

# **The Normative Impact of the Protocol to Eliminate Illicit Trade in Tobacco Products on Non-Parties**

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## **I. Introduction**

Illicit trade in tobacco products causes significant losses in government revenue worldwide and undermines tobacco control policies. Illicit trade accounts for 10% of global tobacco consumption, resulting in annual revenue losses of \$40.5 billion. In addition to making tobacco products more accessible, illicit tobacco trade poses a great threat to public health as illegal tobacco products are generally found to be more harmful than legal ones (e.g., unknown or illegal additives).

Therefore, in 2012, a new international treaty under the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC)—the Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol)—was adopted in the Fifth session of the Conference of the Parties (COP5). The Protocol aims to implement and complement FCTC Article 15, which outlines the elimination of all forms of illicit tobacco trade as an important and inevitable issue.<sup>1</sup>

Even though the Parties of the Protocol today are not as numerous as the FCTC,<sup>2</sup> the importance and influence of this Protocol should not be underestimated. First, as the supply chain of tobacco products is transnational in nature, the Protocol should be expected to be implemented by Parties' laws and regulations that entail extraterritorial jurisdiction effect. Second, given that the Parties include major actors in the global economy (including the European Union, Brazil, India, and some Western European states), the incorporation of the Protocol requirements into the Parties' domestic legislation would motivate non-Parties wishing to maintain trade relationships with Parties to comply with the Protocol in an indirect manner. The overwhelming influence of the Protocol upon tobacco control policies across the world is therefore heavily anticipated.

This Paper explores potential normative impacts of the Protocol upon non-Parties. Because the Protocol and most Parties have not established applicable regulations or guidelines, this Paper takes EU law—arguably the most developed legislation in this regard at the moment—as an example to illustrate such impacts. In addition, EU law seems to be an appropriate reference for the analysis, since more than 11 Parties to the Protocol are EU Member States, representing about one quarter of the Parties.

## **II. Fundamental Pillars of the Protocol**

In the context of the Protocol, “illicit trade” means any practice or conduct prohibited by law that relates to production, shipment, receipt, possession, distribution, sale or purchase,

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<sup>1</sup> With regard to eliminating illicit trade in tobacco products, Article 15 of the FCTC stipulates the obligations for the FCTC parties. In light of the complementary and complementary nature of the Protocol, both the wording of the Protocol and subsequent practices among the parties of the Protocol are reasonably expected to have great value in interpreting Article 15.

<sup>2</sup> As of August 30, 2018, there are 48 parties to the Protocol.

including any practice or conduct intended to facilitate such activity. Therefore, in order to eliminate illicit trade, the Protocol has institutionally designed three principal pillars.

**1. Strengthening supply chain controls:** This is the heart of the Protocol, aiming to ensure that the supply chain of tobacco products and manufacturing equipment are secure against illegal trade. The supply chain means all activities associated with the transformation and flow of goods and services. The reason to require Parties to introduce regulatory measures on supply chain is to hold every transaction under strict scrutiny. These measures include, *inter alia*, licensing, due diligence, tracking and tracing (T&T), record-keeping, and security and preventive measures.

**2. Establishing legal liabilities and offenses:** Any act running afoul to the normal course of supply chain should be addressed. The Protocol defines offences and establishes liability (both criminal and non-criminal), seizure payments, as well as the disposal of confiscated products.

**3. Facilitating international cooperation:** The transnational nature of illicit trade calls for international cooperation. The Protocol provides for, *inter alia*, information-sharing, technical and law enforcement assistance and cooperation, mutual legal and administrative assistance, extradition, and a global information-sharing point located in the Secretariat of the FCTC.

### **III. The Impact/Influence of the Protocol upon Non-Parties**

In light of the transnational nature of the supply chain of tobacco products, the boundary of the impact of the Protocol will not be confined to the Parties. During the course of international trade, goods are subject to laws in multiple jurisdictions, concerning, for example, customs as well as fiscal and tobacco control. In order to export products to high-standard jurisdictions with strong demand, the governments of suppliers tend to amend respective regulations to assist their service providers, manufactures, or exporters. Thus, as the number of Parties reaches critical mass, the market power possessed by them will motivate non-Parties to implement required measures under the Protocol, or take such required measures into serious consideration in the policy-making process.

Below, we identify three crucial measures of supply chain control to demonstrate such impact.

**1. The tracking and tracing system (Article 8 of the Protocol):** Parties would require specific details of tobacco products to be trackable and traceable. These details would be provided by each node of the supply chain, which could be located in various jurisdictions. Importers of the Parties would prefer service providers (e.g., international transit) or manufactures who are capable of complying with such requirements. Therefore, the substantial impact generated by this Article upon non-Parties cannot be underestimated.

The unique identification markings required under the T&T system represent a typical case. Importers of tobacco products of the Parties could ask foreign suppliers (e.g., service providers and manufactures) to perform such obligations. In other words, formalities and the content of the markings could be provided before being imported by the Parties, where the impact of the T&T system upon non-Parties is evidenced.

While most Parties haven't enacted relevant national legislation to implement Protocol obligations, the EU serves as an exception, having adopted Directive 2014/40/EU and subsequent regulations concerning a tractability system for tobacco products. All unit packets of tobacco products are to be marked with a unique identifier (ID). The ID issuer, which is to be independent from the tobacco industry, will be appointed by each Member State and will be responsible for issuing unique identifiers. Suppliers with the need to acquire unique identifiers, regardless of whether they are in the EU, will *de facto* be affected by the system.

**2. The licensing system (Article 6 of the Protocol):** Parties are obliged to establish a licensing system with respect to the manufacture, import, and export of tobacco products and manufacturing equipment. Further, other activities, such as growing tobacco or transporting and wholesaling tobacco products, should be subject to the licensing system where possible. Although foreign tobacco industries will not be directly regulated by such a system, it is possible that tobacco companies with licenses would only deal with 'legal' foreign counterparts with licenses issued by a foreign government. Therefore, non-Parties may be incentivized to establish such a system for their benefits. Additionally, the tobacco industries of non-Parties would act in a manner consistent with regulatory systems established by Parties.

**3. Due diligence (Article 8 of the Protocol):** Parties should require that all individuals/businesses involved in the supply chain of tobacco, tobacco products and manufacturing equipment conduct due diligence concerning their business relationships; monitor the sales to their customers; and report to the competent authorities any relevant evidence where appropriate. A customer who acts against the Protocol would be designated as 'a block customer.' Nationals and companies of non-Parties could be the subjects of due diligence and designated as 'a block customer.' In addition, they could be required to conduct necessary due diligence by customers located in jurisdictions of the Parties. The obligation of due diligence is therefore performed by manufactures that are not subject to the jurisdiction of a Party.

#### **IV. The Extraterritorial Jurisdiction Exercised by Parties Implementing the Protocol and Its Impact on Non-Parties**

**1. Extraterritorial jurisdiction:** Extraterritorial jurisdiction, in the prescriptive sense, refers to a State 'adopt legislation intending to have an extraterritorial effect, i.e., establishing norms governing persons, property or conduct outside the national territory'.<sup>3</sup> Based on the following four circumstances, it is being more and more widely exercised. 1) Against international crimes: This means providing the basis for States to punish international crimes, e.g., piracy, genocide, or crime against humanity; 2) Combating transnational crimes: This means providing the basis for States to address transnational crimes, e.g., transnational organized crime, human trafficking, drug trafficking or illicit tobacco trade; 3) Employing pressure on host States: Asserting extraterritorial jurisdiction generates political pressure toward States in which criminal activities are conducted; 4) Improving the ethics of globalization: In the context of economic globalization, if transnational corporations are

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<sup>3</sup> Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, 9 (Background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels on 3-4 November, 2006), at <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> (last visited Sept. 11, 2018).

located in States exercising extraterritorial jurisdiction, this tends to enhance accountability.<sup>4</sup>

Given the fact that extraterritorial jurisdiction contributes to the elimination of illegal acts of a transnational nature, potential encroachment on sovereignty or ‘judicial chaos,’ to some extent, becomes a ‘necessary evil.’ In addition, it is worth noting that without international coordination and cooperation, extraterritorial jurisdiction will not be as effective as expected.

**2. Impact on non-contracting parties:** Taking EU law as an example, the substance of the Protocol would be executed by suppliers located in non-Parties. Article 15 of the Directive 2014/40/EU stipulates that it is applicable to tobacco products destined for, or placed on, the EU market, even if the said products are manufactured outside the EU.<sup>5</sup> All economic operators of these products are obligated to record.<sup>6</sup> Therefore, by implementing this Directive, extraterritorial jurisdiction would be exercised by EU Member States.<sup>7</sup>

Along this line of thought, as the Protocol has entered into force, extraterritorial jurisdiction would be exercised not only by the EU Member States, but by all Parties. This would generate a significant influence upon economic operators and further drive their own respective governments to amend pertinent tobacco control law.

## V. Conclusion

The anticipated impact of the Protocol on non-Parties is substantial and prominent. The transnational nature of the supply chain of tobacco products and the extraterritorial jurisdiction exercised by Parties represent the underlying rationales. Directive 2014/40/EU and subsequent regulations concerning the tractability system for tobacco products are a case in point. It provides a good model for comparative studies, which would effectively serve the purpose of non-Parties when reviewing existing tobacco control law and future policy-making.

Notwithstanding the obligations of Protocol on Parties as well as the normative impact on non-Parties, the object and purpose of the Protocol will not be achieved without effective international coordination and cooperation among the international community. Information-sharing, technical and law enforcement assistance and cooperation, mutual legal and administrative assistance, and extradition provided for in the Protocol would be a great starting point. In this sense, the involvements and participations of non-Parties will surely become a decisive parameter. Therefore, extending the coordination and cooperation from Parties to non-Parties is critical.

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<sup>4</sup> *Id.* at 2-4.

<sup>5</sup> Directive 2014/40/EU, Article 15.1, ‘In the case of tobacco products that are manufactured outside of the Union, the obligations laid down in this Article apply only to those that are destined for, or placed on, the Union market.’

<sup>6</sup> Directive 2014/40/EU, Article 15.5, ‘Member States shall ensure that all economic operators involved in the trade of tobacco products, from the manufacturer to the last economic operator before the first retail outlet, record the entry of all unit packets into their possession, as well as all intermediate movements and the final exit of the unit packets from their possession.’

<sup>7</sup> Such regulatory rationale can also be explained by the EU General Data Protection Regulation (Regulation (EU) 2016/679). Article 3 of the Regulation, which provides for the territorial scope of the Regulation, explicitly stipulates that the Regulation may, under certain conditions, apply to controllers or processors involved in processing personal data by virtue of the transnational nature of data processing. In the context of economic globalization, the essence of the transnational nature of data processing and the supply chain of tobacco products are identical. Specifically, all activities, from production, shipment, transit, receipt to distribution, sale or purchase, are found in a variety of places, irrespective of whether they are inside or outside the EU.