POLICY BRIEFING

Briefing Note: Fifth Session of the Intergovernmental Negotiating Body on an Illicit Trade Protocol
Geneva, 29th March to 4th April 2012

SUPPLY-CHAIN CONTROL (PART III)

Key recommendations

- Delete references to "legally binding and enforceable agreements" in Articles 6 and 9;
- Add language on key inputs in Article 5, 6, 8 and 12, or at a minimum, modify language on key inputs in Article 5.5 so as to encourage rather than preclude action;
- Delete reference to location of global information-sharing focal point in Article 7.1.

Introduction

During past INBs, Part III of the draft Protocol has been the central focus of discussions, with numerous wording proposals and vigorous debates on some issues, notably the extent of tracking-and-tracing obligations (Article 7). At INB4, Parties achieved consensus on Article 7, subject to the oft-repeated proviso that "nothing is agreed until everything is agreed". Other draft articles were referred to the informal working group, which proposed text for the rest of the supply-chain-control articles.

A key question now facing Parties is whether to propose modifications to wording of any of the Part III draft articles, given the limited negotiating time available at INB5. This is ultimately an issue for Parties to decide. FCA would suggest that there are some drafting problems in the proposals from the working group that do need to be settled before the Protocol is finalised. In some cases, the issue appears to be the wording chosen, rather than the intent, so the changes can be considered housekeeping changes. In other cases, there are more basic issues at stake that might need lengthier discussion.

Problem: inappropriate references to private agreements

In the drafting suggested by the informal working group, there are two mentions (in Article 6 and Article 9) to obligations being "in accordance with national law[s] or legally binding and enforceable agreements." This wording has been in various drafts of Article 6 at past meetings (Cf. Proposals from the informal working group at INB4, in FCTC/COP/INB-IT/4/3), but appears to be new in the case of Article 9.

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The *intent* of this wording appears to be to allow the European Union and its member states to meet their Protocol obligations with respect to due diligence (Article 6) and security and preventive measures (Article 9) via agreements with cigarette manufacturers. However, the need to include wording to achieve this is unclear, and the effect of this wording is potentially much broader than that intended.

"In accordance with national law" is a formulation found in many international instruments, including in the Framework Convention on Tobacco Control (FCTC) itself (e.g. in Articles 10 and 11). It has two possible meanings. First, it could mean that Parties may implement a particular obligation via national law, as opposed to some other mechanism. In this sense, the formulation is generally redundant: of course Parties are free to adopt national laws to implement treaty obligations. In its second meaning, the nature and extent of Parties' obligations are dependent in part on national law. In most cases, this is likely to be the intended meaning.

The formulation "in accordance with legally binding and enforceable agreements" is similarly ambiguous. If it means simply that such agreements are one possible *mechanism* for implementing obligations, it is redundant: nothing in Article 6 or Article 9 precludes a Party from using legislative, executive, administrative or other measures to achieve implementation. (That range of possibilities could be specified, e.g. "Each Party shall require, in accordance with its national law and through legislative, executive, administrative or other measures...".) But the formulation could also be interpreted to mean that the extent and nature of a Party's obligations *depend* on the content of "legally binding and enforceable agreements". This means any Party could opt out of its Article 6 or Article 9 obligations by signing an agreement with *anybody*, so long as that agreement is legally binding and enforceable.

To take it to extremes, a Party could sign an agreement with an auditing company, Global Auditors Inc., declaring that "for the purposes of Article 6 of the Protocol to eliminate illicit trade in tobacco products, conduct of an annual supply-chain audit by Global Auditors Inc. shall be deemed to constitute due diligence by the legal or natural person that is the subject of that audit." More realistically, any Party would be free to sign agreements with individual manufacturers limiting due diligence requirements for that company, and claim to be fulfilling its Article 6 obligations – even if the terms of such an agreement were inadequate.

As worded, "in accordance with... legally binding and enforceable agreements" could potentially also refer to bilateral treaties between Parties. One would need to consider how this interacts with Article 2 of the Protocol.

It is wholly inappropriate to give Parties the ability to contract out of their international obligations via agreements with non-State actors, particularly where there are no agreed standards of transparency with regard to the processes for their negotiation, adoption, and enforcement or their terms. The existing wording appears to leave it open to Parties to adjust their Protocol obligations via confidential agreements with cigarette manufacturers – agreements to which other Parties, citizens of signatory countries and civil society have no or limited access.

Solution: delete "and legally binding and enforceable agreements" wherever the phrase appears in Articles 6 and 9. If necessary, add the phrase "through legislative, executive, administrative or other measures".

Problem: lack of controls on key inputs

There is considerable evidence in recent years of a rise in illicit manufacturing of tobacco products – that is, production that is clearly illegal from the outset, often by groups that do not even maintain the pretence of legality by registering their company, obtaining manufacturing licences, and the like. Sometimes such products are detected when they enter normal channels of trade, at the wholesale or retail level. The "unique, secure and non-removable identification markings" referred to in Article 7.3 should help in particular in detecting such products.

However, some illegally manufactured tobacco products *never* enter normal channels of trade, but are sold on the black market. A bigger difficulty is that once illegally manufactured products are detected at the retail level, it can be very difficult to trace supply back to a distributor, much less to the original manufacturer.

In the area of illicit drugs, as well as the illegal manufacturing of certain hazardous products (such as explosives), one policy approach is to regulate the trade in precursor chemicals or products.[1] This can be quite challenging, particularly because many chemicals used to produce illicit drugs also have multiple other, entirely legal, uses.

In the case of illicit manufacture of cigarettes, the challenge is potentially much more manageable, depending on the choice of precursor product or key input. The two that the FCA has identified in the past are cigarette paper and acetate filter tow (the fibre used to make most cigarette filters). Cigarette papers have no significant alternative uses, except for the smoking of other drugs, such as marijuana. Acetate filter tow does have some alternate uses, although about 80 percent is used for cigarette production. Within the Harmonized Commodity Description and Coding System, both cigarette papers and acetate filter tow have HS numbers – one of the indicators used with respect to manufacturing equipment to determine what forms of equipment can be subject to supply-chain controls.[2] (See our background document on key inputs for more details.) Analysis of trade data, by HS classification, is a proven methodology to detect trade anomalies. For example, it is relatively easy to calculate the approximate number of cigarettes that can be manufactured from an identified volume of cigarette paper. Large movements of cigarette paper without corresponding levels of reported cigarette manufacturing can alert authorities to the likelihood of illegal manufacturing.

At past INBs, the key argument against including key inputs in supply-chain provisions of the Protocol was that they are dual-use or multiple-use products. It should be noted that this principle is <u>not</u> applied to precursor chemicals for illicit drugs or explosives. In the case of manufacturing equipment, Parties have yet to decide whether equipment with potential uses outside tobacco product manufacturing should be included within the scope of the Protocol.

1 Cf. Article 12 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

2 Cf. Manufacturing equipment for the manufacture of cigarettes and other tobacco products: Note by the Convention Secretariat. FCTC/COP/INB-IT/5/INF.DOC./3.

In draft Article 5, the informal working group proposes that the key inputs issue be revisited later. Draft 5.5 reads: "Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted to ascertain whether any key inputs exist that are essential to the manufacture of tobacco products, are identifiable and can be subject to an effective control mechanism. On the basis of such research, the Meeting of the Parties shall consider appropriate action."
This wording is peculiar, in several respects:

- It appears to preclude any action by the Meeting of Parties – including the commissioning of research – until at least five years after entry into force. On the other hand, it provides no deadline for the completion of research. Thus, although it may have been intended as a "consolation prize" for Parties which wished to see key inputs regulated in Part III, its net effect may well be to reduce the probability of action on the issue, as compared to a Protocol that simply failed to mention the topic;
- No further research is needed to demonstrate that there are key inputs that are essential to the manufacture of cigarettes and that can be easily identified. The only question is whether they can be "subject to an effective control mechanism";
- Research into options for controlling key inputs may be helpful, but presumably what Parties will need to take an informed decision is information on regulatory practice, feasibility studies for possible options and/or cost-benefit analyses. The phrase "evidence-based research" is unclear in this context.

If the intent of Parties is to postpone consideration of key inputs until after the Protocol comes into effect, but to ensure the issue is not forgotten, Article 5.5 should be re-worded. It could read: "At its first session following the entry into force of this Protocol, the Meeting of the Parties shall consider what research may be necessary to determine the feasibility of appropriate action on key inputs and ensure such research is conducted. Parties shall review the results of such research at the next session and shall consider appropriate action."

In FCA's view, such a delay is not necessary. A better way to proceed would be to insert references to key inputs into Articles 5, 6 and 8. Licensing and record-keeping would be required for the manufacture, import, and export of key inputs, and due diligence requirements would apply. In the case of Articles 6 and 8, this could be achieved by including key inputs in the definition given to the term "supply chain". Article 12 would also need to be adjusted.

Solution: Language on key inputs should be included in Articles 5, 6 and 8. At a minimum, Article 5.5 should be re-worded to ensure the Meeting of the Parties actually does consider appropriate action on key inputs within a reasonable time after entry into force of the Protocol.

Problem: premature decision on location of the global information-sharing focal point (Article 7)

COP decision FCTC/COP4(11) mandated the informal working group to consider a number of issues, including the organisational location of the global information-sharing focal point whose establishment is stipulated by draft Article 7.1. The working group decided not to consider this last issue, on the basis that consensus had already been reached on the text of Article 7 at INB4 (although it is unclear why the COP would have referred the issue to the working group if it considered the matter to be settled).

In FCA's view, it is premature to determine the optimal location of the focal point, in advance of a determination of its exact function, size and budget. These are operational issues to be worked out by the Meeting of the Parties. By way of analogy, it is worth noting that the decision on the location and structure of the Framework Convention Secretariat was taken at COP1 (FCTC/COP1(10)), at the same meeting that approved the first budget and workplan for the Secretariat.

Draft Article 7 does not make it entirely clear whether the focal point is to be a database, some type of staffed facility or an automated switching system. Under the terms of Article 7, we are at least five years away from a fully operational global tracking-and-tracing system. Many things can happen in the meantime: developments in information technology, developments in illicit trade that influence Parties' implementation of key Protocol measures and developments in the role of other organisations, whether national or international.

As mentioned in our brief on implementation, technical assistance and capacity-building, the extent and nature of Parties' technical assistance and capacity-building needs for implementation of the Protocol is unclear at this point, but may be quite substantial. It would seem prudent to take decisions on operational details and budget priorities in an integrated manner – a task best left to the Meeting of the Parties.

Solution: Simply deleting the phrase "located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control" from Article 7.1 leaves all options for the Meeting of the Parties, to consider at the same time as other important operational issues, such as capacity building, technical assistance, workplan, budget, etc.

Conclusion

In the course of past INB sessions, the FCA has pushed for simplification and strengthening of many provisions of Part III of the draft Protocol. There remain a number of substantive points (e.g. remote sales) and drafting issues which, in an ideal world, we wish the Parties had time to revisit or address, as the case may be.[3] However, if this is indeed the final INB session, we accept that everybody, Parties and observers alike, needs to focus on a much smaller number of issues.

In our view, the three concerns raised here do not fundamentally modify the intent of the draft Part III that is the basis of negotiations here. They can be addressed simply, and failure to do so would create problems for the future of the Protocol that are potentially substantial.

3 Cf. "Comments on the Negotiating text for a protocol to eliminate illicit trade in tobacco products and Proposals of Drafting Groups 1 and 2 (Documents FCTC/COP/INB-IT/3/5 Rev.1; FCTC/COP/INB-IT/4/3; FCTC/COP/INB-IT/4/4)*". Available on-line at: http://tinyurl.com/7f2ep6t .