

Reducing the illicit trade in tobacco products in the ASEAN Region: a review of the Protocol to Eliminate Illicit Trade in Tobacco Products

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Abstract

In November 2012, the fifth session of the Conference of Parties (COP) to the Framework Convention on Tobacco Control (FCTC) adopted the *Protocol to Eliminate Illicit Trade in Tobacco*. This paper examines the Protocol in the context of the illicit trade in tobacco products across South East Asia and highlights those areas of the Protocol which can be effective in reducing that illicit trade, and how the region could approach a coordinated implementation of those key provisions. Details of the current extent of illicit trade in the region, and of the main *modus operandi* of those active in that trade, are provided by the World Customs Organization's (WCO) Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP). This sets the context from which the key elements of the Protocol are analysed for their potential value as mechanisms to directly address regional risks. The paper then examines the question of implementation and discusses those Articles of the Protocol which will require a degree of regional coordination to be fully effective. This regional examination also includes the need for some degree of standardised or consistent approach to implementation of the key Articles to eliminate 'weak points' in the regional supply chains for tobacco.

The current situation in South East Asia

The nature of the illicit trade in any product means that those involved in that trade will seek to 'hide' their dealings and leave little or no trace of their activities. As a result, we may never get precise data on the size, extent and value of this unlawful business despite the fact that there have been many attempts to provide such detail. In terms of tobacco and tobacco products, there is little doubt that these products are illicitly traded in significant volumes and the authors outline 'what we know' as to the size, extent and *modus operandi* of that trade in the South East Asian region. This analysis is based on both market research data, and on seizure reports and investigations conducted by the World Customs Organization's (WCO) Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP).

Whilst tobacco remains a low cost but highly taxed product, the profits to be made from illicit activity will continue to motivate criminals not only to continue their activities¹ but to be creative in terms of how they conduct those activities. As can be seen from recent WCO and WCO RILO AP seizure activity for the region, there are already a number of sophisticated methods in place, all operating with the intention of having un-taxed tobacco enter a market without detection by the relevant customs and/or taxation authorities. These *modus operandi* appear not to be unique to South East Asia but have been found by the WCO to be in use in many regions. In summary, the main types of illicit activities detected to date fall into the following categories:

- Mis-description of the contents of an import or export consignment that contains tobacco products
- Movement of containers through multiple ports, including free ports/free zones, where repacking may occur, until an opportunity for diversion presents itself
- Round trip ‘exports’ originating in the region to outside the region with containers returning without being off-loaded in stated destinations
- Excessive importation of finished cigarettes for repacking and re-export in such quantities that authorities are unable to control the re-exportation process
- Non-licensed or ‘underground’ production facilities producing undeclared cigarettes for distribution into domestic and regional markets
- Non-containerised shipments moving across land, river and some sea borders without declaration (Sou 2013a, 2013b).

Using these types of illicit activities as a reference, and using actual case study materials, this paper now looks at the illicit trade in tobacco in South East Asia. This will serve as an excellent platform to begin an analysis of the potential impact for the region of the *Protocol to Eliminate the Illicit Trade in Tobacco* (the Protocol) in terms of its Articles.

The South East Asian region is considered a primary ‘destination’ for the illicit trade in tobacco, although significant quantities of illicit product are manufactured within the region for intra- and inter-regional distribution. Penetration of illicit tobacco has been put at between 7% and 9% of the regional market as a whole although there are some significant differences when looking at the size of the illicit trade on a country-by-country basis (Euromonitor 2013, pp. 27-28, 31-32, 58).

To date, the largest single seizure was in the order of 43.3 million sticks in Malaysia in early 2009 (WCO 2011, p. 10). Malaysia is noted as a market which is regularly reported as having the region’s highest illicit penetration with non-tax paid cigarettes making up between 36% and 40% of total cigarette consumption.² At the other end of the problem, we see Singapore with an illicit market penetration of around 5% of cigarette sales (Euromonitor 2013), with most markets in the region seemingly reporting illicit sales in the order of 9% to 11% of total consumption.

In terms of what this may mean to the region, Table 1 attempts to capture the potential government revenue losses from tobacco excise taxes during 2011 by applying the 7% to 9% illicit market share for the region as estimated by Euromonitor in its 2012 report on global illicit trade activities.

Table 1: Potential loss of government revenue from the illicit trade in tobacco in South East Asia during 2011

Country	2011 Tobacco tax in USD³
Brunei Darussalam	9,612,000.00
Cambodia	16,444,000.00
Indonesia	7,591,000,000.00
Laos PDR	26,623,000.00
Malaysia	1,645,570,000.00
Myanmar	275,000.00
Philippines	1,136,000,000.00
Singapore	750,000,000.00
Thailand	1,906,000,000.00
Vietnam	649,000,000.00
TOTAL	13,730,524,000.00
Illicit estimate of 7% to 9%⁴ = revenue loss	1,033,480,000.00 to 1,357,964,000.00

Source: Euromonitor 2013.

Based on Table 1, approximately USD13.73 billion was paid in tobacco taxes in 2011, which represents 91% to 93% of total consumption if we are to accept the Euromonitor data, meaning total tobacco tax losses in South East Asia of up to USD1.35 billion. So, how is this occurring?

The illicit trade in tobacco in the region is part of a global supply business as well as being a market for it. The region's proximity to China is an issue, with the Chinese reportedly producing somewhere between 93 and 168 billion counterfeit cigarettes per annum, and with some estimates up to 400 billion per annum, in what has been described as a domestic tobacco industry that has been 'redesigned' to service the black markets of the world (von Lampe, Kurti, Shen & Antonopoulos 2012, p. 44). China is also a lot more complex than just simply being an illicit tobacco exporter. Today, China is itself a large tobacco products consumer market with its own thriving domestic illicit trade – not just for cigarettes diverted without tax being paid but as a destination point for 'western branded' smuggled cigarettes (von Lampe et al. 2012, p. 44).

Using China as a source, Case Study 1 below represents the use of both South East Asia and 'free ports' to successfully divert non-tax paid cigarettes into a market. This multi-port consigning of tobacco products is a common approach as it increases the difficulty for authorities to track the consignment, and will often include the tobacco moving through a free port or free zone where customs controls are generally not applied in the same manner as they are to import/export cargo arriving or departing from a regular port, in this case allowing for repacking into unmarked boxes.

Case Study 1: Transit through and back for diversion in South East Asia

In this example, containers of cigarettes were exported from China as the source country and consigned to a Free Trade Zone in Mauritius. In the Free Trade Zone, the cigarettes were de-vanned and repacked. Instead of the original packages bearing cigarette source information, the syndicate used plain cartons to contain the cigarettes (see photograph below). Therefore, the new cartons obscured the cargo information and jeopardised any national tracking or tracing systems. Eventually, the cigarettes were loaded onto the same containers and returned to the South East Asian region and, eventually, back to China. The diversion (see map below) across the Indian Ocean and South China Sea took three months.



Source: Photograph and map courtesy of RILO AP.

South East Asian countries clearly act as transit countries for both regional and global illicit tobacco activities. Project Crocodile, which is based in the WCO's RILO AP, maintains a database of all suspicious import and export consignments as they relate to the illicit trade in tobacco. Reported by 18 customs agencies which are signatory to the project, during 2012 some 688 suspect export notifications and 321 suspect import notifications were received for analysis and dissemination to 'at risk' countries (WCO 2013, p. 15). South East Asian nations involved in the reporting of suspect movements in the project included Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

Included in the discussion of suspect transit activity is that of the supply to one country of tobacco products far in excess of those required to meet domestic demand. In this case, the selection of such a country is not based on its infrastructure as a regional hub port, but rather the country's capacity to detect and act upon the illicit activities of the criminals concerned.

In Case Study 2, the use of Cambodia as such a transit point is discussed. In Cambodia, the level of imports (when added with local production) far outweigh the needs of the domestic market. Further, reported re-exports of tobacco products are seemingly insufficient to account for this excess of product in the local market and as such there is the obvious question of un-reported re-exports which are just as likely to enter subsequent markets as un-declared imports (Southeast Asia Tobacco Control Alliance [SEATCA] 2013, p. 10).

South East Asia is not only a destination and transit point for the illicit trade in tobacco products but also is a source in some cases. 'Illicit whites' or 'cheap whites',⁵ and counterfeit cigarettes are manufactured in unlicensed or 'underground' factories without the knowledge of the relevant tax authorities. Provided the criminals can keep production undetected, the illicit products will find their way without duties and taxes into both the local market and the markets of neighbouring countries within the region.

Case Studies 3 and 4 illustrate the problems.

It appears a vast quantity of such cigarettes enter Vietnam and Cambodia by means of cargo feeders. On the other hand, some of the illicit cigarettes mentioned in Case Study 3 move between Indonesia and Malaysia (and likely other countries) via high speed motorboats which both demonstrate the organisation and the capacity of the criminals, and the difficulty of interception if suspicious movements are observed. Case Study 4 below outlines these concerns and relates to evidence given by Royal Malaysian Customs & Excise to a recent inquiry on illegal immigrants in that country. Also worth noting in that Case Study 4 is the use, once again, of free ports, in this case the Island of Labuan, in which cigarettes may be sent duty and tax free but seemingly are diverted into the domestic market as non-tax paid products.

Case Study 5 includes the use of 'mis-description' of the contents of a consignment in which criminals simply declare a product, with supporting commercial documentation which indicates a consignment of tobacco products is another good. This may include partially mis-describing a consignment, in that undeclared tobacco products are placed in the back of a shipping container, and other goods which are declared are placed in the front of the container so that any possible inspection by authorities will lead to the assumption that the consignment is in accordance with the manifest (unless the whole container is inspected).

Case Study 5 whilst focusing on the issue of mis-description, does also to serve to reinforce earlier activities in which criminals are using the South East Asian region as a transit point for the greater illicit trade.

Given the impact of the illicit trade in the region, it is now timely to assess the potential effectiveness of the new Protocol in addressing some of these problems in South East Asia, in terms of the various *modus operandi* used and the different scenarios outlined in the case studies.

Case Study 2: Excessive importing or transit country?

In 2008, cigarette trading in Cambodia was as follows:

Imports:	22.7 billion sticks
Domestic production:	4.5 billion sticks
Total available:	27.2 billion sticks
Domestic consumption:	7.0 billion sticks
Declared re-export:	0.5 billion sticks
Unaccounted for:	19.7 billion sticks

Source: SEATCA 2013.

Case Study 3: Manufacture of fake or illicit cigarettes

Regionally, there are many fake cigarette manufacturers. Underground and/or problematic cigarette manufacturing factories produce many brands of fake cigarettes and supply the consumer markets within South East Asia and the greater Asia Pacific region. Within South East Asia, it is known that 'JET' and 'HERO' (pictured below) brands are produced by a Sumatran-based tobacco company and seemingly not produced for the local market. However, they are imported illegally into a consumer country, usually via any number of transit points within the region.

Those illicit cigarettes usually do not comply with any laws of the consumer country and they will not have local import tax stamps or health warnings. Moreover, their quality is not tested by the national authorities and is, therefore, unknown.

The illegal smuggling of 'JET' and 'HERO' cigarettes is said to have been in place for 15 years.



Source: RILO AP; photographs courtesy of Portcullis International.

Case Study 4: 'Malaysia loses RM1 billion, no thanks to cigarette smuggling in Sabah'

'... "Contraband cigarettes sold in Kota Kinabalu normally originate from Labuan while Tawau gets its supply from Sungai Nyamuk and Nunukan. The east coast of Sabah gets its supply from Indonesia and the Philippines", Mohd Fadzly said.

'The modus operandi of the smugglers was to bring the contraband cigarettes into the state on powerful speedboats equipped with three to four engines, each with a maximum capability of 250 horsepower (HP) ... [which makes] 'the smuggler's speedboats extremely difficult to pursue'.

'... "Mohd Fadzly said the contraband cigarettes were normally sold in Kota Kinabalu, Lahad Datu, Sandakan, Tawau, Inanam, Menggatal and Ranau by illegal immigrants.

' "Between 2007 and 2011, the majority of those arrested for involvement in smuggling and selling contraband cigarettes were from the Philippines. Although after 2011 it appeared as though more Malaysians were involved, they were actually Philippines nationals who possessed local identity cards", Mohd Fadzly said to Chin [commission member Datuk Henry Chin Poy Wu of the Royal Commission of Inquiry on illegal immigrants in Sabah].

'... The most common cigarettes smuggled from Indonesia and the Philippines were kretek or clove cigarettes, followed by white cigarettes.'

Source: Lee Shi-lan, *The Malaysian Insider*, 24 July 2013.

Case Study 5: Mis-description of the contents of a consignment

Other than the genuine cigarettes being diverted in and across the region, there is also a significant flow of fake cigarettes in the region. Countries of South East Asia are often used by international cigarette smuggling syndicates as trans-shipment points. In April 2013, Hong Kong Customs detected an international smuggling syndicate seizing an estimated USD3 million worth of fake cigarettes and tobacco from a container. The cargo manifest said that the container held toilet paper, whilst shipping documents indicated that the consignee was a trading firm in mainland China. It was unusual for toilet paper to be exported from Malaysia to mainland China as China is already one of the largest manufacturers of toilet paper.

After a period of observation, it was determined that no party would attend for the collection of the container and it was decided that customs officers would open it for inspection. That inspection found some 955 cartons of counterfeit cigarettes including both 'DEAL' and 'REEF' brands. The counterfeit cigarettes were apparently destined for Australia as packaging included the phrase 'Made in Germany for the Australian Market'. It was believed from shipping documents that the container would have also gone to several more ports in a circuitous route before reaching Australia.

Clearly, the criminals were utilising several techniques to evade detection.

Source: WCO RILO AP.

Scope of the key elements of the *Protocol to Eliminate the Illicit Trade in Tobacco Products* (the Protocol)

During the fifth session of the Conference of Parties (COP) to the Framework Convention on Tobacco Control (FCTC), held in Seoul from 12 to 17 November 2012, the *Protocol to Eliminate Illicit Trade in Tobacco* (the Protocol) was adopted (World Health Organization [WHO] 2013).

The aim of the Protocol is to eliminate all forms of illicit trade in tobacco products by requiring signatories to take measures to more effectively ensure the integrity of the supply chain for tobacco products, and to cooperate internationally on a wide range of policy and administrative matters, as well as proposing a number of criminal offences based on supply chain controls.

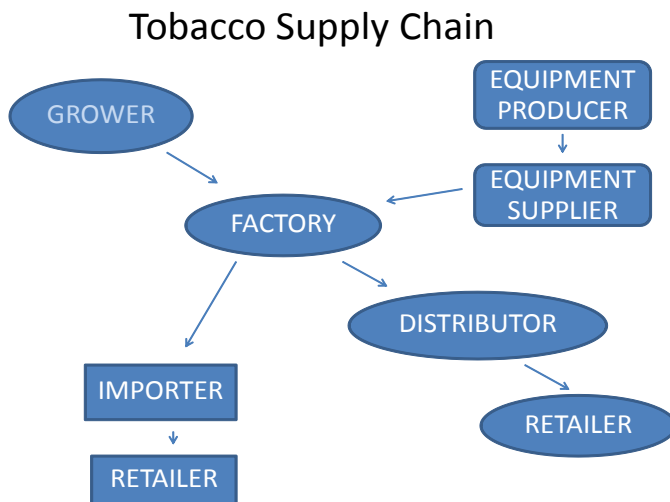
All Parties to the World Health Organization's (WHO) FCTC (currently 176 States and the European Union) are eligible to sign and ratify the Protocol. As at 31 July 2013, some 22 parties have signed the Protocol, which will remain open for signing until 9 January 2014, then countries accede to the Protocol.⁶ The Protocol itself will come into force 90 days after ratification by the 40th party is notified, however, as yet no signatory has ratified.⁷

The Protocol comprises a number of Articles which are designed to enhance controls of the supply of tobacco products. By ensuring the integrity of the supply chain, the Protocol aims to reduce the opportunities of illicit activities, and where illicit activities have occurred, there would be greater prospects of detection, or successful investigation and prosecution of the relevant offences.

To examine the Protocol in the context of the tobacco supply chain, it is useful to look at what actually represents a 'typical' supply chain. Looking at Figure 1, the supply chain starts in the top left corner with the farming of tobacco leaf. Leaf is harvested, cured and then sold to cigarette producing factories, where product is manufactured and packaged for sale. Tobacco factories, depending on the distribution model, will generally sell to a distribution or wholesale company. In some cases this distributor could be a wholly owned subsidiary company, or at the very least, an independent company with exclusive distribution agreements with the manufacturer.

The supply chain ends at the bottom right-hand corner of Figure 1 with the sale from the distributor to retail outlets. However, the Protocol also correctly recognises that tobacco supply chains are now international, and cigarette manufacturers may sell their product in overseas markets which results in an export transaction from the country of production and an import transaction in the intended country of consumption.

Figure 1: Basic tobacco supply chain



Source: Preece 2013.

Significantly, the Protocol includes the manufacture and supply of cigarette making machinery as part of the tobacco supply chain. Importantly, this recognises the risk of such machinery being supplied to 'underground', non-licensed, or non-compliant cigarette making factories such as those mentioned in Case Study 3. There is also a desire in the Protocol to match production capacity with consumption in a particular market. As such, Figure 1 includes in the top right corner, the addition of cigarette production machinery manufacturers and suppliers as part of the supply chain.

The Protocol also recognises the possibility that cigarette manufacture/export and tobacco import/manufacture may occur in ‘free zones’ which, as shown, have been implicated in high risk illicit activities. Changing technology is also contemplated and the Protocol recognises that in some markets the internet and other technology platforms are permitted for the sale of tobacco products, and that this policy may continue. As with free zones, the Protocol seeks to have the relevant supply chain-based controls applied to these types of sales.

International supply chain integrity is not a new concept and in the context of anti-terror initiatives, the WCO has its SAFE Framework of Standards which seeks to improve the integrity of the international supply chain.⁸ Whilst the WCO’s SAFE Framework has a significant trade facilitation component with the capability to ‘authorise economic operators’ who have attained a certain level of integrity, there are some concepts which may link with the Protocol from an international trading perspective, particularly in relation to the roles of customs agencies.

The main forms of supply chain controls proposed include licensing a range of activities, record-keeping for these licensees, the conduct of ‘due diligence’ by licensees prior to making sales and perhaps most significantly, the ability to track and to trace tobacco products as they move through the supply chain, including internationally.

The Protocol then proposes a range of new offences to support the operation and effectiveness of the supply chain controls. These proposed offences also seek to criminalise many of the illicit activities that form part of the illicit trade in tobacco products, properly reflecting the seriousness of that trade and its consequences.

Given that the trade in tobacco products is international and transboundary, the Protocol recognises that mutual cooperation will be required to ensure the supply chain controls are effective, and that offences can be properly investigated and illicit traders brought to justice. This type of cooperation is at several levels from simple information sharing on statistical data relating to seizures and *modus operandi*, through exchanges of intelligence on risks and targets, and in the investigation of transboundary illicit activities, including extradition of suspects.

This paper focuses on what are considered to be the key Articles, or those Articles of the Protocol that comprise Part III which deals with ‘supply chain controls’, Part IV ‘offences’ and Part V which covers ‘international cooperation’ and an analysis of how these Articles should be implemented in the region both from a national and regional perspective. The analysis considers regional risks and links the areas of the Protocol with the case studies above.

Implementation of the key elements of the Protocol across the South East Asian Region

Having looked at the Protocol, it is now important to look at how the key Articles of Parts III, IV and V can be implemented at both a national and regional level to maximise their effectiveness. Implementation will require a number of policy decisions to be taken by each country and many of these should be taken on a consistent basis across the region or based upon a consistent standard of implementation.

This will become a critical issue as the Protocol moves towards coming into force and at this point, there is a lack of guidance on how such policy questions should be addressed. For those Articles requiring regional and global implementation, there is still some uncertainty as to who will support such national (when required), regional and global implementation.⁹ It is expected that such guidelines may be developed under the Meeting of Parties (MOP) and Conference of Parties (COP) processes under the direction of the WHO Secretariat, and have been prepared for certain aspects of the larger FCTC.¹⁰

It remains to be seen whether this is effective, or whether the WHO Secretariat should be working with more ‘enforcement’ orientated agencies such as the WCO or the United Nations Office on Drugs and Crime (UNODC) where agreements are already in place, in terms of maximising the effectiveness of the Protocol and as set out in its preamble (WCO 2013, p. 12). Both agencies are ‘global’ with ‘regional’ structures, and together have significant histories and experience in managing borders and transnational crime.

When undertaking analysis of the regional implementation of the Protocol in South East Asia, support will be needed on several fronts. There will be a need for each country to:

- make a number of national-level decisions for which guidance on best practice could be sought when implementing an Article
- make a number of national-level decisions as to the extent that country will implement a particular Article
- engage in a potentially greater level of administrative, legal and enforcement-related cooperation with regional neighbours.

Being in a position to offer this support, regions will also need to reach certain decisions; in particular, agreement on ‘benchmarks’ or minimum standards to apply in national policymaking for Protocol implementation, and opening the channels and providing mechanisms for regional information sharing and cooperation.

It is essential that the Protocol be recognised as dealing with the international trade in tobacco and that the supply chain for this product (both licit and illicit) will often cross one or more international borders. Thus, if the Protocol as a whole or key Articles in it are not implemented without some form of regional benchmark, the integrity of the supply chain can be compromised and transboundary tobacco movements in South East Asia will become increasingly vulnerable to criminal activities.

Even with guidelines from the WHO via COP, there will still be a need for capacity and capability in terms of implementing the various aspects of the Protocol, and then with on-going operation of the Protocol’s obligations on countries. Thus, whilst the WHO may eventually issue guidelines, agencies like the WCO and UNODC may still need to play significant roles in implementation, especially in a region like South East Asia which is still largely a developing part of the world.

This paper now analyses possible ‘benchmarks’ and other requirements for effective regional implementation, with a focus on what are considered the ‘key Articles’.

Part III: Supply Chain Control

Article 6 Licence, Equivalent Approval or Control System

This Article seeks to prohibit the activities of manufacturing, importing or exporting tobacco products, as well as manufacturing, importing or exporting cigarette manufacturing equipment, unless the entity concerned has been licensed for that activity. Further, Article 6 encourages each member country to consider, where appropriate, requiring a licence or similar authority for those entities engaged in retailing tobacco products; growing tobacco leaf; transporting either ‘commercial’ quantities of tobacco product or manufacturing equipment; and for wholesaling, warehousing, brokering, or distributing either tobacco products or manufacturing equipment.

The act of licensing has two main advantages (Preece 2008, pp. 78-80). Firstly, it will bring all related tobacco supply activities into the knowledge of the authorities. The issue of a licence does not just put the entity ‘in sight’ of authorities but the process of application provides these agencies with detailed

knowledge of the entity and its operations. As will be discussed below, the application process is one of collecting relevant information from potential licensees which can be utilised to assess risk; however, the minimum level of detail required from applicants will need to be considered.

Secondly, the licence provides an opportunity to lower the inherent risk from the tobacco supply chain by ensuring only those entities of a minimum integrity level are operating in that supply chain. Based on application details which can be reviewed and tested, only those applicants reaching a ‘benchmark’ will be so licensed. The licence issued is a recognition that the entity operates with integrity, and the licence identification is then used for others in the supply chain to recognise a *bona fide* business operating lawfully in the tobacco supply chain.

Further, in relation to reducing inherent risk, the issuing of a licence generally provides for the ability to place restrictions and/or conditions on the licensee where a perceived threat is observed. The types of restrictions and conditions that could be utilised are not exhaustive but could, for example, include:

- a security bond relative to the size of the duty and tax liability of tobacco products to be deposited by licensees who store duty and tax suspended product
- wholesale operations not permitted to store duty paid and duty suspended tobacco products together in the same premises, or
- pre-approval required before duty suspended tobacco products are moved from one premises to another.

The 1st policy question – Competent authority

As part of the implementation of the Protocol, Article 6 will require three important policy questions to be addressed by individual countries. The first of these questions relates to assigning a ‘competent authority’ to administer the licensing regime. Likely agencies could include Customs, Revenue or a similar agency, given the ‘connection’ between these agencies and elements of the existing supply chain components of tobacco manufacture, importation, and exportation which are generally already subject to some form of regulatory regime. This licensing is likely to be primarily linked to bonded operations, such as bonded factories and warehouses where domestic leaf is manufactured into cigarettes, or imported finished cigarettes are held with duty suspended, or tobacco leaf is imported for further manufacture. However, what is important to note is that significant tobacco supply and trade knowledge is developed within these customs and revenue agencies, which adds to their capabilities in a wider licensing regime.

Currently, customs agencies will license the warehouses holding imported leaf for manufacture and imported cigarettes, whilst a tax or revenue department will license domestic production. In some cases, a Customs & Excise Department has jurisdiction over all import, export, and domestic activities¹¹ and such an agency, where it exists, could be a logical starting place for a ‘competent authority’.

However, the question of competent authority is not seen as ‘critical’ provided the chosen agency is capable of administering such licensees, and is also capable of cooperating with both relevant agencies internationally and with other revenue and enforcement agencies domestically. The overriding principles in this first policy question are that the agency has sufficient capacity to both administer a licensing regime and to coordinate with relevant local and international agencies.

The 2nd policy question – Licensing regime

The second policy question is crucial and relates to what activities will be included in the licensing regime. Article 6 dictates that the manufacture of tobacco products and manufacturing equipment, as well as importation and exportation of tobacco products and manufacturing equipment, ‘shall’ be included but requires countries to only ‘consider’ other activities in the supply chain. Of significance are the activities of farming tobacco, wholesaling, commercial transporting, and other dealings such as broking and warehousing.

The immediate question is perhaps ‘why would any country want to omit any of these activities from a licensing regime’? It would seem logical that if certain aspects of a supply chain that are considered a risk or have the potential for risk are excluded from a sound control like licensing, then opportunities for diversion and other illicit activities will remain and simply ‘shift’ from existing areas to those unregulated areas of the tobacco supply chain.

The Article makes one interesting exception to licensing: ‘traditional small scale growers, farmers and producers’, although it does not define what constitutes a ‘small scale’ operation. It is likely listed as an exemption for licensing as the Protocol in Article 1 defines ‘supply chain’ as including the growing of tobacco ‘except for traditional small scale growers, farmers and producers’. However, when any regulatory environment begins to allow exemptions and, in this case, an undefined exemption, the administration becomes difficult as many operators either fail to apply for a licence or seek to be excluded from licensing arrangements based on methods or scales of production.

Further, the exemption is seen as not needed and likely to create unnecessary risk as some illicit tobacco trade actually originates or is conducted by small growers and producers.¹² At the very least, this provision calls for some form of tightly drafted definition that severely limits the availability of this concession.

In terms of the other potential exemptions through ‘national consideration’ such as farming, wholesaling, warehousing, and transportation, the preferred position would be to license all such activities. However, minimal consideration could be given to linking the duty and tax status of the tobacco as a principle in addressing this policy.

In this context, the consideration would be that tobacco farming which produces the main raw material for tobacco products (which will be a discussion point in record-keeping policies) as well as the likelihood that a tax liability arises for the tobacco farmer once the tobacco leaf is harvested, and rightly should be accounted for to authorities. Thus tobacco farming should be licensed in all instances, except where the Protocol has specifically exempted ‘traditional, small scale farms’. In these cases, again there is a need to develop a very clear working definition or guidelines as to what constitutes ‘traditional, small scale’.

Warehousing, wholesaling, transporting and other dealings could easily all be licensed, however it is recognised that many entities could be involved. As a minimum, the policy could be linked to the duty and tax status and where such activities will or may involve tobacco products which are duty suspended, those activities shall require a licence. This principle applies because of the risk of diversion where tobacco products have not yet been subject to duties and taxes. Duty and tax paid tobacco products can still pose a risk in that they can be later subject to export and duty drawback, or be exported from a low tax country to a high tax country (bootlegging), however, other supply chain controls could mitigate these types of risks.

To illustrate the policy option, a tobacco factory issued with a licence under Article 6 produces finished cigarettes and contracts a company to distribute the products through the domestic market. Where the distributor has their own transport and storage facilities, and the storage facilities are bonded warehouses under relevant customs or tax legislation for the holding of duty and tax suspended goods, the requirements of Article 6 should be applied to the distribution company and its premises. Where the distribution company is unable to store duty and tax suspended products and the manufacturer forwards only duty and tax paid cigarettes to the distributor, the country can opt whether or not to apply Article 6.

In summary, Article 6 works best when all commercial activities relating to the manufacture and distribution of tobacco require licensing. However, if a minimum standard needs to be adopted then all commercial activities relating to the manufacture of tobacco products and the distribution of duty and tax suspended tobacco products should be licensed.

The 3rd policy question – Licensing administration

The third and final area of policy is administration, which would include the licensing and approval

process, levying of fees, the need to place time limits on validity, and what occurs should the licensee breach any condition or commits an offence under Article 14 of the Protocol.

In terms of the application process, Article 6 does provide a minimum level of information that should be required by applicants for a licence. However, there is no discussion of the criteria that should be met by applicants in response to information provided. As mentioned previously, the licensing regime is a critical area of the Protocol as it determines which entities can enter the tobacco supply chain and do business and which entities represent too great a risk. Once entities with significant risk are allowed to enter to deal in tobacco products the basis of Article 6 and the integrity of the supply chain are undermined.

Table 2 looks at the information proposed to be collected from applicants via Article 6 and the likely reasoning that information was sought. The third column identifies the type of criteria that need to be developed for competent agencies to use in assessing whether an applicant should be granted a licence and whether restrictions or conditions, if any, should be applied at licensing.

Continuing its focus on administration, Article 6 contemplates the right to levy licence fees. In relation to such licensing fees there are several schools of thought. The first is that there should be no fees as they would be additional costs to businesses, and those businesses usually provide significant tobacco duty and tax revenues; moreover, Article 6 is about supply chain controls and not revenue generation.

At the other end of the thinking is that large application and renewal fees work to ensure that only serious, financially viable businesses are entering the tobacco supply chain, by placing a barrier to less serious and non-viable entities. Then the mid ground would suggest moderate or minimal fees that are more reflective of the administrative costs borne by the competent authority to license and re-license entities.

There is however some benefit in all licence fees in the region having some consistency so that investment decisions are not based on this additional cost where an excessive fee is payable in one country but is free in a neighbouring country which could see a business make decisions as to where to base certain operations.

Placing a limit on the validity of the licence – generally one to three years – provides an effective way to motivate continual compliance and an opportunity for competent authorities to monitor that compliance. Provided re-licensing is not an automatic process on receipt of a fee, the renewal process will have an effect.

Whilst licence time validity and fees are not seen as critical policy decisions, the ability to be able to suspend and, if necessary, cancel a licence is. Competent authorities must have this ability as leverage over ongoing compliance and to protect future tobacco tax revenues. Having said that, guidelines can be developed which reflect elements of natural justice, transparency and the need to ensure compliance in the event of a need to sanction a licensee – for illustrative purposes only, guidelines similar to Table 3.

Table 2: Application criteria

Information required by Article 6	Likely reason	Criteria which need to be met for effective licensing control
Name of entity and relevant tax or other identification	Establish <i>bona fide</i>	Entity lawfully exists and is properly registered for all duties and taxes
Names of persons in control	Establish integrity of applicant	Persons are fit and proper in terms of not being the subject of criminal conviction or investigation Persons have relevant knowledge, experience and qualifications
Previous criminal conviction/s	Entity is fit and proper to hold a licence	Entity and/or principal/s not to have been convicted of a fraud-related offence which carries a sentence of imprisonment
Location of premises	Establish <i>bona fide</i> Location of manufacturing equipment within premises	Premises suitable for the production or storage of tobacco products or manufacturing equipment Premises physically secured Production capacity details
Details of products (or manufacturing equipment)	Identification of brands Serial numbers of equipment	Volume of production matches capacity Volume of production should match information provided re market for products
Bank account/s	Tracing future transactions	Confirmation from bank of account details
Market for products	Assess size of market to reconcile with information on volume capacity of manufacturing equipment	Separate sales by domestic and export Separated sales by tax paid and tax suspended Estimated volume of imported leaf and imported finished products TOTAL SALES of product do not exceed market size

Source: Preece & Sou 2013.

Table 3: Licence breaches and possible sanctions

Nature of breach	Possible sanction/s
Failure to keep proper records	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event – cancellation
Not make records available for audit	Licence suspended until records made available
Not conduct due diligence	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event – cancellation
Not inform change of premises, personnel or equipment	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event - cancellation
Non-payment of licence fees	1st event – warning letter 2nd event – administrative penalty Subsequent event – licence suspended until fee paid
Suspected of an Article 14 offence	Where the offence has a penalty of imprisonment, licence suspended for the course of the investigation and prosecution
Convicted of an Article 14 offence	Licence cancelled

Source: Preece & Sou 2013.

How can licensing immediately act to reduce the risks? In Case Study 2 we saw the excessive importation of cigarettes, well in excess of the local market needs, and clearly insufficient re-exportation to cover the over-supply. Article 6 will require the importers here to be licensed, and in that process need to demonstrate their volumes of product are commensurate with the market. Additionally, should declared volumes be reasonable, should checks of *bona fide* and of criminal records indicate the entity or its controlling principals are not ‘fit and proper’, this importer will not be able to import tobacco products.

Article 7 Due Diligence

The requirement under Article 7 for industry to conduct due diligence on their customers will link effectively with the licensing of entities under Article 6. It also reinforces the benefits of adopting a policy with maximum coverage of the licensing regime, as the licence identification held by a customer provides an immediate notification that the customer has undergone vetting by the competent authority and poses a lower risk. Where countries elect to limit the activities to be licensed, the due diligence process to confirm the credibility and integrity of a customer becomes more difficult.

However, in addition to confirming a licence is held by the customer, the supplier should also be looking to confirm that quantities of tobacco products or the nature of manufacturing equipment to be sold is appropriate to the market, and for the customer’s position in the market. It would, for example, under this Article be inappropriate for a manufacturer of cigarettes to sell to a wholesale dealer an amount of cigarettes considered to be in ‘excess’ of the market’s needs, or in excess of regular purchase volumes,

or reasonable purchase volumes, even if the customer is licensed. Competent authorities could ensure that licensees are verifying customers as licensees, monitoring volumes, and performing other checks of non-licensed customers as part of any licence renewal process, should there be concerns by that agency.

Due diligence checks extend to suppliers of manufacturing equipment and it would be difficult to imagine such an equipment supplier selling any relevant machinery to any entity which does not hold an Article 6 licence for manufacturing.

Where a sale to a customer is to proceed, the supplier is also required to take note of the customer's bank details and to confirm that the customer does not have a criminal record. However, where licensees feel obliged not to make a sale to a customer on the basis of a due diligence process, the licensee will be required to report this to the competent authority.

The effectiveness of due diligence is enhanced by making available 'blocked customers' or 'black lists' which should comprise the following:

- entities who have failed to secure an Article 6 licence upon application
- entities who have had their licence revoked for criminal behaviour
- customers of licensees who have had sales refused on the grounds of due diligence, or
- information supplied from another domestic agency or competent international authority, as to serious duty and tax fraud activities.

The ability to check either a customer's current licensing status, or a 'black list' for customers not needing a licence, will underpin the due diligence process.

Given that there is significant international trade, due diligence may also be required to be undertaken on foreign customers. Again, this process is largely enhanced if the foreign customers can produce a licence issued by their local competent authority rather than having to conduct an international due diligence check of the customer, and further demonstrates the need for some consistency in licensing activities and those entities conducting them.

How will due diligence assist in securing the supply chain? Returning to Case Study 3 an 'underground' or unlicensed factory is producing both cheap white and counterfeit cigarettes for distribution in the region. Article 7 will require the manufacturer of the cigarette making equipment to conduct due diligence on the customer seeking to acquire the equipment. In this case, the unlicensed factory should not be able to acquire the necessary equipment to produce cheap whites and counterfeit cigarettes as they would fail due diligence.

Article 8 Tracking and Tracing

The Protocol ambitiously proposes that a global tracking and tracing regime shall be established 'within five years of entry into force of this Protocol'. The global regime will comprise national and/or regional track-and-trace systems and 'a global information-sharing focal point' located at the WHO FCTC Convention Secretariat.

In the context of the Article, 'tracking' refers to the ability to monitor movement of product in the supply chain, whereas 'tracing' refers to the ability to recreate that movement.

The proposed system commences with a need for countries to establish a requirement that all cigarettes have affixed to each 'unit package' and each 'outside package', a unique identifying mark such as a 'code' or 'stamp'. Each of these unique identifying marks must then contain the following data:

- (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 (United Nations [UN] 2012, pp. 12-13).

The objective of the unique markings and this level of detail is for relevant agencies to be able to determine the origin of any cigarette packet, and the point (if any) of any possible diversion into the illicit market. It may also be used to monitor movements of tobacco through the supply chain and be able to confirm the legal status of the product at any particular time. Even where a country has a relatively low tax rate of tobacco products, a track and trace system still needs implementation to the agreed standard¹³ otherwise there will be a 'break' in the tracking and traceability of products leaving all other countries linked to a global system without vital information.

Article 8 is perhaps the most critical of the Protocol as it truly addresses the risks associated with the global supply chain as tobacco products move from dealer to dealer and from country to country. As seen in several of the case studies, these multiple international movements are often a significant component of diverting tobacco products into the illicit market, and tracking and tracing can provide a solution to address some of these risks, or indeed facilitate the timely investigation and prosecution where diversion has occurred.

However, the most important Article for implementation is seemingly the most difficult to implement. Without some agreed standards in relation to technology and data sets, there will be 'gaps' and 'delays' in the knowledge about suspect movements and their reconciliation.

It is therefore important for this issue to be looked at regionally (and realistically, globally). One risk to successfully implemented track and trace systems is that individual countries build their own local monitoring systems and so effective tracking and tracing of products across borders becomes difficult. Without a regional approach, incompatible monitoring systems cannot communicate the required critical data between the agencies of each trading partner. Thus, there needs to be a move towards a 'standard' within the tracking and tracing concept for coding and data management.

Implementing a regional (or global) standard of secure coding and data management systems would enable law enforcement authorities to easily retrieve, through a single access point and in a standard format, information about the product, its manufacture, distribution and legal status, including products in transit.

The emerging track and trace technology now marks products with a unique identifier as required under Article 8 of the Protocol. The serialisation is generally applied during manufacture, on the packaging line, for which all data relating to the product and its manufacture is generated and is accessible by the relevant tax authority.

Whilst Article 8 provides some standards in terms of data, it does not in terms of the enabling systems. This is perhaps the priority: the development of standards and guidelines for countries (and regions) covering the IT needs to support the management of the systems. The relevant support features required in such a system would include:

- activation of data strips at packaging
- compilation of a database upon activation of data strips

- field authentication
- international traceability
- reporting.

Article 9 Record-keeping

Article 9 requires licensed entities to keep records and make them available upon request to the competent authority. The Article effectively looks at two categories of activities for which record-keeping is required – the first is for manufacturers of either tobacco products or of manufacturing equipment, and the second category is for those who are in possession of tobacco products or manufacturing equipment which is to be exported, or is duty and tax suspended and intended to be moved. It is likely that some entities will need to keep both categories of records.

In terms of outlining these record-keeping requirements, a summary of each category can be found in Table 4.

Table 4: Record-keeping – a possible licence condition

Manufacturers of tobacco products and tobacco manufacturing equipment	In possession of tobacco products or tobacco manufacturing equipment for export or non duty and tax paid tobacco products or tobacco manufacturing equipment
Commercial records which reconcile inputs to production	Date of shipment from the last point of physical control of the product/s
General information on market: <ul style="list-style-type: none"> • volumes • trends • forecasts • other relevant information 	Details concerning the product/s shipped (including brand, amount, warehouse)
Quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in: <ul style="list-style-type: none"> • stock • in tax and customs warehouses under the regime of transit or transshipment or duty suspension 	Intended shipping routes and destination
	Identity of the natural or legal person/s to whom the product/s is/are being shipped
	Mode of transportation, including the identity of the transporter
	Expected date of arrival of the shipment at the intended shipping destination
	Intended market of retail sale or use

Source: Preece & Sou 2013.

Manufacturers' records need to demonstrate that inputs to production can be reconciled or matched with outputs from production. This is a critical aspect of the Article and is required so that there can be confidence that all duty and tax liabilities created through manufacture are recorded (and can be tracked until brought to account). To insist on keeping records from the point where 'finished goods' are moved into inventory will not assist competent authorities to confirm, through audit, that all production

has been captured in the records (Preece 2008, p. 82). To this end, manufacturers should be requested to specifically keep commercial records as they relate to acquisition of raw materials; production specifications by brand; production (batch) runs; losses or gains; and quantity of finished product. Such a requirement could be a condition of a ‘manufacturing licence’.

Tobacco manufacturers also need to have records which account for the current and forecast markets for their products, the nature and type of manufacturing equipment they have in place, as well as the inventory (including tax status) they hold. This will assist in ‘flagging’ possible manufacturing operations that may be ‘over producing’ products which can be a risk indicator for potential illicit trade.

Finally, the Article wants tobacco licensees to hold such records for a period of at least four years.

Of note in this Article is the suggestion that all retailers and tobacco growers except ‘traditional, small scale growers’ keep records in relation to their operations without being specific. This will be a difficult requirement if the country has placed these activities outside the licensing regime. However, if it can be achieved, the priority would be to request records from tobacco growers that indicate volumes of leaf sold to licensed factories so that this can be reconciled with declared inputs to production at those factories, and acquisitions of finished cigarettes from suppliers by retailers to reconcile with declared sales by factories or other licensed entities.

How can record-keeping help? Record-keeping is not a preventative control such as licensing and due diligence, but rather a detective control. In Case Study 5 there was an importation of tobacco product which had been mis-described in the customs import declaration process as toilet paper. If a licensee actively mis-describes such consignments, competent authorities are unable to reconcile deliveries into a market by the licensee with products in possession, and duty and tax suspended products in possession. In other words, the competent authority will realise that the licensee does not have sufficient licit product to supply their market. Further, record-keeping provides ‘audit trails’ and at some point, and in another country, records will exist for any export or transit which eventually may confirm the agency’s concerns.

Article 10 Security and Preventive Measures

There are two main components in Article 10. The first requires those entities licensed under Article 6 to report to the relevant agencies in relation to cross border cash transactions that exceed an amount that is normally reportable under local cash transaction laws, and similarly, report any ‘suspicious’ transactions.

The second component places a responsibility for those same licensed entities to only supply either tobacco products or manufacturing equipment in amounts which are ‘commensurate with the intended market’. Thus, with ‘due diligence’ requirements, the Protocol is moving a number of obligations to eliminate the illicit trade onto the industry itself.

Article 11 Sale by Internet, Telecommunications or any other Evolving Technology

Article 11 recognises the increasing role of technology in the economy, particularly in relation to retail level sales of all types of goods. In relation to tobacco products however, the Article seeks to have countries consider ‘banning’ the sale through the internet or other technologies. Where a country continues to allow such sales, Article 11 requires those countries to apply the Protocol to those sales.

Article 12 Free Zones and International Transit

Trade investment policies run by many governments have attempted to attract manufacturing businesses to their economies by providing ‘free zones’, ‘export processing zones’, and similar regions in which foreign investors can operate free of many of the local taxes and regulations. This investment policy creates a policy issue in terms of who manages a ‘free zone’ and the rules that apply – is it a ‘Board of Investment’ under an industry portfolio, or is it a customs agency owing to the nature of the import and

export operations which occur, and does this set up a potential ‘gap’ in control of illicit goods? (Allen 2011, p. 19). In terms of the South East Asian region, whilst there are economic benefits from this type of policy, it has become a clear risk area in terms of the illicit trade in tobacco as seen in both Case Studies 1 and 4.

In recognition of these risks, Article 12 requires countries, within three years of the Protocol coming into force, to apply its manufacturing and transaction controls to any tobacco or tobacco product activities that are to occur in a free trade zone or free port. This implies, and the policy should be supported regionally, as meaning:

- **Licensing.** That manufacturers or dealers intending to operate in a free trade zone to manufacture tobacco products or manufacturing equipment, or to store or otherwise deal in tobacco products or manufacturing equipment, must first obtain a licence under Article 6 to do so from the competent authority. It may also be prudent to have the operators of free ports who may have occasion to unload, repack and reload tobacco products or manufacturing equipment also to have an Article 6 licence.
- **Due diligence.** That those conducting business within a free trade zone, or through an operator of a free port, apply the requirements of Article 7 in the relevant business transaction.
- **Record-keeping.** That licensed manufacturers and dealers keep records in relation to that manufacture, and in relation to any movement of duty and tax suspended goods, as well as free port operators in relation to any unloading, repacking and reloading activities.
- **Track and trace.** That manufacturers of tobacco products in a free trade zone still be required to affix the unique identifier as per Article 8.

Further measures include prohibiting ‘intermingling’ or the packing of tobacco products with non-tobacco products in the same shipping container when the container is removed from the free zone, as well as fuller ‘verification of international transit and transshipment’ of tobacco products through the free zone.

Article 13 Duty Free Sales

This Article seeks to have duty free sales subject to the relevant measures of the Protocol within a period of five years of the Protocol coming into force. However, the Article also suggests that the risk from the duty free market is not well known and therefore, has called for further research to be conducted through the ‘Meeting of Parties’ process.

Part IV: Offences

Part IV will support the implementation and enforcement of the supply chain controls outlined in Part III and will provide for a range of potential new offences that will be available for agencies to prosecute entities that fail to apply the appropriate supply chain controls. The following Articles are worthy of further analysis.

Article 14 Unlawful Conduct including Criminal Offences

Article 14 seeks to have countries adopt in national laws, offences which ‘follow’ the key components of the supply chain and general illicit activities. The main point to be made is the ‘criminalisation’ of the illicit trade in tobacco, providing incentive for the legitimate trade to ensure controls are working, and greater disincentive for those entities looking to undertake illicit activities. In summary, the key new offences sought to support the Protocol include:

- manufacturing, or any dealing in tobacco products or manufacturing equipment ‘contrary to the provisions of this Protocol’

- manufacturing, or any dealing in tobacco products or manufacturing equipment ‘without the payment of duties, taxes and other levies’ or any other acts of smuggling tobacco products or manufacturing equipment
- any form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false unique identification markings
- dealing in illicit tobacco or products bearing a false unique identification mark
- dealing in illicit manufacturing equipment
- ‘mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products’
- intermingling tobacco products with non-tobacco products in free zones
- ‘using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco products in contravention of this Protocol’
- ‘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’
- 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’
- ‘making any material statement that is false, misleading or incomplete, ... to any public officer or an authorized officer ... relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment’
- ‘misdeclaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment’; evading ‘the payment of applicable duties, taxes and other levies, or [prejudicing] any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment’
- ‘failing to create or maintain records covered by this Protocol or maintaining false records’
- ‘laundering of proceeds of unlawful conduct established [above] as a criminal offence’ (UN 2012, pp. 18-20).

It should further be noted that Article 26 then discusses the jurisdiction for where an offence has been committed given the nature of the supply chain. Article 26 does recommend the confirmation of jurisdiction by national laws, and this will become important as it is probable that the region will see an increase in the likelihood that offenders located in one jurisdiction will be committing offences against another jurisdiction. The offender, by their location, should not be able to escape subsequent investigation and prosecution.

Article 17 Seizure Payments

This Article requests countries to consider national laws which provide for the ability to demand unpaid duties and taxes in the event illicit tobacco is seized. It is still a little unclear what is trying to be achieved, as it could be assumed that most customs, excise or tax laws would provide this ability if an entity is detected with ‘smuggled’ product.

The Article may be trying to emulate the system which operates by agreement in the European Union with the major tobacco companies in which seizures of a tobacco company’s product in the illicit market can attract appropriate payments from that company.¹⁴ However, given the Article applies to either the ‘producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products and/or manufacturing equipment’, the Article may be attempting to provide a recourse to the last entity who may have failed in their supply chain control obligations and facilitated the diversion into the illicit market.

Whichever approach is being contemplated, the issue will be to seek consistency in the nature and assessment of seizure payments across the region. As with other aspects of the Protocol, once a particular country implements a policy which is not consistent with other countries' policies, it will influence illicit activities. In this type of policy, any country providing a concession on seizure payment arrangements could result in criminals focusing certain activities in those countries to mitigate the costs should those activities be detected.

Article 19 Special Investigative Techniques

In line with the move to try and criminalise many aspects of the illicit trade in tobacco, Article 19 encourages countries, where domestic laws permit, to apply special investigative techniques when investigating the range of new proposed offences in Article 14. The types of special investigative techniques discussed include methods such as 'electronic or other forms of surveillance and undercover operations' (UN 2012, p. 22).

The Article also seeks a greater level of bilateral or multilateral cooperation in investigating the illicit trade in tobacco, either at a formal agreement level or, at least, on a 'case-by-case', in recognition that there are often many legal and jurisdictional impediments to officials of one country operating in another, or sharing information about their nationals with foreign officials.

Part V: International Cooperation

International cooperation will be an important aspect in ensuring the successful implementation of both the proposed supply chain controls and prosecution of offences. The WCO could play an important role in Part V of the Protocol having established a range of international cooperation and information sharing arrangements under both its SAFE Framework Customs-to-Customs pillar, (WCO 2012b, p. 7) and in certain current regional reporting and dissemination arrangements run through the RILO office.

In terms of the Protocol, the key Articles of Part V are seen as:

Article 20 General Information Sharing and Article 21 Enforcement Information Sharing

Articles 20 and 21 relate to the sharing of general information such as seizures, methods of concealment and relevant import/export trade data, as well as more specific enforcement data such as licensing records, targeting of consignments, investigation outcomes, and detailed information on individual seizures. However, any handover of information to foreign officials will be subject to the 'confidentiality' provisions of Article 22, which defers to domestic laws and mutual agreements in the matter of what information is required to be kept confidential and not to be shared.

What is seen as required regionally for these levels of information exchange to occur is an appropriate 'platform'. Article 22 could indeed see many national laws restrict what type of information can be exchanged and to what type of organisation it can be released, therefore, there may be a need to look at current regional information exchange arrangements. In terms of customs activities, the WCO through its RILO AP is perhaps the appropriate 'platform' at this present time, with one of its main roles described as being 'a regional centre for collecting and analysing data as well as for disseminating information on trends, *modus operandi*, routes and significant cases of fraud'.¹⁵ This role of the global RILO network already includes illicit tobacco.

The WCO SAFE Framework will eventually be an option, with the Customs-to-Customs pillar setting standards to enhance electronic data interchange between customs agencies.¹⁶ Work is being done on areas such as agreeing common data model sets, and risk selection criteria – meaning perhaps one day certain information and target selection may be fully automated (WCO 2012b, p. 7).

The Association of Southeast Asian Nations (ASEAN) has also considered transnational crime in the region, and has had in place a number of regional agreements since 1997. These include the ‘ASEAN Declaration on Transnational Crime’ (1997), the ‘Manila Declaration on the Prevention and Control of Transnational Crime’ (1998), and an Action Plan known as the ‘The ASEAN Plan of Action to Combat Transnational Crime’ (1999) (ASEAN 2012, pp. 9-23). Currently, ASEAN still meets bi-annually at the Ministerial level on transnational crime,¹⁷ and it would be beneficial to have this level of meeting drive regional cooperation initiatives.

There is little information on the output of these initiatives although each calls for levels of information sharing and cooperation. The planned establishment of an ASEAN Centre for Transnational Crime which would have assisted in this regard does not appear to be in operation. However, there is also the ASEAN Chiefs of National Police group which does meet regularly but this group appears more strategic than operational. It would seem that the WCO’s RILO AP may need to take a leadership role in this information sharing proposal, and has been exploring this issue since May 2013.

Article 23 Assistance and Cooperation: Training, Technical Assistance and Cooperation in Scientific, Technical and Technological Matters

Article 23 relates to the provision of training and higher level technical assistance by one country to another. The Article reflects the developmental differences in the economies and encourages those countries with the capability to assist those countries without. The benefits of the Article include the increased capabilities of the less developed countries so as not to leave ‘capacity gaps’ in the international tobacco supply chain.

The training and technical assistance would be related directly to the building and operating of the supply chain controls of Part III of the Protocol and could extend to the investigation and prosecution of offences under Part IV.

The provision of training and technical assistance could be from country to country, or through appropriate regional organisations, such as the WCO which in addition to the RILO AP, has a regional Capacity Building office, the Asia Pacific Regional Office for Capacity Building (ROCB A/P). It is encouraging that ROCB A/P will be studying this issue soon. Other organisations could well play roles, such as UNODC which has expertise and regional resources to assist the lesser developed countries, and Interpol which runs specific capacity building programs to combat the illicit trade.¹⁸

Article 24 Assistance and Cooperation: Investigation and Prosecution of Offences and Article 27 Law Enforcement Cooperation

Article 24 is more specific in terms of international assistance. In this case, the Article requires assistance and cooperation in relation to investigation and prosecution of offences. The assistance and cooperation are subject to domestic laws, and is further confirmed by Article 25 which protects the sovereignty of each country and certainly prevents, for example, one country conducting activities under the Protocol in another country without appropriate agreement between the countries.

Cooperation is also sought under Article 27, in this case between law enforcement agencies, domestically and internationally. Using agreements, within domestic laws, countries are asked to undertake the following enforcement activities:

- enhance communication for secure and rapid exchange on information on criminal offences under Article 14

- ensure effective cooperation between customs, police, relevant agencies and other law enforcement bodies to identify the:
 - whereabouts of suspects
 - movement of proceeds of crime from Article 14 offences
 - movement of property and equipment used, or to be used in the commission of these offences
- provide samples of product for analysis
- exchange technical personnel and other experts where appropriate and subject to formal agreements where required
- exchange specific information on the *modus operandi* where Article 14 offences have been committed (UN 2012, pp. 27-8).

Article 27 also asks countries with the proper bilateral and multilateral agreements to exploit these fully and, where available, to use ‘modern technology’ when combating transnational crimes.

The same issues arise in Articles 24 and 27 as they do for information sharing across the region under Articles 20 and 21. There are no clear or obvious regional law enforcement platforms in operation for cross border investigation and process, however regionally based organisations, such as Interpol, have assisted in ‘field operations’ in which two or more South East Asian countries have been involved in the interception of illicit goods,¹⁹ and this model of the use of international organisational expertise may be what is required until the relevant Ministerial level agreements can be made by ASEAN.

Article 28 Mutual Administrative Assistance and Article 29 Mutual Legal Assistance

In addition to law enforcement cooperation, Article 28 looks at ‘administrative cooperation’ at the international level. Administrative cooperation includes, in this case, the sharing of general information which will enhance the effectiveness of controls of relevant agencies such as details of ‘new customs and other enforcement techniques’ and ‘new trends’, as well as about known offenders and the products they deal in.

Article 29 states that ‘Parties shall afford one another the widest measure of mutual legal assistance’ and cooperation when any investigation and/or prosecution of offences is being undertaken. The Article recognises that the illicit trade in tobacco is an international issue and that whilst offences will likely have occurred in one jurisdiction, evidence or offenders may be located in another. The Article requires countries to assist one another in this process of investigation and prosecution where permissible under domestic law or formal agreement, in:

- (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 (UN 2012, pp. 29-30).

Articles 30 and 31 expand this mutual legal assistance somewhat by providing for extradition of suspected offenders, provided the offence is serious and would be subject to serious penalties in the country that holds the suspect.

These Articles will require a minimum level of capability in the country asked to undertake the relevant administrative and legal activities needed to support other countries which are investigating and prosecuting offences under the Protocol. Again, there needs to be capacity building delivered to those countries that require it, and again, we see organisations like the WCO, UNODC and Interpol with their presence in the region and their expertise being in a position to assist.

How can the region analyse these policy issues and implement the Protocol effectively?

It is clear from the analysis that the implementation of the Protocol across South East Asia will require:

- a number of policy issues to be determined at a national level, particularly those relating to the key Articles of supply chain control such as licensing, due diligence, record-keeping, and track and trace
- some form of regional benchmarks or standards to assist countries with these policy issues so that there is some consistency in decisions taken on the key Articles
- capacity building to individual countries in need as they implement aspects of the Protocol
- establishment of regional cooperation programs in the areas of information exchange, investigation of offences, and prosecution of offences
- support in establishing and operating these types of regional cooperation programs from regionally based organisations with relevant resources and experience.

It is likely that the region will have to wait for guidelines on these relevant Articles to be issued by the WHO Secretariat after due process and consultation through COP. The COP process will involve country-level negotiation from South East Asia rather than from a regional level, however, it is hoped that the sort of analysis and findings from this paper are similar to what is fed by countries into the COP process. In that way, through the guidelines, there will be a minimum standard or benchmark on which countries can base national policy decisions.

Implementation of the Protocol with its reliance on regional (and international) cooperation, and of one country on another to properly administer the key Articles, will need the support of international agencies with relevant resources and expertise.

This paper has acknowledged the WCO for both its capacity building and regional intelligence roles in the Asia Pacific region, and believes there is a strong case for the WCO to support the region, particularly in relation to the operations of the various customs and excise authorities.

Given the nature of the illicit trade in tobacco, these customs agencies will have a key role in the import, export, transit, warehousing and, in some cases, domestic production of tobacco products, and of tobacco manufacturing equipment. Thus customs authorities may well find that they become the competent authority for licensing and other aspects of the Protocol. And the WCO may need to develop programs to assist those countries in need of this new capacity.

The WCO is also integral to the collection and sharing of information and intelligence related to the movement of illicit goods, including illicit tobacco products. It is well placed to enhance or strengthen this existing role as is sought under the Protocol.

However, certain legal aspects including amendment to national laws, investigation and prosecution of offences and enforcement cooperation in investigation and prosecution are highly specialised skills. Thus, other organisations are seen to be important to regional implementation.

As discussed, organisations like the UNODC and Interpol could be engaged to advise on and set up procedures relating to cross border criminal investigations and prosecutions, as well as in the position of national laws to support this and possible amendments that may be required. These agencies are also capable, when resources permit, of looking at capacity building of these same areas.

References

- Allen, E 2011, *The illicit trade in tobacco products and how to combat it*, International Tax & Investment Centre, Washington, DC.
- ASEAN 2012, *ASEAN Documents on combating transnational crime & terrorism*, ASEAN Secretariat, Jakarta.
- Boister, N 2010, 'Recent progress in the development of a Protocol on the Illicit Trade in Tobacco Products', *Asian Journal of WTO & International Health Law and Policy*, vol. 5, no. 1, pp. 53-86.
- Euromonitor 2013, *Illicit trade in tobacco products 2012: Will the new Protocol prove effective?*
- Havoscope Global Black Market Information [n.d.] 'Portion of cigarettes sold illegally in Malaysia in 2011', www.havoscope.com/portion-of-cigarettes-sold-illegally-in-malaysia-in-2011.
- Heijmans, P 2013a, 'Cigarette smuggling from Cambodia to Vietnam abounds', *Phnompenh Post*, 15 February.
- Heijmans, P 2013b, 'Up in smoke', *Bangkok Post*, 26 March.
- International Consortium of Investigative Journalists 2009, *Tobacco underground: the global trade in smuggled cigarettes*, Center for Public Integrity, New York, NY.
- Lieberman, J 2012, 'The new WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products: challenges ahead', *American Society of International Law, Insights*, vol. 16, no. 38.
- Lo, C 2013, 'Smugglers cash in big on "British" tobacco trafficked through Hong Kong', *South China Morning Post*, 8 April, pp. 1-2.
- Malaysian Insider 2013, 'Malaysia loses RM1 billion, no thanks to cigarette smuggling in Sabah', 24 July, viewed 30 July 2013, www.themalaysianinsider.com/malaysia/article/malaysia-loses-rm1-billion-every-year-no-thanks-to-cigarette-smuggling-in-s.
- Maybank Industry Research 2012, *Tobacco: lighting up!*, <http://upload.xinhua08.com/2012/0703/1341284174567.pdf>.
- Mirza, J 2013, 'Illicit cigarette trade to cost Rs100 billion to Exchequer', *The News (Pakistan)*, 19 March.
- Preece, R 2008, 'Key controls in the administration of excise', *World Customs Journal*, vol. 2, no. 1, pp. 73-92.
- Rejab, I & Zain, Z 2006, *The modus operandi of cigarette smuggling in Malaysia*, Technical Report, Southeast Asia Tobacco Control Alliance (SEATCA), Bangkok.
- Sou, G 2013a, 'Free Port of Mauritius: Are cigarette shipments "free" to move in Port Louis of Mauritius?', WCO Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP), *Monthly Circular, 11*, November 2012, pp. 32-40.
- Sou, G 2013b, *RILO Alert No. 15 of 2013: Illicit cigarette movements: JET & HERO Brands* (Analytic), WCO Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP), Seoul.
- Southeast Asia Tobacco Control Alliance (SEATCA) 2013, *ASEAN Tobacco tax report card: regional comparisons and trends*, 4th edn, Southeast Asia Initiative on Tobacco Tax (SITT) of the SEATCA, Bangkok.

- Transcrime 2012, *Analysis of the Draft Protocol to Eliminate Illicit Trade in Tobacco Products*, <http://transcrime.cs.unitn.it/tc/1047.php>
- United Nations (UN) 2012, *Protocol to Eliminate Illicit Trade in Tobacco Products*, <http://treaties.un.org/doc/Treaties/2012/12/20121206%2005-00%20PM/CTC%20IX-4-a.pdf>.
- United Nations Office on Drugs and Crime (UNODC) 2013, *Transnational organized crime in East Asia and the Pacific: a threat assessment*, www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf.
- von Lampe, K, Kurti, MK, Shen, A & Antonopoulos, GA 2012, 'The changing role of China in the global illegal cigarette trade', *International Criminal Justice Review*, vol. 22, no. 1, pp. 43-67.
- World Bank 1999, 'Measures to reduce the supply of tobacco', in *Curbing the epidemic: governments and the economics of tobacco control*, World Bank, Washington, DC, www1.worldbank.org/tobacco/chapter5.asp.
- World Customs Organization (WCO) 2011, *Customs and Tobacco Report 2010*, WCO, Brussels.
- World Customs Organization (WCO) 2012a, *Customs and Tobacco Report 2011*, WCO, Brussels.
- World Customs Organization (WCO) 2012b, *WCO SAFE Framework of Standards to secure and facilitate global trade*, WCO, Brussels.
- World Customs Organization (WCO) 2013, *Illicit Trade Report 2012*, WCO, Brussels.
- World Health Organization (WHO) 2010, Country Profile: Thailand, WHO, Geneva.
- World Health Organization (WHO) 2013, *Protocol to Eliminate Illicit Trade in Tobacco Products 2012*, WHO, Geneva.

Notes

- 1 Lo (2013) suggests tobacco can be manufactured in mainland China for export at USD6.40 per kilogram, then resold in some markets at wholesale prices as high as USD330.00 per kilogram – or a 5,000% mark up.
- 2 Euromonitor 2012, pp. 31-32 (40%); Maybank Industry Research 2012 (36%); Havoscope Black Market Research [n.d.] (36.6%)
- 3 Various sources including World Bank, SEATCA, FPO Indonesia, Thai Excise Department. Note: for Myanmar, data as at 2001 due to lack of credible sources. Rounding to nearest USD1,000 in each market.
- 4 Total collections = tobacco excise paid, and represents 91% to 93% of the total market; 7% to 9% calculation based on total market size.
- 5 'illicit white' or 'cheap white' cigarettes are unbranded and manufactured for the illicit market.
- 6 www.who.int/fctc/protocol/ratification/en/, viewed 31 July 2013.
- 7 See Note 6.
- 8 www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package.aspx, viewed 26 August 2013.
- 9 Lieberman 2012 www.asil.org/insights121214.cfm, viewed 7 August 2013.
- 10 Guidelines have been developed for eight Articles of the FCTC, www.who.int/fctc/guidelines/en/.
- 11 Brunei Darussalam, Cambodia, Indonesia, Malaysia, and Singapore each have customs and excise administered by the one agency.
- 12 Transcrime 2012 <http://transcrime.cs.unitn.it/tc/1047.php>, p. 18, viewed 9 August 2013.
- 13 Transcrime 2012, <http://transcrime.cs.unitn.it/tc/1047.php>, p. 14, viewed 29 July 2013.
- 14 Framework Convention Alliance (2008) Fact sheet about the EU Agreements with tobacco manufacturers to control the illicit trade in cigarettes.
- 15 www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~/_media/WCO/Public/Global/PDF/Topics/Enforcement%20and%20Compliance/Tools%20and%20Instruments/RILO/RILO_09EN.ashx.
- 16 Several articles in *World Customs Journal*, vol. 5, no. 2 (2011) refer to the importance of the SAFE Framework's Customs-to-Customs pillar.
- 17 See www.asean.org/communities/asean-political-security-community/category/overview-8.

- 18 United Nations Office on Drugs and Crime (UNODC) runs programs like Partnership Against Transnational Crime through Regionally Organised Law Enforcement (PATROL) in South East Asia, see www.unodc.org/southeastasiaandpacific/en/patrol.html. Interpol runs capacity building programs internationally and regionally which are specifically aimed at illicit goods, see www.interpol.int/en/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Capacity-building-and-training.
- 19 See, for example, where, on 30 July 2013, Interpol worked with Thai and Malaysian law enforcement officials to seize precursor chemicals in a van on the Thai-Malaysian border, www.interpol.int/en/News-and-media/News-media-releases/2013/PR089.

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