RECENT PROGRESS IN THE DEVELOPMENT OF A PROTOCOL ON THE ILLICIT TRADE IN TOBACCO PRODUCTS

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ABSTRACT

This article reviews the development to date of the draft Protocol on the Illicit Trade in Tobacco Products currently under negotiation as a supplement to the Framework Convention on Tobacco Control. It suggests that diversion from the licit trade into the illicit trade is the main target of the draft Protocol. It examines the process of development of the draft Protocol from the Expert's Template through the various drafts produced by the International Negotiating Body in Geneva in the first three rounds of negotiations held in 2008 and 2009. The article suggests that the European Community's agreement with the Tobacco Company Phillip Morris International has served as a model for many of the regulatory provisions in the Draft Protocol. The article identifies tracking and tracing, licensing and due diligence as the three main tools to be used to prevent diversion, and sets out the problems and progress of negotiations in regard to each. The article also sets out the main criminal justice

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provisions, modelled on existing provisions in crime control conventions, and examines the difficulties around criminalisation of tobacco related offences and the inclusion of a set of complex provisions for international procedural cooperation. Finally, the article speculates on the prospects for successful adoption of a protocol in the final stages of the negotiating process.

KEYWORDS: *illicit trade in tobacco products, tracking and tracing, due diligence, licensing, criminalisation, international procedural cooperation, WHO, FCTC, INB, UN Convention against Transnational Organised Crime*

I. INTRODUCTION

Negotiation of an international treaty to suppress the illicit trade in tobacco, the draft Illicit Trade Protocol to the World Health Organisation's (WHO) Framework Convention on Tobacco Control (FCTC),[1] is currently underway, yet it has attracted little academic attention.[2] This paper seeks only to summarise the development of the draft Protocol and highlight its main features rather than to engage in a full critique of the process. The paper begins by briefly examining the problem of the illicit trade and the rationale for using international law to suppress that trade. The main thrust of the paper is, however, a review of the development of the draft Protocol. The paper focuses on the development of the two main components of the Protocol that have emerged in the negotiating process in Geneva, i.e.: i) those elements of the draft Protocol that attempt to control the chain of supply of tobacco to prevent diversion into the illicit trade; and ii) those elements that use criminal laws and procedures to provide for suppression of the illicit trade. The paper analyses the major elements in these two components and attempts to identify where the negotiations are running into difficulty and why. Finally, the paper speculates as to what the outcome of negotiations is likely to be.

II. THE ILLICIT TRADE IN TOBACCO PRODUCTS

The illicit trade in tobacco is difficult to regulate because the products being traded, tobacco products, which include cigarettes, cigars, loose tobacco, chewing tobacco etc., are all legally traded. The licit trade in these products is generally considered to become illicit through the non-payment of taxes or duties imposed by states designed to discourage consumption of the product. However, Article 1 of the FCTC takes a more expansive view of the scope of the "illicit trade," defining it 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."

The nature of the illicit trade has been discussed at length elsewhere[3] as

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[1] WHO Framework Convention on Tobacco Control [hereinafter FCTC], May 21, 2003, 42 I.L.M. 518 (2003).

[2] Among the limited material, *see generally* Benn McGrady, *Illicit Trade: Tracking and Tracing of Products and the World Trade Organization*, 4(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 129 (2009).

[3] *See generally* David Merriman et al., *How Big is the Worldwide Cigarette-Smuggling Problem*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES 365 (Prabhat Jha & Frank.J. Chaloupka eds., 2000); Neil Boister & Richard Burchill, *Stopping the Smugglers: Proposal's for an Additional*

has the case for curbing the illicit trade in order to increase revenue and suppress negative health outcomes.[4] The problem is not perceived to be, at least at this stage in the evolution of its regulation, an illicit market which grows its own, makes its own, trades its own and sells its own tobacco products. Rather the problem is considered to be diversion from the licit trade, or to put it another way, contraband – the smuggling of goods licitly manufactured. A World Bank study concludes that:

> Large-scale tobacco smuggling relies on criminal organizations, comparatively sophisticated systems for distributing smuggled cigarettes in the destination country, and a lack of control on the international movement of cigarettes. Most smuggled cigarettes are well-known international brands . . . . . Cigarettes are usually smuggled in transit between their country of origin and their official destination.[5]

Joosens, Chaloupka, Merriman and Yurekli explain how the in-transit system is used by large scale organized smugglers (whom they consider most responsible for the vast majority of cigarettes smuggled):

> 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 . . . . . However, less than adequate controls over the in-transit cigarettes result in substantial leakages, with many of the exported cigarettes failing to arrive at their intended destination . . . . . official trade statistics indicate that up to one-third of recorded cigarette exports do not reappear as recorded imports. Most of these are likely to be lost in transit, reappearing for sale in the black market.[6]

In the 1990s media and law enforcement investigations began to reveal

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Protocol to the World Health Organisation's Framework Convention on tobacco Control, 3 MELB. J. INT'L L. 33, 35-42 (2002).

[4] HANA ROSS ET AL., HOW ELIMINATING THE GLOBAL ILLICIT CIGARETTE TRADE WOULD INCREASE TAX REVENUE AND SAVE LIVES, *available at* http://tobaccofreecenter.org/files/pdfs/en/ILL_global_cig_trade_full_en.pdf (last visited Mar. 15, 2010).

[5] WORLD BANK, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 64-65 (1999), *available at* http://www1.worldbank.org/tobacco/chapter5.asp (last visited Mar. 15, 2010).

[6] Luk Joosens et al., *Issues in the smuggling of tobacco products*, *in* TOBACCO CONTROL IN DEVELOPING COUNTRIES, *supra* note 3, at 393, 398-99, *available at* http://www1.worldbank.org/tobacco/tcdc.asp (last visited Mar. 15, 2010). *See also*, *supra* note 5, at 63.

strong evidence that tobacco companies were directly involved in diversion into the illicit traffic. This resulted in public allegations and law suits against certain manufacturers which in turn resulted in agreements with those manufacturers to regulate chains of supply, a matter examined further below. The criminal prosecutions related to that exposé of industry involvement with smugglers still continue. In July 2008 Rothmans and Imperial Tobacco each pleaded guilty to an offence in terms of s. 240(1)(a) of the Canadian Excise Act, 1985 and paid fines of $200 million and $100 million Canadian dollars and then settled at a cost of $1.15 billion Canadian Dollars for aiding and abetting tobacco smuggling between 1989 and 1994.[7] It is difficult to know to what extent direct manufacturer involvement in smuggling persists, although the perception still exists that manufacturers are directly involved in diversion.[8] There is little doubt, however, that smuggling of tobacco products continues. Italian prosecutors have only recently laid charges alleging massive cigarette smuggling into the European Community (EC) from Montenegro.[9]

III. ARTICLE 15 OF THE FCTC

In spite of growing publicity about the contribution of the illicit trade to the violation of tax laws and to the overall negative health impact of tobacco products, it became clear during the negotiation of the FCTC that agreement on detailed provisions for the regulation of the illicit trade in tobacco would not be possible in the FCTC itself. The negotiators of the FCTC decided to include one general provision in the FCTC on the illicit trade, Article 15, entitled the "Illicit trade in tobacco products." Taking a very comprehensive view, in terms of Article 15(1) the parties recognized 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.

Although Article 15 is fairly detailed, there was an interest in the development of even more detailed supplementary provisions on the illicit

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[7] Details of Agreement as of July 31 2008, *see* Centre for Public Integrity, http://www.publicintegrity.org/investigations/tobacco/assets/pdf/settlement.pdf (last visited Mar. 15, 2010).

[8] *See* FCTC, *Conference of the Parties, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products: First Session: Summary Records*, at 4, FCTC/COP/INB-IT/1/REC/1 (Feb.11-16, 2008) [hereinafter First Session, Summary Records]. For example, the delegate from Iran who stated at INB1 "that investigations and legal action had illustrated the involvement of multinational tobacco companies in the illicit Trade in Tobacco Products."

[9] *See* Indictment at the Centre for Public integrity, http://www.publicintegrity.org/investigations/tobacco/assets/pdf/INDICTZIO.pdf (last visited Mar. 15, 2010).

trade. At the first meeting of the FCTC's Conference of the Parties in February 2006 the decision was taken to set up an Expert Working Group to prepare a template for a protocol to the FCTC devoted solely to the suppression of the illicit trade in tobacco products.[10] The Expert Working Group met in late 2006 and produced a template.[11] In June of 2007 the FCTC's Conference of the Parties decided to establish an International Negotiating Body (INB). It would use the template as a basis for negotiation for a protocol that would build upon and complement Article 15.[12] The INB met for the first time in February 2008.

IV. THE EXPERT'S TEMPLATE

A. Introduction

The Template for the proposed Protocol on Illicit Trade to the FCTC [hereinafter the Template][13] contained a set of suggestions for the content of a protocol designed to suppress the "illicit trade," which it defined as "any practice or conduct" relating to the illicit chain of supply. Although not explicit, it is clear from the content of the Template that the main aim was to try to prevent diversion from the licit trade.

In the basic design of the Template the Expert Working Group eschewed a very restrictive system requiring government sanction of every step in the supply chain like that used in drug control[14] in favour of a system more accommodating to the commercial realities of supply of a product that is not prohibited, only regulated. They suggested measures for regulating diversion from the licit trade that relied on imposing self-discipline on its participants. Developing the nominal provisions in the FCTC for preventing diversion,[15] the Expert Working Group chose to use the Template to introduce two main components: (i) a series of measures to regulate the supply chain so that it did not feed the illicit trade; and, (ii)

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[10] FCTC, *Conference of the Parties to the WHO Framework Convention on Tobacco Control, First Session, Decisions and Ancillary Documents*, at 57, COP/1/2006/CD (Feb. 6-17, 2006).

[11] FCTC, *Conference of the Parties to the WHO Framework Convention on Tobacco Control, Second Session, Decisions and Ancillary Documents*, at 15-16, CIO/2/2007/CD (June 30 – July 6, 2007).

[12] *Id.*, at 27-28.

[13] FCTC, Elaboration of protocols (decision FCTC/COP1(16)): Elaboration of a template for a protocol on illicit trade in tobacco products, A/FCTC/COP/2/9 (Apr. 19, 2007).

[14] *See*, in particular, Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151. On the licit drug control system, *see generally* SYAMAL KUMAR CHATTERJEE (1981), LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL 396-416.

[15] The only relevant provision in this regard appears to be art. 15(d) which obliges states parties to "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."

deterrent measures mainly against the criminals involved in illicit trade such as crimes, legal assistance and law enforcement cooperation measures.

While the measures in (ii) can be traced back to the various UN crime control conventions, there is little clear precedent in international law for the measures in (i) apart from international regulation of the finance industry to prevent it from engaging in money laundering. Rather the regulatory provisions in the Template appear to be aimed at "internationalizing" aspects of the Agreement between Phillip Morris International (PMI) and the EC [hereinafter the EC-PMI Agreement].[16] As part of the settlement of the EC's suit against it for alleged money laundering activities surrounding cigarette smuggling,[17] PMI agreed to take a number of steps to control its own supply chains. As a disincentive from allowing diversion it agreed to make a seizure payment to the EC of up to 500% of the unpaid duties and taxes upon seizure of shipments of more the 50000 smuggled cigarettes (5 master cases) without the EC having to prove fault on PMI's part, as well as to provide information on the date and place of manufacture, intervening warehousing and shipment, final destination, identity of first purchaser and any known purchaser.[18] If smuggling goes up, PMI carries that risk. PMI also agreed to adopt procedures for the tracking and tracing of its products which involved obligations on PMI to mark packs, cartons and master cases to allow the EC to track and trace its products. [19] The information provided would include the date of manufacture, the manufacturing facility at which the product was manufactured, the machine of manufacture and the product shift of manufacture. In addition, PMI undertook to know its customers by doing due diligence on all "contractors" – first purchasers, warehousers, shippers or freight forwarders it used to store or ship its products.[20] This involved obtaining information on the person's identity, the intended sales plans of first purchasers, employees, criminal charges and convictions, and bank account details. If PMI was not satisfied that such a "contractor" was able or committed to the smuggling control objectives of the EC-PMI agreement it undertook not to do business with them. PMI also undertook to keep searchable databases of first purchasers with information on the first purchaser's name and order number, shipment date, destination of shipment, point of departure from the final PMI factory or warehouse, the consignee

[16] The Anti-Contraband and Anti-Counterfeit Agreement, Phillip Morris Int'l – EC, July 9, 2004, *available at* http://ec.europa.eu/anti_fraud/budget/cig_smug/2004_en.html (last visited Mar. 15, 2010).
[17] European Community v. RJR Nabisco, E.D.N.Y. (Oct. 30, 2002). The civil suit was dismissed and at the time of the agreement the EC was appealing against that decision.
[18] *Supra* note 16, art. 4, and in particular § 4.01(e)-(h).
[19] *Id*. art. 5, § 5.01, app. D, in particular Protocol 2, 3.
[20] *See* definition of contractor and *id.* app. B, Protocol 2, and in particular § 2.03.

to whom the product was shipped and the intended market or retail sale.[21] In terms of the agreement the EC and relevant EU states authorities have "automated query only" access to this database.[22]

The European Commission has stated that "[t]he Agreement is proving in practice to be a highly effective means of combating cigarette smuggling". [23] The EC-PMI agreement, signed in 2004, has a twelve year life span, and has served as the model for similar agreements between the EC and other tobacco manufacturers.[24]

B. Regulatory Measures in the Expert's Template

Licensing is a common method of regulating dangerous goods in many domestic legal systems. Article 15(7) of the FCTC only contains a "best efforts" provision to use licensing to control the illicit trade. In paragraph 6 of the Template the Expert Working Group emphasised the need for the "strict control of the production and distribution chain through licensing, improved market surveillance and safer production processes." The Expert Working Group noted in paragraph 9 of the Template that "licensing of all participants in the tobacco business, including major suppliers of inputs to the manufacturing process as well as the distribution chain, will contribute to the reduction of the illicit trade." Paragraph 10 spelled out a reasonably comprehensive set of provisions relating inter alia to which persons should be required to hold a license (all participants in the chain of supply), what the conditions for holding such a license should be (compliance with national tobacco laws), how a license can be lost (contravention of the laws), and inspection of license holders.

The notion of due diligence originated in securities legislation as a defence to a charge of inadequate disclosure when brokers selling companies had taken all reasonable steps to discover the financial health of the company whose shares they were selling. It has, however, been used in a number of situations where the law applies an obligation to take reasonable care in doing something. International obligations to enact know

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[21] *Id*. app. B, Protocol 3, § 3.03.

[22] *Id*.

[23] Press Release, European Commission, Anti-Contraband and Anti-Counterfeit Agreement between PMI and the European Community and Member States: twenty-four Member States are Now Parties, (June 6, 2006), *available at* http://docs.google.com/gview?a=v&q=cache:0aZD7H-0QicJ:europa.eu/rapid/pressReleasesAction.do%3Freference%3DIP/06/735%26format%3DPDF%26aged%3D1%26language%3DEN%26guiLanguage%3Den+ECPMI+Agreement,+effective&hl=en&gl=nz (last visited Mar. 15, 2010).

[24] The EC concluded a similar agreement with Japan Tobacco Industry, *see* JT International S.A. JT International Holding BV & the European Community & the Participating Member States, Cooperation Agreement, EC – Japan Tobacco Companies, Dec. 14, 2007, *available at* http://ec.europa.eu/anti_fraud/budget/cig_smug/cooperation_agreement.pdf (last visited Mar. 15, 2010).

your customer (KYC) obligations on persons engaged in licit activities vulnerable to criminal activity, such as that in Article 14 of the UN Convention against Corruption,[25] are quite common. They typically require identification procedures and monitoring, suspicious transaction reporting and adequate record keeping of communications and control systems. The Expert Working Group appeared, however, to have borrowed the concept of due diligence in the Template from the EC-PMI agreement. The Template relied heavily on due diligence as part of the compliance framework to secure the licit chain of supply. Paragraph 7 of the Template applied a requirement that manufacturers do due diligence on their customers by taking "reasonable precautions" in order to "ensure that the . . . customer is capable of and committed to effectively preventing the illegal trade." It did not articulate what these precautions were but KYC was clearly in contemplation. The Expert Working Group left it to the diplomatic negotiations to decide how much knowledge participants in the supply chain would have to acquire and what would follow if their customers refused to give them this information. Clearly there were going to be difficulties in agreeing KYC obligations in a trading system where the purchaser would often not be in a position to know the identity of the final consignee given that the transit system[26] and trading practice was designed to allow rapid and market-responsive shifts in the direction of the consignment. On the other hand, in order to suppress diversion effectively, the system would have to impose KYC obligations of great weight upon each link in the chain of supply and monitor these obligations very closely.[27]

The necessity for tracking of products after they have been produced and tracing seized products back to the point of production was already pointed to in Article 15(2) of the FCTC. Article 15(2) included an obligation to take measures to ensure the marking of packets and packages of tobacco products in order to assist "in determining the origin of tobacco products" and 'the point of diversion" and to "monitor, document and control the movement of tobacco products and their legal status." Article 15(2) also placed each party under specific obligations to "consider, as appropriate, developing a practical tracking and tracing regime that would

[25] United Nations Convention against Corruption, G.A. Res. 58/4, UN Doc.A/58/422 (2003).

[26] General Agreement on Tariffs and Trade art. 5, Apr. 15, 1994, 1867 U.N.T.S. 187, provides for freedom of transit of goods without distinction in respect of ownership.

[27] However, legislative steps such as those taken in the UK that impose a duty on manufacturers not to facilitate smuggling provide a working model for negotiations. *See* the Tobacco Products Duty Act 1979 sec. 7; read with The Tobacco Products (Amendment) Regulations (UK), reg. 29-31 and schedule. The HM Customs guide to the legislation aimed at tobacco companies and traders is *available at* http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_PROD1_026197&propertyType=document#toc (last visited Mar. 15, 2010).

further secure the distribution system and assist in the investigation of illicit trade." The tracking and tracing provisions in the Template (paragraphs 13-20) were designed to help to secure the distribution system because suitably coded products can be tracked through the distribution chain (although the chain itself will not be revealed in its entirety until after the last step is taken), and the path of diverted products once seized can be traced back to the point of diversion. But again the Expert Working Group left it to the negotiations to come up with a system that is comprehensive, reliable and easy to use.

To function effectively the record keeping system proposed by the Expert Working Group in the Template would also have to reliable and comprehensive. Paragraphs 21 to 24 of the Template suggested that the keeping of manufacturing and trading records must be an essential element. A major issue would be the nature of the information to be kept and where it would be held.

The Template also suggested consideration of a range of other regulatory measures to try to control the chain of supply, including anti-money laundering measures and restrictions on internet and mail order sales.

C. Penal Measures in the Expert's Template

Apart from using the criminal law against licit manufacturers for "selling or offering for sale tobacco without a license", "failing to maintain books and records," maintaining fraudulent books and records, and making misrepresentation to and obstructing inspectors, [28] the Template in paragraphs 25-6 suggested the imposition of "dissuasive" civil penalties upon seizure of the products of tobacco manufacturers who fail to control their supply chains. The Expert Working Group must have had in mind the imposition of fines of such magnitude that something akin to the PMI-EC Agreement's "seizure payment" would be imposed through the draft Protocol.[29]

The balance of the penal measures in paragraph 33 of the Template were borrowed from already agreed text in other international crime control treaties in a way that indicated they were neither the main priority of the Expert Working Group nor provisions with which the Experts were particularly familiar. Article 15(4) of the FCTC already provided for legislative measures "with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband

[28] *See* Second Session, *supra* note 13, ¶ 33.

[29] Existing UK law, for example, allows customs authorities to issue substantial penalties to manufacturers for breach of obligations to take control of their supply chains. *See* Tobacco Products Duty Act 1979, *supra* note 27, art. 7B(1).

cigarettes". The Experts fleshed out these provisions in a series of criminal offences by borrowing from language for, for example, the bribery offence in paragraph 33(p), from the offences in Articles 15 and 16 of the UN Convention against Corruption.

Paragraph 35 of the Template suggested strong penalties drawing from a smorgasbord of options. Search, seizure, confiscation and destruction of tobacco products and the things used to manufacture, package and convey these products were dealt with in paragraphs 37 to 42 of the Template. The Template appeared in paragraphs 45-7 to contemplate either (or perhaps both) a value confiscation system for the seizure and confiscation of the proceeds of illicit tobacco crimes or a property forfeiture system. As with the confiscation procedures, the investigative procedures suggested in paragraphs 48-50, which included electronic surveillance, while standard practice in some jurisdictions, were likely to be unfamiliar in others.

The suggested provisions for extraterritorial jurisdiction in paragraph 52 over the offences were unremarkable except for the unusually worded paragraph 52(d) which provided that such jurisdiction should be established "where it is foreseeable that the extraterritorial activity will lead to the commission of a serious offence within the territory of that Party," which differs from, for example, the UNCTOC Convention's language "with a view to commission of an offence . . . within [the state parties] territory."[30]

The Template's provisions in paragraph 55-7 for the sharing of "non-sensitive" statistical information on the illicit trade suggest that the Meeting of the Parties to the Illicit Trade Protocol (MOP) should hold the information with the MOP Secretariat as conduit. This illustrates that the Expert Working Group conceived the Secretariat as playing a central administrative role in the new regime.

The Template suggested many other provisions of a more standard nature. It contemplated data protection (paragraph 62), technical assistance (paragraph 64), and cooperation in investigation (paragraph 67) and training (paragraph 69). It is interesting in both of the latter cases that the Template envisaged potential roles for the "relevant regional and intergovernmental organizations." Paragraphs 71-2 envisaged a mutual assistance sub-regime. There was little detail on extradition; in paragraph 76 the Template invited parties to consider how extradition might be used to minimize safe havens. The Template said nothing about explicit removal of the fiscal offence exception to extradition, of obvious relevance as smuggling is a fiscal offence.

D. A Basic Model for the Draft Protocol?

[30] United Nations Convention against Transnational Organized Crime [hereinafter UNCTOC], G.A. Res. 25 art. 15(2)(c)(i). *See also* art. 16(2)(c) of the UN Convention against Corruption, which is identical.

The Template provided the shape for the development of the draft Protocol, although in many of its key elements the substance appears to have been drawn from the EC-PMI Agreement. This model proposed that:

1. States would vet participants in the trade through licensing;
2. The participants would vet those whom they dealt with through doing due diligence; and
3. The products in which the licensed participants dealt with would be trackable and traceable by authorities.

The aim would be to ensure that if diversion did occur, steps could be taken to prevent it recurring by taking action against the smugglers as well as the licit participants in the trade who were responsible for not protecting the supply chain. While no state has sought to supplant this model in the negotiation process, many states appear to have struggled with the model's substance because they consider the system proposed in the Template to be too ambitious and too prescriptive.[31] The Template suggested consideration of a range of very complex provisions. It seems that more time may have been necessary to develop the content of the Template's suggestions in order to properly prepare for negotiations before discussions started in earnest. At the negotiations the main proponent of elements in the model appeared to be the EU/EC (in the form of the European Commission), but it was not whole-heartedly committed to every element in the model. The delegate for Slovenia, for example, speaking on behalf of the EU at the outset of negotiations, stated:

> The European Union aimed to negotiate a text which could be ratified by all parties to the Framework Convention and which could be adopted by 2010. It particularly wanted strong provisions on tracking and tracing; rules for ensuring the legitimacy of customers and for due diligence; provisions to prevent money laundering and to allow for asset confiscation; and record keeping. The European Union wished to reserve its position on licensing, enhanced law enforcement, offences, sanctions and penalties, and jurisdiction, until specific proposals were available for consideration.[32]

Much of what the EC suggested should be included was contained in the EC-PMI Agreement.

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[31] First Session, Summary Records, *supra* note 8, at 6, 10; the statement of the delegate from Canada, and the Australian delegate sounded a warning note early at INB I when he spoke of the need for the Protocol to "allow maximum flexibility in the way [states] achieved the results and not specify particular approaches."

[32] *Id.*, at 10.

V. THE MEETINGS OF THE INTERNATIONAL NEGOTIATING BODY AND THE DEVELOPMENT OF A NEGOTIATING TEXT

A. Introduction[33]

Ian Walton-George, the senior customs investigations official from the European Anti-Fraud Office (OLAF),[34] was elected as the Chair of the INB at INB I held in February 2008. INB I provided an opportunity for delegations to familiarise themselves with the main principles in suggested in the Template. The plenary read through the elements in the Template taking the comments of delegations. As a result, during the inter-sessional period prior to INB II the Chair produced a Chair's Text of the Protocol.[35] INB II, held in October 2008, allowed states to familiarise themselves with the detail of this text. Negotiation took place mainly in two committees. Committee A dealt with regulatory elements and Committee B with more formal legal elements. In the inter-sessional period a Revised Chair's Text was produced.[36] This was the subject of the hard bargaining at INB III in July of 2009, when real differences of opinion began to emerge on major elements of the draft Protocol (although careful examination of the summary records reveals that many of these differences were present at the outset of negotiations). INB III produced a heavily bracketed Negotiating Text.[37] A decision was also taken to deal with the major issues – tracking and tracing, due diligence and licensing on the one hand, and the criminal offences and allied provisions on the other – at two separate drafting groups which met in Geneva at the WHO in September to November of 2009.[38] These groups produced reports to be examined at INB IV which is

[33] No single document records the full extent of this process. The gist can be gleaned from the following documents: WHO FCTC, *Progress Since the Second Session of the Conference of the Parties: Note by the Convention Secretariat*, FCTC/COP/INB-IT/1/3 (Dec. 12, 2007); WHO FCTC, *Progress Since the First Session of the Intergovernmental Negotiating Body*, FCTC/COP/INB-IT/2/2 (Aug. 4, 2008); WHO FCTC, *Progress Since the Second Session of the Intergovernmental Negotiating Body: Report by the Convention Secretariat*, FCTC/COP/INB-IT/3/2 (May 21, 2009).

[34] Mr Walton-George is the Head of Directorate B, Investigations and Operations II. Directorate B includes within it Unit B3, Customs II, which deals with tobacco smuggling. *See* the European Anti-Fraud Office, OLAF Organisation Chart, *available at* http://ec.europa.eu/dgs/olaf/directory/org_chart/EN-Sept-2009.pdf (last visited Mar. 15, 2010).

[35] WHO FCTC, *Chairperson's Text For a Protocol on Illicit Trade in Tobacco Products*, FCTC/COP/INB-IT/2/3 (Aug. 18, 2008).

[36] WHO FCTC, *Revised Chairperson's Text for a Protocol on the Illicit Trade in Tobacco Products*, FCTC/COP/INB-IT/3/3 (Apr. 23, 2009).

[37] WHO FCTC, *Negotiating Text for a Protocol to Eliminate Illicit Trade in Tobacco Products*, FCTC/COP/INB-IT/3/5 (July 5, 2009).

[38] The two drafting groups will deal with a) art. 7, 5 and 6, then, time permitting, art. 10 and 11; and b) art. 12 and 31 through 33, then art. 13, 14 and 30. *See* Decision of the Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, FCTC/COP/INB-IT/3(1) (July 5, 2009); it is referred to at FCTC, *Third Session of the Intergovernmental Negotiating Body*

to be held in March of 2010. This must be the final INB prior to submission of the text to the FCTC Conference of the Parties in October of 2010 for approval.

In many ways INB III saw the beginning of genuine negotiations. Although there is consensus about the end of the draft Protocol – the elimination of all forms of the illicit trade in tobacco products – very few provisions have been agreed which suggests disagreement about the means to this end. There are various reasons for the slow rate of progress. States have sent health delegates when other forms of expertise have been required to deal with a variety of technical legal issues. There is also a sense that the delegations have only slowly come to realise how ambitious the Template was as a model for the Protocol. The following discussion which relies mainly on the summary records of the INBs (although those for INB III were not available at time of writing) and on the publicly available versions of the draft texts, isolates the major issues that have emerged during the INB process, rather than attempting a complete review of each provision in the text.

B. The Scope of the Draft Protocol

A potentially deal-breaking issue which emerged fully at INB III involves the scope of the draft Protocol. The main concern is whether the scope should include cigarette "manufacturing equipment" and "key inputs" such as tobacco leaf and cigarette papers and filters. The Chair's Text produced after INB I included manufacturing equipment but placed "key inputs" "used in the manufacture of tobacco products" in square brackets and referred to an as yet undecided list to be annexed to the protocol. At INB II the issue of whether leaf should be included in tobacco products was raised.[39] Brazil and Japan objected to the inclusion of both manufacturing equipment and key inputs within the scope of the draft Protocol.[40] The Revised Chair's Text produced after INB II still included reference to manufacturing equipment but did not include specific reference to "key inputs." It was agreed instead that the Secretariat would commission an expert review of the scope of the Protocol. The legal opinion that was offered by the Secretariat concluded quite plausibly that the draft Protocol could include such inputs within its scope. This view was justified by recourse to the comprehensive public health purposes of the

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on a Protocol on Illicit Trade in Tobacco Products, http://www.who.int/fctc/outcome_en/en/index.html (last visited Mar. 15, 2010).

[39] *See* FCTC, *Conference of the Parties, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products: Second Session: Summary Records*, at 13, FCTC/COP/INB-IT/REC/1 (Oct. 20-25, 2008) [hereinafter Second Session, Summary Records]. For example, the statement of Bangladesh.

[40] *See Id.*, at 3, 78.

FCTC, the broad definition of illicit trade in the FCTC and to specific measures such as the destruction of confiscated manufacturing equipment in Article 15 of the FCTC.[41] It did not canvass the practicality of the inclusion of key inputs and manufacturing equipment within the scope of the Protocol. Debate at INB III suggested that states such as Brazil would have great difficulty in the inclusion of tobacco leaf within the scope of the Protocol.[42] Arguments were also made against the inclusion of paper and filters on the basis of their "dual use" (use for other non-tobacco related purposes) by states where the manufacturers of these products are located.[43] Needless to say, all of the references to "key inputs" and many of those to "manufacturing equipment" in the Negotiating Text are in square brackets.

C. Regulatory Measures in the Draft Protocol

It is not surprising that the one general obligation in the Negotiating Text which remains bracketed is the obligation to adopt effective measures to control the supply chain in draft Article 4(1). Part III of the Draft Protocol, entitled "Supply Chain Control," has become the focus of the negotiating process. It has generated a great deal of controversy and little by way of agreement.

Licensing of participants in the supply chain may have had support as an abstract concept at INB I,[44] but at INB II delegations began to insert qualifiers into specific obligations. Canada, for example, suggested that the licensing requirements be left to the decision of individual parties "to the extent considered appropriate in the context of its own legal, administrative and regulatory framework."[45] INB III could not reach agreement on licensing under draft Article 5 of each specific stage in the chain of supply – of producers of manufacturing equipment, manufacturers, importers and exporters, transporters, and primary processors. Instead, INB III saw the introduction of further qualifiers on these provisions such as "where appropriate." Many states have genuine concerns about practicality. Delegations appeared to agree that the Protocol should not require licensing of retailers as this would be practically impossible.[46] However, delegations

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[41] WHO FCTC, *Revised Chairperson's Text on a Protocol on Illicit Trade in Tobacco Products, and General Debate: Legal Advice on the Scope of the Protocol*, ¶ 5-9, FCTC/COP/INB-IT/3/INF.DOC./6 (May 18, 2009).

[42] Personal notes, copy on file with the author. The summary records are not yet available.

[43] Personal notes, copy on file with the author. The summary records are not yet available.

[44] First Session, Summary Records, *supra* note 8, at 12 and 10 respectively. Various delegations expressed support for licensing at INB I, but, Japan, for example, wanted to limit it to manufacturing and distribution. The delegate from Honduras was particularly dismissive of the practicality of licensing.

[45] *See* Second Session, Summary Records, *supra* note 39, at 4.

[46] This issue was raised at INB II; *see e.g. id.*, at 37 (the statement of India, Swaziland, Jamaica and the EC).

also argued strongly against the practicality of licensing of transportation given that tobacco products are often transported with other goods both by road and by sea.[47] Delegations could also not agree about which authorities will license and in particular about what information about licensees they will record. Advocates of licensing as a key element of the draft Protocol have been forced to continually emphasise the role of licensing in promoting public health, even to the point of suggesting a preamble to draft Article 5 to this effect. Perhaps the height of absurdity was reached when some delegations suggested that instead of an obligation on the parties to prohibit the listed activities without a license (the position in the Revised Chair's Text), the preamble of draft Article 5 in the Negotiating Text should begin: "The following activities cannot be carried out by any natural or legal person unless that person is in possession of a license . . . ." Unless this is interpreted as an implied obligation on states to impose licensing, it suggests that persons involved in the tobacco trade are direct subjects of international law! It was for the single delegate from Mongolia, not a lawyer and entirely new to the process, to point out that she understood international law applied only to states.[48] Supporters of the draft Protocol began to give ground. Early on in the negotiations at INB I the delegate for the EC stated that "licensing was only one of the elements that could be used in the overall control of tobacco products" and emphasised the need for the Protocol to respect the "diverse licensing systems in the various parties."[49] In INB II the EC delegate suggested that the provision include the words "or any control system which guarantees [similar] results."[50] At Drafting Group 1 the discussion of draft Article 5 was not completed. Consensus was, however, reached on Article 5(1) which provides for an obligation to license manufacturing, transporting, importing and exporting of tobacco products and tobacco product manufacturing equipment and in Article 5(2) on an endeavour to license retailing and commercial growing, a consensus that will hopefully be supported at INB IV.[51]

Proposals for the control of the supply chain through "customer identification and verification" have also come under attack even though KYC obligations are now commonplace in the finance industry. At INB I some states had difficulty with the notion of the imposition of civil penalties for failure to do due diligence.[52] Further cracks began to appear at

[47] Personal notes, copy on file with the author. The summary records are not yet available.
[48] Personal notes, copy on file with the author. The summary records are not yet available.
[49] First Session, Summary Records, *supra* note 8, at 17.
[50] Second Session, Summary Records, *supra* note 39, at 19.
[51] *See* draft art. 5, Proposals of Drafting Group 1, annexed to WHO FCTC, *Proposals of Drafting Group 1 to the Fourth Session of the Intergovernmental Negotiating Body on Articles 5, 6, 7, 10 and 11 of the Negotiating Text for a Protocol to Eliminate Illicit Trade in Tobacco Products*, FCTC/COP/INB - IT/ 4/3 (13 Jan. 2010).
[52] *See* First Session, Summary Records, *supra* note 8, at 24 (the statements by India who wondered how they would apply internationally, and Mali which suggested deleting the term "civil.")

INB II with the Chinese delegate, the first to speak on the issue suggesting

> that the entire section on customer identification and verification should be merged with the previous section on licenses. No explanation was given in the text [as to] why a verification system should be set up, whom it was targeting, how the verification would be carried out and by whom and how it would be guaranteed. If a proper[ly] comprehensive licensing system was set up, the references to identification and verification would be superfluous.[53]

The Brazilian delegate also questioned "the feasibility of [the] [p]arties monitoring the vast number of commercial transactions to the degree of detail required in the text" and pointed to "[the difficulty of] involving the industry in any form of self regulation" in Brazil.[54]

The scheme in the Revised Chair's Text was very comprehensive in regard to who would have the burden of doing due diligence and included within its scope all natural and legal persons who engaged in manufacture, sale, storage, shipment, distribution, import, export of tobacco products and tobacco manufacturing equipment. These persons would have been obliged to do due diligence in respect of first purchasers, who in turn would have been obliged to do due diligence on persons to whom they sold. But the negotiations at INB III on draft Article 6 of the Revised Chair's Text indicated considerable discord in this regard.[55] Disagreement has extended to the question of what due diligence actually entails and whether it can extend to the identity of the person, licenses held, offences committed, bank account details used for payment and so forth; all of these provisions remain bracketed. Delegations could also not accept the other main thrust of this provision in draft Article 6(6), the EC-PMI agreement derived notion of so-called "blocking" of customers, i.e. the termination of business relations, by participants in the supply chain on receipt of sufficient evidence from the authorities of the customer's knowing participation in activities contrary to the draft Protocol.[56] Although Drafting Group 1 was mandated to deal with this issue it ran out of time and did not do so.

And then there is tracking and tracing. The EC delegate said at INB II that "the protocol should concentrate on big issues such as tracking and tracing".[57] The EC delegate later explained that

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[53] Second Session, Summary Records, *supra* note 39, at 5.
[54] *Id.*, at 39.
[55] Personal notes, copy on file with the author. The summary records are not yet available.
[56] For definition of "Blocked Contractor," refer to the EC-PMI Agreement, which is in very similar terms. The concept of blocked customers was introduced in the Chair's Text although it was not in the Template or discussed at INB I.
[57] Second Session, Summary Records, *supra* note 39, at 37.

> As a result of its extensive experience in combating illicit trade in tobacco products, the European Community had reached the conclusion that tracking and tracing, a key part of the protocol, was one of the most useful means of fighting the phenomenon. Legitimate products could be tracked from the point of first production to the first and subsequent customers, meaning that seized goods could be traced back to identify when and by who[m] they had been diverted to the illicit trade. Although national tracking and tracing systems were to be supported and encouraged, an international system was essential for combating international illicit trade. The agreements concluded by the European Community with Philip Morris [International] and Japan Tobacco International were legally binding; while he was not trying to impose the Community's system on other Parties or recommending the use of any particular company, he stressed the importance of identifying high standards that all international systems must meet. The inclusion of such provisions in the section under discussion would have a notable impact on [the] illicit trade.[58]

But other significant states in illicit tobacco control such as Brazil and Canada have had doubts as to the feasibility of what was being proposed.[59] Concerns raised at INB II about the capacity of developing states to implement such a system[60] lead to requests for an expert review of the feasibility of an international tracking and tracing regime. The review produced by the Convention Secretariat in the inter-sessional period between INB II and INB III concluded that such a regime "[was] technically feasible including for lower resource countries."[61] Yet a working party on tracking and tracing which laboured into the night in Geneva at INB II apparently could not do more than crystallise differences.

The basic problem, revealed by a careful examination of the first bracketed version of draft Article 7(1) of the Negotiating Text, was an absence of consensus on the exact nature of this system. Was it possible to have a centralised international system, or a system linking national systems, or a system of regional and national systems? And who would keep the information and be permitted to interrogate it? The EC seems to favour a system such as that under the EC-PMI Agreement where the information is held by tobacco manufacturers and the law enforcement

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[58] *Id.*, at 40.
[59] *Id.*, at 37.
[60] *Id.*
[61] FCTC, *Revised Chairperson's Text for a Protocol on Illicit Trade in Tobacco Products: Expert review on the feasibility of an international track-and-trace regime for tobacco products: Note from the Secretariat*, at 11, ¶ 7, FCTC/COP/INB-IT/3/INF.DOC./5 (May 7, 2009).

officer uses a computer interface to request specific information about where a product originated. Other states prefer a system that obliges manufacturers to transfer that information to governments which can then either hold the information in national databases to which requests can be directed or transfer that information to a central international clearing house open to requests for information by authorised law enforcement agents.[62] The EC's view may be driven by the impracticality of funding an international database and the tobacco industry's lack of enthusiasm (which raises issues about reliability of information) for transferring sensitive commercial information beyond their control. However, other states are suspicious of leaving the information in the hands of manufacturers. At INB I Brazil stated that "implementation of a tracking and tracing system should be carried out by the government of the party concerned, without any interference from the tobacco industry . . . ."[63] Under the current Brazilian system the government installs and maintains the tracking and tracing system in factories and the industry pays for it, while under the Canadian system the distribution of stamps with covert and overt identifiers is government controlled.[64] At INB II the Brazilian delegate bluntly called "for a clear decision on whether the international tracking and tracing system would be controlled solely by the parties or in cooperation with the tobacco industry."[65] At INB III, the division on who should mark tobacco products and how they should be marked continued producing a heavily bracketed draft Article 7(3). On the one side were states such as Brazil with its tax stamp system, keen that governments not manufacturers should control the affixation of those stamps. On the other side was the EC which preferred manufacturer affixed systems using barcodes and other digital codes.[66]

INB III also revealed extensive division on what products should be tracked and traced in draft Article 7(2). The argument gave substance to the problems surrounding the inclusion of "raw material" and manufacturing equipment within the scope of the draft Protocol because of the difficulties of applying tracking and tracing to tobacco leaf and key inputs and manufacturing equipment.[67]

Finally there was disagreement on what information must be stored (draft Article 7(4)), when it should be recorded (draft Article 7(5)), when it should become accessible (draft Article 7(6)), where it shall be kept nationally (draft Article 7(7), and whether and when it shall be transferred to an international database (draft Article 7(8)) and so forth, which takes us

[62] Personal notes, copy on file with the author. The summary records are not yet available.
[63] First Session, Summary Records, *supra* note 8, at 19.
[64] *See id.*, statements of Brazil and Canada.
[65] Second Session, Summary Records, *supra* note 39, at 7.
[66] Personal notes, copy on file with the author. The summary records are not yet available.
[67] Personal notes, copy on file with the author. The summary records are not yet available.

back to where we began, the failure to agree on the nature of the system as a whole.

Unremarkably, an entirely new version of draft Article 7 was proposed at INB III that tries to limit the burden on states. This less ambitious version's main points of difference are that it does not apply the system to cigarettes intended for the domestic market and which are subject to a stringent stamp control regime unless they are seized outside that market in quantities above an as yet unspecified threshold. But that is not where limitation ends. While it proposes agreement on a "global tracking and tracing system" based on information held by manufacturers and accessed at a national level, there is no provision for access by law enforcement officers from other states. A third version of draft Article 7 was also proposed. It reverts to the original text in the Revised Chair's Text, accept insofar as it incorporates the exclusion of tobacco products intended for the domestic market on the model of the second version but includes the notion of a global clearing house of the information collected which can be interrogated by authorities from other states parties.

Drafting Group 1, which met in the intersessional period before INB IV, spent almost all of its time and energies on coming to consensus on a draft tracking and tracing provision in Article 7, which synthesises many of the alternative versions proposed at INB III.[68] Draft Article 7(1) provides that the parties "agree to establish a global tracking and tracing regime, comprising of both national/regional systems and a global information sharing focal point located at the Convention Secretariat." The key term "regime" denotes a significant measure of flexibility, which seems prudent given that the regime will depend on national/regional systems that differ significantly (draft Article 7(2) obliges parties who have not done so to establish such national systems). The global information sharing point is designed to pull these systems together. The whole regime depends heavily on the obligation in draft Article 7(3) to require that unique identification markings be fixed to all packs for the domestic market. Pursuing one of the main features of the alternatives proposed at INB III, this obligation to carry markings although unqualified for the export market is qualified by the phrase "to the extent considered appropriate" in regard to cartons and master cases for the "domestic market," which opens a potential loophole as products intended for the domestic market are likely to find themselves smuggled across borders.[69] The unique identification mark has according to draft Article 7(4) to allow for either the determination (directly or by means of a link) of useful information such as the date and place of manufacture,

[68] *See* draft art. 7, Proposals of Drafting Group 1, *supra* note 51.

[69] *See* draft art. 7(3)(i) and (ii). The WHO's Legal Counsel has challenged this differentiation as not being supported by art. 15(2) of the FCTC as it sets requirements based on the product sold and not its intended market, and has called on the INB to consider an alternative; *see id.*, ¶ 12.

actual facility, machine used, shift, identity of the first customer, intended market for sale, product description and so forth. In terms of draft Article 7(5) this information has to be recorded, and in terms of draft Article 7(6)-(9) available to a competent national authority and available through that authority in a standardised format to the international focal point. The structure of the regime is thus broadly described; its exact working will have to be developed later assuming a Protocol is adopted incorporating a provision along these lines. It is unclear at this stage whether the INB as a whole will go with this proposal, but as it reflects quite accurately the direction negotiations were evolving at INB III, it may well do so.

The EC has been a proponent of "strong provisions" on record keeping from early in the process, with the EC delegate stating at INB I "that the European Union recognized the importance of document retention and record-keeping in combating the illicit trade and had direct experience of its usefulness in bringing cases to court."[70] But agreement on this the last of the really significant regulatory measures is of course dependent on agreement on what information is going to be recorded (in draft Article 8(2)-(4)), and this was impossible at INB III. There is also disagreement on which persons should keep records (draft Article 8(1)), how long it should be kept for and in what format and who should have access (draft Article 8(5)). There is miraculously consensus but no detail on the obligation to establish a system for sharing information and for the progressive development of that system (draft Article 8(6) and (7)).

The remaining regulatory provisions – security of products to prevent diversion (draft Article 9), prohibition of internet sales (draft Article 10),[71] control of manufacturing and trade in free zones (draft Article 11) and a ban on duty free sales (draft Article 12)[72] – also remain on the table. The forces ranged against agreement – the duty free lobby, those states where free zones are very important for the local economy, and so forth – are considerable. This draft Protocol has brought together for the first time a range of opponents who until now had little in common.

The underlying issue in the disagreements on, in particular, due

[70] First Session, Summary Records, *supra* note 8, at 22.

[71] An Expert Review in this regard is produced by the secretariat in the inter-sessional period between INB II and III, which concluded they "could be compatible with WTO agreements;" FCTC, *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: Note from the Secretariat*, ¶ 46, FCTC/COP/INB-IT/3/INF.DOC./4 (May 7, 2009). Drafting Group 2 was mandated to discuss the provision but did not have the time to do so.

[72] An Expert Review in this regard is produced by the secretariat in the inter-sessional period between INB II and III, which concluded that such a ban was "unlikely to breach any international obligation;" FCTC, *Revised Chairperson's Text on a Protocol on Illicit Trade in Tobacco Products, and General Debate: Expert Review on a Possible ban on Duty-free Sales of Tobacco Products: Note from the Secretariat*, ¶ 25, FCTC/COP/INB-IT/3/INF.DOC./3 (Apr. 30, 2009). Again Drafting Group 2 was mandated to discuss the provision but did not have the time to do so.

diligence and tracking and tracing appear to be whether key elements of the EC-tobacco industry agreements along with the legal and institutional infrastructure that has grown up around these elements within the EC could be internationalised in the way the Template suggested. It is not yet plain that states are willing to do so, even if the cost of doing so is passed on to commercial enterprises within states. The commercial advantages of an even global playing field to tobacco industry players may not be enough to convince doubters in government of the industry's bona fides in regard to playing a positive role as partners in suppression of the illicit trade. States battling the industry in the public health environment are understandably wary of relying on the industry in the law enforcement environment. Advocates of partnership can argue that this partnership will be most unequal, that government agencies will have all the power. Doubters may point to the fact that the industry will retain control of information and systems. Finally, Article 5(3) of the FCTC, which provides that parties shall protect their public health policies "from commercial and other vested interests of the tobacco industry," and the guidelines which flesh this article out, which speak in Principle 1 of the "irreconcilable conflict between the tobacco industry's interests and public health interests,"[73] raise questions about the legality of state partnership with industry in the suppression of the illicit trade. The Algerian delegate at INB I may have had this difficulty in mind when he suggested that the draft Protocol should specify the areas in which the industry could be involved.[74] The EC-PMI Agreement appears to have spawned a Protocol that requires some level of cooperation between the tobacco industry and government – but in this case not with health but tax law enforcement agencies like customs who are perhaps less wary of dealing with the industry. Will the Protocol mark the end of the tobacco industry's involvement in diversion? To what degree, as a practical matter, do governments have to rely on the industry to prevent diversion? It brings to mind the Chinese proverb – *yu hu mou pi* – negotiating with a tiger for its skin.

D. Penal Measures in the Draft Protocol

When the penal measures in the Template were examined at INB I some states raised a number of difficulties with them. The Australian delegate noted:

[73] WHO, *Guidelines for the Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control: on the Protection of Public Health Policies with Respect to Tobacco Control from Commercial and other Vested Interests of the Tobacco Industry*, FCTC/COP3(7) (Nov. 17-22, 2008), *available at* http://www.who.int/fctc/guidelines/article_5_3.pdf (last visited Mar. 15, 2010).
[74] First Session, Summary Records, *supra* note 8, at 19.

> Australia reserved its position on criminalization as an effective remedy. Administrative remedies, such as infringement notices, license cancellation, and civil penalty provisions should be considered. The decision to criminalize a particular conduct should be taken because it was in the public interest to do so. Consideration should be given to the nature of the conduct concerned; how such conduct was dealt with in other circumstances under national law; the use of law enforcement in investigating it; the penalties appropriate to deterrence; and ease of collecting evidence.[75]

One problem was whether many of the activities listed in paragraph 33 of the Template should be merely unlawful, or whether they should be made criminal offences. A common problem in the negotiation of crime control treaties is that not all states designate the same offences as crimes or administrative or regulatory offences.[76] However, this is not unsurmountable if states show a willingness to adopt a broad enough terminology in a treaty so that the underlying conduct is subject to legal suppression. The more specific problem pointed to by the Australian delegate is that the activities listed in paragraph 33 of the Template are considered too trivial to be crimes in most states, and it follows that these activities are not serious enough to justify the various measures of formal international cooperation proposed in the Template including mutual legal assistance and extradition. In order to get agreement in Geneva to apply these forms of international cooperation to illicit tobacco related activities, many states will have to agree to treat at least some of these forms more seriously than they currently do.

In the Chair's Text developed after INB I the proposed list of prohibited activities was divided into two categories. The first was a list of activities to be established as "unlawful" under the parties' domestic law. These included unlicensed selling, manufacturing etc., incorrectly or not labelling, marking or stamping products, obstructing inspectors, not keeping records, and so forth. This extensive list was designed primarily to support the regulatory provisions in the Protocol by ensuring transgression was considered unlawful and adequately penalised. In the Revised Chair's Text it became draft Article 12(2).

The second category was a list of more serious forms of conduct including engaging in manufacturing, transporting, and so forth, without payment of the applicable taxes (i.e. smuggling or contraband offences), counterfeiting of both tobacco products and the equipment to make them, misdeclaring the value of tobacco products, laundering of the proceeds of

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[75] *Id.*, at 32.
[76] *See* Second Session, Summary Records, *supra* note 39, at 37.

tobacco smuggling, secondary participation in these activities and inchoate forms of these activities. In the Revised Chair's Text these "crimes", somewhat elaborated upon, became draft Article 12(1). The most critical difference between these crimes and the unlawful activities in draft Article 12(2) was that the draft Protocol did not provide the original regulatory obligation that the crime was being used to enforce. These "crimes" (they are, in fact, only obligations on states to enact crimes) were going to, if agreed upon, be used to enforce laws that states already apply. For example, the smuggling or contraband offence was to enforce the tax laws of the state, a matter on which the draft Protocol is otherwise utterly silent. So too with counterfeiting, which is to enforce the intellectual property laws of the state, not something the draft Protocol otherwise says anything about. That is not to say that these "crimes" are without purpose. When a treaty does not set the norm (i.e. tax to suppress use of tobacco) the purpose of setting a penal response to the breach of that norm in a treaty is to ensure that states that do punish the breach of that norm harmonise their crimes in order to make international penal cooperation possible. In any event it is arguable that the FCTC sets a "soft" norm for the imposition of tax to suppress tobacco use.[77] The draft Protocol should attempt to criminalise smuggling to makes it possible to cooperate internationally to suppress trans-national smuggling with the ultimate purpose of more effective taxation and health protection. However, whether the draft Protocol should be enforcing intellectual property laws through criminalising counterfeiting is another matter, because the primary interest being protected is that of the tobacco industry in their intellectual property.[78] It remains an open question whether there is a sufficient health interest in preventing counterfeit products coming on to the market. There will be such an interest if the counterfeited products are also duty unpaid[79] or contain chemicals in their production process that significantly increase the health risk of using them, but this will not always be the case.[80] What is certain is that the success of

[77] *See* art. 6(1) of the FCTC where parties recognise that taxation as an effective means of reducing consumption.

[78] Premabular paragraph 5(4) of the EC-PMI Agreement, recognises that EC member states and PMI have a "mutual interest" in "protecting the Trademark rights of legitimate Cigarette manufacturers."

[79] It is interesting in this regard that premabular paragraph 4 of the EC-PMI Agreement, recognises counterfeit as a "growing threat" to the EC's finances.

[80] Non-payment of tax crimes might involve the following:

- commercial brands purchased in low-tax jurisdictions and resold in high tax jurisdictions without payment of tax;
- commercial brands exported without payment of tax and then diverted into the illicit trade and sold without payment of tax;
- counterfeit commercial brands manufactured and sold without tax being paid; and
- smuggler's 'own' brands manufactured and sold without tax being paid. Crimes where there is only an intellectual property violation might involve the following: counterfeit of commercial brands where tax is paid.

the draft Protocol at preventing diversion into the illicit trade will increase the production and trading of counterfeit products.

At INB II and III the division of offences into these two categories was subject to lengthy discussion. The most serious objections were to the notion of criminalisation of the forms of conduct listed in draft Article 12(1) of the Revised Chair's Text. As a result of these objections it was agreed at INB III that the two categories should be collapsed back into one list of "unlawful" conduct[81] and this is now reflected in the Negotiating Text. However, it was apparent that all the provisions for international cooperation that followed draft Article 12 could not be applied to all the unlawful forms of conduct in the new single list; many were simply too trivial. Committee B ended up in an interminable search for some criterion that would enable the identification of "serious" forms of unlawful conduct that parties would be obliged to criminalise and thus to which international cooperation would apply. The EC proposed in draft Article 14(2) that classification as "serious" be predicated on the commission of any one of the listed forms of conduct "on a commercial scale,"[82] which was linked to the amount of the product traded in tonnes. Other delegates objected that there was no universal yardstick for "commercial scale."[83] The various alternative proposals contained in the new draft Article 12(2) left it to the states to decide what forms of conduct in 12(1) are serious. They differ in that while some oblige states to criminalise if that determination is made, others also leave the decision to criminalise up to the state – parties must decide what is serious and choose to criminalise it.

The link to "serious" crime brings into focus the other prominent concern raised at INB I – its relationship to existing crime control treaties.[84] Some states felt that it might well have been more appropriate, given the claims that tobacco smuggling is an organised crime,[85] to link the crimes in the draft protocol with those in the UN Convention against Transnational

[81] Personal notes, copy on file with the author. The summary records are not yet available. This solution was originally proposed by Brazil at INB II and supported by various other states; *see* Second Session, Summary Records, *supra* note 39, at 57.

[82] The EC delegation made this proposal at INB II; *see* Second Session, Summary Records, *supra* note 39, at 57.

[83] *See id.*, at 79, 80 (the objections of Brazil, India and other delegations).

[84] *See e.g.*, First Session, Summary Records, *supra* note 8, at 6, 28-9, 41, 50-1 and 53 (the statements of the delegate from Australia). The delegates from China, India, Saudi Arabia, and Brazil, made a similar point in the specific context of money laundering and asset forfeiture, *see id*., at 40-1. The EC delegate while urging promotion of the other treaties took the view that the protocol itself must contain strong measures on the proceeds of crime, seizure of assets and money laundering, *see id*., at 41.

[85] For example, the delegate from Iran, who stated "that investigations and legal action had illustrated the involvement of . . . transnational criminal groups in large-scale smuggling;" *see* First Session, Summary Records, *supra* note 8, at 4.

Organised Crime (UNCTOC).[86] The strongest link would be to rely entirely on the procedural provisions in the UNCTOC rather than to provide a watered down procedural regime in the draft protocol which potentially weakened the UNCTOC because the Protocol was both *lex specialis* and *lex posteriori*. Making such a link would require that all of the various offences in the draft Protocol carry a maximum punishment of at least four years imprisonment, the criterion in the UNCTOC for a "serious crime".[87] If i) a structured group (in the sense of a non-random group) of more than three individuals acted in concert over a period of time to ii) smuggle tobacco trans-nationally commited a iii) "serious crime" it would trigger the UNCTOC[88] and bring its elaborate international cooperation provisions into play. Making this link would reinforce the UNCTOC's procedural regime and in particular avoid significant expense building a tobacco smuggling suppression apparatus in Geneva at the WHO when such a bureaucracy already existed to service the UNCTOC at the UN Office on Drugs and Crime (UNODC) in Vienna.

As a result of pressure in INB II from parties to UNCTOC which did not want to reinvent the wheel in the draft Protocol, the Revised Chair's Text included an explicit link to UNCTOC. Draft Article 2(3) provided that parties to the UNCTOC would "ensure the full application of" the UNCTOC "relevant to the illicit trade in tobacco products." In the Negotiating Text this draft provision has had various options added, including moving in to the Preamble. A difficulty which has emerged is what to do about states party to the FCTC that intended to become party to the Illicit Trade Protocol but that were non-parties to the UNCTOC.[89] The Revised Chair's Text suggested simply that these non-parties to UNCTOC should endeavour to apply its provisions. However, it became apparent in discussion that some non-parties to UNCTOC are opposed to any formal link between the two treaties. The problem of the link to UNCTOC has also been raised in discussion of whether there should be a "without prejudice" provision as proposed in draft Article 2(4) of the Revised Chair's Text that provides that nothing in the Protocol will effect the rights and obligations in other treaties. Inclusion of such a provision has been opposed by some states that do not like the idea that the Protocol may be subject to, for example, free trade treaties, but supported by those who seek not to undermine the UNCTOC.

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[86] United Nations Convention against Transnational Organized Crime, G.A. Res. 25, ann. I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force Sept. 29, 2003.

[87] *Id*. art. 2.

[88] *Id*. art. 3.

[89] At INB II Colombia stated that not all states were party to the treaties the mutual legal assistance provisions the Chair's Text were based on and thus they had to be repeated in the draft protocol – Second Session, Summary Records, *supra* note 39, at 64.

A specific link to the UNCTOC was also suggested in the definition in draft Article 1 of the Revised Chair's Text of "serious crime" as "conduct constituting an offence punishable by maximum deprivation of liberty of at least four years or a more serious penalty." The aim of the almost incomprehensible draft Article 14(1) appears to have been to attempt to link to this definition by ensuring that grave incidences of the crimes in draft Article 12(1) should be punished by four years or more and officially labelled as "serious". The use of "serious" is meant it seems to trigger the UNCTOC.

Unfortunately, many of the delegates in Committee B of INB III never quite grasped that the Revised Chair's Text proposed a formal link to the UNCTOC. As a result when the crimes were collapsed back into the unlawful actions in draft Article 12(1), the focus on the term "serious" in draft Article 12(2) shifted to its use not to trigger the UNCTOC but to trigger the detailed provisions for international cooperation included in the rest of the draft Protocol.[90] The EC argued that they could not accept a threshold built into "serious" as high as four years when the usual threshold was only one year of deprivation of liberty. The African states insisted it remain four years. But the EC were talking about international cooperation under the Protocol while the African states still appeared to want to cross-refer to the UNCTOC in order to rely on it for international cooperation rather than the Protocol. The debate was marked by an absence of reasons for positions taken, mutual incomprehension reigned, and the Committee went on to examine the provisions for penal cooperation without having settled on a trigger for these provisions. Finding this trigger became one of the main tasks of Drafting Group 2 which met in Geneva in the October and November before INB IV. The Group eventually abandoned a link to serious crime in the definitions of crimes in draft Article 12 and it was only retained as a possible threshold requirement for extradition.[91] Delegates appear content that the draft Protocol contain its own international cooperation regime, even though there has been little debate as to how they are going to find the human or financial resources to run it.

The sanctions provision in draft Article 14 is generally uncontroversial. However, any definition of the threshold of seriousness of the offences in draft article 12 should not be included in draft Article 14, which is where this definition currently resides in the Negotiating Text, because draft Article 14 is about appropriate penalties and control of domestic criminal processes such as prosecutorial discretion and statutes of limitation, and not

[90] Personal notes, copy on file with the author. The summary records are not yet available.

[91] Proposals of Drafting Group 2, annexed to WHO FCTC, *Proposals of Drafting Group 2 to the Fourth Session of the Intergovernmental Negotiating Body on Articles 12-14 and 30-33 of the Negotiating Text for a Protocol to Eliminate Illicit Trade in Tobacco Products*, FCTC/COP/INB-IT/ 4/4 (Jan. 13, 2010).

about triggering international cooperation.

The discussion in Committee B at INB III around draft Article 16 on confiscation indicated the imprudence of copying provisions from the UNCTOC, an earlier treaty but of much broader scope, into the Chair's Text, and then not making it clear that delegations should not tinker with agreed text. For example, a long debate ensued on whether "states parties shall adopt, to the *greatest* extent possible within their domestic legal systems", the Article 12 UNCTOC wording, should be replaced with, "states parties shall adopt, to the *widest* extent possible within their domestic legal systems", a potentially somewhat shallower obligation.[92] This tinkering continued in the debate on special investigative techniques in draft Article 19(1) where the Revised Chair's Text was itself a revamp of Article 20(1) of the UNCTOC. The use of wire-taps and other forms of electronic surveillance is a very sensitive issue because of its rights implications, and to reopen a debate had at Palermo when the UNCTOC was agreed was inadvisable. The delegates to Committee B seem slowly to be becoming aware because the rest of draft Article 19 repeats the UNCTOC formulae and was subject to consensus. But Article 27 on joint investigations which repeats verbatim Article 19 of UNCTOC now has square brackets. Agreement on this provision was very difficult at Palermo, which suggests it will be difficult in Geneva.

That inappropriate tinkering had occurred in the inter-sessional period prior to INB III is illustrated by draft Article 30(3) of the Revised Chair's Text on Mutual Legal Assistance which reads:

> 3. Whenever a crime set out in Article 12.1 has been committed, any Party that has information concerning the victim and circumstances of the crime shall transmit such information, under the conditions provided for in its national law, fully and promptly to the State or States concerned.

This is a modification of Article 12(2) of the Convention on the Safety of United Nations and Associated Personnel[93] and while the notion of transmission of information about the commission of offences may be a welcome addition to the draft Protocol, it was pointed out in Committee B of INB III that the term "victim" makes no sense in the draft Protocol. The

[92] Personal notes, copy on file with the author. The summary records are not yet available.

[93] Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994). A number of provisions of the Revised Chair's Text appear to have been copied from this treaty perhaps because it is a simpler instrument than the UNCTOC and thus may be more acceptable for inclusion in the draft Illicit Trade Protocol. The annex of *Revised Chairperson's Text for a Protocol on Illicit Trade in Tobacco Products: Note by the Chairperson*, FCTC/COP/INB-IT/3/INF.DOC./2 (Apr. 23, 2009) lists the provisions in the Revised Chair's Text which contain language from other treaties and identifies those treaties.

delegations would have been well to heed the warning made by the US observer in INB II

> [who] urged caution in the inclusion of provisions from other legal instruments. Any change [in] wording might create ambiguity and undermine the instrument from which it was taken, as well as the future [P]rotocol. A reference to the instrument concerned might be more useful than reproducing its provisions.[94]

Fortunately Drafting Group 2 saw the light and adopted the principle of using copying text from UNCTOC and modifying it only where necessary.[95]

The critical provision in draft Article 17 of seizure payments, borrowed from the EC-PMI Agreement, was not extensively fiddled with, but was also not agreed to. The destruction of the confiscated tobacco products in draft Article 18 was generally agreed on, although selection of the mode of destruction to ensure minimum environmental impact and security whilst leaving sufficient for purposes of evidence at trial and training has still not been agreed.

The first few provisions of Part V on International cooperation – the sharing of statistical data (draft Article 20), of operational data (draft Article 21), the necessity for confidentiality (draft Article 22), cooperation and technical assistance in training (draft Article 23), assistance and cooperation in investigation (draft Article 24), respect for sovereignty (draft Article 25), and that on jurisdiction (draft Article 26) appeared not to be that controversial, as they are simply analogues of provisions in earlier treaties. Draft Article 28 on law enforcement cooperation has been agreed, but draft Article 29 on Mutual Administrative assistance is subject to a few proposed alterations. Various provisions essential to more formal cooperation including those on mutual legal assistance (draft Article 30) and extradition (draft Article 34), have yet to be fully debated by the INB. They were subject to Drafting Group 2's efforts in Geneva in October and November of 2010, but although it worked on their wording, it could not agree on the necessity of having these provisions in the draft Protocol.[96]

VI. CONCLUSION

The abundant brackets in the regulatory parts of the Negotiating Text produced by INB III are a marker of the difficulties the negotiations have faced thus far in reaching agreement. One reason for the lack of agreement

[94] Second Session, Summary Records, *supra* note 39, at 44.
[95] *See e.g.*, the Report of Drafting Group 2, *supra* note 91, ¶ 12.
[96] *See id.*, ¶ 12-19.

may be a poor grasp of these measures and how they will work domestically. Another may be that few states are affected by all of the problems these measures seek to address. At times during the process the positions have been so uncompromising they have left the impression that there is little agreement on the necessity for an Illicit Trade Protocol at all. Nevertheless, the amount of political capital invested in the process thus far suggests that something will come of it. What eventuates will probably not mirror the ambitions of the Template, which it is submitted were in effect the ambitions of the EC. This is not only because of major differences in global practice but also because of the costs of building such a system globally. If a Protocol is agreed it is likely to include the three main regulatory elements: licensing, due diligence and tracking and tracing. But it seems unlikely unless the process extends beyond INB IV to an INB V that we can expect more than constructive ambiguity in regard to these elements. On the other hand, the penal elements and the self-contained international cooperation regime are likely to be cut down or sacrificed completely in the cause of agreement on the regulatory elements. Cross reference to the UNCTOC would have enabled delegates to remove many of the provisions but reinforce an existing system designed to achieve much the same purpose. The questions of who is going to pay for implementation and what institutional form implementation will take require more detailed attention.[97] A further intergovernmental meeting after INB IV may be necessary.

[97] In this regard, *see* WHO FCTC, *Institutional and Financial Arrangements under Parts VI and VII of the Negotiating Text for a Protocol to Eliminate Illicit Trade in Tobacco Products*, FCTC/COP/INB-IT/4/5 (Jan. 13, 2010). This fairly brief note proposes a range of familiar options for institutional organisation based around some form of "meeting of the parties" backed by a secretariat. In particular, it points out that if capacity is simply added to the existing FCTC Secretariat that "[a]dditional staff would be required to cover Protocol specific issues that are not currently covered by the Convention Secretariat, such as criminal law, trade law, economic/tax administration and customs relate issues" (¶ 29) and puts the cost of four staff at US$1.15million to US$1.5 million per annum (¶ 30). If a separate Protocol Secretariat is establish these costs are estimated to go up significantly (*see* ¶ 23).

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