H., and Merriman, D. (2013). Using littered pack data to estimate cigarette tax avoidance in NYC. *National Tax Journal*, 66, 635-668.; Kurti, M., von Lampe, K., and Thompkins, D. (2012). The illegal cigarette market in a socioeconomically deprived inner-city area: The case of the South Bronx. *Tobacco Control*, 23, i13-i22.; Davis, K., Grimshaw, V., Merriman, D., Farrell, M., Chernick, H., Coady, M., Campbell, K., Kansagra, S. (2013). Cigarette trafficking in five northeastern US cities. *Tobacco Control*, 0, 1-7.; Merriman, D. (2010). The micro-geography of tax avoidance: Evidence from littered cigarette packs in Chicago. *American Economic Journal: Economic Policy*, 2(2), 61-84.; Wilson, N., Thomson, G., Edwards, R., and Pearce, J. (2009). Estimating missed government tax revenue from foreign tobacco: Survey of discarded cigarette packs. *Tobacco Control*, 18,416-418.
- <sup>10</sup> For a general discussion of their methodology, please visit <http://www.euromonitor.com/research-methodology>.
- <sup>11</sup> For specific information on each country's estimate, please see the footnotes within the Tobacco Atlas, available at <http://www.tobaccoatlas.org/>.
- <sup>12</sup> For a more comprehensive discussion on KRMG's research methodology, please see the "Methodology" section of the Project Sun report, "A Study of the Illicit Cigarette Market in the European Union:

2013 Results,” KPMG LLP, London, available at [www.pmi.com/eng/media\\_center/media\\_kit/documents/sun%20report%202013.pdf](http://www.pmi.com/eng/media_center/media_kit/documents/sun%20report%202013.pdf).

- <sup>13</sup> Native American Reservations, located within the United States, have certain sovereign rights. Taxes, especially state imposed taxes, are not collected on Native American Reservations. Lovenheim, M. F. (2008). How far to the border?: The extent and impact of cross-border casual cigarette smuggling. *National Tax Journal*, 61(1), 7-33. (p. 31).
- <sup>14</sup> Beare, M. (2002). Organized corporate criminality - Tobacco smuggling between Canada and the US. *Crime, Law & Social Change*, 37, 225-243.; Joossens, L., & Raw, M. (2008). Progress in combating cigarette smuggling: controlling the supply chain. *Tobacco Control*, 17(6), 399-404. van Duyne, P. (2003). Organizing cigarette smuggling and policy making, ending up in smoke. *Crime, Law & Social Change*, 39(3), 285-317. von Lampe, K. (2005). Explaining the emergence of the cigarette black market in Germany. In P. van Duyne, K. von Lampe, M. van Dijck & J. Newell (Eds.), *The organised crime economy: Managing crime markets in Europe*, (pp. 209-227). Nijmegen, The Netherlands: Wolf Legal Publishers. Von Lampe, K. (2006). The cigarette black market in Germany and in the United Kingdom. *Journal of Financial Crime*, 13(2), 235-254.
- <sup>15</sup> For more information on the agreements between OLAF and the tobacco companies, as well as copies of the agreements, please visit [http://ec.europa.eu/anti\\_fraud/investigations/eu-revenue/cigarette\\_smuggling\\_en.htm](http://ec.europa.eu/anti_fraud/investigations/eu-revenue/cigarette_smuggling_en.htm).
- <sup>16</sup> NAS Report, p 41.
- <sup>17</sup> NAS Report.
- <sup>18</sup> Eastman is one of the companies that produces acetate tow. It lists the various uses here: [http://www.eastman.com/Brands/Eastman\\_Estron\\_Tow/Pages/Overview.aspx](http://www.eastman.com/Brands/Eastman_Estron_Tow/Pages/Overview.aspx).
- <sup>19</sup> NAS Report, p. 41
- <sup>20</sup> NAS Report, p. 41
- <sup>21</sup> NAS Report, p. 114
- <sup>22</sup> For the history of cigarette smuggling across Turkey’s borders see Gingeras, Ryan (2014) *Heroin, Organised Crime, and the Making of Modern Turkey*. Oxford University Press: New York.. For involvement of Italian organised crime in illicit trade of cigarettes see Paoli, Letizia (2003). *Mafia Brotherhood: Organized Crime Italian Style*. New York: Oxford University Press.
- <sup>23</sup> For a more detailed discussion, please see the chapter on cigarettes within the UNODC’s report, pp. 27-32.
- <sup>24</sup> Article 4.1(b) of the Protocol notes that Parties shall “take any measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol.”
- <sup>25</sup> For a list of UNCAC Signatories (140) and Parties (176), please visit <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. For a list of UNTOC Signatories (147) and Parties (185) visit [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XVIII-12&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-12&chapter=18&lang=en)
- <sup>26</sup> For instance, the World Health Organization has highlighted the importance of the “active involvement of all relevant stakeholders” as countries adopt and implement the Protocol to Eliminate Illicit Trade in Tobacco Products. (World Health Organization. World No Tobacco Day 2015. [www.who.int/campaigns/no-tobacco-day/2015/event/en/](http://www.who.int/campaigns/no-tobacco-day/2015/event/en/))
- <sup>27</sup> The following are sample of various webpages focused on countering illicit tobacco and supported by industry: British American Tobacco (BAT): [http://www.bat.com/group/sites/UK\\_9D9KCY.nsf/vwPagesWebLive/DO6TNKVW](http://www.bat.com/group/sites/UK_9D9KCY.nsf/vwPagesWebLive/DO6TNKVW); Japan Tobacco International (JTI) <http://www.stopillicittobacco.com/index.htm>; Imperial Tobacco, <http://www.imperial-tobacco.com/index.asp?page=934>; Philip Morris

International (PMI). [http://www.pmi.com/eng/tobacco\\_regulation/illicit\\_trade/pages/illicit\\_trade.aspx](http://www.pmi.com/eng/tobacco_regulation/illicit_trade/pages/illicit_trade.aspx); [www.stopillegalcigarettes.com](http://www.stopillegalcigarettes.com). Philip Morris USA (PMUSA): <https://www.contrabandtobacco.com/>; <http://www.altria.com/Responsibility/Combating-Illicit-Trade/Pages/default.aspx>.

- <sup>28</sup> For more information about the training, see <https://www.nw3c.org/training/specialty-training/illicit-tobacco>.
- <sup>29</sup> One such example is from Imperial, available at [http://www.imperial-tobacco.com/assets/files/cms/Exane\\_Illicit\\_July\\_1st\\_FINAL\\_PDF.pdf](http://www.imperial-tobacco.com/assets/files/cms/Exane_Illicit_July_1st_FINAL_PDF.pdf); Another example involves Cook County, Illinois (USA)'s Department of Revenue using Philip Morris USA's canines to conduct 71 investigations in 2013. Cook County Government. (2013, December 13). Cook County Partners with Philip Morris's Canine Unit to Combat Illicit Cigarette Trafficking, available at: <http://www.cookcountyil.gov/2013/12/13/cook-county-partners-with-philip-morris-canine-unit-to-combat-illicit-cigarette-trafficking/>. In Romania, a tobacco company signed a co-operation agreement with the National Customs Authority. Support included training, sniffer dogs, and equipment. Available at <http://www.amosnews.ro/arhiva/jti-doneaza-anv-masini-caini-pentru-combaterea-traficului-ilegal-cu-produse-din-tutun-09-12-2010>; <http://www.agerpres.ro/ots/2013/08/08/jti-a-semnat-un-protocol-de-co-operare-cu-politia-de-frontiera-16-01-00>.
- <sup>30</sup> Information provided by JTI, May 2015
- <sup>31</sup> Information provided by PMI. May 2015.
- <sup>32</sup> Information provided by JTI, May 2015
- <sup>33</sup> More information on JTI's "Know your Customer" polices can be found in their agreement with the European Union. The agreements are available at: [http://ec.europa.eu/anti\\_fraud/investigations/eu-revenue/japan\\_tobacco\\_2007\\_en.htm](http://ec.europa.eu/anti_fraud/investigations/eu-revenue/japan_tobacco_2007_en.htm) and [http://ec.europa.eu/anti\\_fraud/documents/cigarette\\_smug/2007/co-operation\\_agreement.pdf](http://ec.europa.eu/anti_fraud/documents/cigarette_smug/2007/co-operation_agreement.pdf)
- <sup>34</sup> Information provided by JTI May 2015.
- <sup>35</sup> Comment made by Kristalina Georgieva, European Commissioner for International Co-operation, Humanitarian Aid and Crisis Response, at EU Parliament Plenary session, video available at <http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1431970271748>.

## Annex 5.1: A methodology on measuring illicit trade in tobacco\*

\* Note: The following material was provided by KPMG for explanatory purposes.

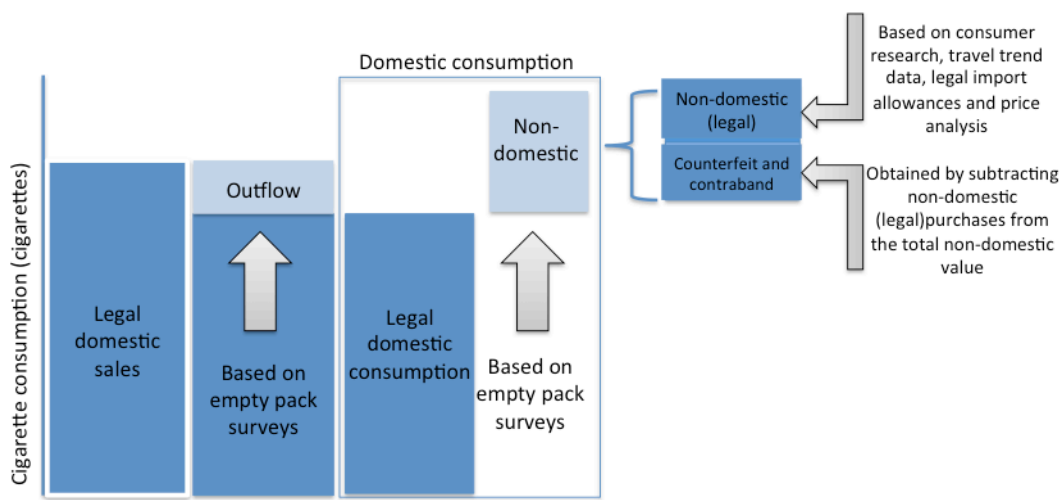
KPMG has produced an annual report on illicit cigarette consumption in the EU since 2006 ('Project STAR'). In 2013 it was renamed 'Project SUN' and was conducted on a pan-industry basis for the first time. Project SUN is a bottom-up analysis of the illicit tobacco trade with the methodology consistently applied since its inception. This is done by undertaking one of the largest consumer markets studies of its type in the world. The inclusion of major tobacco products firms also allowed counterfeit volumes to be identified for all four of the major tobacco manufacturers.

An overview of the Project SUN methodology is shown in Figure 5.3. The project uses an iterative model which takes the legal domestic cigarette sales for all of the EU Member States as a starting point to estimate legal domestic consumption and then uses the results of empty pack surveys (EPSs), again conducted in all of the EU Member States, to estimate the quantum of outflows to other countries and non-domestic inflow volumes. The output of this provides an overall estimate of cigarette consumption in each of the Member States, including both domestic and non-domestic volumes. The non-domestic portion of consumption is then classified as either legal or counterfeit and contraband (C&C), based on the results of analysis using consumer research studies, travel and tourism trend data, smoking incidence data, border sales information and a variety of other data sources.

KPMG's use of both the empty pack surveys and consumer research incorporates two of the three main recommended ways of estimating illicit tobacco trade, as published by the IARC<sup>(2)</sup>. These are firstly observation methods and secondly, large consumer surveys, whilst other data sources such as seizures and smoking prevalence are used as corroborating evidence.

Critiques of the project have centred on the representativeness of the empty pack surveys and on the potential under reporting of the cross-border non-domestic legal trade. Care has to be taken to ensure both of these potential areas of data skew are managed and adjusted for. In addition, the EPSs are expensive to run and therefore only conducted between one (e.g. Denmark, Finland) and three (e.g. France, Italy) times a year. As a result, adjustments have to be made to the EPSs to ensure unusually high readings are not simply seasonal abnormalities.

Figure 5.3. Project SUN (STAR) methodology



Source: KPMG, 2015.

## Market type

The selection of the appropriate research method for measuring illicit trade depends largely on the structure and type of tobacco products in the market. Research should therefore be tailored to the industry structure as far as possible. To categorise the market types:

- Pack market: Markets for which both legal and illicit products are largely sold in packs of manufactured cigarettes. These can vary significantly in size from 10 packs (United Kingdom and Italy)<sup>1</sup>, to 25 packs (Australia).
- Stick market: Markets where cigarettes are often sold by stick. Packs will also exist but often illicit products will be sold in unbranded bags of sticks. Parts of Asia have these characteristics (such as Papua New Guinea) as do parts of Canada.
- Loose tobacco market: Some markets historically have a significant proportion of loose or hand-rolled tobacco in their legal and illegal industries. Examples include Germany, United Kingdom and Australia.

## Research methods

### *Empty Pack Surveys with Non-Domestic Legal Research*

This method is principally appropriate for conventional western pack markets. It does not cover loose tobacco or stick markets.

As a method of measuring illicit tobacco trade for manufactured cigarettes, EPSs are the only market research method that relies purely on physical evidence (avoiding the variability of consumer bias in interview-based methods). Empty pack surveys should be conducted on a consistent basis across all markets in question, allowing for direct

comparison of data and the packs collected form a broad and representative geographic footprint. Their use has a number of significant advantages if the following best practice is followed:

- The volume, sampling method and frequency of pack collections must enable a robust sample
- The sample size and locations collected in each region must be representative of the population within that region, whilst the overall sample must be representative nationally.

In most countries, the domestic EPS results tend to mirror the market shares of the major tobacco manufacturers, suggesting the sampling method results in an accurate representation of the wider market. Where this is not the case a re-weighting exercise should be undertaken.

The measurement of non-domestic legal (ND(L)) purchases must subsequently be determined to remove the legitimate product from the EPSs' calculation of total non-domestic consumption. This can be done through an independent consumer survey. The purpose of the survey should be to measure purchasing habits rather than consumption, in order to avoid the under-reporting typical of consumption surveys and to include any 'gift purchases' from non-smokers. Respondents should be asked about the number of trips made in the year, the destinations and the volume and brands of cigarettes purchased. The surveys are weighted according to gender, age and region to ensure a representative sample of the national population in each country is obtained. Travel statistics should be used to cross check the survey results as well as an analysis of border sales hotspots, where appropriate (e.g. north eastern border of France with Belgium).

### *Strengths and weaknesses*

Empty pack surveys give the highest likelihood of representing a fair estimation of the domestic and non-domestic product being consumed in a market. However great care needs to be taken to ensure the sampling methods are representative of the entire smoking population, not only urban-dwellers and highly populated areas. They remain the only known method to avoid the significant problem of consumer under-reporting<sup>(2)(3)</sup>.

Empty pack surveys greatest strength, the fact that they are based only on physical evidence, is also a weakness. The packs themselves cannot give much information about the sources of illicit product or the split between non-domestic legal and illicit<sup>(4)</sup>. This is why they should be used in conjunction with reliable estimates of non-domestic legal product as well as corroborated with Customs' intelligence and other estimates.

A common criticism of the empty pack survey is that it samples discarded cigarette packs rather than household waste and therefore overstates non-domestic incidence. Sampling for household waste is impractical in most countries but is undertaken in Germany. The German survey, known as a Yellow Bag Survey (YBS), is possible in Germany because household waste is sorted, mainly for the purposes of recycling, which makes it possible to separate cigarette packs from other waste.

Typically, the YBS provides a larger sample than an equivalent EPS, whilst collecting from waste disposal centres results in the collection of packs from both household waste and public bins. The YBS is therefore likely to give a more representative result compared to the EPS.

A comparison of the EPS and YBS methodologies was undertaken by KPMG in 2008 and 2009. Four quarterly waves of the EPS were undertaken in 2008, with two further waves in 2009 (Q1 and Q3). Collection was undertaken in 52 cities across Germany. The non-domestic incidence measured by the EPS was only 1.2 percentage points higher in 2008 (21.1% versus 19.9%) and only 0.4 percentage points higher in 2009 (19.7% versus 19.3%)<sup>(5)(6)</sup>. Consequently, we concluded that the EPSs are a reliable measure of non-domestic incidence, with marginal differences likely due to difference in timing of samples, the rural-urban share of the surveys and the total number of packs collected.

### ***Pack swap surveys***

Pack swap surveys are particularly useful in markets that contain a significant proportion of sticks or where empty pack surveys are not feasible for other reasons. The pack swap methodology involves collection of current packs or sticks from respondents in return for relevant incentives. Pack swaps can be conducted in retail outlets and other populous locations, and can also be collected from home visits. Care of course needs to be taken to ensure social and geographic samples are representative and that the sample size is large enough.

#### *Strengths and weaknesses*

This type of survey can be an excellent way of gaining both physical evidence and consumer feedback. It also enables the research agency to deal with stick products and other tobacco products. However the survey may suffer from under reporting as seen in refusal rates and in the answers to ‘frequency of purchase’ questions. There is also the potential risk of respondents selectively offering packs for the swap.

### ***Consumer surveys***

Evidence of illicit trade is often gathered from straightforward consumer surveys performed either via the web, via telephone contact or via a drop and collect questionnaire. The outputs of these surveys vary considerably. In some cultures survey respondents feel comfortable with sharing information about their illicit consumption; but in others they clearly do not as evidenced by wide disparities between other surveys, Customs' detection rates and reported consumer rates of illicit. Overall, consumer surveys have historically under-reported tobacco consumption, especially in countries where tobacco consumption has become increasingly socially less acceptable. For example, the Australian Institute of Health and Welfare highlight the possibility of under-reporting in their ‘National Drug Strategy Household Survey’,<sup>7</sup> primarily as some respondents did not answer smoking related questions. In addition, the Australian Bureau of Statistics suggested social pressures likely account for such under-reporting.<sup>8</sup> Illicit tobacco consumption is likely to be under-reported to an even greater degree. However, consumer surveys can be used usefully to corroborate the results of other surveys if the questions are about purchase behaviours rather than only consumption estimates.

#### *Strengths and weaknesses*

Consumer surveys have a great deal to add in terms of tracking the consumption behaviours and purchase patterns of illicit consumers. However as an absolute measure of the illicit quantum in any given market they have been found to underreport by up to 25-35%,<sup>9</sup> and should therefore be used as supporting rather than leading evidence.



### ***Mystery shopping***

This technique attempts to survey what brands and tobacco product types are available on the open market. Interviewers can either question consumers as they leave retail outlets, or they can act as consumers themselves. Where researchers have to masquerade as consumers, this can be a higher risk type of research. Also care should be taken to select a representative sample of outlets, including informal outlets such as markets. Care should also be taken in establishing times of day and week in which to visit, again to ensure the survey is representative of consumers' own experience.

#### *Strengths and weaknesses*

Mystery shopping can provide excellent data on the availability, prices and modality of illicit selling of product. However it cannot produce in itself a representative quantum of the illicit products' consumption in that market. Once again it is a technique that should be conducted in conjunction with others to produce a rounded picture of the illicit consumption in a market.

### ***Rolling papers analysis***

This technique is specific to the loose tobacco market. Historically the illicit loose tobacco market is very difficult to research because little evidence exists after the product has been consumed. Therefore most methods for sizing the illicit trade quantum of loose tobacco have tended to rely on consumer interviews only. Rolling papers analysis proposes that a check for this method be produced alongside these surveys. The method analyses the total market for rolling papers and establishes a total potential market for rolling tobacco based on an assumption of tobacco use per paper. Care has to be taken to take account of wastage (papers spoiled), other uses (such as marijuana), and the variability of the amount of tobacco in each rolled cigarette.

#### *Strengths and weaknesses*

Whilst the logic is sound for rolling papers analysis, the degree of variability given the factors listed above produces a wide range of potential market sizes. Therefore this method acts only as a 'sense check' for the quantum of illicit loose tobacco.

### ***Customs and other law enforcement detections***

Our colleagues in customs and law enforcement produce a rich vein of data from the excellent work they do in detection of criminal activity and enforcement of anti-trafficking and smuggling laws. Often data associated with these detection events are shared publicly and are tracked on an annual basis by the relevant law enforcement organisations. We have found that this data can act as an excellent form of collateral for the market research listed above. However care must be taken to avoid over representing the data as consumption data: these detections can only show a proportion of the illicit market. A problem exists in establishing what proportion these detections represent of the total illicit market. Detections depend as much on the performance of the customs or law enforcement agency as they do on the presence of illicit activity and the ingenuity of the smugglers.

### *Strengths and weaknesses*

Customs and law enforcement data should be used as a form of collateral for the presence and types of illicit product in a market. They should not be used as an estimation of the total quantum of consumption of those products.

### Suitability of research methods for different types of market

Table 5.2 below summarises the different research methods for different types of tobacco product markets. These findings are of course subject to significant variability depending on geography, legality, cultural behaviours and other research considerations.

**Table 5.2.**

	Pack market	Stick market	Loose market
EPS + ND(L)	P		
Pack swap		P	
Consumer Survey	S	S	P
Mystery Shopping	S	S	S
Rolling Papers			S
Customs Data	S	S	S

*Note:* Key: P = primary source of illicit quantification; S = secondary source of illicit quantification

## Notes

<sup>1</sup> Following a European Parliament vote in February 2014, the sale of 10 packs will be banned across the EU by 2016. The minimum pack size in EU countries other than the United Kingdom and Italy is currently 19 / 20 packs.

<sup>2</sup> Warner, Kenneth E., “Possible Increases in the Underreporting of Cigarette Consumption”, *Journal of the American Statistical Association* (1978)

<sup>3</sup> Gallus et al, “Temporal changes of under-reporting of cigarette consumption in population-based studies” (2011)

<sup>4</sup> “Tax avoidance and tax evasion”, Chapter 8 - *Handbooks of Cancer Prevention*, IARC (2011)

<sup>5</sup> Ipsos Yellow Bag Surveys, 2008-2009

<sup>6</sup> Ipsos Empty Pack Surveys, 2008-2009

<sup>7</sup> “National Drug Strategy Household Survey”, Australian Institute of Health and Welfare, 2010, 2013

<sup>8</sup> “Profiles of Health, Australia, 2011-13 – Tobacco Smoking”, Australian Bureau of Statistics, June 2013

<sup>9</sup> Gallus et al, “Temporal changes of under-reporting of cigarette consumption in population-based studies” (2011)

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## Chapter 6

### The global illicit trade in illegal narcotics

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*Narcotics have long been one of the most valuable illicit markets, and government efforts to stem both their supply and demand face on-going challenges. This chapter describes the global distribution of major illegal narcotics from source to destination with a focus on heroin and cocaine routes. It explains how traffickers seek out states with weak administrative structures, law enforcement and customs as it is less costly to move illegal wares through states that suffer from weak institutions and a significant informal economy. The links to such areas has grown with the spread of globalisation, and collaboration between criminal enterprises to terrorist organisation has become more prominent. The author concludes that State building and enhancement of good governance practices are key complements to punitive approaches and sanctions.*

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The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area

1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

Globalisation has been a boon for those who seek to profit from illicit trade. It facilitates trafficking and empowers criminal enterprises, enabling criminals and other violent armed groups to share operational knowledge and, in some cases, to collaborate. The vast volume of licit trade allows those trafficking in illegal commodities to create insuperable challenges to state entities trying to track them down (Shelley, 2014).

This chapter describes the characteristics of the global illicit trade in narcotics, presenting estimates of its global volume and value in major sub-classes and discussing the methodological concerns over such estimates. It begins by describing the characteristics of the trade and clearly defining what this sector involves, distinguishing various sub-classes of the trade where appropriate. The major known flows and hubs of illicit trade in these sub-classes are outlined. Second, the chapter outlines the consequences of the illicit trade in illegal narcotics by highlighting the impact of this sector on the budgets of the nation-states that seek to combat it, including the significant costs of funding the security sector, as well as the economic and political repercussions in countries where criminals and criminal networks have co-opted or in some cases penetrated the government.

Overall, this chapter is less concerned with presenting an exact measurement of cultivation, trafficking and consumption of illicit narcotics and more on explaining the choices and motivations of those involved in the trade under specific geographic and economic conditions. In illuminating the variables at play, the aim is to provide governments with insights into how to combat illicit trade more effectively. One goal is to analyse why traffickers transport more products through and to certain countries and the means they employ to facilitate illicit flows. Next, it discusses the consequences and ramifications of the drug trade, including negative externalities and corrosive second- and third order-effects for the environmental, society, and public health. Third, this report provides substantial and compelling evidence of a convergence between the illicit trade in illegal narcotics and other sectors of illicit trade, exploring the ongoing “nexus” debate, or what has labelled “the unholy trinity of transnational crime, corruption and terrorism” (Shelley, 2014). Finally, the report seeks to provide a balanced assessment of existing public policies that have been designed to combat the illicit trade in illegal narcotics on multiple levels – production, transit and consumption – and draws conclusions about how to counter the global illicit trade in illegal narcotics and the organisations that perpetuate and profit from this trade.

## Characteristics of the global illicit trade in illegal narcotics

While it is possible to discuss the characteristics of the global illicit trade in illegal narcotics, including the trends associated with the primary actors involved, the types and sub-classes of the various illegal narcotics being smuggled and trafficked, and the flows, routes and hubs that have been identified, it is significantly more difficult to estimate the volume and value of this illicit trade. Statements on the size and growth of transnational organised crime and the impacts of illicit markets and networks are often heard, but rarely supported with reliable statistics and sound measurement when made at the global level. To be sure, no universally accepted figures exist today, although many scholars and practitioners widely agree that the numbers provided by the United Nations Office on Drugs and Crime (UNODC) is the standard. In other words, while this data has

shortcomings, some of which are described below, it is still preferable to national and even regionally aggregated data, because of its global approach.<sup>1</sup>

One anecdote that surfaces in the literature on measuring illicit flows is that of R.T. Naylor confronting a UN anti-drug official about the USD 500 billion figure he had cited in estimating the size of the world illegal drug market (Naylor, 2004). After meeting resistance, the estimate was subsequently lowered to USD 365 billion (based on the survey of different estimates made in different parts of the world) and then rounded up to USD 400 billion (Andreas, 2010). An unpublished study by Peter Reuter, as recounted by Francisco Thoumi, determined that a more appropriate range for the size of the world illegal drug market was between USD 45 billion and USD 280 billion (Thoumi, 2005). Taking the low and the high end of that range suggests that the value of the global illicit trade in illegal narcotics could be anywhere between USD 45 billion and USD 500 billion, a range so broad as to provide little analytic value.

Numerous challenges arise in measuring both the value and volume of the global illicit trade in illegal narcotics, most of which fall into two broad categories: the accessibility and reliability of data and the politicisation of data. These challenges are compounded by the difficulty of developing sound metrics that can objectively inform an empirically based, data-driven policy debate at both the national and international levels. After discussing these challenges at length, this section describes the characteristics of the illicit flow of narcotics and concludes with recommendations for possible workarounds and suggestions for new ways of conceptualising the challenges inherent in measuring the global illicit drug trade.

### ***Reliability of data***

While much progress has been made on understanding the character and nature of the illicit trade in illegal narcotics, much work remains to be done. The crossover of references into other disciplines, whilst promising with respect to an attempt to be comprehensive, are too often “unco-ordinated” and “eclectic” to the point of further confusing analysis of this subject (Von Lampe, 2006). According to Andreas and Greenhill (2010), this is partly because we exist and interact in a broader policy arena that demands quantification, which includes the prioritisation of bad data over no data, and favours simple and visible metrics of policy “progress” and “success” that can be highly misleading.

As mentioned above, making accurate quantitative and analytical cross-country comparisons of the drug trade is tricky, and the lack of reliable statistics makes assessment or measurement of it extremely difficult. Accordingly, research on transnational criminal networks and drug trafficking organisations relies in large part on qualitative approaches, for example case studies and other comparative historical approaches. Still, this work comes with its own set of obstacles. “For more qualitatively oriented scholars, such as ethnographers, the poor quality of the aggregate data is much less consequential, but access to interview subjects and other research materials in the illicit world presents its own distinct obstacles and challenges, including potentially finding oneself in risky and even dangerous situations” (Andreas, 2010).

### ***Limitations on access to relevant data and information***

The nature of clandestine organisations makes it difficult for researchers to accurately assess their commercial activity. “After all, the success of clandestine border crossings

depends on not being detected and thus they are designed to be as invisible as possible; getting good data is correspondingly difficult, to say the least” (Andreas and Greenhill, 2010).

Quantifying, assessing, evaluating and measuring the value and size of the illicit drug trade and comparing these figures across countries remains a major challenge. While data may be robust for some countries, for others, almost no data is available. This problem is not limited to measuring illicit drugs; accurate quantitative and analytical cross-country comparisons of crime in general is problematic because of the varying (and generally insufficient) national reporting of crime and a divergence between data provided by different sources (Stepanova, 2010). Underdeveloped national criminal justice systems compound these already difficult challenges. Moreover, the weakly functioning states with limited data can often be the same states of interest with regard to narcotics cultivation, processing, trafficking and smuggling. In an ideal world, statistics would draw upon clear and bounded definitions, reasonable measurement and representative samples (Picard, 2013). As the section on methodology suggests, these issues are only a few of the many concerns.

#### *Methodological concerns*

Understanding cross-national variation in the illicit flow of narcotics suffers from some of the same pitfalls as studies attempting to measure criminal violence. Noteworthy methodological challenges include a lack of clear priorities for data collection, limitations in the measurement of independent variables, and the design, implementation and assessment of interventions (Messner, 2003). Selection bias is considered a methodological pitfall in many studies on organised violence and illicit markets, since narcotics trafficking is studied most frequently in general but most often for its connection to violence. Within the drug trade, far more attention is devoted to the trafficking of cocaine and heroin than other drugs like marijuana and ecstasy/MDMA (Andreas and Wallman, 2009; Von Lampe, 2009). Without a clear concept and methodology, research on illicit markets can be a casualty of the self-fulfilling prophecies and false assumptions of the researchers who made them (Vander Beken 2004). Another issue is the challenge of conducting the cross-jurisdictional or comparative criminology, since data acquired from one state may be not be sufficient to compare to data collected from another state (see Rawlinson, 1999; and UN Centre for International Crime Prevention, 2000).

Another methodological concern is the multiplicative effect. Estimates of the drug market (whether based on supply or demand) are inherently imprecise, because they are based on multiplying different uncertain quantities, which amplifies the overall uncertainty. On the back end, this requires and is wholly dependent on a series of assumptions that are often flawed or in need of more rigorous testing. Thoumi recounts estimates offered by Rocha on Colombian net cocaine revenues and concludes by noting the necessity of assessing ranges of *possible* versus *most likely* estimates (Thoumi, 2005). The USD 400 billion figure offered by the United Nations would mean that drugs accounted for a larger share of international trade than the markets for iron and steel. The UN figure is distorted because it is based on multiplying global quantity consumed by an approximation of US levels for prices, so the number is an estimate of “turnover” or total retail expenditures, which includes the value added in importing countries. Yet this is not a trade flow estimate (Reuter and Greenfield, 2001).

Most studies on transnational organised crime fall into three means of data collection: observations, interviews and data stored electronically or on paper. In his study on the challenges for future research on transnational organised crime, Von Lampe identified four primary problems plaguing “the emergence of a cumulative body of knowledge and the development of coherent theoretical frameworks,” including: the lack of detail on both the *modus operandi* and the logistical structure of the activities; the examination of the destination country but not the source or transit country or countries involved; a dearth of comparisons across time and space (driven in no small measure by problems related to differential access to data sources as well as differences in the *existence* of data to begin with); and finally, a lack of compatibility of research due to differences in the unit of analysis, a lack of agreement about units of analysis, or stark discrepancies in conceptual and theoretical frameworks used to analyse the data being analysed (Von Lampe, 2012).

The lack of reliable data and the use of bad data prevent many researchers from attempting to study illicit trade of all types in the first place. The difficulties plaguing data collection and the analysis of illicit drug markets preclude the type of large sample size quantitative studies popular in political science and sociology academic journals. In turn, many studies on global drug trafficking organisations are qualitative. Alas, there is nothing inherently wrong with moving away from the “quantification fetish” (Andreas, 2010). Richly detailed qualitative studies can be extremely useful in answering questions of how or why (Yin, 1989) and can also help us understand and interpret “the complexity of real-world phenomena” (Stake, 1995).

### ***Politicisation of data and the policy process***

In addition to problems with access to data and the myriad methodological concerns outlined above, the data used by many of the actors involved in what has controversially been labelled “the war on drugs” has been politicised. Of course, it is understandable for governments and congressional bodies to want to show progress and a return on investment. “It is unconscionable for this country to continue to carry out a public policy of this magnitude and cost without any way of knowing whether and to what extent it is having the desired effect” (Andreas, 2010). However, too often this leads to the blind acceptance and reproduction of numbers and not enough critique of how certain studies are designed and executed.

While pointing to record numbers of crops destroyed can provide a “politically appealing indicator of ‘doing something’ about drug production at the source – while at the same time keeping funds flowing to anti-drug agencies,” it is also well-known that trafficking numbers and smuggling estimates are “commonly inflated, deflated or simply fabricated, all in the service of political goals” (Andreas and Greenhill, 2010). Reuter has consistently and vehemently denigrated “drug-related ‘mythical numbers’” as irrelevant because they have little actual bearing on the policy decision-making process, calling them “decorations” and “rhetorical conveniences” (Reuter, P. and V. Greenfield (2001). Andreas takes some issue with this claim, stating that while it may indeed be true that numbers have little bearing on policy formulation and decision-making, because of the “policy obsession with quantification ... the absence of any attention-grabbing numbers would certainly be noticed and missed – and is thus consequential” (Andreas, 2010).

Though it may be useful, if not convenient, to have a gauge to measure progress (or a lack thereof), some argue that at the end of the day estimates and measurements make

little difference, because no matter what the numbers indicate, governments will continue to fight the illicit drug trade. Increased interdiction rates might earn some government agents a promotion or even increased funding. Still, as critics note, even the production of these numbers themselves are often the result of a bureaucratic imperative to produce and claim credit for progress, which can lead to an array of negative second- and third-order effects including turf battles, “rice bowls” and “stove-piping” (Andreas, 2010).

Numbers can be fudged or manipulated to support the assertion, which has become nearly ubiquitous, that transnational crime is a large and growing global threat and that its continued growth is a *fait accompli*, without much thought given to the possibility that global crime could ever possibly ebb or that this upsurge could be reversed. “This is not to suggest that the illicit global economy is not a serious problem and should not be treated as a major public policy concern, but to stress that the numbers are often highly suspect but nevertheless popularised and rarely critically scrutinised, and that there are strong incentives to accept and reproduce rather than challenge and critique them” (Andreas, 2010).

Customs officials in the United States have long acknowledged what many observers suspect – seizures at the border are merely a small percentage of the overall flow of drugs, even though this metric has historically been a top indicator used by customs agents to justify their mission, fend off political attacks and ensure continued funding (Andreas, 2010). Policy measures like judicial reform and other forms of reinforcing institutions are not politically popular because of the lag effect from input to output. They could have longer-term benefits, but they are less visible in the short term and they are more difficult to quantify. The onus is on scholars, academics and practitioners to question the use of “dubious statistics to influence the policy debate and perpetuate wrong perceptions of the issues” (Picard, 2013).

The other major element of the politicisation of data on the global narcotics trade is related to what cognitive scientists have called “anchoring effects.” This term describes the phenomenon whereby social scientists, politicians, diplomats, government officials and policy makers “fixate on numbers they have heard, even if those numbers are arbitrary or wrong” (Andreas and Greenhill, 2010). As part of the decision-making process, humans “anchor” on specific values, and in turn gravitate back toward that value to account for other elements of the circumstance that were previously unexplained. Once an anchor is set, there is a continuous and repeated bias toward it (Tversky and Kahneman, 1974). The blame for anchoring does not fall squarely and solely on decision makers, however. The media is also partly at fault, since journalists will use numbers if they are big, originate from a “seemingly authoritative source” and do not already contradict the point that the reporter was attempting to make in the first place (Andreas, 2010).

#### *Definition of illicit trade in illegal narcotics*

Before any discussion of the consequences of global illicit trade in illegal narcotics, it is essential to establish a clear definition of what is meant by the phrase. To begin with, for an offense to be considered transnational, the underlying act must: be committed in more than one state; committed in one state but planned from another state; involve a conspiracy to commit a crime by a group that maintains a presence in more than one state; or have had substantial effects in another state (Picard, 2013). By sector or category, there are numerous ways to group illegal narcotics, but this report limits the



categories of interest to the following: opiates, cocaine, cannabis and amphetamine type stimulants (ATS) (see UNODC, 2014; European Monitoring Centre, 2014; INCSR, 2014).<sup>2</sup> Additional categories could include new psychoactive substances and synthetics, as well as the precursor chemicals needed to transform plant-based or synthetic drugs into the final product. Besides the actual products involved, it might be useful to conceptualise the global illicit trade in illegal narcotics from a systems perspective, focusing on the producers, the traffickers and smugglers, the consumers, logistical hubs and counter-narcotics organisations. Below, the report will detail the interaction of both products (narcotics) and roles, focusing in particular on major known flows and hubs, with specific attention devoted to the smuggling and trafficking of cocaine and heroin.

### Major known flows/hubs of illicit trade in narcotics

While illegal markets and drug trafficking organisations (DTOs) are often the unit of analysis, little attention is devoted to the flows, routes and hubs along which these groups operate and narcotics are smuggled and trafficked.<sup>3</sup> Maritime transport and overland routes dominate the narcotics trade in terms of quantity trafficked, but it should be noted that air transport also plays a part, e.g. by human couriers, internally and in baggage, in air cargo and through fast parcel services (RILO WE, 2013). The leading source countries for cocaine are all located along South America's Andean Ridge and include Colombia, Peru and Bolivia (Millett, 2008). The leading source countries for heroin are Afghanistan, Burma Mexico and Pakistan. One characteristic common among all of the world's major opium- and coca-producing states are that they are either ravaged by conflict, unable to control their entire territory, or experiencing varying degrees of political instability (Patrick, 2006).

This section will identify the major routes, from source to market, for cocaine and heroin, although these routes and hubs obviously facilitate the illicit flow of many different commodities as well, including narcotics but also contraband such as weapons and humans. Although the focus here is on cocaine and heroin, cannabis is the largest narcotics retail market. Domestic production of both cannabis and synthetic amphetamine-type stimulants (ATS) is an important dimension of the illicit drug market and, especially in the case of ATS, may be associated with illicit trade both within Europe and more widely. Such more localised trade may pose different problems and opportunities for intervention to intercontinental flows.

#### *Cocaine routes*

There are four well-known smuggling routes for cocaine that ebb and flow in importance over time depending on a host of factors, including the activity of law enforcement, conflict or instability in countries along the route and many other variables that are constantly in flux.<sup>4</sup>

The first major route for cocaine is known as the Southern Route, which extends down through South America and out from Uruguay and Brazil to either Spain or Portugal as the ultimate destination countries, before being sold on the streets of Europe. Sometimes the cocaine is sent first through South Africa or West Africa before being moved onward to Europe. In Argentina, *Ruta 34* has gained notoriety for its role in the movement of cocaine. This 1 500-kilometre road stretches from the Bolivian border to the Argentine city of Rosario, where drug trafficking organisations receive the shipments and move them on toward their next destination (Ramsay, 2010). Operations along the

Southern Route have been bolstered by Serbian criminals who have established connections throughout Latin America and now rely on Brazil as a hub for cocaine trafficking, due in part to that country's cultural and historical links with Portugal, as well as for its major economic activity, commercial and transport infrastructure (Navear, 2012).

The second major route for cocaine is the Caribbean Route, which stretches through the Caribbean Sea via the Azores to Portugal or Spain. According to the International Narcotics Control Board, approximately 40% of European cocaine shipments go through the Caribbean before reaching Europe (INCB, 2007). The Caribbean Route is frequently used by drug trafficking organisations in Colombia and Venezuela, as well as Jamaican and Dominican gangs firmly entrenched in both mainland Spain and the Canary Islands. Cocaine trafficking along this route is facilitated by the historical relationships between a number of countries and their former colonial holdings, including the Netherlands and the Netherlands Antilles; the United Kingdom and Jamaica; France and Martinique and Guadeloupe; Portugal and the role played by the archipelago of the Azores; and finally, the importance of Spain (especially the port of Algeciras in southern Spain) where Colombian drug traffickers take advantage of historical and linguistic affinities.

The third major route for cocaine is the West Africa/Sahel Route (Cockayne, 2012; Lacher, 2012; Wanneburg, 2005; Mazzitelli, 2007; McGuire, 2010; UNODC, 2007). This route has been pioneered by Colombians flying directly from Venezuela to Guinea-Bissau (Hawley, 2010). Some shipments are moved through Central America and on to one of two transshipment centres located in either Guinea/Guinea-Bissau or alternatively, to locations in the Gulf of Benin, along the coast from Ghana to Nigeria (Caunic, 2013). Organised criminal groups in Nigeria play a significant role in this area of operations and use West Africa as a headquarters for their drug-trafficking operations. Its operatives maintain an extensive network that extends beyond West Africa and to networks in countries including Cambodia, the Czech Republic, Germany, the United Kingdom, Hungary, Italy, the Philippines, Singapore, Thailand, Turkey, the United States and Australia (Cockayne and Williams, 2009). After the cocaine reaches West Africa, it is transported north. Operatives in Morocco have taken on a growing role, and long-standing hashish routes have been used to transport cocaine into Europe. Perhaps unsurprisingly, a 2009 report from the U.S. Drug Enforcement Agency noted the presence of South American and Mexican drug trafficking organisations in the region (Wyler and Cook, 2009).

The fourth and final major route for cocaine trafficking is known as the Southeastern Europe Route, which stretches through the Balkans and into Southeastern Europe, where large shipments arrive in the ports on the Adriatic and Black Sea. This region is plagued by several issues of instability, including a steady presence of criminal organisations, financial volatility in Greece, the ongoing civil wars in both Syria and Ukraine, and the overwhelming influx of refugees into Turkey. All of the aforementioned factors, combined with the liberalisation of trade in the region, have coalesced to provide a boon for cocaine smugglers and traffickers. Bulgaria is an important transit point for cocaine shipments arriving from Latin America (especially the port of Varna) after being trafficked from West Africa via Turkey and the Balkan routes (Williams, n.d.). Many of these shipments are ultimately destined for organised criminal groups based in Italy, including the Ndrangheta, which maintains a base and links to Argentina and Colombia as well as close links to drug trafficking networks in Colombia and Mexico (Associated Press, 2008; Wilkinson, 2007; Corcoran, 2011). As mentioned in the section on the

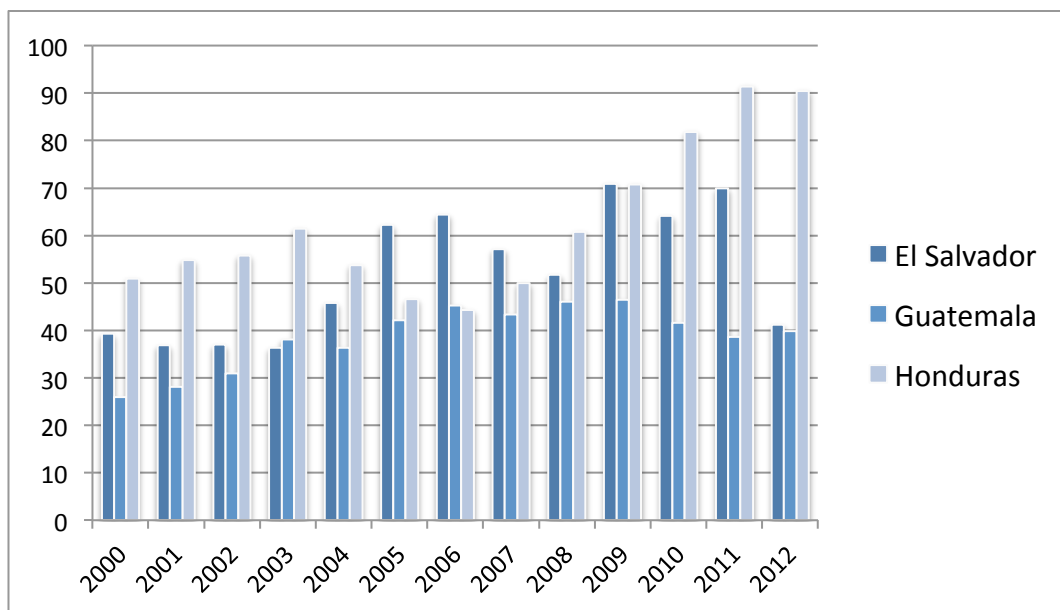
Southern Route, organised crime groups from the Balkans, particularly from Serbia, have established bases in Latin America in order to get closer to the source (Europol, 2011).

In addition to critical routes along which cocaine is trafficked, there are also several key arrival/smuggling points and distribution hubs, where criminal logistics equipped to receive illicit flows from numerous sources are concentrated. In Europe, the most important hub is in the southwest, comprising Spain and Portugal. Other critical hubs are located throughout Europe, including in the northwest (in the Netherlands and Belgium), the southeast (Bulgaria, Romania and Greece, including the ports of Varna, Constanta and Piraeus, respectively), in the south (from southern Italy up north to Milan, where the Ndrangheta is geographically situated between the EU member states of Western and Southeastern Europe) and finally in the northeast, where the Baltic countries are the least important of Europe's five primary hubs for the flow of cocaine. Part of this may be due to geography, as the Baltic ports are further away, but there are a bevy of other potential factors, including more difficulty in masking drugs amongst legal shipments because of the lower volume of legal trade with Latin America, stronger governance in these countries than in other European entry points, the possibility of higher costs and lower margins for traffickers who receive the product in the Baltics points of entry and move it into main EU markets. The result is likely a combination, to varying degrees, of each of the aforementioned variables.

### *Central America's Northern Triangle*

The case of drug trafficking networks in Central America's Northern Triangle demonstrates the challenge of high-intensity crime and surging levels of drug-related criminal violence in countries not engaged in civil war or battling insurgencies. The Northern Triangle is a large swath of territory in Central America formed by the countries of Honduras, El Salvador and Guatemala and geographically located between source countries for cocaine in South America (Colombia, Peru, Bolivia) and the destination market of the United States. Throughout the Northern Triangle, various forms of non-state armed groups (NSAGs) – transnational criminal networks (TNCNs), violent drug trafficking organisations (VDTOs) and street gangs – have established a presence and capacity to use force that rivals or surpasses that of public authorities. Transnational criminal networks seek to control territory with the end goal of establishing a headquarters or base from which to direct their illicit activities. Like insurgents, the violence perpetrated by non-state actors in the Northern Triangle undermines the legitimacy of the state. Unlike insurgents, the TNCNs, VDTOs and street gangs have no interest in governance (Rodgers and Muggah, 2009).

Murder rates in countries comprising the Northern Triangle have consistently ranked among the five highest globally, ranging from between 50 to 90 homicides per 100 000 citizens (Farah and Phillip, 2013; UNODC, 2013). Honduras serves as a critical logistical hub for the cocaine trade between the Andes (source countries) and North America (destination countries) (Bosworth, 2011; UNODC, 2013). It has the highest homicide rate in the world, and organised crime allegedly has links to the police. Before resigning amidst allegations of corruption and incompetence, the attorney general of Honduras testified to Congress that police only have the resources to investigate 20% of the crimes reported (Cawley, 2013).

**Figure 6.1. Homicide rates in Central America's Northern Triangle countries/territories, 2000-2012**

Source: UNODC (2013), *Global Study on Homicide 2013, Data and Statistics*, [www.unodc.org/gsh/en/data.html](http://www.unodc.org/gsh/en/data.html).

The Northern Triangle countries face a unique set of challenges. In El Salvador, the street gangs or *maras* present the most significant challenge (Farah and Phillip, 2013).<sup>5</sup> In Guatemala, the violent criminal group known as Los Zetas has taken hold. And in Honduras, political dysfunction, porous borders and allegedly massive levels of corruption contribute to poor governance. In all three of the Northern Triangle countries, criminal organisations are reported to work with agents of the state in what Douglas Farah has labelled the “transactional paradigm”, where the state either abets or performs criminal activities in exchange for money (Cawley, 2013). The most important nodes in these criminal networks may be the facilitators with the willingness, ability and connections to connect illegal factions with legal institutions (Garzon Vergara, 2012). The political-criminal nexus takes a different shape in different countries, as detailed in a study of countries with many similar structural factors to the countries of the Northern Triangle (Garzon Vergara, 2008).

Los Zetas is comprised of former Mexican paramilitary soldiers and is now heavily involved in a range of trafficking and smuggling rackets throughout the Northern Triangle.<sup>6</sup> Unlike traditional criminal gangs in Guatemala, which historically have relied upon *transportistas*,<sup>7</sup> Los Zetas have essentially cut out the middlemen by establishing a presence in a certain area and proceeding to develop an intelligence network while killing or coercing those individuals or groups that dare resist the organisation (Espach et al., 2011). It has established a sophisticated infrastructure in Guatemala, relying on go-fast boats and self-propelled semi-submersible boats to transport drug payloads through maritime trade routes.

Once merely a drug-trafficking organisation, in recent years, Los Zetas has diversified its criminal portfolio and extended its geographic reach to mirror that of the most sophisticated TNCNs (Dudley, 2012). In areas where they operate, members of Los Zetas

launder proceeds from their criminal activities through front companies, agribusiness and public works contracts (Dudley, 2011). Its intelligence and communications capabilities enable it to conduct surveillance and employ a wide range of denial and deception, political manipulation, information operations and counterintelligence techniques to protect its illicit operations throughout the Northern Triangle. In attacks against both rival trafficking groups and Guatemalan government forces, members of Los Zetas routinely use assault rifles and grenades to overpower their adversaries (International Crisis Group, 2011). In recent years, they have recruited Guatemalan *Kaibiles* into the organisation.<sup>8</sup>

The Northern Triangle suffers from what is called “the vicious cycle of gangs” (USAID, 2006). In short, a dearth of economic opportunities increases the incentives for gang membership and gang-related activities, which puts pressure on government to increase anti-crime and private security resources. In the short term, this reduces the resources available for investment in basic public services, which, all things being equal, further depletes the prospect of delivering economic opportunity.

The gangs are inextricably linked with the VDTOs and in some cases integrated with the organisations, but are more often working as subcontractors of violence, enforcement or distribution. There are at least five ways in which contemporary Central American street gangs threaten security: they strain governments’ police and law enforcement capacity; they challenge government legitimacy by calling into question the state’s ability to provide security and basic services; they act as surrogate governments, extorting taxes and providing “protection” where they are allowed to; they dominate the informal economic sector, using violence and coercion to provide enterprises that operate or support unfair competitive advantage; and they infiltrate police and other government entities in support of their other goals (Bunker and Sullivan, 2010).

The homicide rates in the Northern Triangle would seem to make more sense if any of these countries were currently in the midst of a civil war. However, conflicts, even those criminal in nature, rarely remain parochial for long these days. Rather, criminal groups eventually develop a transnational capability to maximise profits while resorting to violence to take control of smuggling routes. There are some indications that violence may be migrating, at least to some extent and in some countries, from political to criminal forms. As discussed in the case of the Northern Triangle, evidence of this possible trend is currently found in Central America, and such forms of instability may possibly take deeper hold in other regions – particularly regions of weaker states on the periphery of much wealthier areas driving demand for illegal goods and services.

The weakness of institutions in these countries suggests the need for building the capacity of government ministries and law enforcement capabilities. Strengthening the rule of law is necessary to make progress against some of the most visible drivers of crime in the region – drug trafficking, youth violence and gangs, and the wide availability of weapons and firearms left over from the contemporary history of the region’s wars (World Bank, 2011). It is exactly these types of countries – those with a high criminal density and a long history of accumulated illegality and violence – that are the most vulnerable to transnational criminal networks and the criminal violence they instigate (Garzon Vergara, 2012).

### ***Heroin routes***

Global opium production is concentrated primarily in Afghanistan. There are two primary smuggling routes: the Balkan Route and the less travelled, but emerging

Northern Route.<sup>9</sup> The Balkan Route leaves Afghanistan to the west through Iran, enters Turkey and continues onward. In the case of the Northern Route, it leaves through Central Asia and into Russia. A third recent route consists of heroin traveling from South Asia to East Africa and then southward on the continent before moving North through West Africa on to Southern Europe.

The Balkans is a preferred route for smugglers of all sorts, not only for trafficking narcotics. In addition to drugs and guns, smugglers traversing the Balkan Route carry everything ranging from humans to cigarettes, while also driving stolen automobiles across borders. Indeed, the region serves as a “major human cargo trans-shipment point” for migrants and women smuggled into Europe, including many from Iran (Andreas, 2004). During the 1990s, operatives in Montenegro were key links in an untaxed cigarette smuggling ring stretching throughout the Middle East, Central Asia, the Maghreb, the Balkans and Western Europe (Glenny, 2008). Private security firms stole and sold automobiles, which could be located with the help of these same firms for a modest fee. On the Balkans Route, criminals of all types can expand their networks, determine which gangs specialise in moving which products, and in turn, discern who has a comparative advantage.

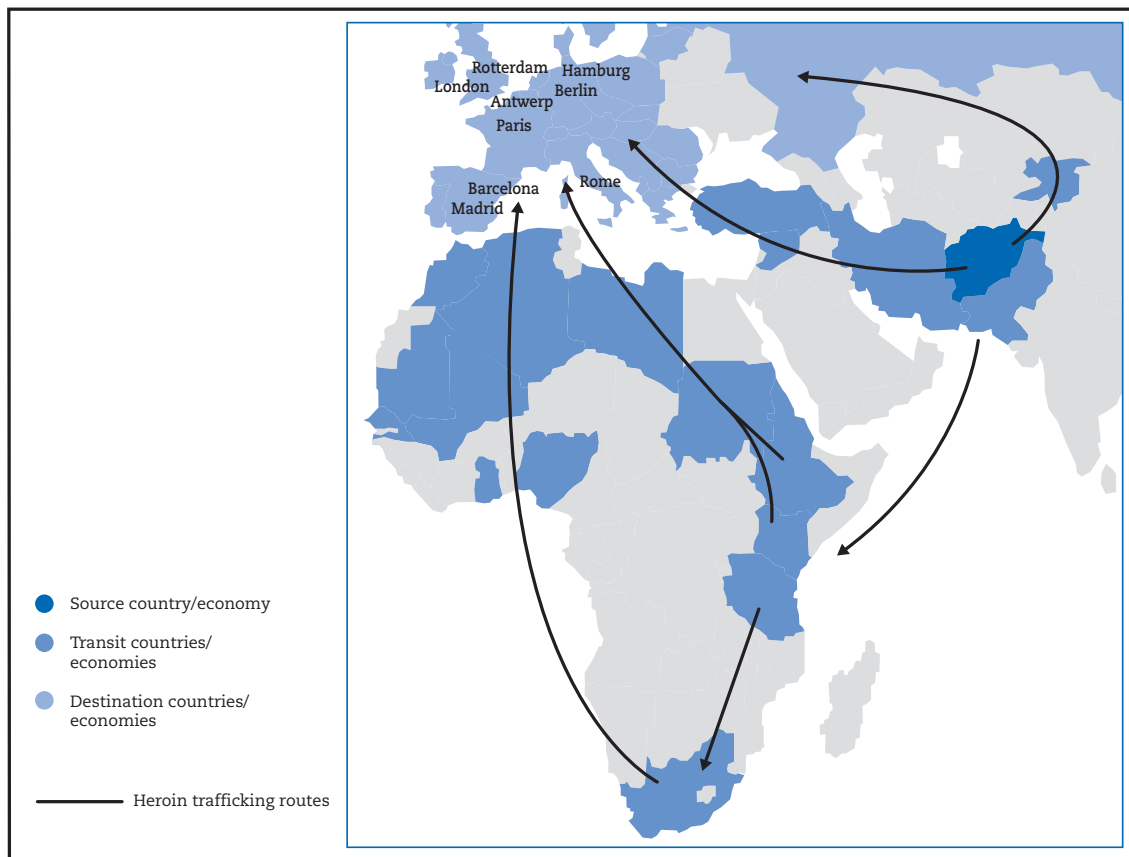
Key arrival/smuggling and distribution hubs for heroin travelling along the Balkan Route include Iran, primarily due to its border with Afghanistan, as well as Istanbul, Turkey. Numerous groups battle for control over the main smuggling routes from Turkey and the Balkans further on into Europe, including Balkan and Albanian criminal groups and Kurdish drug-trafficking networks that have established long-standing ties in various countries throughout the continent, including the Netherlands (a key staging point for drugs moved to the United Kingdom) and Germany. These hubs are important for their proximity to destination markets, commercial, transport and communications infrastructure, as well as the prevalence of other criminal groups that might be called on to provide assistance on an as-needed basis. It is well known that in addition to narcotics, these hubs are critical for the movement of migrants, counterfeit goods, stolen cars and a long list of other illicit contraband (Todorov et al., 1998 Gilmore 1999).

Money laundering enables criminals and the political elite to disguise their ill-gotten gains. In some instances, money has been laundered through the banking system, as it was in Mostar, Croatia, by the Hercegovacka Banka (Dobbins et al., 2008). At other times, laundered funds in the Balkans were reportedly linked to Colombian drug traffickers (Glenny, 2008). “War is a continuation of business by clandestine means: military success often hinges on entrepreneurial success in the murky underworld of smuggling,” notes Andreas (2004). This “murky underworld of smuggling” turned gang leaders into powerbrokers able to liaise with political elites to maximise the consolidation of resources. In this region of the world, organised crime, which mingles with unscrupulous politicians, is a form of malignant civil society that has taken root and attenuated the power of already weak states.

The Northern Route for trafficking opium from Afghanistan through Central Asia gained prominence in the context of newly independent states on Afghanistan’s northern border (Paoli et al., 2009). As Cornell (2007a) notes, of the five states through which heroin is trafficked, based on officially documented seizure rates, Tajikistan is the most heavily used by drug traffickers (Cornell, 2007a). To the surprise of few, corrupt government officials in Tajikistan have been closely linked to facilitating the drug trade in that country (Greenhill, 2009).

Finally, the less frequently used Southern Route has gained prominence since 2014. Along this route, heroin flows from Afghanistan into Pakistan and leaves by boat before ending up in ports of eastern Africa and being moved on to points in Southern Africa. This route has grown in importance (see Figure 6.2) following improved law enforcement efforts in central Europe, and due in part to the chaos of the Syrian civil war. Geographical proximity and limited law enforcement capacity in Kenya and Ethiopia make them obvious choices for the transit of heroin originating in Asia. Southern Africa is a hub for both heroin and cocaine transit due to its well-developed transportation infrastructure (INCB, 2014).

**Figure 6.2. Global heroin trafficking routes (2015)**



Source: Author

Whether or not the “Smack Track” will lead to an expanded market share for criminals has yet to be determined. Viewed in isolation, market size can be “a helpful starting point for measuring the degree of nuisance of organised crime, its corrosive impacts on society and institutions, and the overall indirect impacts on trade. However, it is not necessarily a relevant indicator of general social, economic or environmental harm” (Picard, 2013). As such, the section below outlines some of the consequences of the illicit

trade in illegal narcotics, including the negative political, economic and social costs borne by host-nation governments – producer, trans-shipment and consumer states alike.

### Consequences of illicit trade

With so much focus on the validity, reliability and accuracy of data on the illicit trade in illegal narcotics, what often escapes scrutiny is the host of serious consequences across the political, economic and social levels of society, and how these consequences affect states. While some scholars argue that analysis should highlight the dangers posed by criminal organisations, others argue that the impact of illicit markets is more important than the criminal actors themselves (Picard, 2013). Put another way, the negative externalities of the markets are an important consideration, leaving aside the character of the groups that operate them.

#### *Political impact: Mafia states and corruption*

In the zero-sum nature of politics in some West Africa economies, laws are manipulated and selectively enforced to serve those with political connections (Reno, 2009). In many cases, corruption is just as much about greed as it is about building a personal power base against rivals. As politicians misuse public funds with revenues that should be redistributed to rebuild infrastructure or to invest in the region's human capital, the treasuries of state institutions are being drained. Those formal sources of revenue collected are often used to reward allies and target political rivals. In West Africa, anticorruption investigations tend to single out “low-level or exiled officials, with no mention of incumbent strongmen,” Reno notes (1998). In this corner of the globe, corruption has been perhaps the most consistent, defining feature of government. To many scholars, this should not come as a surprise, given that corruption in West Africa is a deliberate strategy and not necessarily something to be bashful about. Many African leaders myopically use revenue as a resource to be exploited, in an example of what has referred to as “common pool resources” (Ostrom, E. et al., 1993, see also Herbst, 2000). Transit countries are at high risk of public and political corruption, and this tends to produce undesirable social and economic outcomes for the citizens who have to live under such regimes.

Beyond a doubt, corruption is a key enabler of the patronage networks that can be both an inhibitor and facilitator of economic activity and have come to dominate West Africa. People can accept, however begrudgingly, a certain level of ineptitude. But outright discrimination and obstructionism are different from feeble state capacity. The denial of human rights, a blatant disregard for democracy and the rule of law, and a highly fragmented state that actively stifles dissent has led to regimes long since hollowed out by corruption and system of patronage that fails to spread wealth.

During the 1990s, West Africa emerged as a critical hub in the global narcotics trade, with South American cocaine transiting through the region before being reshipped to Western Europe and parts of Asia, including Russia. Other drugs, including heroin, marijuana and methamphetamine, are also regularly trafficked through the region (Grant, 2007). Over the past decade, Latin American drug barons have shifted a share of their wholesale distribution network to West Africa. The region is now at the nexus of wholesale repackaging, rerouting and resale of drugs (Brown, 2013). Organised criminal syndicates from Nigeria are active throughout narcotics trafficking networks in West



Africa, utilising extensive contacts abroad in the United States and Europe to arrange and broker deals, as well as serve as middlemen for transportation.

In addition, a long-standing and well-documented number of narcotics smuggling networks date back decades, when the commercially powerful syndicates from Lebanon first used the region as a transit zone for heroin (Ellis, 2009). Traffickers from the Lebanese diaspora in West Africa co-existed, not always peacefully, with crime bosses from Russia, who used Sierra Leone as a headquarters to smuggle Soviet diamonds in exchange for heroin from Thailand (Ellis, 2009). Other international criminals included Dutch drug gangs that used West Africa as a transshipment point for hashish from Asia and as a conduit for South American cocaine destined for the United Kingdom (Ellis, 2009).

Guinea-Bissau has seen a steadily growing involvement of political and military actors in the drug trade, especially cocaine trafficking. The vast amounts of money available are affecting elections and both local and traditional governance, which in turn affect security on multiple levels. An ancillary effect has been increasing factionalism, with drug-trafficking organisations funding local military cliques as well as providing the tools and tacit knowledge necessary to engage in political assassinations. Much as in Central America, outreach efforts by civilian reformers are met with coercion and violence (Cockayne, 2012).

Guinea-Bissau suffered from violent struggles between political and military elites before cocaine was a major factor in the region; now that the drug trade is entrenched and pervasive, this has only exacerbated long-standing problems (Ellis, 2012). The killing in 2009 of a top general and the president are thought by some to have been the result of the struggle for control, and the April 2012 overthrow of the government more of the same, with trans-shipment of cocaine increasing significantly after the coup (Nossiter, 2012). Politicians, law enforcement personnel and military officers have either been directly implicated in drug trafficking or have been alleged to have provided assistance to drug-trafficking organisations. The nature of the relationship is such that “political actors are using criminal organisation as an aspect of statecraft, and criminal actors are using political privileges as business assets. Traffickers get access to state immunities, passports and diplomatic bags, airspace and maritime approaches, and even state-owned vessels. National political and military institutions are in turn used to tax the trade” (Cockayne, 2012).

High levels of corruption, a lack of the rule of law, and police forces overwhelmed by general security issues, to say nothing of counter-narcotics, make West Africa the ideal “soft target” for drug traffickers. This is especially true of criminals who are seeking to use the region as an area to forge new criminal relationships and illicit partnerships (Cockayne and Williams, 2009). “Indeed, the more capable organisations are at corrupting officials, the more legitimate their activities become,” observes Audra Grant (2007). Another pressing issue for West African governments is that transport hubs all ultimately absorb some of the problems in the host countries themselves, as drug users proliferate alongside the networks that smuggle these same drugs.

States throughout the region have developed into examples of what Jackson (1990) has dubbed “quasi-states,” governments that have been internationally enfranchised but lack the political will, institutional authority and power to protect human rights or provide for the socio-economic welfare of their own citizens (Jackson, 1990). Weak governance in West Africa extends beyond merely ineffective government institutions, a lack of basic

public services and poor leadership. Few educational opportunities and little possibility of advancement, a decimated infrastructure and low adult literacy are all symptoms of states with a compromised capacity to govern.<sup>10</sup> But what accelerates the corrosion of the state is the lack of political will and absence of commitment to improve the situation.

### ***Patronage politics***

Extensive patronage networks lead to the excessive centralisation of authority at the expense of the government bureaucracy. Functional gaps meant that governments are unable to deal with serious issues such as poverty, deprivation and the challenges of population flows and mass migration. Capacity gaps make regulatory mechanisms at the regional and international levels nearly impossible to enforce. And legitimacy deficits leave patronage as the only real option for survival (Reno, 1998). To make up for the lack of social provisions, a small, ruling elite engages in patronage, characterised by the exchange of benefits for political support. These benefits are typically economic in nature, whether in the form of money, jobs or access to valuable resources. Since this style of patronage allows for a certain level of “independent business activity,” the inevitable result is a struggle to control economic rents and the simultaneous existence of a rentier state and predatory warlords (Reno, 2009).

Guinea-Bissau is quickly transforming into the archetypical “mafia state”, led by rulers who rely on patronage networks for survival and are forced to hire private security for protection. Young people join these networks to serve as “muscle” for the political machine. A lucky few with access at high levels are able to secure positions as local political bosses or connections to the narco-economy. In countries like Sierra Leone, individuals have demonstrated loyalty to state officials in exchange for being allowed to participate in the “official” illicit diamond mining economy (Reno, 2010). They prosper as part of joint ventures with the leadership, which allows them to liaise with foreign diamond traders and connect to commercial markets. In Guinea-Bissau, the same *quid pro quo* occurs, except that the economy is built around access to the drug trade rather than diamonds.

Many of the gangs at the lower levels are comprised of marginalised youth who used drugs, eschewed traditional authority structures and were generally disconnected from society. As smaller groups of this ilk proliferate, individual fiefdoms are established, leading to the spread of warlords only interested in the profiting from the drug trade. Needless to say, warlords use violence and coercion to maintain a hold on these fiefdoms. But the fact of the matter remains – these same violent warlords offer disenfranchised youth one of their few opportunities to participate in any kind of economic activity (Reno, 2009).

Before it ever happened with the criminal patronage networks that dominate Afghanistan, overlapping conflicts in West Africa saw government officials and insurgents mingle closely. The result was that the composition of insurgent groups soon closely resembled the very government against which these groups were fighting (Reno, 2003).

### ***Economic impact: Black markets and shadow economies***

The economic impact of drug abuse throughout the world is difficult to quantify, but includes costs associated with hospital and emergency room visits and other medical costs, a higher incidence of disease (especially disease related to intravenous drug use

like HIV/AIDS), increased criminal activity and productivity lost through drug abuse (UNODC, 1998). The illicit trade in illegal narcotics is connected to every sector of the economy, from the influence of drugs on employment status and productivity to the generation of employment, inflation, income distribution and finance and investment.

Throughout certain regions of the globe, such as Central America's Northern Triangle, the Caucasus region of Central Asia and indeed the Balkans, trafficking illegal goods almost certainly qualifies as one of, if not the, single most lucrative form of economic activity. In these regions, the black market economy is not an anomaly, but on the contrary, serves as the main form of economic activity and development. In states where law enforcement is weak, criminal organisations may have the upper hand. As the UNODC (2011) asserts, "In many cases, profit from the heroin trade from the Balkans to Western and Central Europe exceeded the gross domestic product (GDP) of transit countries such as Albania and the Former Yugoslav Republic of Macedonia, posing a serious threat to the licit economy. Given the low GDP per capita across most of the Balkan countries, the heroin trade can significantly exacerbate corruption." Even years after the wars of the Balkans have petered out, black markets and shadow economies still provide a bevy of illicit opportunities to criminal entrepreneurs with the necessary skills and networks.

Toward the end of the 1990s, the black market was thought to account for roughly 50% of Bosnia's economy (Singer, 2000). During the height of the conflict, this figure was undoubtedly higher. Contributing to the pervasiveness of the illicit economy was a shadowy web of partnerships between the very groups that were fighting each other. Indeed, wartime interethnic co-operation in the form of clandestine trading demonstrated just how thin the line between patriotism and criminality had become (Andreas, 2004). Profit superseded ethnic loyalty in many cases, as the war took on a self-sustaining logic of its own (Donais, 2003).

As brutal as the conflict was, there is little doubt that connected elites profited from the suffering. At times, it seemed as though the ultimate goal of the warring parties, at least the well-connected war profiteers, was to extend the conflict, rather than bring it to an end. A stalemate settled in as the besiegers supplied the besieged and sustained the war through trade with the enemy (Andreas 2004). "Bosnia's own Muslim warlords controlled the entire economy of Sarajevo, trading with the Serb besiegers and then squeezing every last penny out of their compatriots by ratcheting up the price of basic foodstuffs, many of which were stolen from the United Nations and other humanitarian organisations" (Glenny, 2008).

The intersection between what Andreas has called the business of war and the business of crime resulted in a form of criminalised warfare where quasi-private criminal combatants served as mercenaries. Indeed, many of the militia and paramilitary formations fighting each other were nothing more than "small groups of politically empowered thugs" who were largely "drawn from the ranks of soccer hooligans, criminal gangs and released prisoners" (Andreas, 2004). These were essentially criminals for hire, who were willing to kill so long as they received adequate remuneration for their services. Nowhere was the shadow economy more evident than in the popularity of what came to be called the Arizona Market. Constructed as an open-air bazaar in 1996, with the intent of revitalising trade and the local economy in the Brcko District of northeast Bosnia, the Arizona Market soon morphed into an outpost of illegal activity. Four years after it opened, the market housed 2 000 shacks spread over 35 acres near the headquarters of

4 000 peacekeeping troops (Andreas, 2008). Every weekend, 25 000 people visited the market, which supplied income to approximately 20 000 individuals from the region.

As the laws of supply and demand took root, the Arizona Market served as a hub for human smuggling (illegal migrants and prostitutes were trafficked from Moldova, Ukraine, Romania and other nearby Eastern bloc nations) and every other imaginable illicit vice. Each year, the Bosnian state lost out on an estimated USD 30 million in tax revenues that could have been used to help rebuild the shattered nation (Andreas, 2008). Instead, profits from contraband trade were either pocketed for personal gain or funnelled back into nationalist causes, which had the opposite of the intended effect of fostering ethnic integration.

Few could fault the desperate participants from engaging in this form of unregulated commerce. The transition from socialism to the most unbridled form of capitalism imaginable, ungoverned by rules or regulations, provided the kinds of economic opportunities once only afforded to the *nomenklatura*, and even that was conducted in secret and on a much smaller scale. The Arizona Market was a mere microcosm of the illicit economic trade occurring every day throughout the Balkans and helped contribute to a legacy of *laissez-faire* that would outlive the war itself, further complicating post-conflict efforts to restore a semblance of order and the rule of law to Bosnia and its environs.

Organised criminal groups in the Balkans have long capitalised on the geographic bridge between east and west to meet demand for illegal goods. “The Balkan Route” stretches from Afghanistan and Iran through Turkey-Bulgaria-Yugoslavia-Hungary, or Albania to Western Europe (Bacon, 2007). Eighty percent of the heroin seized (with a value of EUR 400 million) comes through some iteration of this route. Drug traffickers in the Balkans follow the same business model as those in Central America; they break up larger shipments into more manageable loads and store the narcotics in depots or strategic warehouses throughout Eastern and Southeastern Europe (Koppel and Szekely, 2002).

Drug trafficking in the Balkans is estimated to earn criminal groups approximately USD 7 billion a year, as drugs make their way from South Asia through the Balkans and on to Western Europe, transported by trucks, cars, speedboats and large ships (Bacon, 2007). Within the Balkans, Albania is a commonly used strategic location, through which cocaine, heroin, marijuana and hashish pass through en route to Italy and Greece (Bacon, 2007). Many Albanian criminals have ties to other powerful criminal syndicates, including Italian organised crime (Koppel and Szekely, 2002). Croatia also sees heavy drug traffic and has earned a reputation for being a “smuggler’s paradise,” largely due to its 1 000-kilometre coastline and more than 1 000 small islands (Bacon, 2007).

Throughout the conflict in Bosnia, United Nations peacekeepers from UNPROFOR were alleged to have engaged in drug trafficking with the help of the Sarajevo mafia (Andreas, 2008). Reports suggest that Ukrainian UNPROFOR soldiers imported heroin into Bosnia using UN vehicles (O’Kane, 1993). In 1993, heroin was discovered in a shipment of sugar originating from Ancona, Italy, delivered to Bosnia via a UNHCR airlift (Andreas, 2008). Fragile states, defined as those with “weak capacity to carry out basic functions of governing a population and its territory and being unable to develop mutually constructive and reinforcing relations with society,” are havens for illicit behaviour (Miraglia et al., 2012). Since the drug trade can be endemic to regions of conflict where fragile states predominate, even the soldiers sent to keep and enforce peace feel at liberty to enrich themselves by joining in the trade.

### *Second- and third-order effects of drug trafficking*

In addition to the political and economic consequences of illicit trade in narcotics, the transnational drug trade “involves criminal activities that impact the security of citizens, undermine the authority of states, erode the social fabric, criminalise society and generate an overall cost of crime that must be borne by society” (Picard, 2013). The second- and third-order effects of drug trafficking are pervasive and far-reaching. Besides the obvious consequences in the economic, political and security realms, the illicit trade in illegal narcotics has consequences for family and community, public health, education and the environment.

Substance abuse is one of several corrosive factors contributing to the disintegration of the family. When the primary earner in the family is the individual most directly affected by drug abuse, this exacerbates the situation. All of these sectors affect overall levels of civil society. From a public health perspective, drug addiction, disease and deaths from overdoses place a strain on the medical and health resources. Addiction is a problem not just for destination or consumer countries, but also for source and trans-shipment states as well. According to a 2009 drug abuse survey in Afghanistan, between 2005 and 2009, the number of opium users increased by 53% to 230 000 people, while the number of heroin users increased to 120 000, a 140% increase that made Afghanistan the country with the highest opiate prevalence rate in the world; even higher than neighbouring Iran (UNODC, 2010). Finally, environmental damage is related to the illicit trade in illegal narcotics and is caused in producing countries by deforestation, the growing of crops as monocultures, the processing of harvested plants into drugs and the use of environmentally dangerous chemicals in production, processing and eradication (UNODC, 1998).

In the short term, much of the harm from drug trafficking has been in supplier and trans-shipment countries. In the longer term, however, consumer countries like the United States and European countries will suffer some of the harmful effects created by the large-scale demand for and continued consumption of illegal narcotics. Unfortunately, the developing countries that have growing markets for domestic consumption are among the least equipped to handle the fallout from death and disease. These countries simply do not have the resources to mount a public health awareness and treatment campaign on par with countries like the United States, Canada or the United Kingdom. From an environmental standpoint, the cultivation and processing of illegal narcotics (as well as from the counter-narcotics techniques used to combat the drug trade) can lead to a host of negative impacts, including deforestation, pollution and the contamination of critical water sources.

### **Nexus with transnational organised crime**

Among scholars and practitioners engaged in combating transnational organised crime, one of the heated debates of recent years is the extent to which a convergence or growing nexus has grown up between transnational organised criminal networks and terrorist or insurgent organisations. For this chapter, the more pressing concern is the convergence between the illicit trade in illegal narcotics and other sectors of illicit trade, but the crime-terrorism nexus debate is also relevant. In many cases (though by no means in *every* case), where a convergence between illegal narcotics and other sectors of the illicit trade occurs, terrorist or insurgent groups lie at the core of the problem.

To be sure, many insurgents rely on criminality for financing. After the Cold War, superpower financing of proxies was withdrawn, making states weaker and more susceptible to attack. Similarly, criminal and insurgent groups that had previously relied on state financing were forced to either become criminals or fade away. Even where groups specialise in one form of criminality, for example, narcotics trafficking, terrorists or insurgents rarely limit their activities to one sector of the illicit economy. Rather, groups known to smuggle and traffic narcotics have also allegedly profited from the illicit trade in a range of commodities, including humans, weapons, gemstones, antiquities, tobacco, pirated electronics and much more. These groups include the Provisional Irish Republican Army (PIRA), the Liberation Tigers of Tamil Eelam (LTTE), Hezbollah in Lebanon, Hamas in Palestine, the Kosovo Liberation Army (KLA), the Islamic Movement of Uzbekistan (IMU), the Kurdistan Workers' Party (PKK), the Revolutionary Armed Forces of Colombia (FARC), Al Qaida in the Islamic Maghreb (AQIM) and others (this list is not exhaustive). Perhaps the most notorious of these insurgent groups is the Taliban, a group that has elevated itself as an indispensable player in the global heroin trade, which it uses in part to fund and finance the ongoing insurgency in Afghanistan.

### *Afghanistan: Centre of the nexus*

The Taliban's two primary sources of funding are the narcotics trade and money donated by sympathisers in the Middle East (Collins and Ali, 2010). The Taliban's position on narcotics has evolved considerably over the years. On occasion, the group has knowingly suppressed the cultivation of poppy in Afghanistan in order to manipulate the international market price. At one point, a Taliban ban on poppy cultivation suppressed the supply by 90%, increasing the value of the group's stocks by ten times the price (Felbab-Brown, 2006). While the Taliban frequently reversed itself on involvement in the illicit narcotics trade between 1994 and 2001, its position since then has been for the most part consistent.<sup>11</sup> Once the insurgency began in earnest, Taliban fighters made a series of shrewd manoeuvres, including advancing loans to opium farmers, in order to obtain their backing whilst simultaneously ensuring a future source of revenue (Peters, 2009). In line with its renewed offensive to win "hearts and minds," the Taliban now actively promotes poppy cultivation and provides protection to farmers growing the crop (Brahimi, 2010).

Though figures vary widely, the narcotics trade generates a profit between USD 70 million and USD 500 million per year for the Taliban.<sup>12</sup> Giustozzi provides a much tighter range, with estimates that the Taliban retains an annual surplus of between USD 110 million and USD 130 million (Giustozzi, 2010). Even after the costs of sustaining an insurgency are deducted, this is hardly a "rainy-day fund." How an insurgent group finances itself has a major impact on the motivation of its members, overall group morale, political legitimacy and the trajectory of the conflict. The Taliban does not rely solely upon narcotics as a means of funding its insurgent activities in Afghanistan, and indeed maintains diverse sources of financing, coupled with a robust support network that offers both active and passive support.<sup>13</sup> Part of the Taliban's war chest is derived from a multibillion-dollar trade in goods smuggled from Dubai to Pakistan (Rubin, 2000).

The Taliban's involvement with the narcotics trade has steadily increased. In 2004, the group was sending small teams to attack checkpoints or make diversionary strikes in order to protect opium cultivation. Three years later, by 2007, insurgent commanders were operating mobile laboratories to process heroin (Peters, 2009). In 2006 and 2007, UNODC estimated that drug trafficking generated between USD 200 million and

USD 400 million a year, including money earned through taxation on imports of chemical precursors (UNODC, 2009). Other estimates indicate that for every kilogramme of opium refined into heroin and morphine base, the Taliban collects USD 250/kg (Peters, 2009). If the United Nations' estimates are correct that Afghanistan produced 500 metric tons of heroin and morphine base in 2008, this means the group would have earned USD 125 million in that year alone. By 2010, the Taliban graduated to the more profitable end of the value chain – processing and exporting – which included as many as 36 different cross-border smuggling operations in which the Taliban was playing either a direct or indirect role (Peters, 2010).

As coalition forces continue to target the nexus between narcotics and the insurgency, the Taliban portrays itself as a defender of Afghans' livelihoods, while attempting to paint coalition forces as an occupying force intent on destroying the crop most important to the Afghan economy. Besides deriving significant financial profits from the drug trade in Afghanistan, the Taliban also gains political capital from its sponsorship of the illicit economy (Felbab-Brown, 2012). At various stages in the process, the value chain produces profits for myriad actors involved besides the Taliban, from Afghan government officials to *hawaladars* providing financial networks, to the rural farmers growing and harvesting the poppy. From a structural standpoint, the market is "well adapted to the characteristics of the product and to the nature and intensity of risks. Markets extend from the farm gate to the frontier and beyond, and there is working capital financing available at all stages, as well as credit and other inputs for producers" (World Bank, quoted in Felbab-Brown, 2012). The opium industry is capable of producing steady, reliable and relatively well-paying jobs (if only on a seasonal basis), while the bureaucrats in Kabul are unable to do the same. The opium economy in Afghanistan has developed an illegal but highly effective support system and infrastructure.<sup>14</sup>

Money generated through crime, extortion and fundraising is devoted to paying Taliban insurgents and obtaining weapons for the group's fighters. At various times, particularly when relations between the two groups were more cordial, the Afghan Taliban siphoned funds off for Baitullah Mehsud and the Pakistani Taliban over the border (Acharya, Bukhari and Sulaiman, 2009). Some reports have also indicated that the Taliban has engaged in heroin-for-arms trades with members of Russian organised crime (Williams, 2012).

The Taliban occasionally co-operates with the Haqqani network to achieve short-term objectives. Although the network is part of the insurgency, it also functions like an organised crime group, motivated by profits but also by issues such as honour, revenge and ideology (Peters, 2012). The Haqqani network is widely thought to be involved in the procurement of precursor chemicals such as acetic anhydride, lime and hydrochloric acid, which is conducted through legitimate fronts and aided by protection from elements of Pakistan's Inter-Service Intelligence (ISI), which has reportedly shut down any investigations into the smuggling of acetic anhydride (Peters, 2012). An analysis of recent events in eastern Afghanistan suggests that high levels of violence, rampant criminality and indiscriminate brutality could mean that the group has now become a criminal operation than an insurgent group.

Even if observers are unable to determine a ballpark estimate for Taliban profits, the opium economy has become an entrenched part of Afghanistan's larger economic system. Opium cultivation is widespread in Afghanistan, especially in the country's predominantly Pashtun southern provinces dominated by the Taliban.

At one point, the Taliban was described as “a loose alliance in which each region was responsible for raising its own funds” (Peters, 2009). While the organisation has never been considered a monolith, more recently, there have been signs that the insurgency is splintering into smaller factions across the country, including in Afghanistan’s north, where non-Pashtun Taliban fighters are less interested in implementing *sharia* and are more concerned with non-ideological pursuits like earning money through smuggling and trafficking (Raghavan, 2015). With Hamid Karzai gone and the Ghani administration seeking to make progress in identifying and purging corrupt government officials, there is a sliver of hope that Afghanistan’s criminal patronage networks can be attenuated. But even progress on this front, however unlikely, will do little to displace the opium economy, which is widely regarded among Afghans as an economic lifeline in and of itself. Indeed, unlike in countries like Guinea-Bissau, where the state has become directly involved in the drug trade, in Afghanistan, criminal activities such as trafficking “are less overtly the business of political leaders and more the province of an emerging criminal underworld with strong political connections” (Raghavan, 2015).

### ***Convergence or divergence?***

In the ongoing discussion and debate over whether or not and to what extent there is a convergence between terrorism and insurgency on the one hand, and transnational organised crime on the other, there are several side conversations and a tendency for scholars to talk past one another, even if they are in agreement about several of the most important factors being analysed. After reviewing some of the essential elements of the convergence or “nexus” discussion, this section concludes by arguing that at least in the short-term, the most immediate risks involve terrorists’ reliance on crime, especially drug trafficking, to finance terrorist attacks in Europe and elsewhere.

Makarenko (2004) has written extensively about the relationship between criminal groups and terrorist organisations, as well as the types of activities they engage in to accomplish their objectives. Her “model of terrorist-criminal relationships” suggests that the relationship between transnational organised crime and terrorism should not be conceived of in terms of path analysis, but rather as a sliding scale on which groups can go back and forth between the extremes of crime and ideological insurgency, occupying any number of intermediate stages between these poles along the way. Cornell (2007b) asserts that as some terrorist and insurgent organisations grow more intimately involved in the narcotics trade, their ideological zeal may cool off, and their motivation turn from politics to profit.

Besides relationships between criminals and terrorists and the activities in which they engage, the structure of these organisations and their logistical requirements warrant further scrutiny. Hutchinson and O’Malley (2007) downplay the notion of a nexus, although they concede that under certain conditions, terrorists and criminals will co-operate for mutual benefit. Indeed, this co-operation is facilitated by the changing structural organisations of these groups, which have increasingly shifted to a more decentralised network, rather than a top-down vertical hierarchy (Dishman, 2005). From a logistical standpoint, some scholars argue that progressively, terrorists and criminals will begin to in-source the activities they used to outsource through co-operative relationships (Dishman, 2001), or what Williams has called “do-it-yourself (DIY) organised crime” (Williams, 2008a). This includes developing an appreciation for the value of corruption and bribery, another facilitating factor in the convergence between crime and terrorism.

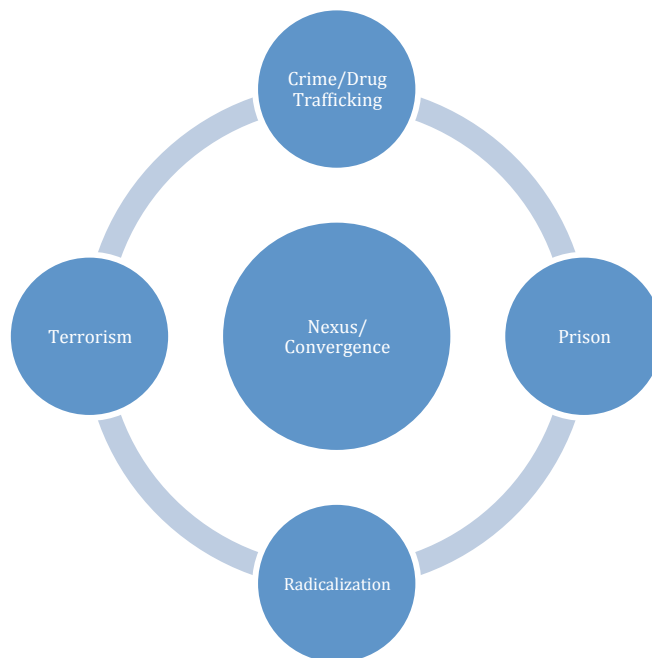


Whether criminals and terrorists continue to co-operate or whether each follows the DIY model, there are costs and benefits to either mode of operation. One obvious benefit of terrorists and insurgents participating in the drug trade has been a strengthening of operational capabilities and an increase in their legitimacy among producing communities (Cornell, 2005; Palma, 2015). In addition to money, the narcotics trade in drug-producing countries has the potential to provide terrorists with recruits and sympathisers among “impoverished, neglected, isolated farmers” who can help cultivate drug crops while also serving as a bulwark against pro-government groups and anti-drug campaigns (Rollins and Wyler, 2013; Felbab-Brown, 2010). The cultivation of illicit crops like poppy or coca is labor-intensive and provides employment to hundreds of thousands to millions of people in countries, including Afghanistan and Colombia, respectively (Felbab-Brown, 2012; see also Corpora, 2006).

The truth is, despite the high-level academic debate and the excellent research already published on the nexus between crime and terrorism, we still know very little about how strong this convergence might be. Even if it were widely accepted that a nexus exists, there is far from anything resembling consensus on its implications and ways to address them. While it is important to think through the strategic implications of a nexus, the more pragmatic approach might be to ask the question, “Does the illicit trade in illegal narcotics fund terrorism?” The clear answer is “yes.”

A study by Oftedal (2015) of the Norwegian Defence Research Establishment (FFI) looked at data on the financing of 40 jihadi cells that have plotted attacks against European targets between 1994 and 2013 and concluded that the second most common method of funding for these attacks (in 28% of cases analysed) was illicit trade (which included drugs, cars, forged documents and weapons). Three-quarters of the plots cost less than USD 10 000 to plan. The 2004 Madrid train bombings killed 191 people and injured another 1 600 in an attack financed primarily by the leader of a small, yet effective drug-trafficking network that smuggled hash from Morocco and ecstasy from the Netherlands to Spain (Williams, 2008b). Relatively small amounts of money could just as easily be used to plot and conduct a terrorist attack in Western Europe similar to the *Charlie Hebdo* attacks in Paris in January 2015 or the Copenhagen attacks the following month. And while the *Charlie Hebdo* attack was allegedly funded with USD 20 000 from Al Qaida in the Arabian Peninsula, it is easy to see why some terrorists planning similar types of attacks would follow the Madrid model – small sums of money collected over time through the use of somewhat banal criminal activities like drug dealing, various types of fraud and petty theft (Schmidt, Mazzetti and Callimachi, 2015).

Indeed, where a concept of a nexus between crime and terrorism might be most interesting is the emerging profile of small-time crook to terrorist, a profile that is now emerging in many of the jihadist attacks and plots recently targeting Europe. As Williams and Hoffman note (n.d.), “with continued politicisation and radicalisation of organised crime, instances of transformation from criminal or drug trafficker to terrorist and from criminal enterprise to terrorist organisation will become more frequent.” Besides the 2004 Madrid cell, proceeds from drug trafficking are also suspected of funding another plot against Madrid aimed at the National Court (2004), the Hofstad Group in the Netherlands (2004), a Swedish cell (2010), Mohammed Merah’s rampage (2012) and an attack at a kosher supermarket in Paris (2012) (Oftedal, 2015). Involvement in crime, especially drug trafficking, can lead to prison, which in some cases serves as an incubator for religious radicalisation and violent extremism. As criminals become radicalised, this potentially increases involvement in the plotting and execution of terrorist attacks.<sup>15</sup>

**Figure 6.3. Relationship between nexus components**

Source: Author

Determining the extent to which there is a nexus between transnational crime and insurgency is difficult not only due to conceptual confusion but also because data sources are poor. Unlike political violence, which traditionally pits politico-military groups against the state in a contest over the control of territory, criminal violence prioritises the pursuit of illicit profit (Stepanova, 2010). Still, traditional distinctions between criminal violence and political violence are becoming more difficult to discern in conflict settings, particularly in failed states. In conflict zones, a range of violent non-state actors fight for control over power and resources in an attempt to maximise the opportunities afforded by the war economy. Accordingly, the distinction between criminal violence and political violence is important, if not blurry, as criminal violence and illicit economic activities can only be properly addressed once a state has regained some semblance of the rule of law, and where it is able to provide a modicum of stability, at least in the short to medium term. The concluding section offers an analysis of existing policy responses and their viability.

### Policy responses

In evaluating existing public policies designed and implemented to counter the illicit trade in illegal narcotics, how do states know what policies are effective and what policies are ineffective? Many supply-side policies including eradication, alternative crop substitution and interdiction have been highly criticised as being ineffective, while a growing chorus of voices now trumpet less punitive policies including decriminalisation, public health awareness and education, treatment and other harm reduction-based policies

(although these, too, have received their fair share of criticism).<sup>16</sup> Table 6.1 below offers a broad overview of several existing public policies to combat the illicit trade in illegal narcotics.

**Table 6.1. Overview of existing public policies to combat the illicit trade in illegal narcotics**

Stage of the process	Public policy	Measure of effectiveness	Costs to the state	Challenges to policy
Production	Eradication	Hectares eradicated	Loss of political capital	Lack of will and/or capacity, marginalisation of illicit crop farmers, gains only temporary, dangers posed by militants potential human rights abuses, switch to synthetics
Production	Crop substitution	Cultivation figures	Risk of backlash	Resistance from farmers, coercion of criminals/insurgents
Transit	Interdiction	Amount of drugs seized, couriers apprehended	Resources needed for border security, law enforcement and customs training and enforcement	Volume of trade, success increases value of drugs but not cost of production, agencies on defense not offense, traffickers accept major losses and still profit 'balloon effect'
Transit	Surveillance	Networks disrupted Organizations dismantled	Resources, Investment in emerging technologies	Adaptation of networks atomization of networks, Traffickers' toolkit (concealment, deception, corruption,) dilemma of intel gain/loss
Consumption	Incarceration	#s locked up	Human capital	Inadequate detention capacity
Consumption	Treatment	Overall # of users, recidivism rate	Financial burden	Room at treatment facilities
Consumption	Decriminalization/ quasi-legalisation	Overall # of users Levels of violent crime	Diplomatic issues with other states opposed to this policy, possible increase in # of drug users	Domestic political opposition

In the case of certain supply-side policies like eradications, as Felbab-Brown (2014) has noted, “There is not one single case over the past five decades where eradication policies succeeded in bankrupting or defeating belligerents.” Moreover, as Reuter (2014) has observed in his research on the mobility of drug trafficking, interdiction policies often fall victim to “the balloon effect hypothesis”, where the result of authorities getting tough on trafficking is merely the relocation of the trafficking activity to another location, resulting in high costs to the state, but nothing more than a temporary inconvenience to the DTO.

As a result, states should be more frugal in how they allocate their assets (already lean, in many cases). This means crafting tailored deterrence strategies based on selective targeting and sequential interdiction, moving away from random non-strategic raids and toward “strategic selectivity”, and marshalling resources that can be used to anticipate where illicit flows might shift next, in response to ongoing efforts to attack the supply and trans-shipment networks (Felbab-Brown, 2014).

### *Metrics and measures of effectiveness*

No analysis of data relevancy would be complete without even just a brief discussion of the metrics and measures of effectiveness used in the field. Here, there is no conventional wisdom or universally accepted “silver bullet”. For example, while the disruption and dismantling of drug trafficking organisations seem like a sound measure and worthwhile goal, is it more preferable to contend with several major cartels or alternatively, several hundred *cartelitos*? Similarly, does the failure to detect illicit flows mean they are not there? Are drug seizures the result of luck, skilled work by police and law enforcement, amateur traffickers or some combination of all of these? As Walsh (Andreas, 2010) points out, “larger and more frequent drug seizures are often presented as evidence of policy success, and lauded as a testament to more vigorous enforcement, but they may simply reflect increased drug production and trafficking. Or they may be the result of more enforcement and more drugs in circulation – the seizure statistics themselves provide no clue.” The “Catch 22” of counter-narcotics is that agencies may be confiscating more drugs because they are benefiting from more resources and getting better at their jobs, or they may simply be confiscating more drugs because a greater volume is flowing through the system (Andreas, 2010). In short, increased numbers of arrests may simply mean more violators, rather than more effective enforcement.

### **Conclusion**

Some of the pitfalls of research in this area could be avoided if researchers could resolve the problem of establishing and maintaining contacts to relevant data owners, who could potentially be activated within the time constraints of a “normal” funded research project. This issue is more severe in some countries as opposed to others, but one initiative could be working toward an accepted framework that could facilitate something closer to consistency between requests for data access and the granting of access to official data.

An encouraging trend in the closely related field of criminal justice science over the past decade is the focus on evaluation as an important methodology. Both states and non-governmental organisations that routinely conduct successful evaluation respect the utility of research and have attempted to ingrain an appreciation for evaluation into their cultures. As such, they dedicate substantial resources to collecting relevant data and conducting evaluations. Moreover, some governments have adopted a formal philosophy of supporting “evidence-based strategies”, which hinges on the reporting, classification and measurement of data (Edwards and Gill, 2003).

Finally, the state of academic research on illicit markets could be improved through a whole of government approach to compiling cross-national databases on the relevant data. This stresses the need for both a “top-down” and “bottom up” approach to this issue, from local to state to federal agencies working toward a common goal instead of on an *ad hoc* basis, or worse, at cross-purposes. Admittedly, the task is daunting – it requires the co-ordination of the various intergovernmental agencies in law enforcement, crime prevention and criminal justice to co-operate and collaborate. Moreover, enforcement is not the only approach to deterring or reducing illicit trade in narcotics. Economic development that provides alternatives to criminal enterprise should be considered as part of broader government strategies to address illicit trade in all its forms (Schultze-Kraft, 2014).

The endemic criminal violence that results from every step of the drug trafficking value chain erodes state institutions and is often difficult to reverse. The international community must figure out a way to deal with the spill over violence and the human security implications, including refugee flows, addiction, disease, corruption and general instability generated by the illicit trade in illegal narcotics. Where criminal violence should be considered acutely problematic is in cases where it merges with traditional forms of political violence, like terrorism and insurgency. In these cases, criminality (and the violence that often accompanies criminality) helps fund the insurgency, and groups can morph over time into criminal-insurgent hybrids. Moreover, war profiteers disguised as rebels seek to enact strategies that will serve to prolong the conflict as a means of continuing to reap the economic benefits, as in conflict zones throughout the globe, from the jungles of Colombia to the mountains of Afghanistan.

The clearest implication for international security policy is the need to become more effective at building the capacity of states to combat transnational organised crime and criminal violence. This can be accomplished through focusing security co-operation efforts in vulnerable countries on ministerial capacity, institution building and defence reform, all of which are foundational to other forms of capacity, like border control and anti-corruption efforts.

Furthermore, ministerial capacity can be improved even when the partner nation's absorptive capacity is generally low. This is a self-reinforcing cycle, since ministerial capacity building can itself improve a partner's absorptive capacity, thus enabling future capacity building in other areas. With sufficient ministerial capacity, countries plagued by high levels of illicit trade and criminal violence will be better prepared to plan and integrate strategy and operations against the range of threats arrayed against them. States need to be better prepared to exploit potential vulnerabilities. In cases where terrorists or insurgents are co-operating with criminals, this opens the door for the possibility of infiltration by law enforcement and intelligence agents. Along these same lines, states should seek to develop counter-narratives that discredit the ideological appeal of terrorists and insurgents by emphasising their linkage to common criminality.<sup>17</sup>

## Notes

<sup>1</sup> In private correspondence with a number of the world's recognised experts in the field of transnational crime and international security, each of these individuals had a similar response, including Phil Williams, Louise Shelley, Peters, G., Mark Galeotti and Christopher Corpora.

<sup>2</sup> These categories were selected because after a review of the literature on illicit narcotics, these drugs in particular were deemed to constitute the vast majority of the market and contribute widely to the most far-reaching social, political, economic, public health, environmental and other ills plaguing source, production, transit and destination countries. See UNODC World Drug Report 2014, Vienna: United Nations Office on Drugs and Crime; European Drug Report: Trends and Developments, European Monitoring Centre for Drugs and Drug Addiction, 2014; and the United States Department of State International Narcotics Control Strategy Report (INCSR), Bureau for International Narcotics and Law Enforcement Affairs, Volume I: Drug and Chemical Control, 2014.

- <sup>3</sup> The literature on transnational organised crime often uses the terms *smuggling* and *trafficking* interchangeably, except for human trafficking and human smuggling, where the first is a crime against the person and the second is a crime against the state. For the sake of clarity and precision, this research proceeds from the notion that smuggling is about the crossing of borders, while trafficking refers to the broader process of moving illicit goods. The author is thankful to Phil Williams for this observation.
- <sup>4</sup> Much of this section has been informed by an unpublished paper on cocaine trafficking by Phil Williams, produced for the George C. Marshall Center and shared with the author.
- <sup>5</sup> The two most dangerous gangs in El Salvador are Mara Salvatrucha (MS-13) and Calle 18, although, to date, only the former has been designated as a transnational criminal organisation (TCO) by the US government. See Douglas Farah and Pamela Phillip, *Central American Gangs and Transnational Criminal Organizations: The Changing Relationships in a Time of Turmoil*, International Strategy and Assessment Center, 2013, pp.23-29.
- <sup>6</sup> Los Zetas were previously the Gulf cartel's enforcers, have split off and formed a separate drug trafficking organisation and turned against their former sponsors.
- <sup>7</sup> *Transportistas* are locals who possess the best intelligence on transportation routes, topography and ongoing law enforcement operations and who are known to provide secure transport services for trafficking gangs dealing in illicit goods (e.g. drugs, weapons, humans).
- <sup>8</sup> The Kaibilis, like the Zetas, are special forces soldiers specialising in jungle warfare and counterinsurgency operations.
- <sup>9</sup> Much of this section has been informed by an unpublished paper on heroin trafficking by Phil Williams, produced for the George C. Marshall Center and shared with the author.
- <sup>10</sup> A UNDP Human Development Report listed Sierra Leone's adult literacy rate at 13.3%, the lowest of the 160 countries in the report. UNDP, Human Development Report 1991: Financing Human Development, New York: Oxford University Press, 1991, p.121.
- <sup>11</sup> One exception was when Taliban fighters destroyed fields of opium poppies in eastern Afghanistan, the first time since 2001. Emma Graham-Harrison, "Taliban Destroy Poppy Fields in Surprise Clampdown on Afghan Opium Growers," *The Guardian*, May 20, 2012.
- <sup>12</sup> The CIA and the DIA estimate that the Taliban receives USD 70 million a year from the drug trade. According to the former US director of national intelligence Dennis Blair, the Taliban made USD 100 million from the drug trade in 2008. The DEA puts the number at around USD 300 million, while Peters, G. asserts that the number is much higher, probably USD 500 million. For more on the role of narcotics in Afghanistan's economy, see: (Goodhand, 2008), (Rubin, 2004),
- <sup>13</sup> For a discussion of active versus passive support in terrorism and insurgency, see Christopher Paul, "As a Fish Swims in the Sea: Relationships Between Factors Contributing to Support for Terrorist or Insurgent Groups," *Studies in Conflict and Terrorism* 33, no. 6, (2010): 488-510.
- <sup>14</sup> David Mansfield quoted in *Counter-Narcotics in Afghanistan 2012*, Civil-Military Fusion Center, August 2012, p33, [http://reliefweb.int/sites/reliefweb.int/files/resources/CFC\\_Afghanistan-Counter-Narcotics-Volume\\_Aug2012.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/CFC_Afghanistan-Counter-Narcotics-Volume_Aug2012.pdf)
- <sup>15</sup> This is not to suggest that jail or prison is the only factor in the radicalisation process. To be sure, this analysis is not meant to be causal, merely a narrative of how some cases unfold. A robust discussion of the causes of radicalisation is beyond the scope of this paper, but suffice to say it results from a combination of economic, social, political, religious and cultural factors/variables including wide-ranging grievances.
- <sup>16</sup> For criticism of certain education programs as ineffective, see <http://files.eric.ed.gov/fulltext/ED423321.pdf>
- <sup>17</sup> The author is thankful to Phil Williams for this observation.

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## Chapter 7

### The size, impacts and drivers of illicit trade in alcohol

By Paul Skehan and Ignacio Sanchez\* and Lance Hastings\*\*

*This chapter presents an assessment by industry stakeholders of the illicit trade in alcohol with a focus on spirits and beer. Transnational criminal networks profit from trafficking and illegal trade in alcoholic beverages, whether by evading the payment of duty on goods or dealing in otherwise unbranded products. It is estimated that billions of dollars from these activities flow through the global economy each year, distorting local economies, diminishing government and legitimate business revenues, and in some cases posing a serious health risk to consumers.*

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The opinions expressed and arguments employed in this chapter are those of the authors and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.



## Introduction

The immediate general effects of illicit trade include major social ills such as crime and environmental degradation, and over the longer term, the impact runs much deeper, undermining the rule of law, fuelling corruption, and reducing government revenues and competitiveness. Stakeholders in the alcohol industry are particularly concerned by the impact of illicit alcohol on consumers' health and on the economic sustainability of legal companies. As a consequence, illicit trade in alcohol can be said to put consumers' health at risk, reduce governments' revenues and undermine the rule of law, jeopardise the economic sustainability of private companies in the alcohol sector and its supply chain and disadvantage the population in general through the loss of jobs and deterioration of the environment.

## Illicit trade in alcohol – definitions

Before analysing the scope of the illicit alcohol trade, it is worth establishing common terms of reference to frame the global discussion. In an effort to harmonise the terminology used in this context, representatives of the spirit, beer and wine sectors agreed upon the following definitions in 2014.

### *a. Recorded alcohol*

- Licit beverage alcohol products produced and sold within a regulatory framework and reflected in official statistics of either the country where they are produced, the country where they are consumed, or both. Thus, in some cases, alcohol considered recorded in the country of production may not be recorded in the country of consumption, and vice versa. Efforts to estimate recorded alcohol in a given market may emphasise the country where it is produced or the country where it is consumed, depending on the nature of the research and whether the focus is at the country or regional level.
- Also referred to as the “formal” market.

### *b. Unrecorded alcohol*

- Alcohol not reflected in official statistics of the country of production, the country of consumption, or both. Includes:
  - (Licit) informal
  - Illicit
  - surrogate
- As with recorded alcohol, efforts to estimate unrecorded or illicit alcohol in a given market may emphasise either the country of production or the country of consumption, depending on the nature of the research and whether the focus is at the country or regional level.
- WHO uses the term “unrecorded alcohol” in its reports (WHO, 2014).



*c. Surrogate, or substitute, alcohol*

- Alcohol or products containing alcohol not intended for human consumption as beverages, but that are consumed as substitutes for beverage alcohol.

*d. Informal alcohol*

- Beverage alcohol produced outside a regulatory framework, whose production and consumption tend to follow cultural and artisanal practices. Includes home production.
- May be licit or illicit, depending on the laws governing a particular jurisdiction.

*e. Legal cross-border trade or shopping*

- Beverage alcohol licitly purchased outside, and brought into, a market for the personal use of the consumer.
- These products are recorded in the jurisdiction where they are purchased, but not where they are consumed.

*f. Contraband/smuggled alcohol*

- Alcohol with original branding that has been illegally imported/smuggled into a jurisdiction and sold, evading tariffs/customs.
- It includes:
  - “Ant-smuggling”: circumventing import/ export regulations by continuously exploiting exemptions that allow travellers’ to carry minimal amounts of alcohol for personal consumption. The beverage alcohol is purchased inside one jurisdiction where excise tax is lower than in the market where it is transported for commercial purposes.
  - Beverages brought in excess of the applicable travellers’ allowance regulation.

*g. Counterfeit alcohol*

- Fraudulent imitations of legitimate branded products. These beverages violate the intellectual property (IP) rights of legitimate producers.
- Includes refilling, falsification and tampering.

*h. Tax leakage*

- Legally produced alcoholic beverages on which the required excise tax was not paid in the jurisdiction of production.

*i. Non-conformed alcohol*

- Products that are not compliant with production processes, guidelines or labelling legislation.
- Includes products produced with denatured alcohol or illegal industrial alcohol.

*j. Parallel imports*

- Authentic, branded products licitly imported into, and sold in, a market without the consent of the brand owner.

### Illicit trade in alcohol – scope

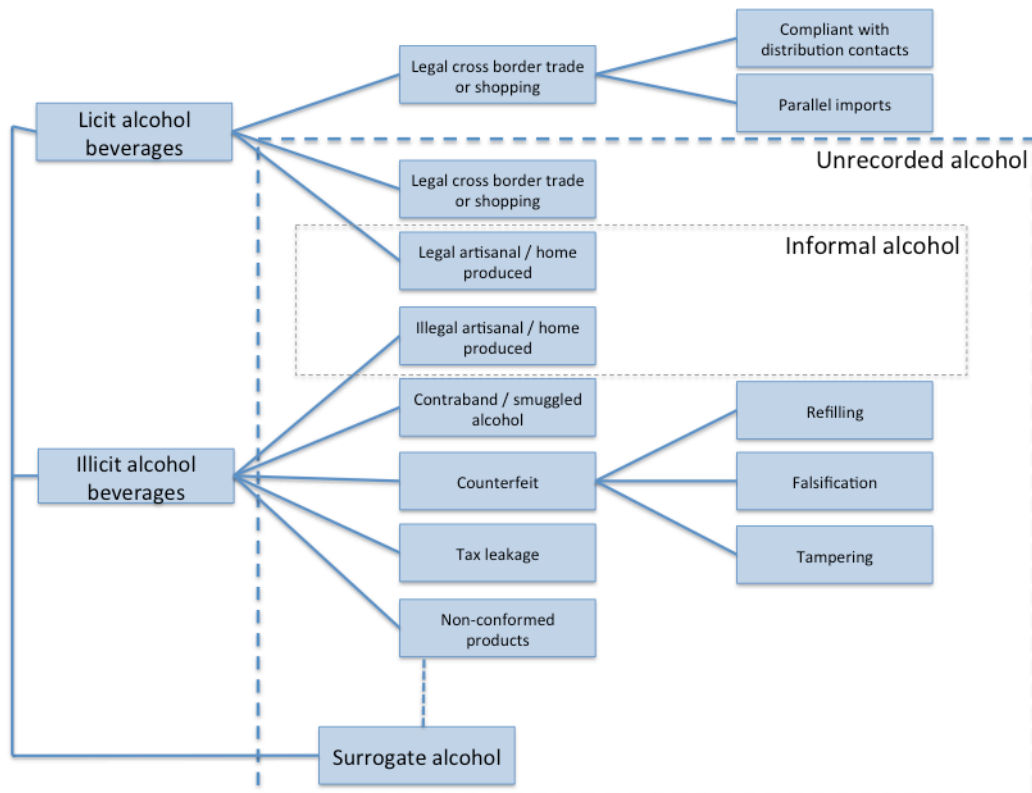
For the purposes of this paper, illicit alcohol has a number of different definitions and forms, and means different things to different people and authorities. At government level, treasuries see illicit products as those not paying taxes, health departments see them as not fit for human consumption, while commercial agencies see as illicit as anything that undermines legitimate business and trade.

From the perspective of companies, illicit trade involves anything that illegally takes trade away from the brand owner. It includes products imported without the permission of the intellectual property owner.

The larger definition would include all products that do not comply with production guidelines, tax, excise, custom or intellectual property legislation.

Based on the definitions agreed upon, a common understanding of “illicit trade in alcohol” would include “illicit alcohol beverages” and “surrogate alcohol” and would exclude from the scope “parallel imports” commercialised through official channels. However, in some countries, parallel trade is illegal, and official data and studies may include this type of trade.

**Figure 7.1. Taxonomy of illicit trade in alcohol**



Source: Authors

## Extent of illicit trade

International organisations such as the World Health Organization (WHO), national governments and stakeholders in general agree that a substantial share of all alcohol consumed globally is derived from non-commercial sources.

However, although WHO makes reference in its *Global Status Report on Alcohol and Health 2014* to an estimation of nearly 25% of total worldwide adult consumption, industry data on a global scale are limited at present, but market-level data collection is expanding across the industry. However, there is no international standard on how it should be measured (WHO, 2014).

Consumption data on a global basis also exist in theory (WHO, 2014), but as well as being open to challenge on the survey methodologies, it is also now somewhat dated (the data used are based on a 2010 survey). It also reports on total unrecorded and does not distinguish consumption by illicit subgroup.

**Table 7.1. Total adult per capita consumption (APC), unrecorded APC and proportion of unrecorded APC of total APC, in litres of pure alcohol, by income group, 2010**

Income group	Total APC	Unrecorded APC	Proportion of unrecorded APC of total APC (%)
Low income	3.1	1.4	44.3
Lower middle income	4.1	1.7	42.3
Upper middle income	7.3	1.8	24.2
High income	9.6	0.8	8.5
World	6.2	1.5	24.8

*Sources:*

European Commission (2013), *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border*, European Commission, Brussels.

Kaže, V, Strateļuks, A & Škapars, R (2011), “Consumer Values and Consumption Patterns Driving Latvian Strong Alcoholic Beverages Market”, *Current Issues in Management of Business and Society Development*, Riga

PwC (2013), *Counterfeit goods in the UK – Who is buying what, and why?*, Price Waterhouse Cooper, New York.

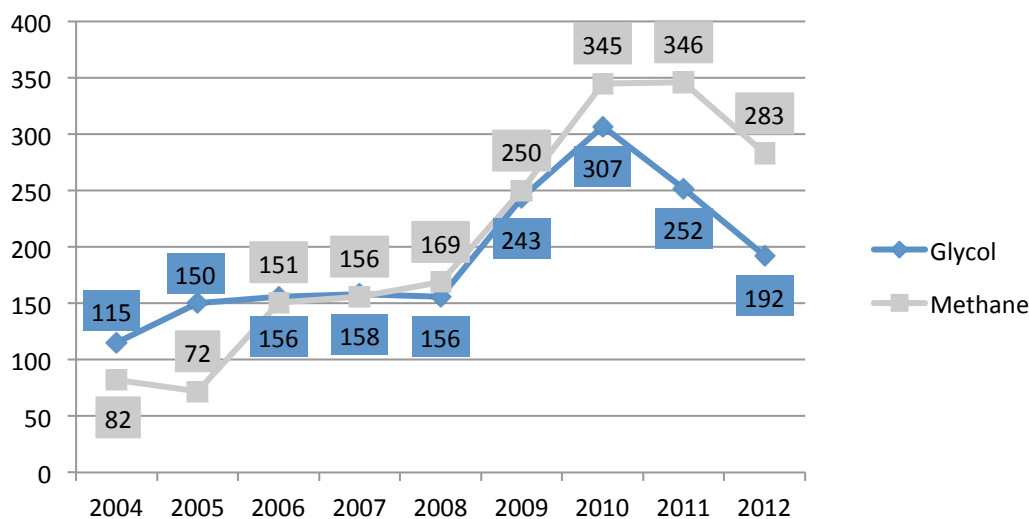
WHO (2014): *Global Status Report on Alcohol and Health*, World Health Organization, Geneva.

There are many market case studies, but some of the methodologies are questionable and use different definitions that further confuse the picture and make comparison difficult. Consumption data are frequently based on consumer surveys, but such surveys rely on a consumer’s being able to distinguish illicit alcohol from the genuine product, which, in the case of counterfeit alcohol, can be challenging. This and other factors create a risk of underreporting. Counterfeit surveys conducted at point of consumption can be very effective, but they are expensive, given the expertise involved in identifying counterfeit products. Some statistics based on seizure data (governments/International Federation of Spirits Producers) are publicly available. However, seizure data can fluctuate significantly, and its availability is dependent on the resources and priorities of enforcement at a given point in time (European Commission, 2013).

Data are available, but how robust they are as a basis for globally charting/scaling the issue in terms of economic impact has proven difficult to determine. Some interesting market assessments are, however, available and could be used as case studies:

- A recent consumer survey by PwC UK in the **United Kingdom** indicated that 18% of adult respondents had purchased counterfeit alcoholic products. The reality is that consumers probably meant “illicit/nonconformed” alcohol rather than this more specific subgroup (PwC, 2013).
- In **Latvia**, a recent study sponsored by the Association of Latvian Spirits Producers and Distributors (LADRIA) showed that 56% of regular illicit alcohol consumers have used such products for over 10 years, 34% plan to purchase them again and 59% purchase illicit alcohol at least once a month (Kaže, et al., 2011).
- According to the study, the market for illegal alcohol in Latvia is equivalent to approximately 5 million litres per year. Of the total alcohol market in Latvia, 32% by volume is illicit, non-commercial alcohol.
- In **Poland**, a project was carried out in 2012 by the Polish Spirits Industry (PPS) in partnership with the Ministry of Finance and Customer Service. The main findings were:
  - Between 2009 and 2011, illicit spirits represented around 12 million litres of pure alcohol (mLPA) per year, and the majority of illicit spirits (7 mLPA) was derived from decontaminated industrial alcohol.
  - The illicit alcohol trade is lower than it was 10 years ago, but there has been an observable upward trend in recent years.
  - Between 2008-2011, local hospitalisations due to alcohol consumption and methanol or glycol intoxications and deaths increased.

**Figure 7.2. Patients hospitalised in Poland due to glycol and methanol intoxication**



Source: Klinicznej, Z.T. (2011), “Przegląd lekarski”, Gdańskiego Uniwersytetu Medycznego, Vol.1/ 68/ 8, pp. 453-8.

- In **Mexico**, the average quantity of illicit alcohol consumed is approximately 1 litre of pure alcohol per capita a year (Medina-Mora, M.E. et al. 2011). In

addition, a study conducted by the industry in order to analyse tax issues estimated that 33.1% of the consumption of distilled spirits (>20% vol.) in Mexico was unrecorded. In the formal market for distilled spirits at the end of 2012, 213.5 million litres were sold, at a value of MEX 33 830 million (taxes included). The unrecorded market could thus represent 105.5 million litres, for a value of up to MEX 11 198 million, including taxes (Consultores Internacionales, 2013).

In the same way, a study by the International Center for Alcohol Policies (ICAP, 2012) in 2012 compiled analyses of several national studies and also estimated the consumption of non-commercial alcohol in Mexico at 1 litre of pure alcohol per capita per year. It also noted that distilled beverages account for an estimated 30% to 40% of the non-commercial alcohol market in Mexico.

- In **India**, experts estimate annual alcohol consumption at 2.2 litres pure alcohol per capita for recorded products and 2.2 litres for unrecorded products, according to 2008-2010 figures (WHO, 2014).

The 2013 report from the Federation of Indian Commerce and Industry (FICCI) suggests that the “grey market” represents 10.2% of total alcohol consumption in India. The study defines the “grey market” as the difference between expenditure on consumption (data from National Sample Survey Office) and the value of the supply captured from the sum of production of factories for domestic consumption (from Annual Survey of Industry data), registered micro-enterprises (data from micro, small and medium enterprises) and imports (data from the Directorate General of Commercial Intelligence and Statistics data) (FICCI, 2013).

The difference is attributed to the following items:

- Goods produced or imported and sold in the country by evading taxes.
- Sale of domestically produced counterfeited (either deceptive or non-deceptive) goods.
- In **China**, it was reported in 2012 that 80% of the milk-wine produced violated national standards. Counterfeiting of fine wines appears to be a major problem. In 2012, 10 000 bottles bearing fake labels of “Château Lafite” were found in a house in Wenzhou (Wen, 2012; The Independent, 2011; BBC, 2012). The French National Institute for Origin and Quality (INAO) handles more than 500 new infringement cases per year, of which 30% are Chinese. Of these 30%, almost 100% deal with wine (La Revue du Vin de France, 2014).
- In **Sri Lanka**, a survey of 2 408 randomly selected households from low socio-economic bracket reported that 19% have a member who regularly consumes non-commercial alcohol.
- In **Brazil**, informal alcohol consumption is estimated to account for 20% of total alcohol consumption (15% of beer, 55% of wine, 32% of cachaça and 63% of other distilled beverages) (Fundação Getúlio Vargas, 2008). Of 608 samples analysed between 1993 and 1999, 391 were counterfeit and two contained methanol content above the limit permitted by legislation (Nagato et al., 2001). The Brazilian Ministry of Agriculture estimates that 95% of the roughly 30 000 to

40 000 stills in Brazil are unregistered/ clandestine. In Minas Gerais, it is estimated that 90% are unregistered (Vaissman, 2004).

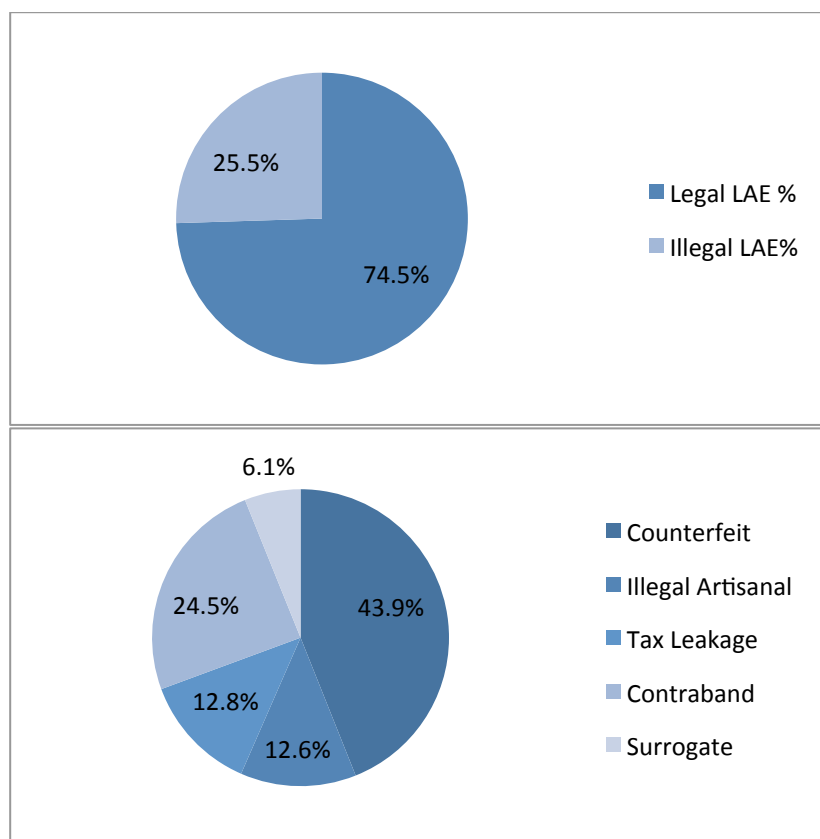
- In the **LATAM** region (Colombia, Ecuador, El Salvador, Honduras, Panama, Peru), while the illegal market represents on average 21% of the total market for alcohol, Colombia, Ecuador and Peru account for more than 94% of the total illegal market (Euromonitor, 2012).

In Colombia, industrial manufacture of illegal/unbranded brands is the largest subcategory within counterfeit, representing 91.4% of total counterfeit in litres of alcohol equivalent (LAE), of which 100% is distilled, due to the high demand for cheaper distilled products and the higher profit margins compared to beer.

In Ecuador, the largest illegal alcohol category is contraband. Ecuador's Ministry of Health estimates the number of illegal brands to be about 100, with approximately 1 350 registered brands on the market.

In Peru, counterfeit products are the most common illegal alcoholic drinks in the market (almost 140 000 hectolitres LAE). These products are popular with consumers because they are cheaper than their legal counterparts, widely available through both formal and informal channels, and are difficult to identify as illegal.

**Figure 7.3. Illegal alcoholic beverages market in Latin America region**



Source: Euromonitor International (2012), *Size and shape of illegal alcoholic beverage market in LATAM*.

- In **Russia**, non-commercial alcohol beverages, which are untaxed and unrecorded, account for a significant portion of all alcohol beverages consumed, particularly in small towns and rural areas. In the ICAP study, less than 10% of the population in all study sites reported consumption of surrogate alcohol (ICAP, 2012).

Unrecorded per capita consumption in Russia was estimated at 2 litres in 2010 (Neufeld and Rehm, 2013). In Kaluga Oblast, 471 cases of acute alcohol poisoning were reported in 2011, 99 of which were attributed to surrogate alcohol products. The conclusions from a chemical analysis of 13 samples collected in the Moscow region as part of the Global Actions initiative were as follows: “According to the chemical analysis of 13 beverage samples obtained ... the potential acute toxicity of samogon, homebrew, vodka, alcohol and fortified wine available through illegal sale, does not exceed the potential acute toxicity of commercially produced beverages, although it should be noted that chronic use of homebrews may lead to an elevated risk of oncological and hereditary diseases” (Korchagina, G. et al, 2012).

- In **Botswana**, there are few published estimates of unrecorded alcohol consumption. The WHO Global Status Report on Alcohol, the most recent estimate, states that 35.7% of all the alcohol consumed in Botswana comes from unrecorded alcohol (WHO, 2014). A study conducted by the Botswana Epidemiology Network on Drug Use (BENDU) in 2003 found that home brews, due to their affordability and accessibility, were the most common type of alcohol consumed (Parry and Plüddemann, 2003).
- In **Uganda**, the most recent WHO figures on per capita alcohol consumption (based on litres of pure alcohol) show Uganda as having the second-highest per capita consumption of alcohol in sub-Saharan Africa. Every year, the media reports at least one incident in which people die, and/or suffer kidney or liver problems, or go blind, from drinking spirits laced with methanol or other toxic substances. One of the worst incidents occurred in April 2010, when 89 people died and 100 more were hospitalised from drinking unbranded Waragi contaminated with methanol (The Daily Monitor, 2010).

### Quantifying the broader impacts of illicit trafficking in alcohol

There are multiple impacts of illicit trade of alcohol:

#### *Consumer health*

Increases in alcoholic liver disease and cirrhosis in certain central and Eastern European countries that began in the 1980s have been linked to the consumption of illegal homemade alcohol containing hepatotoxic aliphatic alcohols (N.B. this claim has been disputed) (Szucs et al., 2005; Lachenmeier et al., 2008).

In India, illicit alcohol consumption during 2003-05 caused more than 328 deaths, according to media reports (ICC, 2012).

The level of risk depends on the subcategory of illicit, and so again, understanding which categories are being referred to is crucial (e.g. no health risk from products that have not been subject to an excise tax). The categories where the health risks are most

acute include counterfeit, fictitious “brands”, industrial/denatured alcohol and, to a lesser extent, home production.

The primary health risk is from methanol poisoning, although other substances or by-products of manufacture can be found in illicit liquid, such as isopropyl alcohol and chloroform. No scientific studies are known to the industry analysing the potential long-term health risks from consuming product laced with IPA, for example. Studies have been conducted on risks associated with methanol poisoning, although what is deemed a deadly dosage can depend on the individual. Nevertheless, poisoning or death due to unsafe levels of methanol is the No. 1 health risk, and many recent examples support this (Czech Republic, Indonesia, Turkey, Cambodia etc.) (Prauge Post, 2014, The Standard, 2014)).

Long-term development of adverse health effects may explain lack of media coverage on large-scale incidents of illness or deaths from consumption of moonshine, an illicit alcoholic drink common in Virginia and the Southern United States. Lead concentration in humans is cumulative, and the adverse health effects only become apparent with time. A study published in 1995 identified 128 adult deaths linked to lead toxicity in the United States between 1979 and 1988, of which moonshine was the cause in 20 of the 25 patients for whom the source of lead was identified (Staes et al., 1995). In May 2003, research from the Blue Ridge Poison Center at the University of Virginia Health System reported high lead levels in samples of moonshine, and showed that people who drink moonshine are at serious risk of lead poisoning (Bradley, 2005).

### ***Government revenue***

The costs of policing organised crime and securing borders is a fiscal burden, not only in the loss of excise and VAT, but in the loss of other taxes such as corporation tax/national insurance contributions.

### ***Health and safety***

Production of illicit alcohol is often carried out in unhygienic and uncontrolled conditions. Workers in such facilities, and the general public in the area, can be exposed to the risk of industrial accidents. For example, five people were killed in 2011 in an explosion at an industrial estate in Boston, Lincolnshire in the United Kingdom, when an illicit vodka plant exploded (Daily Mail, 2011).

### ***Environment***

Regulated alcohol manufacturers operate in a sustainable way, maximise recycling opportunities, and dispose of any by-products of production in a responsible manner, in order to protect the environment. Illicit operators rarely follow safety standards or guidelines for using natural resources, the quality of materials used or in disposing of waste.

### ***Economic sustainability of legal producers***

The existence of illicit alcohol puts at risk the economic sustainability of legal producers and their workers. The effects on the formal economy of the trade in illicit alcohol are summarised in Chapter 5 of this report.



### Effects on government revenues (structured by region and/or countries)

Similar scenario to above, data exist but some uncertainty remains concerning what it is based on, and/or how it is calculated. Several studies demonstrate the loss of revenues that illicit alcohol represents for governments:

**Table 7.2. Summary of lost government revenue**

Country	Year	Loss in USD	Comment
		395	Spirits (midpoint estimation)
United Kingdom	2013	1 000	Beer (midpoint estimation) Wine (midpoint estimation)
Greece	2013	50	
Netherlands	2013	135	Cross border
Latvia	2011	54	Potential direct tax revenues
Poland	2012	281	Direct tax revenues
South Africa	2009	75	Wine and spirits
India	2012	404	Tax loss
Russia	2004	267-400	
Estonia	2001	8	
Thailand	2010	278	Tax evasion
Colombia	2011	300	Contraband of spirits
Cambodia	2006	22	Beer smuggling

*Sources:*

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- United Kingdom:** Each year, Her Majesty's Revenue and Customs (HMRC, 2014a) calculates the estimated loss of tax on excise goods through criminal activity. A top-down approach is used, and the National Statistics Office's Survey of Living Costs and Food (LCF) survey is used to calculate the overall consumption of alcohol by the population. From this, the legitimate clearances are subtracted, the difference being the tax gap or loss. The resulting upper and lower statistical limits have a 95% accuracy. The tax loss median figure is the midpoint between the upper and lower statistical limits, the latter sometimes being a

negative figure. The methodologies are similar for wine and spirits, but departmental data only is used to calculate the lower limit for beer tax loss.

The 2014 report estimates that in 2013, the illicit market was as follows (N.B. the estimated figures for wine and beer are considered to be too high by the respective industries):

**Table 7.3. Size of the illicit alcohol market in the United Kingdom (2012-13)**

Product	Upper estimate	Midpoint estimate	Revenue losses (upper-midpoint estimate)
Spirits	13%	5%	GBP 680mn-260 mn
Beer	17%	12%	GBP 1 000mn-700mn
Wine	11%	5%	GBP 720mn -340mn

Source: HMRC (2014a): Measuring tax gaps, [www.gov.uk/government/statistics/measuring-tax-gaps](http://www.gov.uk/government/statistics/measuring-tax-gaps).

- **Greece:** According to a study by the Foundation for Economic and Industrial Research (IOBE), the losses from the illegal trade of alcoholic beverages, estimated to have been exacerbated after the increase of excise duty, are calculated at approximately EUR 57 million (without including the two-day produced tsipouro, or pomace brandy) due to the non-payment of excise duty. Additional losses stem from the nonpayment of the VAT in a large segment of the market (Foundation for Economic and Industrial Research, 2013).
- **Netherlands:** Four criminal cases in 2012-13 led to a recovery of EUR 6 million unpaid excises and penalties. Dutch authorities estimate the revenue losses at EUR 100 million per annum.
- **Latvia:** According to a recent study, the illicit trade in alcohol represents a loss of EUR 54 million annually in potential direct tax revenues, not to mention the extra burden on the social budget (WASET, 2012).
- **Lithuania:** Surrogates that are classified as cosmetics and not subjected to alcohol regulation constitute 7% of alcohol turnover, according to the Alcohol Industry Association of Latvia (LANA) (Lithuanian Free Market Institute, 2012).
- **Poland:** A project carried out in 2012 by the Polish Spirits Industry (PPS) in partnership with the Ministry of Finance, Customer Service and the Polish Security Printing Works indicated a loss of direct tax revenues of approximately EUR 281 million annually.
- **South Africa:** In 2009, about 160 000 hectolitres of spirits and about 400 000 hectolitres of wine were estimated by industry as illicit, corresponding to an annual revenue loss for the government of about EUR 75 million (SADC, 2012).
- **India:** The gap between supply and consumption was USD 800 million in 2010 (FICCI report), and rose to USD 1.2 billion in 2012. This represents a tax loss for the Indian government in 2012 of IND 25 100 million – approximately IND 2 600 million in direct tax and IND 22 500 million in indirect tax (FICCI, 2012).

The FICCI report calculates this loss to government on the basis of an estimated sales loss for the industry of IND 56 260 million.

- **Russia:** The annual loss from the illicit alcohol trade was estimated at RUB 20 billion in 2000 and RUB 7.6 billion-11.7 billion (USD 267 million-400 million) in 2004.
- **Estonia:** An excise tax deficit for spirits of EEK 216 million was estimated in 1999, EEK 64 million in 2000, and EEK 91 million in 2001. The figures were attributed to illicit alcohol (namely, vodka).
- **Thailand:** The estimated annual loss was THB 10 billion in 2010, due to tax evasion on alcohol (including, but not limited to, smuggled/illicit products) (The Bangkok Post, 2011).
- **Colombia:** From 1995 to 1999, a 30% loss each year was estimated, due to inter-departmental smuggling (Oxford Economic Forecasting, Fedesarollo, and International Tax and Investment Centre, 2000). Annual losses due to contraband liquor were estimated at USD 300 million in 2011 (El Espectador, 2011).
- **Cambodia:** Beer smuggling resulted in USD 22 million of lost revenue in 2006 (ABC News, 2007).

### Effects on the formal economy

There are a number of clear effects:

#### *Loss of sales revenue*

The mere existence of unrecorded alcohol imposes a strain on the formal economy by reducing sales of legitimate producers and loss of excise tax revenue to governments. For example, in India, the spirit sector estimates the loss of sales due to grey market operations for 2012 at IND 56 260 million. The loss of revenue hampers investments and innovation in the industry (FICCI, 2012).

#### *Loss of jobs*

Other generic IP reports try to quantify the impact of “illicit” or counterfeit in terms of loss of jobs in the formal economy. This can be a difficult to quantify/support, and no credible data on this exists for the alcohol sector.

#### *Increased cost base*

Covert and overt protection measures to defend brands from attack can cost millions to develop and implement, increasing the cost base and the prices to consumers.

#### *Loss of equity/reputation*

Governments do not always differentiate between harm caused by illicit products and that caused by the abuse of legal products. The image of the alcohol sector as a whole, as well as of specific brands, when counterfeiting is involved, is a significant concern.

It is also clear that some of the health and behavioural issues being reported by some authorities are not simply the result of consumers drinking irresponsibly, but potentially a result of drinking contaminated illicit spirits.

Brands' public loss of reputation among consumers who have consumed counterfeit alcohol is also an issue, although it is difficult to quantify.

### ***Legislative burdens***

There are additional legislation or restrictions that the formal sector must contend with as a result of illicit activity. These can be related to health, marketing freedoms or sales/ distribution. The Czech Republic is a case in point, where the spirits industry was affected by the consequences, although it was not directly involved in the initial problem (RT, 2012). The sad irony is that attempts to manage the problem by legislation in the formal sector can often create conditions more conducive for illicit trade to flourish.

### **Nexus with transnational organised crime**

In many countries, the production and sale to retailers and consumers of counterfeit products has been practiced mostly on a localised, "cottage-industry" scale to date, with one or two individuals working together to refill and recap genuine empty bottles, perhaps 100 at a time. However, in Russia, Europe and elsewhere, organised criminal gangs have manufactured and supplied counterfeits on a much larger scale, making use of heavy machinery such as bottling lines, as well as entirely counterfeit components, including bottles. For organised criminals, the equation is one of risk versus reward, and counterfeiting of alcohol is likely to attract their interest. Counterfeiting of alcohol is not a government or law enforcement priority, because the penalties for those who are caught generally do not constitute a deterrent (that is, modest fines and, occasionally, short custodial sentences). The potential profits of the counterfeiting of alcohol relative to the investment demanded are substantial. It provides a quick return, whether as manufacturers, as suppliers of illicit spirit or bottles to counterfeiters, or as peddlers through clubs and bars.

In Europe, the trend is for operations to move from refilling genuine bottles to full-scale mechanised manufacture. All aspects of the pack are replicated (bottles, labels, closures as well as illicit/industrial alcohol). Some operations are mobile, full production units being packed into 60-foot containers that can be moved around a country. In Russia, a manufacturing site was recently raided that had the capacity to produce 11 000 bottles of illicit alcohol per hour. Investment in such machinery, the operations' level of sophistication, and the sheer scale of production is indicative of organised crime. According to Dutch Customs authorities, non-duty-paid products found in the Netherlands are largely destined for the United Kingdom.

The international linkages of illicit alcohol are indicated by recent UK Border Force actions: (HMRC, 2014b):

- 580 interceptions (seizures at the border and referrals to HMRC) protecting revenue of over GBP 18 million; 56 heavy goods vehicles seized between April and June 2013.

- 735 interceptions (seizures at the border and referrals to HMRC), protecting revenue of over GBP 33 million, and 35 heavy goods vehicles seized between July and September 2013.

There is less evidence of linkages to terrorism, but vodka counterfeiting was known as a source of funding for the Irish Republican Army (IRA), and some of those involved have continued their activities even though they no longer have any evident link with paramilitary forces (Caunic, 2011).

The illicit trade is transnational/global in nature. Cross-border trade of smuggled and duty-diverted goods is prevalent in many parts of the world. There is also evidence of cross-border trade of counterfeit/illicit alcohol products between neighbouring markets. However, the real global nature of illicit alcohol trade is reflected in the sourcing of component parts by organised criminal gangs. Eastern Europe and Asia are a source of fake/counterfeit dry goods, which are imported into a specific target market and used to assemble the illicit product for local consumption.

The World Wide Web has offered a new source of commerce. A study from the Free University of Bozen-Bolzano in Italy analysed the online auctions market for empty wine bottles through eBay in Germany, indicating the real risk of refilling them to resell as genuine wine (Schamel, 2013).

Customs authorities in the EU in 2013 reported 13 cases concerning alcoholic beverages covering 59 240 articles and representing a retail value of original products of EUR 1.5 million. The EU report notes that 69.91% of alcoholic beverages coming from China and 28.76% of those coming from Latvia were not released (European Commission, 2013). These figures are examples of counterfeit spirits bottles manufactured in China and shipped to Europe. The extent of such trade is not clear, but it is relatively easy to organise, given China's impressive ability to manufacture counterfeit bottles (National Review). From the Customs' point of view, the sheer volume of container traffic makes intercepting such shipments a matter either of luck or good intelligence.

## Drivers of the trade in illicit alcohol

### *a) An economic gap with legal products*

Illicit trade in alcohol is flourishing in an economic landscape where austerity measures are reducing disposable income, and pricing policies (taxation, minimum unit price, etc.) limit the affordability of alcohol in the regulated sector.

It is no great surprise that products subject to high rates of tax and excises, as alcoholic products are, are typically a target of the counterfeit industry (Transcrime, 2010). Markets with the highest excise regimes tend to have greater problems with illicit trade, whether smuggled or counterfeit, etc. Since direct and indirect taxation raises the price of value of a bottle of spirits, the financial rewards for those who avoid paying the taxes can be huge, and markets with the biggest "tax opportunity" are most targeted. It may be an exaggeration, but in many markets it is not far from the truth to state that taxation on alcohol effectively funds illicit activity.

Recent tax increases in Ecuador (particularly the *impuesto a los consumos especiales*, or ICE), for example, has boosted the growth of illegal alcohol in the past five years, reducing the sale of legal/formal liquor (Euromonitor, 2012).

In Mexico, a formal alcoholic beverage (with alcohol content above 20% alcohol by volume), has to pay 53% excise tax (*ad valorem*) plus 16% VAT applied to the base price (Ley del impuesto especial sobre producción y servicios, 2013; Ley de Impuesto al Valor Agregado, 2013).

With this taxation structure, illicit products are offered to the consumer for about MEX 200 for a 5-litre bottle, when the average cost of a litre of an alcoholic beverage is around MEX 100. Given the real price structure for such products, the cost of one litre is estimated at about MEX 10, making the total cost for 5 litres about MEX 50. The potential profit makes such products very attractive to producers.

*Ad valorem* tax regimes present a greater risk of counterfeit activity than premium (international) brands, as do markets with high trade tariffs, such as India. Both have a detrimental impact on affordability, but not on demand.

### ***b) Legislative framework***

Annex I contains some examples of market legislation. There is no all-purpose approach, as different markets have a range of laws in place (both criminal and civil) under which action can be taken. The biggest challenge appears in those markets with weak laws, or where laws may be strong but the penalties weak, or where the police/judiciary do not effectively enforce existing laws. This can make the illicit trade attractive compared with other forms of criminal activity, because any penalties (such as fines) are factored into their business plans, and operations can be swiftly resumed if no custodial sentence is involved.

### ***c) Lack of enforcement***

Typically, illicit alcohol production attracts less interest from law enforcement, as other, more serious crimes take precedence. Mexico, for example, has stringent laws governing illegal alcohol, but the police do not enforce them, as they prioritise their work suppressing drug wars/firearms activities.

Mexican authorities have stepped up their efforts to prevent the entry of illicit alcohol into the market of in recent years. However, with 87 000 litres confiscated in 2010 versus 367 000 litres destroyed in 2012, it still represents a tiny part of the illicit alcohol in the market, given that an estimated 105.5 million litres of illegal alcohol are consumed annually (Informador, 2013).

The issue becomes a priority only if there is an impact on consumer health (e.g. in the Czech Republic) or when organised crime and tax fraud is involved on a large scale. This, rather than any violation of IP, drives law enforcement engagement.

Customs officials' lack of training in recognising counterfeit products is also a critical point in the fight against illicit alcohol.

### ***d) Social values***

In the LATAM region (Colombia, Ecuador, El Salvador, Honduras, Panama, Peru), as in the rest of the world, counterfeit and illegal brands are bought almost exclusively by low-income sectors of the population. In addition, there is a certain level of acceptance and perceived legitimacy of contraband products across all countries (Euromonitor, 2012).

Surrogate products are largely consumed by those with heavy substance abuse issues, generally homeless populations. Unlike other pirated products, consumers are not generally aware that these products are illicit alcoholic beverages, or, in most cases, of the health risks associated with the consumption of illicit alcohol.

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## Annex 7.1: Illustrative legal frameworks for anti-counterfeiting

### United Kingdom

	IP laws	Other civil/statutory laws or remedies	Criminal laws and liability (including administrative liability)
Applicable laws	Trade Marks Act 1994 or Copyright Designs Patents Act 1988; Council Regulation (EC) 1383/2003 and Goods Infringing Intellectual Property Rights (Customs) Regulations 2004 (the "EU Regulation").	Sales of Goods Act (SOGA)	Consumer Protection from Unfair Trading Regulations 2008 (CPR 2008); Fraud Act 2006 (FA 2006), Conspiracy and Proceeds of Crime Act 2008. Conspiracy to commit an offence under TMA 1994 or CDPA 1988 is also a criminal offence under Section 1 Criminal Law Act 1977. Also other miscellaneous offences under Criminal Law Act. Council Regulation (EC) 1383/2003 Goods Infringing Intellectual Property Rights (Customs) Regulations 2004 (the "EU Regulation").
Interim Injunction available	Yes	No	No
Damages available	Yes	Yes	Generally no
Storage and destruction of goods	Yes	No	Yes, goods can also be confiscated
Imprisonment	No unless private criminal proceedings are brought by owner.	Generally no	Yes, up to 5 years on summary conviction and 10 years on indictment conviction
Fines	No, unless private criminal proceedings are undertaken by owner.	Generally no	Yes, a maximum of GBP 5 000 on summary conviction and unlimited fine on indictment conviction.
Other penalties	No, unless private criminal proceedings are undertaken by owner	Restitution	Can have both imprisonment and fines at the same time.
Prosecution	By owner	By aggrieved customer	By government authorities, e.g. trading standards or Customs. Possibility of taking out private criminal proceedings in some cases.

## Viet Nam

	IP laws	Other civil/statutory laws or remedies	Criminal laws and liability (including administrative liability)
Applicable laws	Civil Procedure Code – Article 129 (infringement), 202 (civil remedies), 206 to 210 (preliminary injunction), 204 and 205 (damages). Article 25 & Article 29 (subject-matter jurisdiction over IPR-related disputes); <i>Chapter VIII, Part I of the Law (injunctions)</i> , Article 198 – IPR holders' entitlement to protection against infringement. <i>IP Law</i> : Article 216 (border enforcement measures); Article 218 to Article 219 (procedures for border enforcement measures)	<i>Product Liability Claim</i> : Ordinance on Protection of Consumers' interest (Article 9 – Consumers' right to sue manufacturers' product liability)	<i>Penal Code</i> : Article 156 (manufacturing or trading in prohibited goods), Article 157 (counterfeit foodstuffs and pharmaceuticals), and Article 171 (penalties). <i>IP Law</i> : Article 216 (border enforcement measures); Article 217 (brand owners' burden of proof); Article 218 to Article 219 (procedures for application of border enforcement measures). <i>Decree No. 154/2005/ND-CP</i> : Article 48 to Article 55 (procedures for application of border enforcement measures). Administrative Action: <i>Article 129</i> (trademark infringement); <i>Article 213</i> (definition of counterfeit trademark goods); <i>Article 214 to Article 215</i> (administrative sanctions and measures) <i>Ordinance on Administrative Sanctions: Article 12 to Article 21</i> (types of administrative sanctions applicable against infringers); <i>Article 28 to Article 42</i> (enforcement bodies' powers)
Interim Injunction available	Yes	No	No
Damages available	Yes	Yes	Owner may make a civil claim and have this included in the court's decision.
Storage and destruction of goods	Yes	No	Yes, goods can also be confiscated
Imprisonment	No	Generally no	Yes, usually six to seven months. Often less than 20 years, but a life term is possible.
Other penalties	No	Generally no	Capital punishment: theoretically possible
Fines	No	Generally no	Yes, criminal action. Maximum of VNM 50 million (about USD 3 000). For administrative action, up to five times the value of counterfeit goods up to VNM 100 million (USD 5 900).
Prosecution	By owner of IP right	By aggrieved customer	By government authorities e.g. Trading Standards or Customs. Possible to take out private criminal proceedings in some cases.

## South Africa

	IP laws	Other civil/statutory laws or remedies	Criminal laws and liability (including administrative liability)
Applicable laws	<p>Civil procedures under the Counterfeit Goods Act 37 of 1997 – however Notice of intention to institute civil proceedings must be served within 10 court days of detention by Customs, and civil proceedings instituted 10 days thereafter.</p> <p>Can also bring proceedings in respect of IP infringement separately under the normal IP laws (South African Trade Marks Act 1993) or concurrently with action under the CGA.</p>	<p>Consumer Protection Act 2008 (CPA). Under Section 61 of the CPA, a producer, importer, distributor or retailer of goods is liable for any harm or damage caused wholly or partly as a result of:</p> <ul style="list-style-type: none"> <li>the supply of unsafe goods,</li> <li>a product failure,</li> <li>defect or hazard in the goods,</li> <li>inadequate instructions or warnings provided to the consumer pertaining to any risk associated with the use of the goods, regardless of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer.</li> </ul> <p>This liability is joint and several, which means that a consumer can elect to take action against any one of the parties in the supply chain, irrespective of any contract with that party and even where they are unable to establish negligence. Furthermore, suppliers, manufacturers and distributors may not contract out of this strict liability.</p>	<p>Counterfeit Goods Act 37 of 1997 and the regulations thereto (CGA).            Customs: In terms of Section 15 of the CGA, South African Revenue Services/ Customs authorised to act as Inspectors in the detention and seizure of counterfeit goods. Also Relevant provisions of Customs &amp; Excise Act: details the relevant provisions for actions and procedures including the detention and obtaining of warrants for the seizure of counterfeit goods in terms of the CGA.            Police: Commercial Crime Unit (CCU) is tasked with actions in the marketplace. CCU is very active in the marketplace in acting on complaints lodged by brand holders as well as department-driven initiatives.            CIPC Inspectors: Companies and Intellectual Property Commission (CIPC), formerly the Department of Trade and Industry (DTI), has appointed Inspectors entitled to receive complaints and act under the provisions of the Counterfeit Goods Act. This is a relatively new body. CIPC also responsible for the appointment and control of Counterfeit Goods Depots.</p> <p>Customs will not act unless trademark, etc., is registered.</p> <p>Also Contravention of labelling requirements, Liquor Act requirements can offer alternative relief available in cases where there is a contravention of these provisions (and not for counterfeits <i>per se</i>).</p>
Interim Injunction available	No	No	No
Damages available	Yes using IP laws	Measure of damages is the harm, injury or loss suffered by an aggrieved consumer.	Generally no
Storage and destruction of goods	Yes	No	Yes, including seizure by Customs.
Imprisonment	Generally no	Generally no, unless it becomes a criminal offence	Imprisonment theoretically possible (maximum of 3 years for first conviction and maximum 5 years on subsequent convictions) but very rare.
Fines	Only under private criminal prosecutions	Generally no unless it becomes a criminal offence	Yes. Amount not exceeding ZAF 5 000 per article in first conviction and ZAF 10 000 per article on subsequent convictions.
Other penalties	None	Generally none	None
Prosecution	Owner. Owner can also bring private criminal prosecutions.	Aggrieved person	By customs, police or CIPC Inspectors

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## Chapter 8

### Sport manipulation as economic crime

By Fred Lord and Stuart Page\*

*Global sporting events and the revenues of their immediate derivative products, such as televised events and sports betting, have been growing at an exponential rate. A negative side effect of the globalisation of sports has been an increase in abuse of the betting market as a mechanism for money laundering. This chapter argues that a patchwork of policies against illegal betting and frameworks for sports governance is currently exploited to fuel the criminal economy by providing a means to launder massive amounts of illicit revenues. Criminal individuals and groups have been known to penetrate leagues and teams through ownership or contractual arrangements, which positions them to manipulate results. The authors argue that the cases of manipulation could be far more numerous than is currently reported or acknowledged due to a lack of sufficient fraud detection resources and weak surveillance. They conclude with a call for the adoption of more effective preventive measures, and for enhanced means to detect and/or report incidents through an internationally co-ordinated, pro-active response.*

\* The International Centre for Sports Security (ICSS) - Sorbonne Research Programme on Ethics and Sports Integrity

The opinions expressed and arguments employed in this chapter are those of the author(s) and do not necessarily reflect the official views of the OECD or of the governments of its member countries.

This chapter and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

#### 1. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

#### 2. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Introduction

On the surface, sport is booming. Globalisation has created new markets, bigger audiences and greater commercial opportunities. As sport has become global, however, so too have the criminal networks that prey upon Organised crime syndicates are well-versed in exploiting the gaps in corporate governance and international co-ordination, and they are looking to new sports markets for fertile ground. Gambling on sports, and rigging the results, has become a means to launder money obtained in other criminal enterprises.

## Definitions

There are currently few definitions of the concept of manipulation of sports competitions, whether within academic doctrine or adopted at the international level. It is therefore necessary to formulate a more elaborate definition of the concept, based on the one hand, on the possible link between manipulation and sporting bets and, on the other hand, the possibility that sporting participants may be offered a consideration to modify their performance on the field. The different types of manipulation resulting from the combination of these elements should correspond to different sanctions: whether disciplinary and/or criminal, depending on the nature of the offence.

There are different ways to define the manipulation of sports competitions. The terms “manipulation”, “fixed matches”, “sports fraud” and “corruption in sport” or “arrangement” are also used interchangeably. In 2011, Gorse and Chadwick seem to have been the first to give a fairly broad definition to the manipulation of sports competitions: “any illegal, immoral or unethical activity that attempts to deliberately distort the result of a sporting contest (or any element of it) for the personal material gain of one or more parties involved in that activity” (Gorse and Chadwick, 2011).

In the same year, the Australian Sports Ministry gave a more complete definition in a press release from the Sport and Recreation Ministers’ Council: “Match-fixing involves the manipulation of an outcome or contingency by competitors, teams, sports agents, support staff, referees or officials and venue staff. Such conduct includes:

- a) *the deliberate manipulation of the outcome of a sporting competition or an event during the competition, or a point spread*
- b) *an athlete’s deliberate underperformance*
- c) *conceding or letting go of an element of the competition*
- d) *the wilful disregard by an official of the competition of the competition’s rules*
- e) *an interference in the game or on the playing surface via the venue staff*
- f) *the use of inside information for a bet placed, or by a gambler who hired someone to manipulate the outcome or a phase of the competition.”*

In January 2014, the Enlarged Partial Agreement on Sport (EPAS, Council of Europe) in turn proposed a definition that seems to suit the public authorities, the sporting movement and betting operators. The manipulation of sports competition involves “an arrangement, act or intentional omission aiming to improperly change the result or the

progress of a sports competition in order to totally or partially remove the unpredictability of that competition for the unwarranted personal material gain of oneself or others.”

### *Types and modus operandi*

As the number of cases of manipulation of sports competitions related to sports bets is constantly increasing, another classification is suggested, in which four different categories can be distinguished (A, B, C and D):

**Table 8.1. Classification of sports competition manipulation**

	Manipulations that do not include offering consideration to a participant in the competition	Manipulation including the offer of consideration to a participant in the competition
<b>Manipulations unrelated to sports bets</b>	(A) Example: sports arrangement (“Match of shame”) <sup>1</sup> F.R.G Austria/football/World Cup 1982) <sup>2</sup>	(B) Example: corruption by bribes (Marseille/Valenciennes/football/1993)
<b>Manipulations linked to sports bets</b>	(C) Example: (To be confirmed: case under investigation) Agreement regarding the score at halftime (Cesson Montpellier/ handball/2012)	(D) Example: Organised crime and manipulation of matches <sup>3</sup> ( <i>Calcioscommesse</i> /in football in Italy/starting in 2009)

*Source:* Sorbonne-ICCS (2014), Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport, Sorbonne-ICSS Research Programme on Ethics and Sports Integrity, Paris, p.37.

The identification of these four categories of manipulations of sports competitions is not purely speculative. In fact, they make it possible to determine in which circumstances disciplinary law and criminal law can apply distinctly or together. It is important to distinguish manipulations that are not related to sports bets and manipulations linked to sports bets.

### *Manipulations unrelated to sports bets*

There are two possibilities.

- The author of the manipulation was not offered any direct or indirect advantage by a third party: these cases clearly stem from a choice made by the sports actor, whether or not he or she can be punished on the ethical, moral, and/or disciplinary level. At the 2012 London Olympic Games, the Badminton World Federation disqualified eight players (four women’s doubles pairs – one from China, one from Indonesia and two from South Korea) accused of “not having made their best efforts to win” group matches. Some considered this sanction too severe, since the players had acted in this way to preserve their chances of winning the tournament. Others considered that regardless of the players’ goals, the event was not up to expectations, and that they therefore deserved a disciplinary sanction for “tanking”.
- The author of the manipulation was offered a direct or indirect benefit: the situation involves corruption (active for the perpetrators and passive for persons who accept it or do not report it). Cases in this category are therefore covered by both criminal and disciplinary sanctions.

### *Manipulations linked to sporting bets*

Here again, there are two possibilities:

- The author of the manipulation influences the course of the competition in the absence of any advantage: since it involves personal actions (whether acting alone or with other sports stakeholders, teammates, opponents or referees, for example), this situation constitutes internal fraud. It is generally difficult to suppress under criminal law because it is rarely clearly described in national criminal codes. Moreover, in practice, given the difficulty of proving that manipulation occurred, sanctions under disciplinary law may remain theoretical.
- The manipulation simultaneously incorporates elements of corruption, as seen in (B), and sports bets: sanctions can be imposed both through the criminal and disciplinary systems. A number of large cases of sports fraud revealed in recent years involving organised crime fall into this category: cases such as “Bochum affair” in Germany, “Mr. Ye affair” in Belgium and *Operation: Last Bet, Calcio Scommesse* in Italy.<sup>4</sup> Among the four identified categories, this type of manipulation is the main threat to the integrity of sport, since it directly challenges the sovereignty of sports authorities and the states concerned, and harms the public order. This is why some countries and territories have specific regulations on such offences in their criminal code.<sup>5</sup>

Manipulation can be carried out in order to gain a direct or indirect advantage for the perpetrator or for someone else, which itself determines the type of sanction that should be imposed:

- Manipulations unrelated to bets and with no direct advantage gained by the perpetrator or another person (example: an athlete already qualified for the subsequent stage of a competition voluntarily loses an event in order to avoid playing against a strong adversary at the next stage). These cases are clearly linked to the participant’s sporting strategy, which may be sanctioned on ethical or moral grounds. These cases concern, at the most, disciplinary regulations.
- Manipulations linked to bets, but that do not involve something in return (e.g. an athlete who loses voluntarily because he bet on his defeat): this is internal fraud, difficult to sanction under criminal law in its current state, and particularly involves disciplinary law.
- Manipulations linked to bets and including the offer of a consideration (e.g. an athlete loses voluntarily to allow a third party who has promised him an advantage, so that the third part may win a bet): this type of manipulation represents a primary danger to the integrity of sports and falls under both criminal and disciplinary law.

### ***Major known hubs and flows: A global phenomenon***

A review of cases of the manipulation of sports competitions leads to the conclusion that these abuses are pervasive throughout the world. Certain disciplines of sport are affected more often than others, but as a whole this phenomenon threatens the economic and social integrity of competitions at the local, regional and international levels. Cases of sport manipulation involve all aspects of sport: athletes, agents, clubs, referees/judges, vendors, advertisers and leagues. The number and types of cases show that manipulation

of sports competitions is a global phenomenon and suggest that activities corrupting sports take place at all levels and across the community of sporting professionals. Furthermore, this manipulation is often instigated and/or controlled by external criminal individuals and groups who seek to profit illegally from sports. These external actors sometimes penetrate leagues and teams through ownership or contractual arrangements, to allow the manipulation. In other cases, these external criminal actors recruit internal members.

Football, at all levels, has the largest number of manipulation cases reported annually. Rampant football manipulation in Asia, recurrent problems in Italian championships and the famous “Bochum” investigation cases have gained notoriety. Manipulation scandals involving hundreds of matches have occurred in countries including, but not limited to, Finland, Australia, El Salvador, China and South Africa. Cricket faces the second greatest threat of manipulation, while cases have also been uncovered in snooker, basketball, volleyball, wrestling, motor racing, boxing, badminton and handball, among others.

These cases, however, probably represent only a fraction of the true incidence of manipulation. The lack of adequate fraud detection resources in some federations and weak surveillance of lower league, junior, women’s and local competitions lead to the conclusion that cases of manipulation could be far more numerous than is currently acknowledged.

The number of cases reported within a region is not a reliable indicator of the effectiveness of regulatory regimes, because the true number of cases in each territory remains unknown. As with many other criminal statistics, the number of reported incidents is influenced by many factors, beyond the actual prevalence of crime. The fact that no fraud cases have been detected in certain states may mean that the state has taken effective preventive measures, but it may also indicate that it lacks an adequate means of detection and/or that reporting of incidents is implicitly or explicitly discouraged. Certain sports organisations are more inclined than others to make the efforts needed to stop acts of manipulation, and this, in principle, will help them detect more cases. A parallel can be drawn here with doping cases: federations that conduct very few drug tests uncover few cases of doping, which could suggest, erroneously, that the federations are not as affected by this phenomenon. While the number of reported cases merits examination, it is only one data point among many in evaluating the prevalence of manipulation in a given sport.

### ***Where manipulation of sports competitions occur***

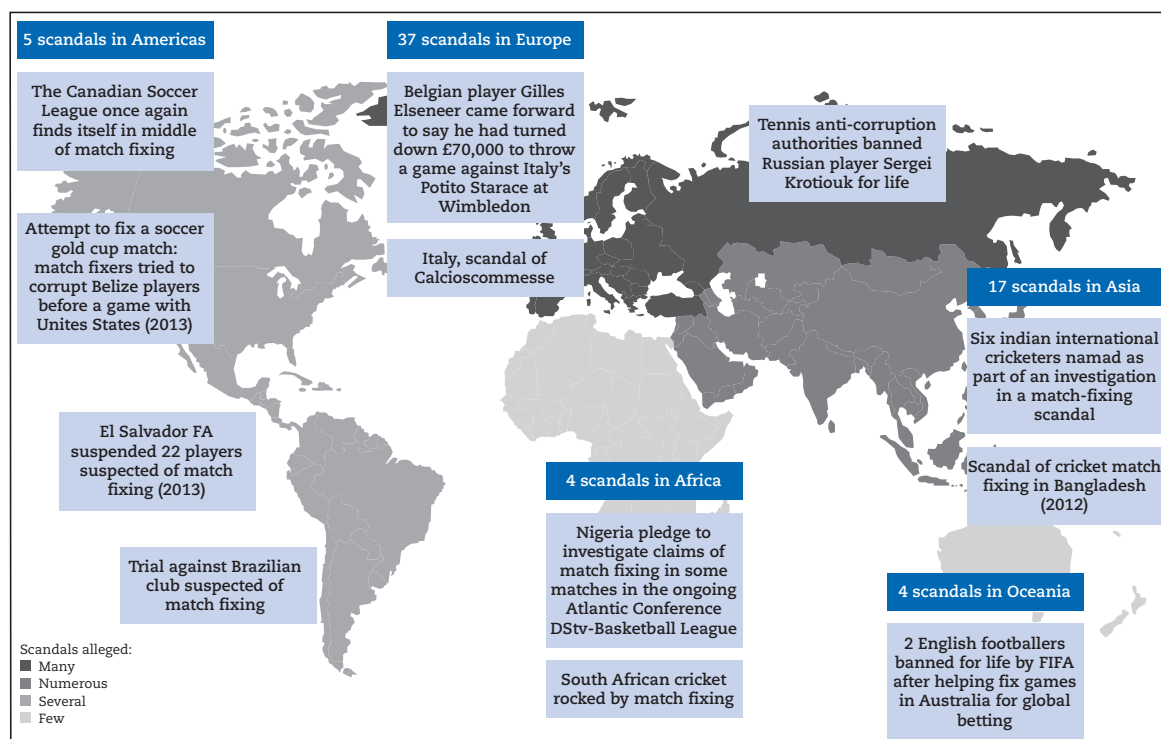
More cases of manipulation are reported or discovered in Europe than any other region. Football is the most seriously affected, but it is not the only such sport. Europe also has the greatest number of sports disciplines affected. Some of the most notorious manipulation scandals have hit some of Europe’s most popular sports, and football, cricket and rugby matches have all been fixed. Furthermore, practically all sanctions imposed for manipulating competitions in less popular sports such as snooker and tennis have involved European athletes.

Asia has been most hit by the rigging of cricket matches and players. In 2013 alone, numerous investigations into national tournaments led to the suspension of a significant number of players in India, Pakistan and Bangladesh. While in absolute terms, the number of manipulated football matches in Asia is fewer than in Europe, the cases that affected Asian competitions were often found to have been almost entirely manipulated.

In terms of distribution across sports, many different sports in Asia have had instances of manipulation, but fewer than Europe.

In Oceania, sports manipulation cases have only been reported in football, cricket and rugby. In Africa, other than in football, only isolated cases have been uncovered in cricket, boxing and basketball. In the Americas, cases of manipulation were observed, for example, in baseball and basketball (North America), and football (Central and South America). Figure 8.1 provides a concise overview of the distribution of reported cases of the manipulation of sports competitions. It is not intended to be exhaustive, but simply to indicate trends. As mentioned, the reported cases are likely to be the tip of the iceberg. The number of cases of manipulation in 2013 alone is widely suspected to run into the hundreds or even thousands.

**Figure 8.1. Global distribution of reported cases of the manipulation of sports competitions in the past 3 years**



Source: Sorbonne-ICSS (2014), *Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport*, Sorbonne-ICSS Research Programme on Ethics and Sports Integrity, Paris, p.6.

## Consequences of the illicit sports betting sector

### ***Economic impact: The increasing importance of sport in the global economy***

Today, sport is an economically important and fully global activity. The sports market (excluding the parallel market of illegal sports bets) accounts for almost 2% of global gross domestic product (GDP). This has had major ramifications, some positive, others

less so. As sport became a global concern, so too did sports betting, which was transformed by, among other things, the growing complexity of the types of odds and the transformation of a market for amateurs into a market for professional investors. One key side-effect of this transformation was to turn the sports betting market into a vital support platform for money laundering.

Sport now constitutes a global economic activity and a market in and of itself. The available data, and in particular the introduction of high added-value commercial organisations that are replacing lower-value sports associations, are evidence of this. The size of this market and the advantages and drawbacks of enacting a legal framework for the sports market are worth examining.

In contemporary developed economies, sports markets have considerably expanded, often representing as much as 1.5% to 2.5% of GDP, i.e. a larger fraction of the economy than the textile, leather-footwear or steel industries. Sectors of this magnitude are rare. Sports-related markets form an industry or sector in which services (e.g. providing the possibility of practicing a sport, attending a sporting event and the products linked to it, for example televised sporting events and sports betting) account for a preponderant part of the sector, rather than physical goods (e.g. sports articles, sporting equipment). Most of these markets were transformed with the advent of the global economy in the past two decades, after which they acquired the status of global markets. In addition, various sports markets are in constant interaction, together forming the sports industry (or sports economy).<sup>6</sup>

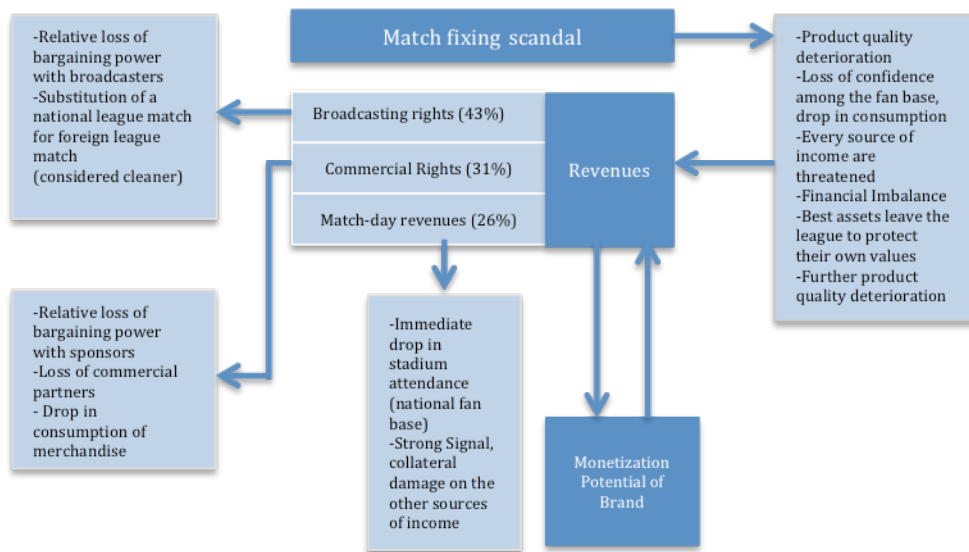
Sports markets develop as countries develop: their economic importance is considerable in developed countries, not as great in emerging countries and relatively low in developing countries. However, because there is no pre-established statistical and accounting framework for proven and collected data, no precise determination of such markets is possible. An estimate based on partial numbers provides an approximate scale of between EUR 800 billion and EUR 900 billion in 2011 (excluding the parallel market of illegal sports bets), which makes up between 1.7% and 1.8% of global GDP. In developed countries, the sports sector thus exceeds the textile and steel industries. If the weight of illegal sports betting is included, the volume of the sector is likely to rise by 20% to 50% based on conservative estimates, and by almost 100% on the basis of the highest estimates.

The most internationally relevant element of the sports economy is sporting events and their immediate derivative products, televised sporting events and sports betting. The annual number of international sporting events has risen dramatically: from 20 in 1912, 315 in 1977, and 660 in 1987 to 1 000 in 2005. Globalisation has also affected the sports sponsorship market and the market for the distribution of sporting goods.

The financing of large European football clubs has also become globalised. The prevailing model in European professional sports until the 1990s were clubs financed mainly by local or national sources: ticket office receipts, public subsidies, private donations, member contributions and sponsors. During this period, revenue obtained from television broadcasting rights constituted a minimal part of the financing – for example, 0% in 1971 and 1% in 1981 for first-division French football teams. This trend increased rapidly toward the end of the 1990s, first in European football and spreading to other popular sports (i.e. cricket, basketball, rugby and handball). Today, the primary source of financing in professional sports is the media, in particular broadcasting rights, followed by the investments of wealthy owners. Clubs have also developed sophisticated

merchandising operations, which, for example, represented up to 34% of Manchester United's revenues in 1998. Lastly, some clubs specialise in the training of promising amateurs, earning value from trading these players on the global market. Other clubs rely on the capital market by reorganising as joint stock companies and selling their shares on the market. All aspects of this financing model are becoming increasingly globalised. There is no longer an intrinsic link between the national affiliation of a large football club and its television rights, sponsorship and financial backing.

**Figure 8.2. Negative demand shock: Impact of match-fixing scandal on a national federation**



*Source:* Sorbonne-ICSS (2014), *Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport*, Sorbonne- International Centre for Sport Security Research Programme on Ethics and Sports Integrity, Paris.

The globalisation of sport and its financial stakes, individually and collectively, produces a double effect: increasing the potential gains that can be achieved by manipulating sports competitions and incentivising efforts to control results in sports. This element of control undermines a core value in sports and game competition – the expectation that each team or player has a fair chance at victory, based on talent. The very fabric of the match is compromised, tainting both public and private expectations.

#### *A transnational market of sports wagers of an estimated EUR 200 to 500 billion*

Since the 2000s, the sports betting market has, like traditional financial markets, become fully globalised. A bettor in one country can access an online betting platform located in another county to bet on the results of sporting events taking place in a third country in real time. For example, a Japan-based bettor can bet through a sports betting website based in Malta (which is considered illegal in Japan), on the number of corners in a Brazilian championship football match. This sports betting market is grafted onto sporting competitions of all levels, in all disciplines, from the most prestigious, such as



the Olympic Games, to the most modest, and from those with high stakes to those with almost none.

This hyper-globalisation, however, does not operate in an arena of regulations, controls and co-ordination between states. Sports wagers constitute *prima facie* a provision of services that is governed by the applicable law, whether the law of a given country, European Union law, or the law of the World Trade Organisation. However, in itself, it involves disparate national conceptions of public policy: not all states consider sports betting legitimate or legal. Those who accept sports bets while making efforts to regulate them must contend with the ubiquity of sports bets operators and consumers. In the end, all states facilitate the development of a transnational market of bets based on sports competitions held inside or outside their territory, and that legally or illegally, attract consumers located within their jurisdiction. Organisers of sports competitions have a limited or even no real understanding of how these events form the basis for sporting bets.

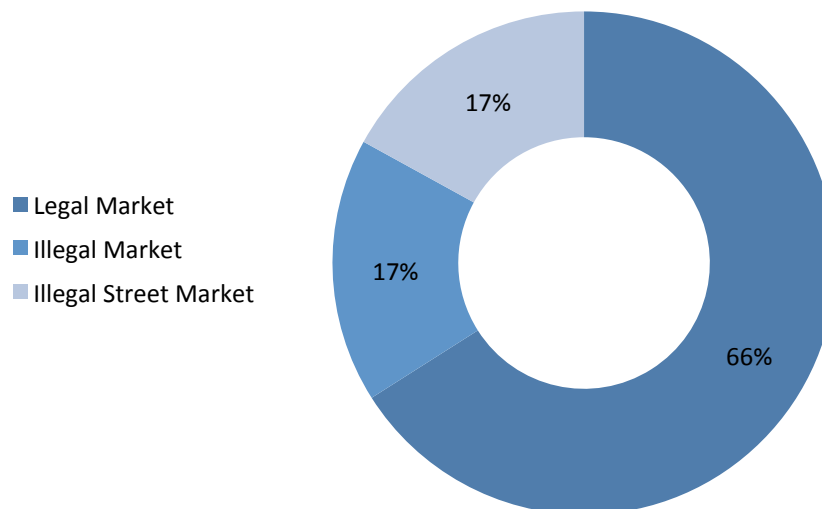
Globalisation has been exploited by those who contribute to the worst forms of financial and other abuses in sports. The fixing of matches seems to have evolved along with illegal international sports bets. Through international capital flows transiting or investing in sports and sports bets, money of questionable origin is being moved through global financial conduits to give it an appearance of legality. The opportunities for using sports as a vehicle for money laundering are multiplying.

### Nexus with transnational organised crime

#### *Illegal betting*

A significant underground economy has developed around illegal betting. The sheer size of the market and the difficulty of detecting suspicious transfers within it have made it highly attractive to organised crime.

**Figure 8.3. Distribution of sports betting market in 2011**



Source: Sorbonne-ICSS (2014), *Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport*, Sorbonne-International Centre for Sport Security Research Programme on Ethics and Sports Integrity, Paris, p.19.

The scale and dynamic nature of the Asian betting market creates conditions beyond the control of local and foreign authorities. The co-existence of legal, illegal and partially illegal operators confronts regulators with a complex task. It leads partially illegal operators to resist measures to regulate sports integrity, because they could negatively affect their profits. It also creates conflicts of interest, as illegal operators finance professional sports to gain legitimacy.

Criminals already attracted to tax havens are similarly drawn to the promise of profit in the growing number of countries that attract betting operators because of their low taxation regimes and weak regulation. The massive expansion of live betting makes it almost impossible to detect market movements and possible manipulation in real time.

### ***Money laundering and transnational organised crime***

Money laundering is another factor facilitated by the development of sporting bets.

#### **Box 8.1. The ramifications of money laundering**

##### **What is money laundering?**

Those engaged in illegal activities cannot fully benefit from their criminal profits if they are not able to justify the income. They are therefore obliged to integrate (or pretend to integrate) illegal income into the legal economy. In this sense, money laundering creates an organic link between the legal and the underground economy. For example, by injecting dirty money into an "official" business, organised crime syndicates make it possible for these companies to acquire large amounts of cash and make them more competitive with foreign companies.

Beyond the mere legitimisation of funds, money-laundering operations also help conceal criminal activities. If criminals can avoid showing any evidence of suspicious funds, they can escape detection by the public authorities. Laundering is essential for any illegal economic enterprise.

The money-laundering mechanism generally involves three stages:

Firstly, "placement", which allows illegal cash to be introduced into the financial system in the form of scrip. The conventional technique was to enter a bank with a suitcase full of cash and ask the clerk to deposit the funds in an account. The vigilance now demanded of banks requires criminals to find alternative methods. Generally, the money is passed through deposits in financial institutions, or by the purchase of different kinds of monetary instruments (traveller's checks, currency, bearer bonds) or in the form of tradable goods as monetary instruments (diamonds, gold). This is the critical step in the laundering process, since money loses its physical character, and is transformed into something less identifiable and more discreet.

The second phase involves "dispersion" (also known as stacking, or conversion), in which launderers multiply their financial transactions to hide the original source of funds and the identity of the real owner. These operations can be purchases and resale of fictitious goods and services, electronic fund transfers, financial transactions such as loans secured by the deposit of an equivalent amount in the bank's coffers, and false invoices. The offshore system of tax havens that do not inquire about the origin of the assets or their owners, or the activities conducted through their financial systems, presents many advantages for such operations.

Finally, the "integration phase" (or recycling) completes the laundering process. The funds that were illegally introduced and dispersed are then reinvested in the legal economy. These cost-effective and legitimate investments may take the form of real estate projects, the purchase and sale of businesses, shares, etc.

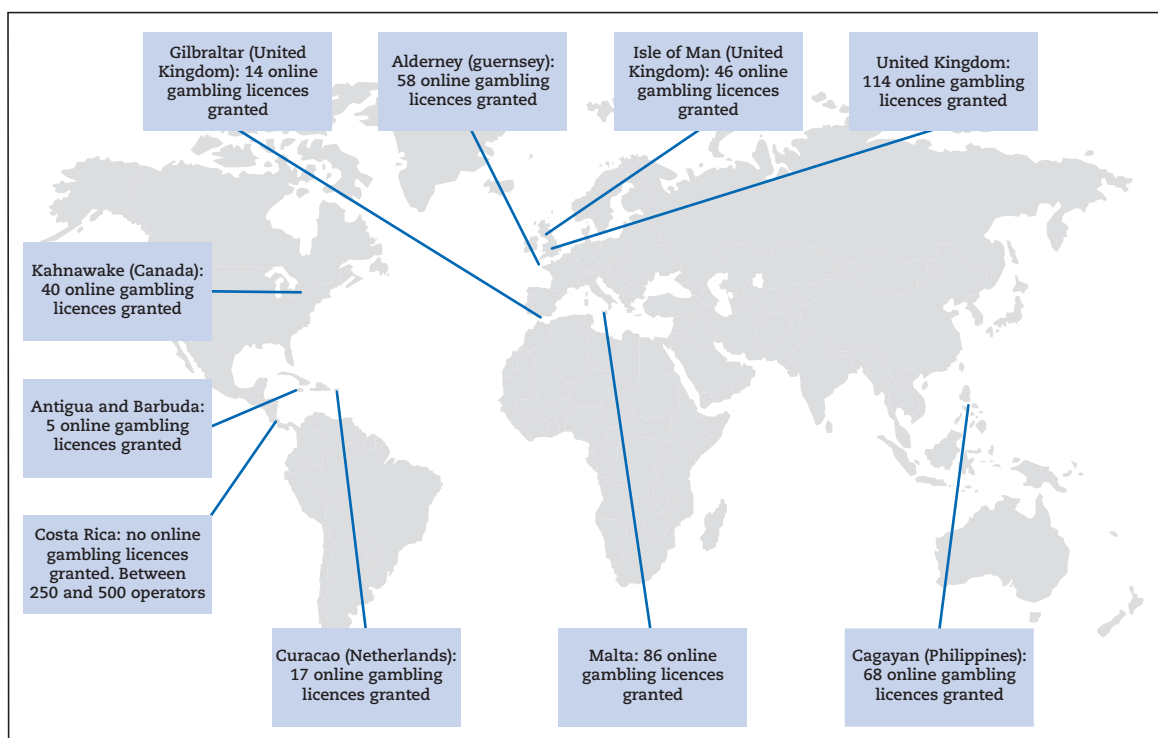
*Source:* Rodier, A. (2013), *Les Triades, la menace occultée*, Editions du Rocher, Monaco; Vernier, E. (2013), *Techniques de blanchiment et moyens de lutte*, third edition, Dunod, Paris.

Sporting bets, propelled by the development of the Internet, have undergone profound changes in the past 15 years. However, before the advent of “live betting” and “betting exchanges”, the risk of money laundering was driven by the nature of the operators. Between 1995 and 2014, bets were handled in a small world of bookmakers and lotteries, where a few hundred organisations coexisted within delineated borders. Today, they involve a jungle of tens of thousands of operators, without borders, often with opaque structures in constant movement.

The main area of money-laundering risk linked to sporting bets concerns the regulation and supervision of the operators themselves. Mainly established in tax havens, which are now often also gambling havens, sporting bets operators regularly offer their services via the Internet without the required licences. Thus 80% of the today’s global bets are illegal, which places sporting bets in a “deficient market” (Sorbonne-ICSS, 2012)

This problem is not specific to betting or gambling, since it results from the dual use by organised crime of offshore jurisdictions and the global reach of the Internet. Like gambling, many sectors are affected by the placing of an illegal tender on the market, starting with counterfeit drugs and luxury goods. However, the particularity of online games is that they allow the transfer of illicit money, in the form of winnings, to bank accounts in a well-regulated country.

**Figure 8.4. Countries and territories with licensed online gambling (2013)**



Source: Sorbonne-ICSS (2014), *Protecting the Integrity of Sport Competition: The Last Bet for Modern Sport*, Sorbonne-International Centre for Sport Security Research Programme on Ethics and Sports Integrity, Paris, p.13.

They can therefore be used to launder dirty money. Quite apart from the difficulty of tracing funds that transit between several countries, this phenomenon is reinforced by the fact that illegal betting is generally not an offence, much less a crime. For a drug dealer, this provides an ideal instrument: once potentially substantial gains have been laundered, there is little or no risk of getting caught and few or no deterrents.

Moreover, the Internet has more weaknesses than physical networks, in monetary terms. It is possible to launder money through illegal bets on the Internet, whereas dirty money in the street is much harder to launder, even if it is made with an unlicensed, bookmaker. Additionally, major instances of money laundering, of more than EUR 1 million, are difficult to organise through outlets. Indeed, the shops of physical operators, which are subject to various procedures, are primarily targeted to launder money derived from secondary offences: concealed work and minor instances of drug trafficking.

Anonymity is not everything, especially since the most responsible operators seem to have understood the scale of the risk: registration of winners above a certain level of earnings, identifying recurring winners, establishing classifications, etc. On the Internet, many operators do not seem to show the same professionalism, primarily because the competition is tough and because money launderers are in a sense ideal clients: they agree to regularly lose a lot of money without jeopardising the fixed-odds operator's financial interests. Only totally legal online operators (lotteries, PMU, SNAI, etc.) or those that tend towards legality (Paddy Power, Ladbrokes, William Hill, etc.) agree, even if some of them have officially protested the draft of the 4th European directive against money laundering. Deficiencies or even violations of the regulations by other operators are innumerable: targeting bettors in countries where their operations are considered illegal, serious deficiencies in the verification of the identity of their customers, payments to offshore accounts without verifying the owner of the account, accepting payment methods favouring anonymity, average rates of return to players of above 93%, extremely high betting limits for "good customers", failure to report any suspicious activity to financial authorities, etc. The widely reported cases in the United States, the leading country in the fight against cybercrime linked to online games, demonstrate the seriousness of the phenomenon: many online betting sites helped launder money derived from "serious criminality," mostly through Central American sites. In this context, the examples of Beton Sports and Legendz Sports should be noted (Kalb and Verschuuren, 2013).

In addition, it appears that the fight against money laundering, a challenging task, is similarly difficult for betting operators. Anti-money laundering is not a priority for most national sporting bets regulators, which lack both the means and the expertise to handle this complex and emergent subject. This is an almost impossible challenge for police units specialised in cybercrime, who face lack of co-operation from some countries and also the boundless ingenuity of organised crime, whose members have mastered the assembly of intricately camouflaged, multinational business structures. Moreover, it is difficult to criticise some betting operators, who, even when subjected to real controls, do not always contribute actively to the process of eliminating illegality. From their perspective, the competition is tough, especially when it is illegal, and making too much of a fuss would simply entail leaving some "risky customers for the less scrupulous neighbouring operator". That being said, banks face, and meet, similar challenges, and betting operators should be strongly encouraged to maintain a similarly pro-active approach.

The clandestine nature of money laundering and the opaque structure of sporting bets make it difficult to determine the amount of money laundered. It is, however, plausible that, as asserted in a recent study, up to USD 140 billion per year is laundered in this fashion.<sup>7</sup> This would mean that over 10% of global revenues of organised crime are laundered through sporting bets.

Given its complexity, the problem of money laundering linked to sports bets must pass a thorough examination of the industry itself: do governments want their citizens to gamble for fun, as a recreational activity? If so, they must adapt sporting bets products to promote recreation rather than business, starting by capping the rate of return to players and the level of wagers, so as to return to more “reasonable” bets. Conversely, if the prospect of a market of professionals does not give them pause, they will need to clarify the boundaries of an industry that requires the establishment of some rules and regulations. Otherwise, given the risks inherent in the business, not to mention the losses in tax revenues, some governments may unintentionally provide opportunities for criminal networks. Indeed, money laundering poses a real threat to national governments because it is directly proportional to domestic criminal activity. Finally, we must not forget that money laundering is a global and systemic phenomenon. Sporting bets, and gambling more generally, are but one link in the chain. As the backbone of the financial system, banks will continue to be the key instrument of detection, since any attempt to launder money must, at some stage, transit through them.

#### **Box 8.2. Case study: how online unlicensed gambling works**

A Malaysian national, was recognised around the world as a high-roller, a poker star with an enormous bankroll (allegedly between USD 300 million and USD 400 million), playing for the highest stakes. In 2014, the suspect, his son and six others were arrested and charged with one count of unlawful transmission of wagering information and one count of operating an illegal gambling business. Authorities believe the suspect is a high-ranking member of the Hong Kong-based 14K Triad, and to have run a billion-dollar illegal gambling operation from Caesars Palace in Las Vegas.

His illegal operations were uncovered when casino personnel were asked to set up an unusually large amount of electronic equipment and technical support at a residence in Las Vegas, Nevada. During setup of the equipment, casino personnel noticed similarities between the screens and those at the casino’s sports book, as well as displays of betting odds for gambling websites that were illegal in the United States. Further investigation by the Nevada Gaming Control Board determined that the technical setup set the stage for an illegal wagering operation. The Gaming Control Board worked in conjunction with undercover law enforcement agents until 9 July, when agents raided the premises and recovered gambling records, computer equipment and other items.

It later emerged that he was allegedly placing bets using SBOBet, an online betting platform registered on the Isle of Man, and IBCBet, which is based in the Philippines. Court documents reveal that he told police that he had investments in IBCBet, and his son revealed that the suspect actually owned the website, considered by industry sources to be Asia’s largest online gambling website. Neither website is licensed to operate in Nevada. This was not the suspect’s only brush with the law. He was arrested on 18 June 2014 in Macau, along with more than 20 others, for operating an illegal sport gambling business.

## Responses

### *Measuring the effectiveness of existing policies: monitoring the fluctuation of odds*

Monitoring systems designed to identify suspicious fluctuations of odds (such as the BFDS27 of SportRadar) make it possible to identify anomalies and to alert public and/or sports authorities to possible manipulations. However, these alert systems have almost never led to convictions; conversely, only a small number of the sports fraud cases resulting in convictions were initiated because of such alerts. Unlike their counterparts in the financial markets, these alert systems do not have access to betting volumes. Given these conditions, it would seem difficult to achieve more than a state of heightened suspicion. At the same time, betting operators are developing their own internal monitoring systems to control financial counterparty risk linked to odds betting. These operators have the advantage of integrating precise information on the distribution of the volume transiting through their network, starting with the identity of their clients. They are thus in the best position to judge the integrity of bets placed by their clients on their own platforms.

However, by avoiding operators known for their advanced detection mechanisms and by carefully spreading their bets between several operators, it is not difficult for criminals to circumvent this risk in a betting market that lacks transparency and is ill-equipped to combat this type of manipulation in a co-ordinated fashion. Real-time monitoring of live bets would require significant resources, beyond the reach of some bookmakers. Still, dismantling alert systems would certainly lead to an increase in fraud cases. Monitoring systems are therefore necessary, but not sufficient.

### *Public policies against illegal betting*

The public policies concerning sporting bets, the instruments necessary for combating illegal bets as well as the regulatory framework imposed on the market and monitoring of sporting bets and operators, can be divided into three broad categories:

- For certain countries, sports bets – and more generally online games – are considered to be a bonanza that creates jobs and significantly increases public revenue. The Cagayan province in the Philippines, Gibraltar and Malta, for example, fall within this category;
- For other jurisdictions, sports bets constitute public and social risks that should be strictly managed. China, the United States and Switzerland take this stance.
- For others, sports bets are considered a socially accepted practice that should nonetheless be regulated.

Beyond their willingness to combat illegal betting, it is useful to classify countries according to the priority they give to sports integrity. Such classification could include: laws providing for punishments for the offence of sports fraud, prohibition of participants from betting on the sporting events in which they take part, restrictions on sports bets (types of bets authorised, imposing limits on rates of return as well as bets), exchanges between betting operators and the sporting movement, and financial contributions from betting operators for the protection of sport integrity.

### *Establishing authorities to regulate sports betting*

Beyond the essential need for regulatory authorities dedicated to the regulation of sports bets, effective powers and tactics are also critical. A review of measures and tactics currently in use indicated that the following are be effective:

- Injunctions addressed to illegal sites.
- Drawing up a black list of illegal operators.
- Blocking illegal sites (via Internet Access Providers).
- Blocking the payment of winnings made through an illegal provider.
- Prohibiting advertising of and by illegal operators.
- The principle of mutual exclusion: the public authorities in charge of regulating bets can decide not to grant a national licence to an operator that does not comply with the rules established in another state; they can also decide to revoke an operator's licence if the operator commits illegal acts in another country.
- Establishing an offence for illegal bets: in this case, betting on an illegal website is criminally reprehensible; therefore, the individual is responsible for identifying legal/illegal websites and not betting on an illegal website.

### *Search engines in the fight against illegal betting*

Practices in the field of combating illegal bets have been set by Belgium, Israel and the United States. Although the mechanisms put in place in these countries have proved to be efficient, the case law of the Court of Justice of the European Union (CJEU) on the limitations concerning the requirements of the Member States regarding Internet Access Providers (IAPs) are worth noting. The advantages granted by the Court to the IAPs through these two decisions could in fact restrict the possibility of blocking procedures favoured by the public authorities.

Repressive measures and potential sanctions seriously limit the number of illegal bets. This is the case regardless of the regulation model used (US: prohibition; Israel: monopoly; Norway: licences). This conclusion is important because it represents a clear response to the preferred argument of illegal operators. These operators maintain that since no blocking measure is entirely effective, states should accept all operators that are granted a licence somewhere (even in a tax or betting haven). While it is true that no technical measure can completely eradicate illegal operators, especially given the creative measures used to circumvent regulation, regulatory models do exist that can dramatically reduce the presence of illegal operators.

Of the methods listed above, four are critical, foundational pieces of a regulatory strategy. In order of implementation priority, they are:

- the principle of mutual exclusion (a sports betting regulator can decide to grant a licence only to operators that are not listed on the blacklist of any countries);
- blocking payments through an indirect approach, as is done in the United States (the responsibility for results is thus transferred to financial and other related institutions);

- establishing a blacklist (not public) of illegal operators and blocking their websites;
- prohibiting the advertisements of illegal operators, subjecting media outlets to heavy fines for accepting to sell advertising space to these operators.

### ***Improving tools adopted through the initiative of betting operators and sports institutions***

Certain European Lotteries (EL) have created, since 1999, a sports betting monitoring system capable of detecting certain irregularities on the market. Their example was followed in 2005, by ESSA, an association of private operators, which developed a similar system and concluded several agreements with sporting federations, in order to generate alerts in cases of suspected manipulation. These monitoring tools need to be perfected. When issues linked to the manipulation of sports competitions became a major subject for the future of sport, the two groups of operators (the lotteries on the one hand, and bookmakers and pure players on the other) each developed codes of conduct to control the risks of manipulation linked to sporting bets. The lotteries' codes of conduct aims to defend a regulated gaming model, where betting formulas remain reasonable and are designed for bettors who wager on a casual basis. They also explicitly stress the necessity to take firm action to combat illegal bets. For the members of ESSA, EGBA or RGA (associations of private operators), who sometimes operate without authorisation in the jurisdiction of the consumer where they sell their products, the first concern is protecting the consumer from risks of fraud and creating monitoring and internal control tools. Expertise is also crucial. Therefore, betting operators must co-operate with sports entities to train and inform their members.

### ***Developing instruments for prevention, information and education***

Among the methods likely to decrease risks of manipulation of sporting events, prevention and information are vital. They are simple to put in place, efficient and directly operational. The risks that, for example, an “educated” athlete or referee will become involved in fixing a sporting event are greatly reduced. Prevention and education are the key tools that can produce results in the short term.

### ***Increasingly diverse actions***

Today, the range of preventative actions used by the various stakeholders is becoming more diverse. While not exhaustive, the following includes various actions that may be taken, some complementary.

- organising and co-ordinating actions (unit dedicated to sport integrity, network of trainers, etc.);
- adapting sports disciplinary procedures (models, conflict of interest rules, etc.) and codes of conduct;
- informing sports leaders, public authorities and targeted individuals (for example, media outlets);
- in-depth training of trainers;
- preventive actions destined for sports participants (face to face, e-learning, interactive fora, using social networks, practical guides, etc.);



- communicating with the public;
- other actions (studying the behaviour of sports participants in connection with fixed matches, ombudsman, etc.).

It is worth noting the motivations for preventive actions: anticipating risks, reaction times for concrete problems, improving image, seeking financial resources, etc.

### ***Recent awareness and education programmes***

The ICSS-Sorbonne report attempted to analyse the main measures known to be in use to raise awareness of sports manipulation and identified about 60. Campaigns aimed at prevention and information are a recent phenomenon; 60% of the programmes identified were launched after 2012, and more than 75% after 2011. This can be explained by the fact that most of the large scandals were uncovered fairly recently. The trend is clear: most organisations develop programmes in response to a widely publicised case and not as a preventive measure.

North America was the first continent to set up preventive and educational measures to promote integrity in sports. However, since 2010, after repeated scandals, Europe has also established educational programmes on the manipulation of sports competitions and sports bets. More than 40% of the operations in Europe concerned football, tennis, cricket and rugby. Not surprisingly, football and the multisport and government organisations (the International Olympic Committee [IOC], SportAccord, the Australian government, National Olympic Committees, etc.) each represent one-third of the preventive actions established for sport integrity.

### ***Improving the governance of sports organisations – a new priority***

Potential flaws in the governance of sports institutions could directly or indirectly increase their vulnerability to manipulation of sports competitions. This could either be directly, by not protecting them against risks that corrupting agents may influence organisations or individuals, or indirectly, by preventing them from either initiating the fight against the manipulation of sports competitions (by not sufficiently responding to them, for example), or from conducting an effective fight, because of a lack of legitimacy.

An analysis of risks linked to the governance of sports organisations that are likely to affect sports integrity identified the following risk factors:

- control of the organisation by organised crime
- financial difficulties of the organisation
- denying a situation from fear for the organisation's image in the event of a scandal
- lack of interest in sports integrity issues; operational difficulties in the management of integrity issues (including a lack of responsiveness)
- favouring short-term objectives to the long-term interests of the organisation
- isolation of the sports organisation from the public authorities (thus running the risk of insufficient reaction)

- dilution of responsibilities between the stakeholders of a given sport on the subject of integrity (rising an inadequate reaction)

As with public authorities and other private organisations, sporting institutions are required to observe good governance that is based on three principles: responsibility, transparency and participation. These principles develop into a series of more concrete requirements (legitimacy of the organisation's managers, development of a strategic perspective, taking into account the views of all the members of the institutions as well as external stakeholders, instituting appeal mechanisms, transparency of the decision-making process, the responsibility of decision makers, combating sports manipulation and conflicts of interest, complying with the fundamental rights and economic liberties of private persons, etc.). Certain specificities of the sporting movement have a direct impact on its governance. The main sporting institutions are simultaneously regulators and principal economic agents. They are generally concerned with adopting norms and decisions that help regulate their sport, but also with the advancement of their own economic and commercial interests. Sports organisations have varying objectives and differ widely in financial results, number of licensees, sporting results, etc., making a uniform approach difficult.

Several studies have already noted flaws in the governance of sports institutions, whether in general or in particular. In the fight against the manipulation of sports competitions, they can be prone to stalemate, a lack of responsiveness and transparency and a certain paralysis in the decision-making process. Whether spontaneously or through external pressure, certain sporting institutions have adapted their systems of governance as their functions and public opinion and regulatory requirements evolved. Examples include the adoption, in 2008, of the Basic Universal Principles of Good Governance of the Olympic and Sports Movement by the IOC. This illustrates the indirect impact of good governance, that targeted measures can only produce results if they are coupled with sound institutional structures. Another instance is the Union of European Football Association's rules on financial fair play, which were enacted on 1 June 2012. This shows the more direct impact of good governance in neutralising a precise factor capable of encouraging the manipulation of sports competitions, because the rules on financial fair play are designed to avoid late payments of salaries by clubs to their players (a key risk in sports fraud).

On the basis of the analyses in the ICSS-Sorbonne report and the recommendations given (for example, in resolution 1875, adopted on 15 April 2012 by the Parliamentary Assembly of the Council of Europe), several good governance measures that may help counter the risks mentioned above can be suggested:

- The integrity of sporting directors should be guaranteed, because the ethical competence of sports institutions can be compromised by the election procedure and functioning of the decision-making bodies;
- The managing bodies of a sport organisation should adopt a pro-active and preventive strategy, rather than a reactive one;
- The financial risks of sporting structures that can be required to remunerate athletes should be managed;
- The operations of managing bodies of sporting federations and leagues should encourage sports integrity;

- Each sports organisation should establish a classification of risks, primarily integrity risks, with a long-term perspective and a procedure for managing incidents;
- Each sports organisation should be mandated to establish an integrity committee with real authority;
- Integrity should be included in the statutes and regulations of national and international sporting federations and leagues.

### **Conclusion: What policy should be advocated, and why?**

While many stakeholders in the sports industry now acknowledge the scale of the threat, a co-ordinated, pro-active response has remained elusive. The disparate efforts of sporting bodies and governments to confront the challenge have not kept pace with criminal innovation. It has, however, created a better understanding of which policies can be effective. Implementing the right policies against illegal betting and the right frameworks for sports governance are prerequisites for addressing sports manipulation. The unique conditions of each sport, country and sporting body make a uniform approach difficult, but co-ordination on a global scale can help overcome these challenges, linking disparate efforts and offering sport protection against a globalised adversary.

Combating illegal betting is a public policy issue at all levels. Regardless of a country's regulation model and tax level, it is very difficult today to eliminate illegal bets. On a technical level, it is difficult to block all illegal sites, as well as the payments of illegal financial transactions linked to bets. In addition, numerous countries have not yet clearly defined the legal contours of Internet screening, since the Internet remains a young and dynamic medium. Lastly, combating illegal bets is not typically included among government priorities, given competing threats such as terrorism. While the complete eradication of illegal bets does not seem feasible, countries that have recognised the danger of illegal betting and mounted campaigns to combat it have obtained significant results.

By contrast with reactive measures, prevention initiatives targeting bettors and offenders, police action and co-operation with financial institutions have noticeably reduced the number of illegal bets. The most effective preventive and educational measures to promote integrity in sports requires, at least at the national level, co-operation between public authorities, the sporting movement and betting operators. In addition, sports leaders should be trained to anticipate risks to sports integrity.

In each sports organisation, information communication on the subject of sports integrity should reach all the stakeholders in the sport. These organisations should also decide who will perform this training and modify prevention programmes, as well as the best means of communication. A mechanism for evaluating the results obtained should be set up to adapt preventive programmes.

Lastly, the preventive actions undertaken, and the results obtained, should be made known to the public and media. Actions involving fans and supporters should also be encouraged.

## Notes

- 1 This “match of shame” was held in Gijón, Spain, on 25 June 1982. As explained by Albrecht Sonntag in an article published on 23 June 2014 in *Le Monde* entitled: “Mondial 2014: Allemagne-États-Unis, le prochain “match de la honte””: “The Austrians and Germans, once the score opened by Hrubesch in favour of the Germans, simply stopped playing after 75 minutes. Helpless victims of the masquerade, the Algerian players in the gallery waved money as a sign of disappointment. Never again! It is in this spirit that the German manager Hermann Neuberger, who was then vice president and head of the Organising Committees of the World Cup at FIFA, determined, as a result, that the last matches of the group stage should take place simultaneously. Changes were implemented as of the next edition. Nevertheless, the arithmetics of sports rankings still do not rule out the possibility of finding oneself in circumstances that are favourable for certain teams but bad for others. What can, or what should the German and American teams do next Thursday? Attack at any cost, while risking losing their place in the knockout stages due to counterattacks late in the game? Sports ethics would allow it, while professional opportunism would prohibit it. As Alain Cayzac wrote in his recent book *Petits ponts et contre-pieds*, players in 1982 committed ‘a professional faux pas by not taking the context into account’. The qualification of manipulation retained for such behaviour could be challenged. In fact, again according to Albrecht Sonntag, concerning some of the players who participated in this match, “they actually felt that the situation was uncomfortable, but (...) a prior arrangement was not necessary for all the world to bend to “constraints” and demonstrate “professionalism”. But according to other sources, after the halftime, the German player Paul Breitner approached the Austrians to ask them not to try to equalise. The pact was therefore concluded after halftime. Some also refer to a “pact of non-aggression”. In our search for categorisation, the existence of an explicit agreement is essential. If the pact is implicit, in the absence of a formal agreement, it is difficult to speak of “manipulation”. It should be noted that “manipulation” and “corruption” are two different concepts.
- 2 During the 2014 World Cup in Brazil, questions were raised about whether such a scenario would be repeated at the 26 June match between Germany and the United States. A draw would have allowed both teams to qualify for the knockout stages at the expense of Ghana and Portugal, which competed at the same time. Before the game, several articles discussed this possibility.
- 3 Such cases are unfortunately taking place more frequently. For recent examples, see the case of the professional football player sentenced to 30 years in prison by a court in Viet Nam ([www.bigstory.ap.org/article/9-footballers-face-match-fixing-trial-vietnam](http://www.bigstory.ap.org/article/9-footballers-face-match-fixing-trial-vietnam)) or the case of the Australian coach Zia Younan, sentenced to four months in prison with reprieve and a fine of AUD 3000 ([www.theguardian.com/sport/2014/aug/04/football-players-who-botched-matchfixing-result-told-it-was-life-and-death](http://www.theguardian.com/sport/2014/aug/04/football-players-who-botched-matchfixing-result-told-it-was-life-and-death)).
- 4 These cases involved charges of match fixing in professional football and placing bets placed on the designed result.
- 5 In their criminal code, as in France (corruption – active or passive – of sporting bets, Articles 445-1- 1 and 445-2-1 of the Penal Code), Bulgaria and Spain, in their sports code, as is the case for Cyprus, Poland and Greece; or even in their special criminal codes (Italy, Malta and Portugal).
- 6 Economics of sport as understood in academic education and research is designated as “sports economics” (sports economic analysis or “science”).
- 7 Estimate provided on several occasions by Valérie Fourneyron, French minister of Youth and Sports from May 2012 until March 2014. See her interview with the newspaper *Corsematin.com* of 7 February 2013: “In 2011, Interpol estimated that mafia networks used bets to launder USD 140 billion per year”.

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