

Chapter 11

Trends and Challenges in Combating Illicit Trade in Tobacco Products in the U.S.



Matija Kajić and Stanisław Tosza

Abstract Most of the illicit tobacco trade (ITT) in the USA is caused by high tax rates on cigarettes in many states and localities and the availability of much cheaper cigarettes from low tax states and other low-tax jurisdictions, such as Tribal lands or Internet sales from domestic sellers or international sellers (who can evade all U.S. federal, state, local cigarette taxes). This chapter aims to give an account of how the U.S. deals with this and other problems of illicit tobacco trade, including both its successes and its shortcomings. The chapter gives an account of necessary aspects of regulation, and explains the enforcement side, including policy, applicable law, and agency involvement. Particular attention is paid to central challenges of U.S. efforts to fight the ITT, including prioritisation of ITT in comparison to other criminal activities, data on ITT related criminal activity, track and trace systems, and coordination among responsible agencies and levels of government.

The Authors are particularly grateful to Eric N. Lindblom for his explanations of the US tobacco regulation and practice and extremely valuable comments on this chapter. Stanisław Tosza would also like to thank the O'Neill Institute for National and Global Health Law at Georgetown University for the hospitality during his research stay which significantly contributed to our understanding of the US legal framework and practice as well as to agents of some of the law enforcement agencies analysed in this paper who wished not to be named. All errors are our own.

M. Kajić (✉)

Faculty of Law, Economics and Governance, RENFORCE, University of Utrecht, Utrecht, The Netherlands

e-mail: m.kajic@uu.nl

S. Tosza

Faculty of Law, Economics and Finance, University of Luxembourg, Luxembourg, Luxembourg

e-mail: stanislaw.tosza@uni.lu

11.1 Introduction

Tobacco is one of the biggest public health threats world-wide,¹ and is responsible for more than 480,000 deaths per year in the United States, including 41,000 deaths attributed to second-hand smoke exposure.² Although government excise tax increases have worked effectively to reduce smoking and other tobacco use in the United States, their success has been dampened by the presence of an illicit market in tax-evading cigarettes.³

The illicit tobacco trade (herein: ITT) comprises several illegal schemes (interstate smuggling or bootlegging, international smuggling, illicit whites, illegal production, and so forth), the most prominent of which, in the case of the U.S., is bootlegging—specifically interstate bootlegging (see below for details). To these, one should add also Internet and other remote sales and deliveries (via mail or common carrier) of tax-evading cigarettes (and, to a lesser extent, other tobacco products) from both U.S. and international based illegal sellers. Although such internet-based tax-evading sales were curtailed considerably by the 2009 Prevent All Cigarette Trafficking (PACT) Act.

Generally speaking, regulatory bodies use a range of strategies directed at the licit market (consisting of legal manufacturers and importers) to prevent and reduce smoking and the death, disease, and other harms smoking causes. These include: high taxation and tax harmonization, minimum age laws, limiting the availability of (certain) tobacco products, advertising restrictions, product and packaging regulation, manufacturer and retailer licensing, counter marketing or other public education programmes, and tracking and tracing (which also directly addresses illicit trade). However, some of these measures are used to a very limited extent, if at all, in the U.S. (e.g. there is no tax harmonization, no product regulation other than flavour restrictions, no national laws to restrict availability, very few state/local laws that do the same, and very little use of tracking and tracing). A general lack of prioritization for ITT as a criminal activity remains, as does the lack of coordination among agencies and an absence of singular agency leadership. While these problems persist, a number of interesting solutions and possibly successful enforcement strategies have already been woven into the U.S. legislation and policy on ITT.

This chapter aims to give an account of how the U.S. deals with the problem of illicit tobacco trade—both the successes and the shortcomings. Due to the effects of consumption patterns in the licit market on the growth of the illicit market, the chapter will firstly briefly explain the functioning of the licit market, before delving into the ensuing consequences and problems with the functioning of the illicit market. Relevant to this, the chapter gives an account of necessary aspects of regulation, and explains the enforcement side, including policy, applicable law, and agency involvement. While this analysis focuses mainly on cigarettes, there

¹World Health Organization (2018).

²U.S. Center for Disease Control and Prevention (2020).

³World Health Organization (2018).

are also important aspects of ITT considered in relation to smokeless tobacco, loose tobacco and cigars. Cigarettes make up the largest portion of the U.S.' tobacco market and bootlegging of cigarettes makes up the biggest portion of the U.S.' illicit tobacco trade, making the bootlegging of cigarettes the most pressing ITT problem to consider. Cigars are mentioned with regard to some case studies, but this is a much smaller fraction of the ITT market and the tools described below might not necessarily apply. Furthermore, the chapter will only briefly touch upon some rising trends in the licit market, like vaping, as there does not (at least yet) seem to be any related ITT problem.⁴

11.1.1 The Nature of the U.S. Licit Tobacco Market

The U.S. is the 4th largest producer of unmanufactured tobacco globally, despite general U.S. production of tobacco steadily declining since its peak in 1963.⁵ In 2019–2021 an estimated 14% of U.S. adults were cigarette smokers.⁶

The size of the adult smoking population has declined from what was almost 30% in 2005,⁷ but the consequences of smoking are long term.⁸ As such, tobacco use remains the leading cause of preventable disease and death in the United States.⁹ Considering the threat to health posed by tobacco, some steps have been taken by U.S. regulators and policy makers to discourage smoking. However, these are relatively weak compared to measures in place in other industrialized countries, and the effectiveness of some of these measures have been undermined by some of the recent changes in the U.S.' tobacco market, such as the increase in availability of tobacco products online, and the rise of e-cigarettes and multi-product use.

The vast majority of cigarette sales in the U.S. take place through face-to-face transactions. Buying cigarettes online was a growing trend in the early 2000s,¹⁰ linked not only to the simplicity of the online-ordering process but, even more, to the influx of websites selling “tax-free” cigarettes, which sometimes evaded federal, state, and local taxes totalling more than \$3.00 per pack. In 2009, Internet cigarette (and smokeless) sales, as well as related tax evasion were directly addressed by the federal PACT Act, thereby reducing not just tax evading Internet/remote sales but all Internet/remote sales (e.g., by making cigarettes non-mailable matter and prompting many common carriers to stop delivering cigarettes; see below Sect. 11.2.1 for more

⁴Regarding health aspect, see for instance: Gostin and Glasner (2014), p. 596.

⁵Mackey et al. (2014), p. 1, p. 3.

⁶Cornelius et al. (2019), p. 1; Campaign for Tobacco-Free Kids 2021.

⁷U.S. Center for Disease Control and Prevention (2019b) ‘Current Cigarette Smoking Among Adults in the United States’.

⁸Chaloupka et al. (2015), p. 5.

⁹Chaloupka et al. (2015), p. 5.

¹⁰Chriqui et al. (2008), pp. 253–265.

details). Because of the rise of vaping in the U.S., in 2021, the PACT Act was expanded to apply to Internet sales of e-cigarettes, as well.

Vaping is the practice of inhaling and exhaling the vapour produced by an electronic cigarette or similar device, which has recently grown in popularity, particularly among young people, including many who would not otherwise use any tobacco product.¹¹ According to a report by the U.S. Center for Disease Control and Prevention (herein: CDC), a recent increase in the number of middle and high school students using electronic cigarettes has erased past progress in reducing youth tobacco consumption.¹² Studies on the topic have criticized the new advertisements for electronic cigarettes, as clearly having the deliberate attempt to assert smoking as “cool” to youthful consumers, much like the Marlboro Man advertisements did in the 60s.¹³ This is not only an issue because nicotine exposure during adolescence impacts learning, memory, and attention, but also because it “primes the brain for addiction, making it so that youths who use e-cigarettes are more likely to go on to smoke conventional cigarettes”.¹⁴ The U.S. Food and Drug Administration, which previously had tobacco control jurisdiction over only cigarettes and smokeless tobacco, began to oversee and regulate e-cigarettes more directly in August 2016, when it issued its “deeming” rule to include all tobacco-nicotine products that are not medical drugs under its tobacco control jurisdiction.

The role of addiction in the illicit trade for cigarettes and other tobacco products is a key factor to keep in mind too. If consumers were not addicted, less effort would be geared toward trying to evade taxes or find illicit sources of cheaper cigarettes when prices on the licit market sharply increased. For this same reason, vaping and e-cigarettes could create a strong discouragement on illicit trade for cigarettes in response both to new tax and price increases, as well as to any new FDA regulations to ban menthol or minimize nicotine levels. Instead of going through the illegality, inconvenience, lack or reliability of illicit markets, many addicted consumers might switch to still-legal e-cigarettes—if they were not too much more expensive.

¹¹National Research Council (2015), p. 9; The most complete oversight of research in the area of ITT in the U.S. was done by the National Research Council, the operating arm of the United States National Academies of Sciences, Engineering, and Medicine. The members of the Council who were selected to create the 2015 report on “Understanding the U.S. Illicit Tobacco Market” were chosen for their special competences on this topic and included relevant experts in the field like Frank J. Chaloupka, Klaus von Lampe and others. This is the reason why their report is relied on to explain and verify the components of the U.S. ITT discussed in the present chapter.

¹²U.S. Center for Disease Control and Prevention (2019c) ‘Progress Erased: Youth Tobacco Use Increased During 2017–2018’.

¹³Gostin and Glasner (2014), p. 596.

¹⁴U.S. Center for Disease Control and Prevention (2019c) ‘Progress Erased: Youth Tobacco Use Increased During 2017–2018’.

11.1.2 Regulation of the Tobacco Market

The U.S. regulation of the licit market is a mixture of federal, state, and local government law and regulation. Among the most important are taxation, smoke-free laws, public education and counter-marketing campaigns, advertising restrictions and marketing restrictions (such as flavour bans). From the perspective of the comparative research in this book, three elements are crucial because they have the most actual or potential impact on ITT: product requirements, licensing and taxation. Congress and state and local legislatures are the primary sources of new tobacco control laws or taxes, with taxes administered by the Alcohol and Tobacco Tax and Trade Bureau (herein: TTB) at the federal level and by various state and local government agencies. However, in 2009, the U.S. Family Smoking Prevention and Tobacco Control Act (herein: Tobacco Control Act) granted the FDA extensive powers to regulate tobacco products and their manufacture, distribution, marketing and sale. While also establishing procedures whereby no new or substantially changed tobacco products were permitted to enter the U.S. market without a permissive order from FDA finding that their marketing will be “appropriate for the protection of the public health.”¹⁵ Although FDA’s tobacco control jurisdiction initially applied only to cigarettes, tobacco for roll-your-own cigarettes, and smokeless tobacco products, the FDA issued a rule to extend its tobacco control jurisdiction to cover all other tobacco-nicotine products, including e-cigarettes, as of August 2018.¹⁶

A key feature of the act requires “that new tobacco products do not have greater potential for initiating or maintaining dependence than existing products”.¹⁷ Through Section 907 of the Act, the FDA is also given the authority to regulate the characteristics of tobacco products (such as nicotine levels, ingredients, or toxic yields during use) through implementing tobacco product standards in order to better protect the public health. For example, because of Section 907, the FDA has the power to restrict permitted levels of certain substances in tobacco products, with the aim of reducing the harmful dependency caused by high nicotine levels. To reduce youth initiation and use and promote cessation by existing smokers, the FDA has also announced that it will issue new rules to prohibit certain smoked tobacco products with characterizing flavours, including menthol-flavoured cigarettes.¹⁸

The FDA has also stated an intent to issue a new rule to reduce permitted nicotine levels in cigarettes and certain other smoked tobacco products to non-addictive levels, but has not yet taken any formal action to do so.¹⁹ Studies have outlined how the primary reason for tobacco’s long term harmfulness is its addictive property,

¹⁵National Research Council (2015), p. 19.

¹⁶Huang (2019).

¹⁷National Research Council (2015), p. 174.

¹⁸U.S. Food and Drug Administration (2018), p. 4.

¹⁹Family Smoking Prevention and Tobacco Control Act [2009], Sec. 907.

which causes long-term use with repeated exposure to harmful toxins.²⁰ With this in mind, it is clear that an FDA rule to establish a product standard which would reduce nicotine in smoked tobacco products to non-actionable levels would prompt many current smokers to quit or switch to less-harmful forms of nicotine consumption and would prevent experimental users from becoming regular, addicted users.²¹ Political and bureaucratic obstacles have prevented the FDA from issuing an effective tobacco control rule for nicotine levels.

The tobacco industry also continues to oppose both any possible nicotine-reduction rule and the FDA-promised new rule banning cigarettes with a menthol flavour. The industry claims that either rule would contribute to the growth of a large, new illicit trade, either in illegal menthol or illegal full-nicotine cigarettes.²² However, several analyses have rejected these tobacco industry claims, arguing that any growth of the illicit trade which might occur as a result of the lower nicotine measure would be so minimal that it would not “interfere seriously with the nicotine rule’s public health gains,”²³ with the risks to any new menthol rule being even smaller. The reasons for this lack of interference are mainly that any illicit trade in full-nicotine or menthol cigarettes would have to smuggle the cigarettes over international borders (rather than just smuggle them from nearby lower-tax jurisdictions within the United States as is the ITT practice now) or produce them through new illegal domestic manufacturing. Any such international-border smuggling or domestic manufacturing at a large enough scale to jeopardize the health benefits of low-nicotine cigarettes on the legal market would be difficult, if not impossible, to perform under the radar of law enforcement, as would any subsequent illegal distribution, marketing, and sale to illicit buyers.²⁴ Nevertheless, to maximize public health gains from a nicotine-reduction rule (or menthol rule) and avoid any possible rhetorical or practical illicit trade problems, these analyses recommend that FDA supplement the rule with a range of accompanying measures to minimize the size of any possible new illicit market.²⁵ These recommended measures include the likes of a track and trace system, stricter regulation on manufacturing and packaging machines, and several others—all of which are discussed further on in the present chapter.

Another instance in which the FDA has not made use of its extended authority to protect public health relates to graphic health warnings on tobacco products. The Tobacco Control Act requires prominent warning labels for tobacco products about potential health risks.²⁶ The purpose of these recommendations is to communicate information about health risks of tobacco in the hopes of reducing the appeal of

²⁰U.S. Food and Drug Administration (2018), p. 4.

²¹U.S. Food and Drug Administration (2018), p. 4; Lindblom (2019), p. 960.

²²Lindblom (2019), p. 960; Ribisl (2019), p. 1007.

²³Lindblom (2019), p. 960; Ribisl et al. (2019), p. 1007.

²⁴Lindblom (2019), p. 960.

²⁵Lindblom (2019), p. 960.

²⁶National Research Council (2015), p. 19.

cigarettes which has been continually heightened through years of positive advertising from the tobacco industry.²⁷ The FDA was required by the Tobacco Control Act to issue regulations requiring graphic health warnings on all cigarette packs by June 22, 2011.²⁸ While the FDA did issue these regulations, the tobacco industry challenged them in court and the D.C. Circuit Court of Appeals struck down the rule on the grounds of commercial speech violations.²⁹ This was largely due to a failure on the part of the FDA to provide substantial evidence showing that enacting their proposed graphic warnings will accomplish the objective of reducing smoking rates, as required under the Administrative Procedure Act.³⁰

Since then, the FDA had supported new research regarding graphic health warnings, but had not yet taken any other publicly visible action to develop a new rule requiring warning labels for cigarettes.³¹ As a result, in 2018, the American Academy of Pediatrics brought a case to the Massachusetts District Court, accusing the FDA of failing to fulfil their mandate under the Tobacco Control Act by “unlawfully withholding” or “unreasonably delaying” the promulgation of a final rule on graphic warnings.³² The case was brought with the aim of drawing attention to the deadline for implementation of graphic warnings missed by the FDA, and having the court compel the FDA to act. The court ordered the FDA to provide an expedited schedule for the “completion of outstanding studies in this area and the publication of the graphic warnings rule for public comment” by September 26, 2018.³³ In August of 2019 the FDA proposed thirteen new warnings that would appear on all cigarettes, which include various graphic images and warnings.³⁴ The FDA’s tobacco director Mitch Zeller said the new effort is supported by research and could “hold up under any legal challenges”.³⁵ Although FDA issued the final GHW rule in 2020, it has not yet gone into effect, as of July 2021, because of tobacco industry legal challenges that are still pending in court.

The remaining two key components of U.S. licit market regulation are licensing and taxation. Licencing refers to the measures imposed by the government to control the supply chain by granting access to the licit tobacco market only to certain, approved tobacco growers, manufacturers, distributors, and retailers.³⁶ In the U.S.,

²⁷Dewhirst and Wonkyong (2011), p. 397.

²⁸Family Smoking Prevention and Tobacco Control Act [2009], Sec. 903.

²⁹United States District Court, District of Columbia, *R.J. Reynolds Tobacco Co. v. United States Food & Drug Administration*, Judgement, [Nos. 11–5332, 12–5063] 24 August 2012 (*R.J. Reynolds v FDA*), 845 F.Supp.2d 266.

³⁰United States District Court, District of Massachusetts, *American Academy of Pediatrics v. United States Food and Drug Administration*, Judgement, [No. PWG-18-883] 15 May 2019 (*Academy of Pediatrics v. FDA*).

³¹National Research Council (2015), p. 19.

³²*Academy of Pediatrics v. FDA*; 5 U.S. Federal Code (U.S.C.) Ch.7 § 706(1) (1994).

³³*Academy of Pediatrics v. FDA*.

³⁴U.S. Food and Drug Administration (2020).

³⁵U.S. Food and Drug Administration (2020).

³⁶National Research Council (2015), p. 5.

tobacco growers and manufacturers of products necessary for the manufacture of cigarettes (filters and cigarette paper) are “not subject to licensing or other regulatory oversight”, it is considered that regulation at this stage would be difficult to implement and enforce due to the availability of many of the materials needed for said manufacture.³⁷ The manufacturers of cigarettes, however, are required to obtain a license from the TTB prior to engaging in business operations.³⁸

Tobacco product taxation is aimed at raising revenues and, by raising prices, helps to discourage the use of tobacco products. The particularly relevant segment of U.S. law in this area is Chapter 52 of the Federal Code, on “Tobacco Products and Cigarette Papers and Tubes”. Chapter 52 outlines the rate of taxes for the full spectrum of products containing tobacco—but does not yet reach tobacco products that contain and deliver nicotine without including any tobacco, such as e-cigarettes or nicotine lozenges or pouches. Chapter 52 further includes liabilities, exemptions and various requirements for both manufacturers and importers of tobacco products.³⁹ Taxation is also regulated by the Jenkins Act of 1949, amended by the 2009 PACT Act, which governs the collection of taxes on, and trafficking in, cigarettes and smokeless tobacco.⁴⁰ Cigarette manufacturers are required to pay “federal excise tax on cigarettes destined for the domestic market when the cigarettes leave the production facility”.⁴¹ Meanwhile, cigarettes destined for export, otherwise known as “in-transit” cigarettes, are exempt from taxes until they are introduced into a market. Wholesale involves the storage of large quantities of cigarettes in warehouses, before their eventual distribution to retailers.⁴² In addition to the federal excise tax, wholesalers have to pay state and local taxes and obtain and affix tax stamps on each pack.⁴³

While some scholars argued that “extensive research demonstrates the effectiveness of tax and price policies in reducing tobacco use”,⁴⁴ they also conclude that the presence of the ITT can significantly reduce the effectiveness of increased taxes in reducing tobacco’s negative impacts on health “by increasing the affordability and accessibility of tobacco products”.⁴⁵ This line of argumentation highlights the key

³⁷National Research Council (2015), p. 32; U.S. Food and Drug Administration (2018), p. 4.

³⁸National Research Council (2015), p. 32.

³⁹26 U.S.C Ch.52 § 5701 – 5763 (2017).

⁴⁰Bureau of Alcohol, Tobacco, Firearms and Explosives (2020b) ‘ATF Prevent All Cigarette Trafficking (PACT) Act Information Guide’, pp. 5–6.

⁴¹U.S. Food and Drug Administration (2018), p. 4; National Research Council (2015), p. 32.

⁴²National Research Council (2015), p. 32.

⁴³National Research Council (2015), p. 32.

⁴⁴Chaloupka et al. (2015), p. 7.

⁴⁵Jha and Chaloupka (1999), p. 196. It should be noted here, that the ITT’s ability to increase the affordability and accessibility of tobacco products is relevant only to non-youth smokers. One of the most powerful impacts of raising prices on the licit market (via tax increases on cigarettes or other tobacco products) is that it prevents youth experimentation, implementation, and use. Illicit trade does not significantly reduce that impact because youth are much less likely, compared to regular smokers, to try to find or take advantage of price reductions through illicit trade.

connection between policies administered on the licit markets and their consequences for the illicit market. As well as, by extension, on the health of smokers, who are less likely to respond to tax increases by trying to quit smoking if they can still access lower-priced cigarettes through the illicit market.

In addition to taxation policies at the federal level, tax-like policies exist in agreements between private actors and state authorities as well. One such agreement is the 1998 Master Settlement Agreement (herein: MSA). At its core, the MSA establishes a legal framework for tobacco companies to provide payments to government agencies (which go towards the coverage of tobacco-related medical costs and prevention programs) in exchange for the government agencies to withdraw health-related legal proceedings against the tobacco companies.⁴⁶ This means instead of opting for litigation in a multitude of health-related court cases, the tobacco companies have agreed to make annual payments to the settling states (and comply with a range of marketing restrictions and requirements). Thereby, the tobacco companies have protected themselves against trials that may have resulted in higher damages payments than the yearly amount they are expected to contribute under the MSA. While the annual cigarette company payments to the states under the MSA are significant, it is clear that the companies have simply passed those extra costs on to smokers through cigarette price increases.

The MSA has been signed by 50 cigarette manufacturers, four large U.S. tobacco companies, forty-six states, the District of Columbia, and five U.S. territories.⁴⁷ Payments are reduced when the combined sales and cigarette market share of participating manufacturers' and tobacco companies falls below 1997 levels.⁴⁸ However, the settlement payments are calculated using only numbers on the "quantity of tobacco products for which federal excise taxes were paid".⁴⁹ Cigarettes which evade federal excise taxes because they are sold on the illicit market are not counted towards the settlement payments, meaning that the MSA could be viewed as yet another taxation policy which may inadvertently create an incentive for the tobacco companies to divert their products to the illicit market. These implications for the ITT are felt mainly at the state level, where it is estimated that a state, like Massachusetts in 2004, loses around \$1000 in MSA payments for every 1 million federally untaxed cigarettes sold.⁵⁰ On the other hand, every large decline in smoking directly translates to enormous benefits to the U.S. and the states in terms of less disability and disease, lower smoking-caused health care and other costs, and increased worker productivity.

Given the major public health threat presented by ITT worldwide, as well as the estimated \$40.5 billion yearly loss of revenue for governments worldwide, much international attention has been targeted at measures to eliminate the ITT. The most

⁴⁶Lo (2008), p. 535.

⁴⁷National Research Council (2015), p. 22.

⁴⁸National Research Council (2015), p. 22.

⁴⁹National Research Council (2015), p. 22.

⁵⁰National Research Council (2015), p. 22.

widespread of these measures has been the World Health Organization's treaty, the Framework Convention on Tobacco Control (herein: FCTC) and the complementary Protocol to Eliminate Illicit Trade in Tobacco Products (herein: The Protocol). The FCTC has been ratified by 171 countries, but the U.S. has not followed suit—having only signed the convention in 2004.⁵¹ There has been no ratification mainly because of industry opposition. This is evident in that the U.S. Tobacco Industry continues to challenge even elements of U.S. policy that are similar to those required by the FCTC, such as Article 11 of the FCTC on graphic/pictorial warning, outlined above.⁵² Despite a failing implementation, simply by becoming a signatory (even without ratification), the FCTC has created certain obligations for the U.S. under customary international law.

11.1.3 Nature of ITT in the U.S.

Worldwide, ITT generally consists of four main illegal schemes: bootlegging, large-scale smuggling, illicit whites and illegal production.⁵³ For each of these schemes certain phases of the supply chain are legal or illegal—depending on the phase at which the product is diverted to the illegal market.

The ITT in the U.S. is “dominated by domestic sources”, and centres primarily around bootlegging schemes.⁵⁴ Bootlegging is defined by the National Research Council as “the legal purchase of cigarettes in one jurisdiction and their consumption or resale in another jurisdiction without the payment of applicable taxes or duties”. This type of activity is also referred to as ‘tax evasion’, and is a large-scale criminal activity carried out mainly by criminal organizations.⁵⁵ It is not to be confused with another technical term in U.S. tax law: tax avoidance, which is most often an individual behaviour, as part of which individuals buy “cheaper tobacco products in a neighbouring jurisdiction...and bring them to their home jurisdiction for personal consumption”. Although tax avoidance can also be quite prevalent in certain areas of the U.S. where especially high-tax, jurisdictions border quite low-tax jurisdictions and it is easy to travel from one to the other.⁵⁶

There are two main types of bootlegging in the U.S.: bootlegging from low taxes states (such as Virginia) and no-tax or low-tax Native American Reservations to high-tax states (such as New York State or California) or especially high-tax localities (such as New York City or Chicago) where both state and local tobacco

⁵¹ WHO Framework Convention on Tobacco Control (2005); Bollyky and Gostin (2010), p. 2637.

⁵² Chung-Hall et al. (2019), p. s122.

⁵³ U.S. Food and Drug Administration (2018), p. 12; National Research Council (2015), p. 33.

⁵⁴ U.S. Food and Drug Administration (2018), p. 19; National Research Council (2015), p. 2.

⁵⁵ Chaloupka et al. (2015), p. 5; National Research Council (2015), pp. 23–24.

⁵⁶ Chaloupka et al. (2015), p. 5; National Research Council (2015), pp. 23–24.

taxes are paid.⁵⁷ Such tax evasion comes about because state and Tribal governments, and many (but not all) local governments can set their own cigarette and other tobacco tax rates, meaning that there is no harmonization of tax policy at the federal level. This results in different states, tribal lands, and cities and towns having different excise tax rates and sharply different retail tobacco product prices, creating the prime conditions for bootlegging.⁵⁸ Some states (like Virginia, North Carolina, or Missouri) fall into the category of “source” states for contraband and others (like New York or Illinois) fall into the category of “destination” states, with New York City and Chicago being even more lucrative destinations because of their local tobacco tax rates imposed on top of the states.⁵⁹ Virginia and North Carolina are major tobacco-producing states,⁶⁰ and are categorized as a source states because of their low excise taxes, with North Carolina being especially attractive because it does not require any state tax stamp on packs sold within its borders, as virtually all other states require. For instance, Virginia has the second lowest cigarette excise tax rate in the country (\$0.30 per pack) but is also geographically close to the mid-Atlantic and New England states which have some of the highest cigarette tax rates.⁶¹ This leads to Virginia being a primary source state for bootlegged cigarettes in 2012. On the receiving end of smuggling efforts from source states are destination states like New York. According to Klaus et al, New York City has arguably the largest local cigarette black market in the United States.⁶² This claim correlates with the fact that the State of New York has the highest cigarette excise taxes in the U.S. (\$4.35 per pack) and the second highest combined state and local excise tax rate (\$5.85 per pack), making it vulnerable to illicit trade of bootlegged cigarettes and tobacco products.⁶³ Similarly Chicago, with a state tax rate of \$3.00 per pack,⁶⁴ is another target for the cigarette black market. Cities are also especially attractive destinations for bootlegging because of their concentrated populations and sometimes also because of the existence of other criminal organizations and networks that can help with the distribution and sale of the bootlegged packs.

Bootlegging from Native American reservations is also common as many Tribes do not have tobacco taxes or have very low tax rates. As found by a 2017 study: “rather than quitting or reducing consumption of cigarettes, some price-sensitive smokers in the United States may avoid state and local excise taxes by purchasing their cigarettes from nearby Indian reservations.”⁶⁵ The central question regarding the tribes’ contribution to ITT has been whether or not tribes can legally sell tax-free

⁵⁷ Von Lampe et al. (2014), pp. 270–271.

⁵⁸ Chaloupka et al. (2015), p. 5.

⁵⁹ National Research Council (2015), p. 146.

⁶⁰ Von Lampe et al. (2014), p. 270; Kleiman and DeFeo (2017), p. 3.

⁶¹ National Research Council (2015), p. 146; Von Lampe et al. (2014), p. 270.

⁶² Von Lampe et al. (2014), p. 267.

⁶³ National Research Council (2015), p. 149; Von Lampe et al. (2014), p. 273.

⁶⁴ DeFeo et al. (2018), p. 15.

⁶⁵ National Research Council (2015), p. 149.

cigarettes to non-Native Americans, seeing as the U.S. federal government has recognized them as having the right to govern themselves.⁶⁶ Despite this, Congress does have the right to regulate commerce between the states, with foreign nations, and with Native American tribes.⁶⁷ States have no authority to go onto tribal lands to enforce any state laws or taxes—even if states may legally apply state taxes on product sales to non-tribal members on tribal lands within the states borders. However, states can require payments of state-taxes when purchases of cigarettes from tribal lands by the state residents are brought into the state.⁶⁸ Studies on this topic recommend that state governments consider policies aimed at reducing non-taxed tobacco sales through measures such as agreeing a tribal-state compact that allows tribes to collect state excise taxes in return for remitting part of the revenues for tribal benefit or setting a limited quota of sales that can be made to tribal members.⁶⁹

A close-up of both the negative effects and constructive counter measures in the sale of illicit tobacco on Native American reservations can be seen in the state of New York. In the 2000s Native American Reservations were the main source of contraband cigarettes reaching the New York black market.⁷⁰ The New York State Department of Taxation was able to track the growth in quantities of untaxed cigarettes being delivered to these reservations, which in some cases amounted to 3.6 million cigarettes annually for each tribal member.⁷¹ With this data it became increasingly obvious that the cigarettes were being sold further to non-tribal consumers, resulting in increased efforts from various authorities to curb the illicit sales and the eventual decrease in cigarette deliveries to reservations.⁷² The increased efforts included measures by states' attorney generals and the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives to discontinue the purchasing and delivery of cheap cigarettes from Native American reservations over the internet. These efforts culminated in the enactment of the federal PACT Act (see below in Sect. 11.2.2), as well as the coming into force of a New York state law requiring New York tax stamps to be fixed onto all cigarette packs delivered to tribal stores. This meant that "tax-exempt purchases by tribal members in New York State continued to be possible, but only through a coupon or prior approval system that effectively limited the volume of tax-exempt sales to tribal members". For both bootlegging from Native American Reservations, as well as for the other most common type of bootlegging (interstate bootlegging), the close-up examples given above for the state of New York really go to show how much of the issue with ITT in

⁶⁶National Research Council (2015), p. 56; Von Lampe et al. (2014), p. 272; Wang (2017), p. 304.

⁶⁷National Research Council (2015), p. 56; Von Lampe et al. (2014), p. 273.

⁶⁸Information gathered from interviews conducted in preparation for the present research.

⁶⁹National Research Council (2015), p. 56.

⁷⁰Von Lampe et al. (2014), p. 276.

⁷¹Von Lampe et al. (2014), p. 277.

⁷²Von Lampe et al. (2014), pp. 277–280.

the U.S. happens in the interstate commerce. This hints at a possible solution which would rely on the interplay between state level and federal level actors.

The second most common scheme in the U.S. illicit tobacco market is large-scale smuggling, whereby illegally produced cigarettes from other countries are smuggled into the United States. Large-scale smuggling occurs when “cigarettes are sold without the payment of any taxes or duties, even in the country of their origin”, thereby diverting legally-produced, untaxed cigarettes to the illegal market.⁷³ Large scale smuggling is a smaller component of the U.S. ITT than bootlegging, nevertheless it should not be neglected.⁷⁴ The large-scale smuggling of illicit tobacco products is often intertwined with other criminal activity.⁷⁵ For example, two Federal Bureau of Investigation (herein: FBI) coordinated investigations, by the name of ‘Smoking Dragon’ and ‘Royal Charm’, intercepted the smuggling of counterfeit cigarettes from China and North Korea, alongside a multitude of other illegal commodities including ecstasy, methamphetamines, counterfeit pharmaceuticals, counterfeit U.S. currency, and Chinese military grade weapons.⁷⁶

Another scheme is illicit production, which involves the manufacturing of cigarettes in violation of the law, usually either through unlicensed or underreported production of unique brand, non-brand cigarettes or counterfeit cigarettes.⁷⁷ Since the U.S. tobacco producers engage in “geographically fixed, visible, and regulated operations” it is relatively easy for law enforcement to detect and disrupt illegal activity of this nature.⁷⁸ As such, in the rare instance that illegally produced tobacco products are seized by U.S. authorities they typically originate from other countries, like China, North Korea, and Paraguay.⁷⁹

Finally, another illicit scheme with a limited presence in the U.S. are illicit whites, “cigarettes that are legally produced under unique brand names or no brand name”.⁸⁰ As the products in this scheme are legally produced, the first two stages of the supply chain for illicit whites (pre-production and production) are legal, while the final three stages (taxation, wholesale and retail) are illegal.⁸¹ Illicit whites have a limited presence in the U.S. ITT.⁸² Studies hypothesized that this is the least common

⁷³National Research Council (2015), p. 34.

⁷⁴Von Lampe et al. (2014), p. 268.

⁷⁵See National Research Council (2015), p. 3, for more information: “Although many claims have been made regarding the relationship between the illicit tobacco trade and terrorism, the link between the U.S. illicit tobacco market and terrorism appears to be minor, and there is also no systematic evidence of sustained links between the global illicit tobacco trade and terrorism.”

⁷⁶U.S. Department of State (2015), pp. 12–13.

⁷⁷National Research Council (2015), p. 39; U.S. Food and Drug Administration (2018), p. 7.

⁷⁸National Research Council (2015), pp. 39–40.

⁷⁹National Research Council (2015), p. 40.

⁸⁰National Research Council (2015), p. 38.

⁸¹National Research Council (2015), p. 33.

⁸²U.S. Department of State (2015), p. 5.

scheme because U.S. consumers have a preference for cigarettes diverted from the licit market with familiar brand names.⁸³

11.1.4 Main Players

The two types of bootlegging, and other illicit trade schemes, are driven by the behaviours of participants on both the demand and supply side of the ITT.⁸⁴ On the demand side the behaviour of the consumers is considered, but the supply side is more complicated as it includes both the suppliers on the licit market and the suppliers on the illicit market.

Consumption of tobacco products purchased illegally carries little social stigma in the U.S.⁸⁵ The National Research Council report found that lower socioeconomic populations participate more in the consumption of illicit tobacco products (purchasing mainly locally sold illicit cigarettes),⁸⁶ but higher income and higher education-level consumers are not exempt from illicit tobacco consumption.⁸⁷ They tend to purchase cigarettes online or travel to other states to avoid higher taxes.⁸⁸ The report also found that “heavier smokers and those less interested in quitting are [...] more likely to engage in tax avoidance and tax evasion”, and that a relatively small percentage of the illicit market constituted purchases by youths.⁸⁹ This is interesting, considering that it is usually assumed that young people, with usually lesser means, tend to use the illicit market more than more adult consumers, who usually have higher and more stable means. Despite the small participation of youth in the illicit market, these transactions are of a particular public health concern, considering the higher disposition of young people to fall into addiction.⁹⁰ Additionally, the youth population (and other smokers) may still be consuming ITT products, without being aware of it. This is because a large amount of tax-evading cigarette packs are sold by otherwise legally operating U.S. retailers that buy the tax-evading cigarettes from illegal suppliers to increase their profits.⁹¹ The buyers often do not notice that they are buying cigarettes with other-state or no-state tax stamps on them.

⁸³National Research Council (2015), p. 3.

⁸⁴National Research Council (2015), p. 3

⁸⁵U.S. Food and Drug Administration (2018), p. 17.

⁸⁶National Research Council (2015), p. 6.

⁸⁷U.S. Food and Drug Administration (2018), pp. 18–19; National Research Council (2015), pp. 3–4.

⁸⁸U.S. Food and Drug Administration (2018), pp. 18–19; National Research Council (2015), pp. 3–4.

⁸⁹U.S. Food and Drug Administration (2018), p. 11; National Research Council (2015), p. 4.

⁹⁰U.S. Food and Drug Administration (2018), p. 2; National Research Council (2015), p. 4.

⁹¹Information gathered from interviews conducted in preparation for the present research.

The main licit suppliers in the U.S. are Philip Morris USA, R. J. Reynolds Tobacco Company (herein: RJR) and ITG Brands.⁹² As well as some smaller suppliers like the Universal Corporation, JR Cigars, Iwan Ries and Co., Hestia Tobacco, and Pax Labs. Though smaller manufacturers exist, the U.S. tobacco market is dominated by Philip Morris and RJR.⁹³

The licit tobacco industry was previously proven to be involved in the expansion of the global illicit trade, both directly and indirectly.⁹⁴ Accusations of direct involvement were primarily based in legal claims, such as that brought by the EU in 2000 claiming that the industry plays a role in organized crime via the execution of large smuggling schemes.⁹⁵ Tobacco companies in the industry profit from sales to traders, “regardless of whether the cigarettes are then sold legally or illegally”.⁹⁶ As such, the smuggling of legally manufactured cigarettes was seen as a way in which the industry companies could introduce their products into new markets and expand their share of existing markets,⁹⁷ while at the same time avoiding regulatory requirements and any added tax on their products (which discourages consumer purchase on the licit market).⁹⁸ Instead of pursuing this through the courts, a series of legally binding agreements was created between the EU and various tobacco industry actors to cooperate in combating the ITT.⁹⁹

With these agreements in place, it is claimed that the tobacco industry is no longer contributing to the ITT directly.¹⁰⁰ Nevertheless, quite recent studies have found evidence from “growing & diverse sources” to indicate that the tobacco industry players continue to be involved in tobacco smuggling and that licit cigarettes produced by these industry players account for around two-thirds of the global illicit cigarette market.¹⁰¹ Beyond this type of direct involvement in smuggling, scholars and international organizations continue to make the claim that the U.S. tobacco industry is involved in indirect (but systematic) disruption of policies aiming to combat the global illicit trade.¹⁰² Using the example of the WHO FCTC, it has been demonstrated how the industry first attempts to block proposed policy, then seeks to “weaken policy language in order to ensure minimal restrictions on its business”, and finally “employs an arsenal of tactics to delay implementation of the policy”.¹⁰³ All the while, the tobacco industry presents itself as an ally to the legislative and political

⁹²ITG Brands (2020).

⁹³Debertin (2001), p. 512.

⁹⁴Joossens et al. (2016), p. 254.

⁹⁵Joossens et al. (2016), p. 254.

⁹⁶Joossens et al. (2016), p. 254.

⁹⁷National Research Council (2015), p. 27.

⁹⁸Chaloupka et al. (2015), p. 7.

⁹⁹Tosza (2021, forthcoming), pp. 11–12.

¹⁰⁰National Research Council (2015), p. 3.

¹⁰¹Gilmore et al. (2019), p. 127.

¹⁰²National Research Council (2015), p. 27; Bialous (2016), p. 5.

¹⁰³Bialous (2016), p. 3.

process aiming to fight the ITT. This “alliance” is further demonstrated by the scholarly concern around “the quality and transparency of industry-funded research on the illicit tobacco trade” and the industry’s relationship with law enforcement.¹⁰⁴ Furthermore, INTERPOL has been also subject to criticism for accepting a donation from the tobacco industry, even if aimed at supporting the work of important law enforcement organizations, in particular as this organization plays a role in the intergovernmental process of drafting and implementing policies aimed at addressing the ITT.¹⁰⁵

Criminal networks are the most obvious contributors to the ITT. The ITT is unusual in comparison to other illicit markets, “most cigarette smugglers operate within self-sufficient, small-sized enterprise structures”, with the illicit market being rather fragmented.¹⁰⁶ Little is discussed in the literature about criminal networks in the U.S. specifically, as many of the findings about criminal networks in the ITT come from international studies. Some of these studies have confirmed that there are some, limited connections between tobacco smuggling and other criminal activity, but mainly “the people involved in all segments of the distribution process of the illicit tobacco trade generally do not have serious criminal records, and the illicit tobacco market is not associated with violence”.¹⁰⁷

11.1.5 The Estimated Size of ITT in the U.S.

Experts estimate that “the portion of the total U.S. tobacco market represented by illicit sales has grown in recent years”.¹⁰⁸ Even though the majority of the burden of the illicit cigarette trade falls on low income and middle income countries, the ‘Campaign for Tobacco-Free Kids’ estimates that around 10% of the cigarette market share is illicit, even in high income countries (like the U.S.). These estimates are based on a 2009 study by the International Union Against Tuberculosis and Lung Disease. Further findings that more than 30,000 lives could be saved annually in those same countries, from 2030 onwards, if illicit trade was eliminated. These numbers focus on cigarettes, but that makes sense for the U.S. as well, as the U.S. illicit market consists primarily of bootlegged cigarettes.¹⁰⁹ LaFaive, Nesbit, and Drenkard ran a statistical analysis of the results found by the National Research Council and the results found in another study done by Mackinac Center for Public Policy, and found a high correlation coefficient for these percentages.¹¹⁰ The high

¹⁰⁴National Research Council (2015), pp. 27–28.

¹⁰⁵National Research Council (2015), p. 28.

¹⁰⁶National Research Council (2015), p. 56.

¹⁰⁷National Research Council (2015), p. 3.

¹⁰⁸For more detailed analysis of this growth, see: Chaloupka et al. (2015), p. 5.

¹⁰⁹Campaign for Tobacco-Free Kids (2020); Joossens et al. (2009).

¹¹⁰LaFaive et al. (2016), p. 3.

correlation indicates that these estimates on the size of the ITT in the U.S. are quite accurate, despite coming from very different sources. Furthermore, other studies in this field have estimated that the U.S. has “the third largest illegal cigarette market in the world in terms of the absolute number of illegal cigarettes traded, only surpassed by China and Russia”.¹¹¹

In addition to these estimates, the National Research Council found that the illicit tobacco market is not evenly distributed across the country. High-tax states like New York were found to have a much higher presence of the illicit market, while other states with lower taxes had a more minor presence of the illicit market.¹¹² This also means that the health and financial problems caused by the ITT in the U.S. are not evenly distributed. The total tobacco taxes collected in 2011 by all states and localities was \$17.65 billion.¹¹³ However, even more could have been gained, particularly by the high-tax destination states, if tobacco products had not been diverted to the illicit market. The financial loss of this diversion was \$2.95 billion in state cigarette excise taxes for high-tax destination states (with the State of New York accounting for nearly half of this total).¹¹⁴ Meanwhile, the financial gain of the diversion for lower tax source states was an estimated \$0.82 billion.

11.2 ITT Policy Objectives of the U.S. and Applicable Law

11.2.1 *Applicable Law*

In the United States, the key federal laws that address the illegal tobacco trade and product diversion are the Jenkins Act of 1949, the Contraband Cigarette Trafficking Act (CCTA), the Tobacco Control Act, the Prevent All Cigarette Trafficking Act (PACT Act) and the Internal Revenue Code.¹¹⁵ The following sub-section discusses the relevance of each of these federal laws in the context of the fight against ITT. In addition to these acts, “federal statutes regarding trafficking in counterfeit goods and services, currency reporting, money laundering, aiding and abetting, conspiracy, and racketeering” have also been used in tobacco enforcement investigations.¹¹⁶

¹¹¹ Von Lampe et al. (2014), p. 267.

¹¹² National Research Council (2015), p. 5; U.S. Food and Drug Administration (2018), p. 4.

¹¹³ National Research Council (2015), p. 5.

¹¹⁴ National Research Council (2015), p. 5; U.S. Food and Drug Administration (2018), p. 4.

¹¹⁵ Alderman (2012), p. 8.

¹¹⁶ National Research Council (2015), p. 140.

11.2.1.1 Jenkins Act 1949

The Jenkins Act of 1949 is particularly relevant for taxation and internet sale of tobacco products. It provides a reporting duty to the buyer's state tobacco tax administrator for "[a]ny person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce".¹¹⁷ This provision is meant to enable states to collect cigarette excise taxes from consumers.¹¹⁸ The Act provides for civil and criminal penalties,¹¹⁹ but was hardly enforced by the federal government before the PACT act (see below).¹²⁰ Furthermore, state governments also found the law difficult to enforce because identifying and prosecuting internet suppliers was difficult to tackle at the state level, resulting in many internet sellers entirely ignoring the Jenkins Act requirements.¹²¹

11.2.1.2 Contraband Cigarette Trafficking Act (CCTA)

The CCTA was enacted in 1978 and is particularly relevant for tax evasion. The act makes it "a felony for any person to ship, transport, receive, possess, sell, distribute, or purchase more than 10,000 cigarettes (500 packs) per month that bear no evidence of state cigarette tax payment in the state in which the cigarettes are found".¹²² Violation of the CCTA is a felony, meaning that it can result in both fines and a 5 year prison sentence. In addition to the possession and distribution requirements, the act also requires record-keeping for "any person who ships, sells, or distributes more than 10,000 cigarettes or 500 single-unit cans or packages of smokeless tobacco in one transaction".¹²³ The CCTA is important as it tackles the tax evading interstate smuggling ITT crimes (i.e. bootlegging), which are most prevalent in the United States.

11.2.1.3 Prevent All Cigarette Trafficking Act of 2009 (PACT Act)

Internet sales, and related tax evasion, were a growing trend until the federal PACT Act came into force in 2009. The act's central objective is tackling the sale of illicit tobacco products via the internet. In particular "it regulates the mailing of cigarettes and smokeless tobacco products to consumers through the U.S. Postal Service; adds new requirements for registration, reporting, delivery, and recordkeeping, including

¹¹⁷ 15 U.S.C Ch.10A § 376 (1964).

¹¹⁸ National Research Council (2015), p. 20.

¹¹⁹ 15 U.S.C Ch. 10A § 376 (1964).

¹²⁰ Alderman (2012), p. 8.

¹²¹ Alderman (2012), p. 8.

¹²² 16 U.S.C Ch 114 § 2342 (2011); National Research Council (2015), p. 20.

¹²³ National Research Council (2015), p. 20.

a List of Unregistered or Non-Compliant Delivery Sellers; and increases penalties to a felony up to 3 years imprisonment.”¹²⁴ Most importantly, Section 3 of the PACT Act provides that, subject to certain exceptions, cigarettes, including roll-your-own tobacco and smokeless tobacco are nonmailable.¹²⁵ Prior to the PACT Act (which amends the Jenkins Act), the Jenkins Act was hardly enforced. In 2020, congress added e-cigarettes to the PACT Act, which previously applied only to cigarettes and smokeless tobacco.¹²⁶

11.2.1.4 Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act)

The Tobacco Control Act of 2009 is the most recent piece of legislation aimed specifically at fighting the ITT. The Act’s central requirements are already discussed at length in Sect. 11.1.2 on regulating the licit tobacco market, which are only briefly summarized here. The Tobacco Control Act’s central component are the additional competences it grants to the FDA, requiring “the FDA to promulgate record-keeping regulations for the tracking and tracing of tobacco products through the distribution system”.¹²⁷ The most important of these competences is the possibility to set standards on the content of tobacco products (like the banning of flavouring), requirements on cigarette health-warning labels, limitations placed on non-face-to-face sales, and finally, advertising to youths.¹²⁸

11.2.1.5 Internal Revenue Code

The Internal Revenue Code (herein: IRC), which is the domestic portion of the U.S. federal statutory tax law, includes a chapter on the taxation of tobacco and enforcement thereof.¹²⁹ Important components of this code are the rates of required tax payments, qualification requirements for manufacturers and importers, and the rules on both civil and criminal penalties. Criminal violations of the IRC can include: engaging in business unlawfully; keeping or making any false or fraudulent record, return, report, or inventory;¹³⁰ as well as, purchasing or selling cigarette papers or

¹²⁴Prevent All Cigarette Trafficking Act of 2009, Public Law 111–154, 111th Congress (2009–2010); Bureau of Alcohol, Tobacco, Firearms and Explosives (2020a) ‘ATF Prevent All Cigarette Trafficking (PACT) Act Information Guide’.

¹²⁵Section 1716E of Title 18, U.S. Code.

¹²⁶S.1253, Preventing Online Sales of E-Cigarettes to Children Act of 2019.

¹²⁷National Research Council (2015), p. 19.

¹²⁸Family Smoking Prevention and Tobacco Control Act [2009].

¹²⁹26 U.S.C Ch.52 § 5701 – 5763 (2017).

¹³⁰26 U.S.C Ch.52 § 5701 – 5762(a)(2) (2017).

tubes unlawfully.¹³¹ Such criminal penalties can carry a maximum of 5 years' imprisonment and a \$250,000 fine.¹³² Civil violations of the IRC, on the other hand, can include: failure to pay a tax; possession of more than the permitted amount of tobacco for personal use; and the selling of tobacco products marked for export on U.S. territory.¹³³ Such civil penalties carry lower imprisonment times and fines of around \$1000.¹³⁴

In addition to these federal laws, states and localities can enact and enforce laws that govern the illicit tobacco trade. For instance, each state has laws with both civil and criminal ramifications for possessing, transporting, and selling illicit products.¹³⁵ It is interesting to note that both source and destination states are sometimes taking steps to go beyond federal law in the fight against ITT. As explained above, Virginia is a source-state with a low cigarette excise tax rate (\$0.30 per pack), while New York is a destination state with a high cigarette excise tax rate (\$4.35 per pack). Virginia profits from the ITT "when cigarettes are purchased legally in Virginia and sold elsewhere".¹³⁶ However, despite positively gaining from interstate trafficking, in 2012 it became the "first state to pass a criminal statute to specifically deal with interstate trafficking".¹³⁷ The new rules qualified possession of 25 cigarette cartons (5000 cigarettes) as a Class 1 misdemeanour (subject to more stringent penalties) and further qualified any subsequent offense a Class 6 felony.¹³⁸ New York, on the other hand, definitely harbours losses when cigarettes are legally purchased in other states and illegally sold in New York. The further components of this problem are addressed in the enforcement segments (see below, Sect. 11.3.1).

11.2.2 Measures to Prevent and Limit ITT

U.S. scholars working on the ITT have proposed a number of measures to prevent and limit the ITT schemes most present on the U.S. market (mainly interstate bootlegging/smuggling). These have included taxation measures (like tax harmonization and a federal rebate system), the development of an effective 'tracking and tracing system', stricter regulation on manufacturing/packaging machines, improved enforcement efforts and more active public education programmes.

¹³¹26 U.S.C Ch.52 § 5701 – 5762 (2017).

¹³²26 U.S.C Ch.52 § 5701 – 5762 (2017).

¹³³26 U.S.C Ch.52 § 5701 – 5763 (2017).

¹³⁴26 U.S.C Ch.52 § 5701 – 5763 (2017).

¹³⁵National Research Council (2015), p. 146; U.S. Food and Drug Administration (2018), p. 10.

¹³⁶National Research Council (2015), p. 146.

¹³⁷National Research Council (2015), p. 146; U.S. Food and Drug Administration (2018), p. 10.

¹³⁸National Research Council (2015), p. 146; U.S. Food and Drug Administration (2018), p. 10.

Authors point to a harmonization of tobacco tax rates at state and local levels as a potential effective solution to the problem of bootlegging.¹³⁹ It is not possible to reduce interstate smuggling simply through the raising of federal taxes, because differences would still remain at the state and lower level and continue to create space for profiting from smuggling.¹⁴⁰ Harmonization of state and local taxes, on the other hand, would entirely remove the profit motive for smuggling as the price of cigarettes would be equal for consumers in every state.¹⁴¹

Another way in which harmonization could be achieved is through a rebate scheme at the federal level, by which rates in high-tax jurisdictions would stay the same, while rates in low-tax jurisdiction would increase—to again equalize the price paid for cigarettes in all states. This would create a level playing field and disincentive to interstate bootlegging, but would also create the opportunity for low-tax jurisdictions to increase revenue from local taxes by increasing the price of cigarettes without actually increasing the price consumers had to pay (because of the rebate).¹⁴²

The effect of such tax harmonization measures may well be the most effective way to eliminate the incentive for smuggling, but the attitudes towards such measures in low tax states and high tax states differ.¹⁴³ The United States is characterized by a patchwork of different tobacco-tax levels, making it difficult to protect the interests of all states with one overarching tax harmonization measure.¹⁴⁴ For instance, low tax states “currently suffer no revenue loss from the interstate smuggling trade and even benefit from taxes paid on cigarettes bought to be smuggled out of the state”.¹⁴⁵ Furthermore, the elected officials in low-tax states, which are often also tobacco products states, are expected by the general public to protect the state’s economic interests by limiting taxation on tobacco products.¹⁴⁶ On the other hand high tax states are eager to maintain taxation as a source of revenue, and are therefore unlikely to be willing to reduce taxes (and by extension also the incentive for bootlegging).¹⁴⁷ These differences are most likely the reason why, as of 2017—according to Kleiman and DeFeo—“there seems to be no instance on record in which two or more jurisdictions have negotiated a harmonization of cigarette taxes to reduce interstate smuggling. . . Similarly, there appear to be no instances of

¹³⁹ Kleiman and DeFeo (2017), p. 4; Chaloupka et al. (2015), p. 14.

¹⁴⁰ Kleiman and DeFeo (2017), p. 4.

¹⁴¹ Kleiman and DeFeo (2017), p. 4.

¹⁴² A deeper analysis into the barriers and challenges of implementing a rebate scheme in the U.S. can be found in Kleiman and DeFeo (2017), p. 4.

¹⁴³ Kleiman and DeFeo (2017), p. 4; Chaloupka et al. (2015), p. 14.

¹⁴⁴ Von Lampe et al. (2014), p. 270.

¹⁴⁵ Kleiman and DeFeo (2017), p. 3.

¹⁴⁶ Kleiman and DeFeo (2017), p. 3.

¹⁴⁷ Kleiman and DeFeo (2017), p. 3.

voluntary reductions or increases of tobacco taxes specifically to discourage smuggling”.¹⁴⁸

Beyond tax harmonisation, having lower taxes on e-cigarettes when taxes are raised for smoked tobacco products could make e-cigarettes an economically attractive legal alternative to illicit cigarettes. This goes back to the point made earlier about the root cause of the ITT being a consumers’ addiction to tobacco products, not an inherent desire to participate in illicit schemes. As such, consumers are more likely to prefer any (cheaper) alternatives on the licit market, including e-cigarettes, as opposed to the cigarettes and tobacco products on the illicit market. Similarly, a lack of tax harmonization in many states/localities makes lower-tax cigars an economically attractive alternative to higher-tax cigarettes (and to illicit lower-tax cigarettes).¹⁴⁹

Another proposed method to tackle ITT is a ‘Track and Trace System’, which refers to the process of “recording and monitoring the physical locations through which the goods travel in the distribution channel”.¹⁵⁰ Such a track and trace system (herein: T&T system), is recommended by Article 15 of the FCTC and required by Article 8 of the Protocol to Eliminate Illicit Trade in Tobacco Products.¹⁵¹ However, the U.S. has not signed the latter instrument. The aim of the proposed T&T system, with regards to tobacco products, would be to forecast excise tax revenue, “eliminate under- and mis-declaration of production and trade volumes”, as well as to “detect diversion of goods”.¹⁵² Tax stamps (coded identifier markings affixed to tobacco products) are important components of such a system, because they allow the product to be traced back to its origin, and sometimes even subsequent distribution events allowing the product to be traced through its entire distribution chain. A T&T system can be used to monitor involvement of illicit actors in the ITT but can also be used to identify participation of licit tobacco industry companies in the diversion of tobacco products to illicit markets. Considering concerns over tobacco industry involvement in illicit bootlegging of tobacco products,¹⁵³ several studies point to the importance of T&T systems being developed independently of any industry influence.¹⁵⁴ The TCA also requires the FDA to implement a track and trace system for tobacco products from manufacture or import all the way to retail (but not through to the final sale to consumer). The FDA has, thus far, ignored that statutory requirement, without explanation, and no one has yet initiated a lawsuit to force the FDA to abide by the requirement (as was done in the graphic health warnings rule for cigarettes).

¹⁴⁸ Kleiman and DeFeo (2017), p. 4.

¹⁴⁹ Information gathered through interviews.

¹⁵⁰ DeFeo et al. (2018), p. i; WHO Framework Convention on Tobacco Control (2005).

¹⁵¹ WHO Framework Convention on Tobacco Control (2005), Art. 15; WHO Protocol to Eliminate Illicit Trade in Tobacco Products (2018), Art. 8.

¹⁵² DeFeo et al. (2018), p. i.

¹⁵³ Gilmore et al. (2019), p. 127.

¹⁵⁴ Gilmore et al. (2019), p. 127; Gallagher et al. (2019), p. 4.

Only three U.S. states (California, Massachusetts and Michigan) use T&T to combat ITT.¹⁵⁵ A 2018 study by DeFeo, Kleiman, and Priege examined California's T&T system in order to determine if such a system could be valuable in other states and, potentially, also nationally. It found that T&T systems in individual U.S. states have a positive impact on combating counterfeiting, but that such a system would make sense as a measure to combat the most common illicit scheme (interstate bootlegging), only if it encompassed "low-tax as well as high-tax jurisdictions, and if those jurisdictions learn how to share and use the resulting information".¹⁵⁶ This finding lines up with that of the 2017 study by Kleiman and DeFeo discussing tax harmonization, as both reviewed tools for tackling ITT (tax harmonization and T&T systems) would require collaboration between states.

Despite the fact that illegally produced tobacco products were not found to be a major component of the U.S. ITT, the illicit manufacturing market should not be neglected if ITT is to be fully eradicated.¹⁵⁷ Illegal manufacturers need machines to produce and package their products,¹⁵⁸ which is why regulation on manufacturing machinery plays an important role in limiting the opportunities for illicit manufacturing. Regulation of the manufacturing stage can be difficult to implement and enforce as many of the materials needed for the production of tobacco products, including machinery, are available in abundance.¹⁵⁹

Another component of the solution relevant to the ITT's manufacturing machinery could be found in tracking manufacturing information through a T&T system. Article 4.1 of the FCTC requires each party's T&T regime to demand an abundance of information to be directly accessible to assist authorized parties in determining the origin of tobacco products.¹⁶⁰ One of the pieces of information required is the machine used to manufacture the tobacco products.¹⁶¹ If the tobacco products' tax stamp is lacking a link to a known manufacturers' machinery, authorized parties are able to demonstrate the pack's inauthenticity¹⁶² and enforce existing legislation against any persons involved in the known supply chain of the counterfeited merchandise. This type of machine-tracking via a T&T system is not currently implemented nationally in the U.S., as it would also only be effective if it encompassed both low-tax and high-tax jurisdictions, with concrete sharing of resulting information between jurisdictions.

Regarding efforts to detect and investigate the illicit trade, enforcement of the labelling and recording requirements on the licit market (discussed above in

¹⁵⁵ DeFeo et al. (2018), p. i.

¹⁵⁶ DeFeo et al. (2018), p. iii.

¹⁵⁷ Von Lampe et al. (2014), p. 268.

¹⁵⁸ National Research Council (2015), p. 41.

¹⁵⁹ National Research Council (2015), p. 114; Chaloupka et al. (2015), p. 25.

¹⁶⁰ WHO Framework Convention on Tobacco Control (2005), Art. 4.1.

¹⁶¹ WHO Framework Convention on Tobacco Control (2005), Art. 4.1.c.

¹⁶² Kleiman and DeFeo (2017), p. 4.

sub-section 1.3) are key factors.¹⁶³ The FDA has the authority to regulate the labelling and tracking requirements of tobacco products through the distribution system,¹⁶⁴ but have not done so yet. They also have the authority to enforce the TCA and any related rules (including potentially track and trace) against importers, manufacturers, distributors, wholesalers, and retailer. The Bureau of Alcohol, Tobacco, Firearms and Explosives (herein: ATF) is the enforcement authority (with authorization from the PACT Act) that may enter business premises of retail sellers, and inspect their records and any tobacco products stored at the premises.¹⁶⁵ Violations of reporting requirements, “which include a failure to document the name, address, destination and vehicle license number of the purchaser” can result in a fine or up to three years imprisonment.¹⁶⁶ These types of enforcement efforts are considered to be effective in limiting the ITT, and should be incentivized with appropriate funding for enforcement authorities.¹⁶⁷

A good example of enhanced efforts to detect and investigate the ITT is the Container Security Initiative (herein: CSI). This initiative was launched in 2002 to target international, large scale smuggling operations. It is set up so that “Customs and Border Protection staff are stationed at foreign seaports and work with local authorities to scrutinize containers bound for the United States”.¹⁶⁸ The initiative is supported by the 24-Hour Manifest Rule, “which requires that cargo manifest data be electronically filed with U.S. customs at least 24 hours before cargo destined for the United States is loaded onto a vessel at a foreign port”.¹⁶⁹ Over the past 10 years, legislation has been proposed in Congress (but not passed into law) about establishing a track and trace system for tobacco products and implementing other anti-smuggling efforts. As such, enhanced enforcement efforts clearly exist as regards to international smuggling, but—as will be discussed in a further sub-section of this chapter—domestic enforcement could be improved in several areas.

11.2.3 Question of General Policy

In addition to the above-mentioned problems, a central issue of tobacco policy (highlighted by several studies) is one of “coordination across various agencies,

¹⁶³Family Smoking Prevention and Tobacco Control Act [2009], Sec. 301; National Research Council (2015), p. 21.

¹⁶⁴National Research Council (2015), p. 19; U.S. Food and Drug Administration (2018), p. 5.

¹⁶⁵National Research Council (2015), p. 20.

¹⁶⁶National Research Council (2015), pp. 20–21; U.S. Food and Drug Administration (2018), p. 10.

¹⁶⁷National Research Council (2015), p. 20; U.S. Department of State (2015), p. 15.

¹⁶⁸National Research Council (2015), p. 36; U.S. Department of State (2015), p. 9.

¹⁶⁹National Research Council (2015), p. 36.

participants and levels of government”.¹⁷⁰ The issue is rooted in a lack of priority being placed on the ITT, which is visible at both the regulation and enforcement levels. This lack of priority is caused primarily by the fact that ITT is not perceived as a serious (enough) problem by authorities or by society at large. Instead, the ITT is perceived as an economic issue, rather than a major problem for public health.

In regulation, the lack of priority manifests itself through a limited amount of legislation being drafted and implemented. Examples of FDA regulation on the licit market, such as nicotine content standards and graphic picture warnings, illustrate that the FDA is not fulfilling its mandate to impose the necessary limitations on tobacco standards in the name of public health. Even following legal claims brought by organizations from the health community,¹⁷¹ the FDA has failed to fully follow through on regulating important issues like nicotine content,¹⁷² and health warnings.¹⁷³

The lack of support for ITT regulation can also be seen in the governments’ attitude towards the FCTC, which has still not been ratified by the U.S. since it became a signatory in 2004.¹⁷⁴ The bureaucratic cumbersomeness of creating and implementing new legislation is another obstacle in this area, especially in the current U.S. political climate.¹⁷⁵

The anti-regulation attitude is further contributed to by a strong lobby from the tobacco industry, as it becomes increasingly difficult to regulate the licit and illicit tobacco markets without hurting the economic activity linked to the tobacco industry. The tobacco industry manages to effectively promote the narrative considering that increasing regulation of the licit tobacco market, particularly through taxation and quality standards, will lead to a growth of the illicit market and even the financing of terrorism. The link with terrorism continues to come up in government reports on the ITT,¹⁷⁶ despite the fact that it has been continually disproven.¹⁷⁷ The grounds for disproving the link between the ITT and terrorism in the U.S. is that the ITT in the U.S. is too scattered, and if it were to grow it would not be able to escape the attention of U.S. law enforcement.¹⁷⁸

None of these issues are made any easier by the politically sensitive aspects of further regulation of the licit and illicit tobacco markets. The first politically sensitive component is the involvement of Native American reservations in the ITT. This is sensitive because even though the federal government is entitled to regulate commerce between the states and Native American tribes, it is still difficult to enforce

¹⁷⁰National Research Council (2015), p. 5; see also: Kleiman and DeFeo (2017), p. 1.

¹⁷¹*Academy of Pediatrics v. FDA*; 5 U.S.C. Ch.7 § 706(1) (1994).

¹⁷²Lindblom (2019), p. 960.

¹⁷³National Research Council (2015), p. 19.

¹⁷⁴WHO Framework Convention on Tobacco Control (2005); Bollyky and Gostin (2010), p. 2637.

¹⁷⁵Florko (2020).

¹⁷⁶U.S. Department of State (2015), p. 2, p. 17.

¹⁷⁷National Research Council (2015), p. 3; Kleiman and DeFeo (2017), p. 11.

¹⁷⁸National Research Council (2015), pp. 39–40.

policy within reservations.¹⁷⁹ A further sensitive issue is the unpopularity of tobacco regulation with states in which tobacco production is a critical component of the states' economies.¹⁸⁰ This refers to major tobacco-producing states like Virginia and North Carolina.¹⁸¹ Both of these sensitive components linked to the ITT carry significant political risks and hinder further regulation in this area.

In enforcement, the lack of priority placed on ITT manifests itself most clearly in the understanding of ITT from the perspective of relevant agencies. The study by the U.S. National Research Council was not able to find “systematic, up-to-date information on measures of enforcement activity and success by these agencies or find a systematic discussion of the priority given to tobacco enforcement”.¹⁸² Instead, it seems that for U.S. law enforcement agencies ITT is less an issue of public health, and more an issue of national security. When viewed from the perspective of national security, illicit tobacco is seen as less of a threat than other major areas of criminal activity—like drugs, violent crime and terrorism.

A further lack of motivation around ITT, comes from the fact that efforts to fight ITT do not bring in as much revenue for the relevant agencies when compared to other illicit market crimes, such as the illicit drugs.¹⁸³ From the perspective of enforcement agencies the loss of 21% of the total tobacco market revenue to ITT¹⁸⁴ is not a loss major enough to warrant the expenditure of the agency finances and man-power needed to fight it. However, neither the national security perspective, nor the 21% figure cover or consider the additional social costs generated by ITT, including: increased health risks caused by consumption of unregulated tobacco products; increased levels of smoking among youths; “law enforcement costs; crime-related violence; and revenue for criminal organizations”.¹⁸⁵

11.3 Enforcement

11.3.1 Levels of Enforcement, Relevant Agencies and Techniques Applied

The enforcement of ITT federal and state laws is complicated as it belongs to a number of agencies at different levels of government. Different levels of the U.-S. government have been identified as having different strengths: with local agencies having the most access to information about retailers, state agencies being best

¹⁷⁹National Research Council (2015), p. 56; Von Lampe et al. (2014), p. 273.

¹⁸⁰Von Lampe et al. (2014), p. 271.

¹⁸¹Von Lampe et al. (2014), p. 271; Kleiman and DeFeo (2017), p. 3.

¹⁸²National Research Council (2015), p. 139.

¹⁸³Kleiman and DeFeo (2017), p. 5, p. 6; Prieger et al. (2015), p. 15.

¹⁸⁴National Research Council (2015), p. 5.

¹⁸⁵DeFeo et al. (2018), p. i.

informed about transport routes and smuggling methods, and finally, with the federal government having the largest amount of resources and greatest range of enforcement powers.¹⁸⁶ In line with this, the administrative measures (including regulatory market surveillance, licensing, and the administering of tax enforcement measures like tax stamps) tend to be cantered at the state level, while enforcement powers tend to be cantered at the federal level where resources are greater.¹⁸⁷

As explained above, regulations differ from state to state, as do the necessary and available enforcement agencies. Even Virginia, a low-tax state, has reasons to discourage cigarette smuggling. For instance, to bypass Virginia's rules on cigarette possession, traffickers may set up fictional retail businesses to buy cigarettes in Virginia in bulk for later sale in destination states, thereby avoiding the payment of sales taxes both in Virginia and the destination jurisdiction.¹⁸⁸ Another reason why Virginia may have stepped up efforts is because low-deterrence efforts in state laws offer criminal networks and their actors the opportunity for low-risk and profitable criminal activity.¹⁸⁹ This opportunity could attract more criminal actors, bringing more crime to the state through ITT-related activities like credit card fraud and money laundering.¹⁹⁰ This example illustrates how even though some states are more affected than others, ITT is a multijurisdictional activity which affects all states to a degree and requires the coordinated efforts across state lines.¹⁹¹

The authorities tasked with enforcing Virginia's tobacco related laws are the Virginia Department of Taxation, the Virginia Cigarette Tax Board, the Criminal Interdiction and Counterterrorism Unit and the Tobacco Enforcement Unit in the Virginia Attorney General's Office.¹⁹² The Department of Taxation is tasked with auditing cigarette wholesalers to ensure that all administrative requirements have been met, such as forms and invoices required by state law.¹⁹³ The Tax Board performs inspections to ensure that all tobacco retail establishments pay local excise taxes.¹⁹⁴ The Counterterrorism Unit is responsible for seizures of illicit tobacco products as part of routine drug search efforts, while the Enforcement Unit inspects retail establishments and seizes any illicit tobacco products as part of specific ITT control efforts.¹⁹⁵

On the opposite end, a destination state like New York certainly has a direct revenue-loss incentive to tackle the ITT, as well as a general combating crime incentive (similarly to Virginia). The state's previous focus on taxation on the licit

¹⁸⁶ Chaloupka et al. (2015), p. 19.

¹⁸⁷ Chaloupka et al. (2015), p. 19.

¹⁸⁸ National Research Council (2015), p. 148.

¹⁸⁹ National Research Council (2015), pp. 148–149; Kleiman and DeFeo (2017), p. 5.

¹⁹⁰ National Research Council (2015), p. 149.

¹⁹¹ National Research Council (2015), p. 159; Kleiman and DeFeo (2017), p. 1.

¹⁹² National Research Council (2015), pp. 146–147.

¹⁹³ National Research Council (2015), p. 146; U.S. Department of State (2015), p. 10.

¹⁹⁴ National Research Council (2015), p. 147.

¹⁹⁵ National Research Council (2015), p. 147.

market and the limiting of street sales on the illicit market drove the ITT into retail outlets, which is where legislative and enforcement efforts are currently focused.¹⁹⁶ The agencies that enforce these new measures in states are also varied and range from public health and revenue departments to sheriff's offices and local tax boards.¹⁹⁷ Since the ITT in New York was pushed into retail establishments, the New York legislature responded with new laws and a task force specifically targeting retailers.¹⁹⁸ The New York Tobacco Task Force (herein: TTF) was created and tasked with inspecting licensed cigarette retailers, issuing summonses and making arrests of those found in violation of tobacco laws.¹⁹⁹ The formation of the TTF resulted in the seizure of 247,631 packs in two years, representing New York State tax revenue losses of \$1,649,222.²⁰⁰ Meanwhile, the new law increases "penalties for retailers who evade tobacco taxes or sell tobacco without a license, reduces the possession thresholds for being deemed a retail dealer, increases fines for the concealment of contraband cigarettes, [and] prohibits discounts for tobacco products", among other stringent measures.²⁰¹

In addition to the TTF, other enforcement agencies in the state of New York are the Department of Taxation and Finance, New York City Sheriff's Office and the New York Police Department (herein: NYPD). The Department of Taxation and Finance, together with the NYPD, are responsible for the enforcement of anti-contraband policies and the CMSA.²⁰² Furthermore, they specifically enforce the regulations that require each retailer, wholesaler, and distributor of cigarettes and tobacco products in the state to register for a license.²⁰³

The outlined increased enforcement measures and strategies seem to have had a positive impact on somewhat reducing the size of ITT in New York.²⁰⁴ However, studies have shown that the ITT is dynamic and adaptive, as well as that the increased efforts have, in some cases, been trivial when compared to the total size of ITT within certain states.²⁰⁵ For instance, despite the new, strict rules being created in Virginia, enforcement statistics informing the National Research Council study found that "very few charges are filed, and even fewer convictions are obtained" on the basis of the new rules.²⁰⁶ In fact, when reported figures for seizures, arrests, and prosecutions were compared with figures on the estimated total number

¹⁹⁶National Research Council (2015), p. 150; Kleiman and DeFeo (2017), p. 5.

¹⁹⁷National Research Council (2015), p. 148; Kleiman and DeFeo (2017), p. 10.

¹⁹⁸National Research Council (2015), p. 149; Kleiman and DeFeo (2017), p. 14.

¹⁹⁹National Research Council (2015), p. 150.

²⁰⁰National Research Council (2015), p. 150.

²⁰¹New York City Local Law 97 (2019); National Research Council (2015), p. 151.

²⁰²As discussed above in sub-section 3.1, the CMSA is a state specific regulation which sets minimum cigarette prices in New York at each stage of distribution.

²⁰³National Research Council (2015), p. 151.

²⁰⁴National Research Council (2015), p. 151; Kleiman and DeFeo (2017), pp. 5–6.

²⁰⁵National Research Council (2015), p. 151; Kleiman and DeFeo (2017), pp. 5–6.

²⁰⁶National Research Council (2015), p. 148; Kleiman and DeFeo (2017), p. 3.

of Virginia cigarettes smuggled to high-tax jurisdictions, it was found that less than 0.16% of the total number of cigarette packs were intercepted by Virginia state authorities.²⁰⁷ It should be noted that the measures may have had some deterrent effect that is not possible to measure with the currently accessible data,²⁰⁸ but regardless it remains a fact that large numbers of Virginia's tobacco products continue to be smuggled across state borders to high-tax jurisdictions like New York.

In addition to the enforcement agencies at the state level, at the federal level several agencies also play different, yet important roles in the fight against ITT. The relevant agencies are the Bureau of Alcohol, Tobacco, Firearms and Explosives (herein: ATF) in the U.S. Department of Justice (herein: DOJ); the Immigration and Customs Enforcement (herein: ICE) and Customs and Border Protection (herein: CBP) in the U.S. Department of Homeland Security (herein: DHS); the TTB in the U.S. Department of the Treasury; and the Internal Revenue Service (herein: IRS). The role of each of these agencies in ITT enforcement is outlined below.

11.3.1.1 Bureau of Alcohol, Tobacco, Firearms and Explosives in the U.S. Department of Justice (ATF)

The ATF is primarily focused on the reduction of violent crime and contraband cigarette trafficking activity, as well as the accompanying revenue losses.²⁰⁹ Furthermore, the Bureau investigates violations of counterfeit tax stamps, money laundering, mail and wire fraud, and the distribution of illegally imported cigarettes. In prosecution proceedings for violations relating to the ITT, the ATF employs federal agents, auditors, and investigators to investigate and present the case for prosecution.²¹⁰ To complete these tasks the ATF works with other federal, state, local, and international law enforcement and revenue agencies, under the Contraband Cigarette Trafficking Act and the Prevent All Cigarette Trafficking Act - specifically focusing on "divesting criminal and terrorist organizations of money derived from this illegal activity".²¹¹

From 2000 until 2012 the ATF was significantly intensifying its cigarette smuggling investigations, increasing both the number of investigations and the number of cases brought. During this time "the value of seizures from tobacco diversion cases quadrupled from \$6,276,648 in fiscal 2004 to \$26,680,976 in fiscal 2008. . . , and the value of tobacco seizures as a percentage of all ATF seizures rose from 30 to 50 percent".²¹² However, in 2012 an internal ATF memorandum required all new

²⁰⁷National Research Council (2015), p. 148; Kleiman and DeFeo (2017), p. 3.

²⁰⁸National Research Council (2015), p. 148; Kleiman and DeFeo (2017), p. 3.

²⁰⁹U.S. Department of State (2015), p. 15.

²¹⁰National Research Council (2015), p. 140; Kleiman and DeFeo (2017), p. 3.

²¹¹National Research Council (2015), p. 140; Kleiman and DeFeo (2017), pp. 3-4.

²¹²National Research Council (2015), p. 140.

tobacco investigations to include a “nexus to violent crime” and clarified that on “rare occasions” investigations without a violent crime component would be authorized if they involved “large-scale fraud perpetrated by organized criminal enterprises and results in a significant loss of federal or state tax revenue”. This memorandum underlined how ATF’s “tobacco diversion investigations are minimal in relation to its other mission areas”.²¹³ This finding was confirmed in ATF’s budgets from 2004 to 2009, which show that “diversion programs are allocated significantly fewer resources than violent crime investigations”. Furthermore, these findings remain accurate in present time, as the ATF’s Congressional Budget Submission for the fiscal year of 2020 only discusses budgeting for diversion of firearms and explosives from legal commerce, and makes little to no mention of funding for tobacco smuggling as a whole.²¹⁴ Furthermore, a 2014 report by the Government Accountability Office “observed that during the years from 2003 to 2013 when ATF Budget Submissions consistently requested 2% of its budget resources for alcohol and tobacco enforcement, less than one half of one percent of investigations actually involved alcohol or tobacco”.²¹⁵

Kleiman and Defeo summarize the problem, stating that federal investigations of ITT are now isolated, sporadic and unlikely to create effective deterrence,²¹⁶ further highlighting that the new “limitation is unlikely to have escaped the notice of professional smugglers, who need only avoid violence to avoid investigation by the ATF”.²¹⁷ According to the National Research Council, the low prioritization of Tobacco smuggling is also evident more broadly within the DOJ’s prioritization of terrorism and violent crime over other areas of legal enforcement, as well as with the general low priority of prosecuting those involved in the illicit tobacco trade.²¹⁸ The DOJ’s prioritization remains largely the same in its Strategic Plan for the years 2018 to 2022.²¹⁹ Countering the threat of terrorism remains the number one strategic goal. Considering ITT’s limited contribution to terrorism, it is clear that none of the funding or manpower for this goal will be directed towards it. The promotion of public safety makes an appearance in the third strategic goal, as does the promotion of the rule of law in the fourth strategic goal.²²⁰ These two goals could be strongly related to tobacco, considering the existence of a rule of law framework for ITT and the threat ITT poses to public health, however the plan makes no specific mention of tobacco enforcement efforts. Methods which could be relevant for the fight against ITT, like increased efforts to reduce trafficking and the raising of community

²¹³ National Research Council (2015), p. 141.

²¹⁴ Bureau of Alcohol, Tobacco, Firearms and Explosives (2020b) ‘Congressional Budget Submission Fiscal Year 2020’.

²¹⁵ Kleiman and DeFeo (2017), p. 2.

²¹⁶ Kleiman and DeFeo (2017), p. 1.

²¹⁷ Kleiman and DeFeo (2017), pp. 1–2.

²¹⁸ U.S. Department of Justice (2014), p. 1; National Research Council (2015), p. 141.

²¹⁹ U.S. Department of Justice (2018c) Strategic Plan, p. 1.

²²⁰ U.S. Department of Justice (2018c) Strategic Plan, p. 1.

awareness towards the illicit market, are mentioned but only in relation to illicit drugs and opioids.²²¹ This again reaffirms the agencies' preferred focus on other, more perceivably threatening areas of criminal activity, like the illicit trade in drugs.

11.3.1.2 The Immigration and Customs Enforcement (ICE) and Customs and Border Protection in the U.S. Department of Homeland Security (CBP)

ICE is the largest investigative agency in the U.S. Department of Homeland Security. It is responsible for enforcing immigration and customs laws within the United States,²²² and it also has an investigative arm 'ICE HIS', which has broad legal authority to investigate all types of cross-border criminal activity, including illicit tobacco violations and related trade fraud and financial crimes.²²³ ICE's ITT combatting efforts include its National Intellectual Property Rights Coordination Center (herein: IPR Center).²²⁴ The IPR Center's Trade Enforcement Unit manages the Tobacco Program, which "promotes and assists investigations and interdictions of tobacco smuggling by monitoring, coordinating, and providing guidance to various federal, state, and local law enforcement agencies on international smuggling matters".²²⁵

The work of ICE is further supplemented by the CBP—as ICE investigates criminal activity, while CBP intercepts contraband at the border.²²⁶ The CBP is the "unified border agency within the Department of Homeland Security charged with the management, control, and protection of U.S. borders at and between the official ports of entry".²²⁷ Its inspection duties are carried out by inspectors, who use an Automated Targeting System (herein: ATS), which targets arriving containers for review and inspection at ports of entry.²²⁸ The ATS is further built upon by stratified examination, which "randomly selects additional containers for random inspections".²²⁹ In addition to this, the CBP is responsible for the collection of "the federal excise tax on imported tobacco products along with customs duties and fees as part of its customs revenue functions".²³⁰

According to a 2004 U.S. Government Accountability Office Report, in the fiscal year of 2003, the CBP and ICE made "56 seizures of counterfeit cigarettes, with an

²²¹ U.S. Department of Justice (2018c) Strategic Plan, p. 19.

²²² National Research Council (2015), p. 143.

²²³ U.S. Department of State (2015), pp. 9–11.

²²⁴ National Research Council (2015), p. 143.

²²⁵ U.S. Department of State (2015), p. 11; National Research Council (2015), p. 143.

²²⁶ National Research Council (2015), p. 143.

²²⁷ U.S. Department of State (2015), p. 9.

²²⁸ National Research Council (2015), p. 144.

²²⁹ National Research Council (2015), p. 144.

²³⁰ U.S. Department of State (2015), p. 9.

estimated value of \$45.8 million, and 135 seizures of genuine cigarettes, with an estimated value of \$5.1 million”. Though reporting of a similar nature exists from 1998, no updated reports on this topic have been made by the Accountability Office since 2004. Limited, and scattered, accounts of state-specific CBP seizures of counterfeit tobacco products could be found,²³¹ but no overarching, nationwide reports or numbers on the topic were found. This points to a lack of continued reporting on ITT enforcement efforts, and therefore, also a lack of opportunity for the evaluation of the success (or failure) of those enforcement efforts in the fight against ITT.

11.3.1.3 The Alcohol and Tobacco Tax and Trade Bureau (TTB) in the U.S. Department of the Treasury

The TTB administers the provisions “of the Internal Revenue Code of 1986 that imposes Federal excise taxes on tobacco products and cigarette papers and tubes, and establishes a comprehensive civil and criminal framework to protect the revenue”.²³² The agency also collects federal excise taxes on tobacco product manufacturing and bulk importing.²³³ Manufacturers are required to obtain permits from the TTB in order to produce cigarettes in the United States.²³⁴ In line with these licit market supervision duties, on the illicit market the TTB also investigates illegal production, under-reporting of production, smuggling, and diversion of domestic tobacco products intended for export.²³⁵ The agency initially only pursued civil enforcement, but “eventually recognized the advantage of adding criminal deterrence and implemented a criminal investigative capability”.²³⁶

Previously the TTB had no jurisdiction over interstate smuggling offences, only collection of federal taxes and investigation.²³⁷ Studies by Kleiman and DeFeo suggested that statutory changes to the TTB’s mandate could “fill the gap left by ATF’s de-emphasis of tobacco enforcement”.²³⁸ They argued that “a single strongly motivated agency, with no higher priority than the direct collection of federal tobacco taxes and the support of state and local tax collection efforts” could address all aspects of the ITT, if appropriately funded and managed.²³⁹ The Congressional Budget for the TTB’s fiscal year 2020, implements the transfer of responsibility as

²³¹ U.S. Customs and Border Protection (2019), p. 1.

²³² U.S. Department of State (2015), pp. 15–16.

²³³ National Research Council (2015), p. 144.

²³⁴ National Research Council (2015), p. 144.

²³⁵ U.S. Department of State (2015), pp. 15–16.

²³⁶ Kleiman and DeFeo (2017), p. 3.

²³⁷ Kleiman and DeFeo (2017), p. 3.

²³⁸ Kleiman and DeFeo (2017), p. 3, p. 6.

²³⁹ Kleiman and DeFeo (2017), p. 6.

proposed by Kleiman and Defeo,²⁴⁰ as well as allocating a substantial amount of funding for the restructuring.²⁴¹ This restructuring has the potential to improve enforcement in the fight against ITT by providing more centered leadership on the enforcement efforts.

The techniques applied by the TTB to combat illicit trade (prior to the restructuring) vary, but include background checks on potential permit-holders, regular audits of existing industry members, and investigative models to identify industry members with the greatest risk of non-compliance.²⁴² Furthermore the TTB employs “auditors, investigators, and laboratory scientists, who analyse tobacco products to ensure their appropriate tax classification, analyse counterfeit tobacco products and tax stamps, and provide other technical support for investigations of illicit tobacco products”.²⁴³ In addition to this, the TTB “collaborates with foreign counterpart tax administrators to share information and best practices in tobacco excise tax administration and enforcement”.²⁴⁴

In the fiscal year of 2018, the TTB did not manage to meet its two annual targets for tax collection performance.²⁴⁵ The TTB has two measures which intend to demonstrate the effectiveness of TTB operations in revenue collection. These are the ‘Amount of Revenue Collected per Program Dollar’ and the ‘Percent of Voluntary Compliance from Large Taxpayers in Filing Payments Timely’.²⁴⁶ Seeing as in 2018 neither of the targets were met, the new TTB 2020 Budget proposes several updates to its measures. A great deal of the blame for failure to meet targets is placed on the tobacco tax collection, with the most recent budget report stating that “The year-to-year decline in performance represents continued declines in tobacco revenue that, after peaking in FY 2010 following the significant tax rate increases enacted in 2009, have steadily declined in line with shifts in consumption patterns, product manufacturing, and trade”.²⁴⁷ With this in mind the proposed updated measures include an increase in staff and a redesign of the legacy tax system.²⁴⁸

The TTB report states that the investment in staff would allow TTB to hire “the necessary additional enforcement personnel to conduct the complex, multi-state investigations associated with contraband cigarette smuggling”.²⁴⁹ The budget calls for \$3.3 million for this, and would allow the TTB to hire more auditors, investigators, other program staff and criminal enforcement agents. In addition to the

²⁴⁰Bureau of Alcohol, Tobacco, Firearms and Explosives (2020b) ‘Congressional Budget Submission Fiscal Year 2020’, p. 9.

²⁴¹Alcohol and Tobacco Tax and Trade Bureau (2020), p. 9.

²⁴²U.S. Department of State (2015), pp. 15–16.

²⁴³National Research Council (2015), p. 145.

²⁴⁴U.S. Department of State (2015), pp. 15–16.

²⁴⁵Alcohol and Tobacco Tax and Trade Bureau (2020), p. 12.

²⁴⁶Alcohol and Tobacco Tax and Trade Bureau (2020), p. 12.

²⁴⁷Alcohol and Tobacco Tax and Trade Bureau (2020), p. 12.

²⁴⁸Alcohol and Tobacco Tax and Trade Bureau (2020), p. 12.

²⁴⁹Alcohol and Tobacco Tax and Trade Bureau (2020), p. 5.

staff, the budget would enable TTB to “initiate any needed rulemaking and guidance as well as support initial research into system requirements and data analytics to improve enforcement targeting”.²⁵⁰

The TTB further budgeted another \$2.5 million to modernize its outdated tax system, which has remained largely the same since the year 2000. The funding will support “efficient filing and processing as well as facilitate data analytics to timely detect tax evasion”, all of which are deemed to be particularly important “in light of recent tax reforms that present workload and enforcement challenges”.²⁵¹ The new enhanced systems and analytics will enable the TTB “to use its tax information, as well as import and export data from other Federal agencies, to more effectively target known tax evasion schemes”.²⁵²

Despite these positive additions to the TTB program, challenges caused by data protection legislation continue to be a barrier to enforcement. The data protection limitations occur because while the TTB does have a list of licensed tobacco manufacturers (who obtained a permit for the production of their products), this information is not disclosed publicly because it is treated as a tax record, which falls under the protection of 26 USC 6103.²⁵³ This provision states that returns and return information (including a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, etc.) shall mainly be confidential,²⁵⁴ making it impossible for the TTB to share licensing information with enforcement authorities. Without this information it is difficult for enforcement authorities to know which manufacturers are licensed and which are not, thereby leading to an additional hoop which enforcement authorities (even those within the TTB) have to jump through.

11.3.1.4 Internal Revenue Service IRS-CI

Finally, the Department of the Treasury, Internal Revenue Service—Criminal Investigation (herein: IRS-CI) administers and enforces U.S. tax laws, but also investigates money laundering, Bank Secrecy Act violations, terrorist financing, and other financial crimes.²⁵⁵ The field officers work with other enforcement and revenue agencies to investigate cigarette smuggling cases.²⁵⁶ Particularly of note is the IRS-CI’s contribution of agents to other agencies on a reimbursable basis when they have been short-staffed. For example, the IRS provided agents to support the

²⁵⁰ Alcohol and Tobacco Tax and Trade Bureau (2020), p. 6.

²⁵¹ Alcohol and Tobacco Tax and Trade Bureau (2020), p. 6.

²⁵² Alcohol and Tobacco Tax and Trade Bureau (2020), p. 6.

²⁵³ National Research Council (2015), pp. 144–145.

²⁵⁴ 26 U.S.C Ch.52 § 5701 – 6103 (2017).

²⁵⁵ U.S. Department of State (2015), pp. 15–16.

²⁵⁶ U.S. Department of State (2015), p. 16.

TTB in the initial stages of its expansion into criminal deterrence and detective action.²⁵⁷

Another mode through which the IRS is granted competence for involvement in some ITT cases is through money laundering. They follow the money and can provide important investigative analysis. The IRS is granted these competences via federal provisions on money laundering.²⁵⁸ Importantly, indications of money laundering violations are often identified from tax information which is usually protected by the disclosure provisions of 26 USC §6103, including returns and return information. This means that the IRS is the only agency which can use tax information protected by 26 USC §6103 clause to identify money laundering violations, which could be linked to ITT or other crimes.²⁵⁹

11.3.2 Coordination and Cooperation Between Relevant Agencies

Coordination and cooperation between the relevant agencies are best evident in concrete examples of ITT cases. Both national and international border cases involve collaboration between federal enforcement agencies like the TTB and the IRS-IC. For example, in October of 2016 a cigar-importer in South Florida was arrested and charged with fraudulently evading \$13 million in federal taxes on imported cigars.²⁶⁰ The complaint against the importer alleges that his company “consistently underpaid the Federal Tobacco Excise Tax due on imported large cigars and, in an attempt to cover up the scheme, altered documents to conceal the price he paid for foreign-made cigars”. His arrest was a result of the joint efforts of a TTB field operation agent and an IRS-CI special agent.²⁶¹ The two were working together as a result of the reimbursable agreement, under which the IRS provides the TTB with special agents to contribute to the TTB’s relatively new criminal enforcement role.²⁶²

In another case is May of 2018, a Korean National was sentenced to nearly four years in prison for his role in a conspiracy that “sold cigarettes domestically, but did not pay excise taxes after falsely claiming the cigarettes were leaving the United States on cargo ships sailing out of the ports of Los Angeles and Long Beach”.²⁶³ This case was investigated by the TTB, IRS-CI, ICE and the ATF in unison, and resulted in claims that between 2012 and 2015, the Korean national and others

²⁵⁷U.S. Department of State (2015), p. 16.

²⁵⁸Internal Revenue Manuals § 9.5.5.4.4 (2007); Internal Revenue Manuals § 9.5.5.4.5 (2004).

²⁵⁹Internal Revenue Manuals § 9.5.5.4.4 (2007).

²⁶⁰U.S. Department of Justice (2016b) South Florida Tobacco....

²⁶¹U.S. Department of Justice (2016b) South Florida Tobacco....

²⁶²Kleiman and DeFeo (2017), p. 3.

²⁶³U.S. Department of Justice (2018a) Korean National Sentenced....

diverted approximately 143 million export-only cigarettes from an export warehouse—resulting in the evasion of \$7,260,203 in federal excise taxes and \$5,986,458 in California excise taxes.²⁶⁴

Meanwhile, in the national-border cases, the investigations are mainly led by federal agencies, but a vital role is also played by state agencies like sheriff's departments, state police, state taxation offices and state Attorney's Offices. For instance, in a 2016 case, which confirms the problem of interstate smuggling between Virginia and New York, five individuals pled guilty to unlawful cigarette smuggling before a federal court.²⁶⁵ The defendants first acquired large quantities of cigarettes in Virginia (a low tax jurisdiction), and then transported them to New York (a high tax jurisdiction) to sell for a maximal profit.²⁶⁶ The inquiry into this case involved the Frederick County Virginia Sheriff's Office, the Virginia Office of Attorney General, the TTB, the West Virginia State Police, the New York Department of Taxation and Finance, the FBI, and the IRS-CI.²⁶⁷

In another 2018 case, a man was sentenced to one year and one day in prison, and a payment of a \$3.5 million fine, for failing to maintain required records relating to the manufacture and sale of cigarettes.²⁶⁸ The man shipped, sold, and distributed quantities of cigarettes in excess of 10,000 in single transactions and failed to maintain required records (which include the identity of, and shipping information for, each purchaser).²⁶⁹ During the period of illicit activity his business generated proceeds of at least \$3.5 million from his unlicensed cigarette manufacturing operations.²⁷⁰ This case was investigated by the U.S. Alcohol and Tobacco Trade and Tax Bureau (TTB), and was prosecuted by the U.S. Attorney's Office of New York.²⁷¹

Counter to the general negative assessment of cooperation between agencies, there are a few cases that exemplify the possibility for successful cooperation between federal and state agencies like state police, sheriff's offices, the TTB and the IRS-CI. The ATF features significantly less in the enforcement efforts of these cases, most likely due to its decreased emphasis on ITT enforcement.²⁷²

²⁶⁴ U.S. Department of Justice (2018a) Korean National Sentenced....

²⁶⁵ U.S. Department of Justice (2016a) Five convicted in....

²⁶⁶ U.S. Department of Justice (2016a) Five convicted in....

²⁶⁷ U.S. Department of Justice (2016a) Five convicted in....

²⁶⁸ U.S. Department of Justice (2018b) North Country Man....

²⁶⁹ U.S. Department of Justice (2018b) North Country Man....

²⁷⁰ U.S. Department of Justice (2018b) North Country Man....

²⁷¹ U.S. Department of Justice (2018b) North Country Man....

²⁷² Kleiman and DeFeo (2017), p. 3.

11.3.3 *Challenges and Potential Changes*

In addition to the low prioritization of ITT enforcement,²⁷³ other issues faced in U.S. ITT enforcement include limited data available, lack of coordination, and an absence of singular leadership.

A study by Kulick, Kleman and Prieger, finds that law-enforcement data generally tends to suffer from “inconsistent definitional and reporting standards across local, state, and federal agencies”.²⁷⁴ This is confirmed in the National Research Council study which notes the lack of research on estimated risks of detection, prosecution and conviction for various illegal activities, including the ITT.²⁷⁵ The studies note how research in this area is “pieced together” using unreliable and incomplete data, as well as hard-to-verify assumptions about said data.²⁷⁶

Data on conviction rates of tobacco smugglers and others involved in the ITT is not accessible to the public, and where indications and assumptions do exist, it appears that the risk of being detected, prosecuted and convicted for ITT crime is negligible.²⁷⁷ This limited data leads many, both in academia and in practice, to view ITT smuggling as a low-risk activity.²⁷⁸ The uncertainty in this area is further induced by the uneven distribution of the ITT among states. As previously described, some states, like Chicago and New York, see a much higher amount of ITT related crimes than other states.²⁷⁹ This leads studies to suggest that a decentralized approach to detect and convict smugglers may be more effective than a federal approach.²⁸⁰ However, before these modified enforcement efforts can come into play, efforts at data collection need to be improved, beginning with the two federal agencies with a central responsibility in ITT enforcement—the ATF and the TTB.²⁸¹

Where ITT enforcement operations required both state and federal involvement, the ATF and TTB have useful data which could contribute to a better understanding of the ITT. Furthermore, the Federal Bureau of Investigation and the Department of Homeland Security may have some data on the ITT, where efforts have intersected with organized crime.²⁸² However, the bulk of enforcement data is held by the state authorities, who carry out approximately 85% of total U.S. law-enforcement.²⁸³ As such, in order to improve law enforcement data, which is currently so incomplete, a

²⁷³National Research Council (2015), pp. 158–159.

²⁷⁴Prieger et al. (2015), p. 7.

²⁷⁵National Research Council (2015), p. 152.

²⁷⁶Prieger et al. (2015), p. 7; National Research Council (2015), p. 152.

²⁷⁷National Research Council (2015), pp. 154–155.

²⁷⁸Kleiman and DeFeo (2017), p. 5; National Research Council (2015), p. 152.

²⁷⁹National Research Council (2015), p. 155; Kleiman and DeFeo (2017), p. 5.

²⁸⁰National Research Council (2015), p. 155.

²⁸¹Prieger et al. (2015), p. 7.

²⁸²Prieger et al. (2015), p. 7.

²⁸³Prieger et al. (2015), p. 8.

deep dive into the large amount of data collected by thousands of counties and local police jurisdictions is required. Such a data analysis has not yet been completed for the ITT. As such, it is a task of the Bureau of Justice Statistics, which collects and analyses information on crime, criminal offenders, and the operation of justice systems at all levels of government.²⁸⁴

Besides hindrances brought about from limited data availability on the ITT, the most important problems identified in literature relate to insufficient cooperation between U.S. agencies, lack of coordination and the absence of singular leadership.

As to the first of these issues, the National Research Council cites a 2009 audit report from the U.S. Department of Justice which found ATF's "diversion efforts to be ad hoc and lacking clear coordination between the headquarters and field units, with no formalized procedures for sharing intelligence information".²⁸⁵ No updates on this could be found in newer audit reports by the federal Department of Justice.²⁸⁶

The lack of coordinated information sharing and enforcement effort is not only an issue among federal agencies, but also between federal and state agencies. Kleiman and DeFeo have already outlined how a long history of federal funding being used to motivate state efforts against nation-wide crime problems exists, and could be used to benefit the partnership between state and local law enforcement (but is largely not).²⁸⁷ The following example is given:

FDA enforcement actions seem to be largely state-led, and its State Tobacco Retail Compliance Check Inspection Program does not appear to be integrated with federal ITTP enforcement. If a new ITTP initiative were to provide for grants to ITTP Task Forces these grants might in some ways overlap or duplicate FDA funding of its compliance check program. Such an overlap should be tolerated, because tampering with FDA prerogatives in this area would be regarded with suspicion. If liaison could be established with state agencies without provoking a hostile FDA reaction, those agencies could be important information resources that should be part of an integrated ITTP strategy. Of the total violations sanctioned by FDA, approximately 85% were either sales to minors or sales without age verification. Retailers who sell to minors may be more prone than average to sell smuggled products. Some formalized method of communication about the identification of suspect retailers, in addition to records of formal FDA sanctions, should be institutionalized.²⁸⁸

If these information sharing and enforcement collaboration issues are to be remedied, information sharing procedures (such as those called for by Article 4.1 of the FCTC) and standard enforcement collaboration mechanisms, should be developed and put into place.²⁸⁹

A final problem is the absence of singular leadership among the various agencies which have competence in the area of ITT. It previously seemed that leadership in

²⁸⁴ Bureau of Justice Statistics (2020).

²⁸⁵ National Research Council (2015), p. 145.

²⁸⁶ Office of the Inspector General (2020).

²⁸⁷ Kleiman and DeFeo (2017), p. 7.

²⁸⁸ DeFeo et al. (2018), p. iii.

²⁸⁹ DeFeo et al. (2018), p. iii.

enforcement of ITT regulation lay in the hands of the ATF, however with recent de-emphasis on ITT this no longer seems to be the case. ATF's leadership role and engagement in ITT could potentially be restored if "ample funds could be provided to address ATF's violent crime priorities and leave a surplus for alcohol and tobacco enforcement". However, seeing as this is unlikely to happen, Kleiman and Defeo proposed a reorganization of ITT enforcement, via a transferring of responsibility for non-tax cigarette crimes to the TTB.

While the transfer of responsibility could confuse non-federal counterparts, would require quite some statutory reorganization and would call for a re-thinking of agency funding around tobacco enforcement, Kleiman and Defeo nevertheless maintained that it would be a positive change in the wider context of the fight against ITT. Kleiman and Defeo went on to theorize that if ITT enforcement responsibilities are transferred to the TTB, additional funding for their training, staffing and implementation efforts would be required. Industry buy-backs of seized cigarettes would not be an option because the U.S. Patriot Act requires the destruction of seized cigarettes.²⁹⁰ The other financing option, of funding ITT enforcement through tobacco excise taxes or tobacco excise tax violations, is a possibility but would require changes in legislation to be made.

As mentioned above, the Congressional Budget for the TTB's fiscal year 2020 implements the transfer of responsibility as proposed by Kleiman and Defeo,²⁹¹ as well as allocating a substantial amount of funding for the restructuring.²⁹² In addition to the funding, the administration has "proposed legislative changes to consolidate Federal alcohol and tobacco tax authorities within Treasury, which will integrate ATF authorities into TTB's Federal excise tax enforcement program".²⁹³ It is hoped that these changes will improve CCTA enforcement through TTB, resulting in "increased field presence, and, over time, improved voluntary compliance through an increased deterrent effect".²⁹⁴ It might be considered surprising that these changes take place during an administration, which has been considered as rather reluctant to increase corporate regulation and related enforcement. However, it seems that the restructuring of the ATF and TTB lines up well with the administration's efforts to crack down on gang violence and crime syndicates through the ATF—leaving competence around ITT to the TTB.²⁹⁵

In 2017, Kleiman and Defeo were predicting that the current combination of enforcement priorities and policy challenges would not stop the increase in ITT in the U.S.²⁹⁶ It is too early to tell if the newest restructuring of competence among the

²⁹⁰ USA Patriot Improvement and Re-Authorization Act § 223 d.1 (2005).

²⁹¹ Alcohol and Tobacco Tax and Trade Bureau (2020).

²⁹² Alcohol and Tobacco Tax and Trade Bureau (2019), p. 9.

²⁹³ Alcohol and Tobacco Tax and Trade Bureau (2019), p. 14.

²⁹⁴ Alcohol and Tobacco Tax and Trade Bureau (2019), p. 14.

²⁹⁵ Greenwood (2018).

²⁹⁶ Kleiman and DeFeo (2017), p. 1.

two central agencies, the ATF and the TTB, has had an impact on voluntary compliance and a general decrease in the size of the ITT.

11.4 International Cooperation of the U.S.

Despite the central issue of ITT in the U.S. being interstate bootlegging, it also has an international component.²⁹⁷ As discussed above, in the few instances when illegally produced tobacco products (which are less prominent in the U.S. ITT) are seized by U.S. authorities, they typically originate from other countries, like China, North Korea, and Paraguay.²⁹⁸ These products are smuggled into the U.S. through the practice of large scale smuggling. The U.S. CBP and other federal and state authorities can play a major role in enforcing measures against large-scale smuggling, but the issues are a cross-border problem, requiring collaborative efforts (at both the national and international levels). Efforts to improve collaboration include international legal instruments and bodies targeting ITT specifically, with attention being focused mainly on information sharing and cooperation among agencies.

As outlined in several sources, a U.S. lack of emphasis on international efforts to fight ITT is displayed in its decision not to ratify the FCTC and not to sign the Protocol (see above, Sect. 11.1.2). As far back as 2010 Bollyky and Gostin argued that “the FCTC, if adequately resourced and implemented, could offer the opportunity to sustainably avert millions of premature deaths”, if the implementation of the protocol was not so slow.²⁹⁹ Bollyky and Gostin believe that the U.S. could close the implementation gap if it cooperated with other states through the WHO and across sectors with the Framework Convention Alliance—thereby highlighting the fight against tobacco control (on both the licit and illicit markets) as a global health priority.³⁰⁰

11.4.1 Cooperation with other International Agencies

The relative U.S. inactivity regarding the FCTC ratification should not be understood as its complete inaction on the international ITT scene. In fact, the U.S. has played, and continues to play, an important role in cooperation with other international agencies, in cooperation with the EU through bilateral agreements and in influencing the fights against ITT in other states world-wide. For instance, the

²⁹⁷National Research Council (2015), p. 40.

²⁹⁸National Research Council (2015), p. 40.

²⁹⁹Bollyky and Gostin (2010), p. 2637.

³⁰⁰Bollyky and Gostin (2010), p. 2637.

U.S. chaired the Task Force on Charting Illicit Trade, which is part of the OECD High Level Risk Forum, tasked with coordinating international expertise in the quantification and mapping of the illegal economy.³⁰¹ The task force aimed to “provide a fuller understanding of the connections between different forms of illicit activities so governments may enact policies to counter these threats and increase the economic and societal resilience to these threats”.³⁰² Among these illicit activities, the illicit trade in tobacco was also discussed. According to the OECD website, the last documents on this task force’s activities are available from a 2017 meeting.³⁰³ However, no meetings or evidence of activities of this task force could be found since, though the task force used to meet regularly on a yearly basis.

The global attention towards the ITT is also evident in the 2019 report of the United Nations Conference on Trade and Development (UNCTAD). The report outlines how the ITT negatively affects the achievement of four specific Sustainable Development Goals, namely goal 3 (good health and well-being); goal 8 (decent work and economic growth); goal 16 (peace, justice and strong institutions); and goal 17 (partnerships for the goals).³⁰⁴ It goes on to highlight the U.S. as one of the countries where positive developments in recent years are leading the way in combating the ITT.³⁰⁵ With this praise, the report is referring to the U.S.’ efforts to introduce tobacco product requirements, thereby reducing the demand for contraband or nonconforming tobacco products.³⁰⁶ While earlier segments of this chapter criticised the FDA’s approach regarding these product standard efforts, it is nevertheless true that they are a step in the right direction.

One of the important components of international cooperation relating to any kind of illicit trade are the customs authorities, as the front line in the fight against cross-border smuggling.³⁰⁷ In line with this, the increased security role of customs authorities is highlighted in the drawing up of complete guidelines for customs security functions in the WCO Framework of Standards to Secure and Facilitate Global Trade (SAFE). The United States became a signatory to this Framework early on in 2005.³⁰⁸ Though not binding, the signatures express the U.S.’ intent to comply with the framework on a voluntary basis.³⁰⁹ The Framework calls for a customs cooperation network between states, which rests on three key pillars: Customs-to-Customs network arrangements, Customs-to-Business partnerships and Customs-to-other Government Agencies cooperation. Regarding the Customs-to-Customs network, the SAFE Framework seeks to enhance electronic information sharing and

³⁰¹ U.S. Department of State (2015), p. 20.

³⁰² U.S. Department of State (2015), p. 20.

³⁰³ OECD (2020).

³⁰⁴ Transnational Alliance to Combat Illicit Trade (2019), p. 104.

³⁰⁵ Transnational Alliance to Combat Illicit Trade (2019), p. 106.

³⁰⁶ Transnational Alliance to Combat Illicit Trade (2019), p. 106.

³⁰⁷ European Commission (2019).

³⁰⁸ World Customs Organization (2018), p. 3.

³⁰⁹ Aigner (2010), p. 47.

mutual recognition arrangements between customs authorities to promote seamless movement of goods through secure international trade supply chains.³¹⁰ The framing of this aim in the framework shows the intent to balance security on the one hand, and support legitimate business activity on the other—taking care to ensure that the former does not obstruct the latter. As such, the framework further stresses that customs administrations should not burden the international trade community with different sets of requirements to secure and facilitate commerce, which is why the SAFE Framework does not duplicate or contradict other intergovernmental requirements.³¹¹

These are just some of the international cooperation frameworks and reports which the U.S. is a part of. However, since the U.S. is not a signatory to the FCTC its cooperation methods with other states are best reviewed on a bilateral basis—firstly in its cooperation with the EU and then in its cooperation and influence on other states (mainly its neighbours).

11.4.2 *Cooperation with the EU*

Cooperation with the European Union (herein: EU) in the fight against ITT is valuable, particularly when considering their combined annual loss of revenue and strong trading relationship. The European Union ITT-related public revenue losses are estimated at around €10 billion annually.³¹² While for the U.S. the estimates for the annual state and local tax loss caused ranges from \$2.95 to \$6.92 billion.³¹³ In addition to this, both the EU and U.S. have an interest in preserving their strong trading relationship while still heightening security to limit illicit activity (such as ITT) which can often accompany the licit trade systems. Sources have described the EU and U.S. as sharing the largest economic relationship in the world,³¹⁴ with their transatlantic trade flows (goods and services trade plus earnings and payments on investment) averaging around \$5.3 billion per day in 2017, and continuing to grow.³¹⁵

Seeing as the U.S. has not ratified the FCTC, the EU—U.S. cooperation in the fight against ITT is mainly based on bilateral cooperation agreements, and involves cooperation with three central EU bodies: Interpol, Eurojust, the European Anti-Fraud Office (OLAF) and Europol. There are no specific ITTP agreements between the EU and U.S. but there is a variety of extradition, mutual legal assistance and

³¹⁰World Customs Organization (2018), p. 4.

³¹¹World Customs Organization (2018), p. 1.

³¹²OLAF (2017).

³¹³National Research Council (2015), p. 5.

³¹⁴Office of the United States Trade Representative (2019).

³¹⁵Office of the United States Trade Representative (2019).

exchange of information agreements in place which are relevant to the fight against the ITTP.

Interpol is the agency responsible for combatting ITTP through training, operational support, information exchanges, and public awareness campaigns, while also working to identify and disrupt the transnational organized criminal networks behind the ITTP.³¹⁶ Interpol's Trafficking in Illicit Goods and Counterfeiting program has a specific ITT related component.³¹⁷ Eurojust is a Union body aiming to stimulate and improve coordination and cooperation between competent judicial authorities of the Member States, particularly in relation to serious organised crime.³¹⁸ Eurojust signed a Cooperation Agreement in November 2006 with the United States, which includes *inter alia* appointing a US liaison prosecutor.³¹⁹ Europol is the agency which collects and disseminates criminal intelligence and provides operational support and analysis to the police authorities in the EU Member States. Europol does so by providing detailed operational analysis, which can be used to predict potential trafficking routes for illicit tobacco shipments.³²⁰ Europol executes the Mutual Legal Assistance Agreement (in force between the U.S. and EU) in non-judicial settings.³²¹ Finally, OLAF is the agency working in close cooperation with national law enforcement agencies and customs services both inside and outside the EU to "prevent, detect, investigate, and collect evidence so that evaded duties can be recovered and perpetrators prosecuted".³²²

Finally, it is worth mentioning the authority, which, while at the moment of writing is only about to become operation, is most likely to become a significant element of the fight against tobacco smuggling concerning the EU: the European Public Prosecutor's Office (EPPO). It shall be "responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union".³²³ Among the offences falling into the scope of its competencies should be in particular customs fraud. The EPPO is also empowered to establish cooperative relations in particular with

³¹⁶U.S. Department of State (2015), p. 18.

³¹⁷U.S. Department of State (2015), p. 18.

³¹⁸European Parliament and Council Regulation (EU) 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L 295/138, Art. 2.

³¹⁹Agreement between Eurojust and the United States of America signed on 6 November 2006, available at: <https://www.eurojust.europa.eu/sites/default/files/InternationalAgreements/Eurojust-USA-2006-11-06-EN.pdf>.

³²⁰European Parliament and Council Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L 135/53, Art. 3, 4, 5.

³²¹U.S. Department of State (2015), p. 19; Explanatory Note on the Agreement on Mutual Legal Assistance between the European Union and the United States of America [2003] OJ L 181/34, Art. 8.

³²²European Parliament and Council Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L 248/1, Art. 1.

³²³Art. 4 of the EPPO Regulation.

authorities of third countries,³²⁴ which may entail for instance “the exchange of strategic information and the secondment of liaison officers to the EPPO”.³²⁵ At this point there are no known efforts to establish such relationships with US authorities, but they are likely to be established in the future.

The 2010 extradition agreement between the EU and U.S. incorporates several modern components that were not part of past treaties between the U.S. and specific EU Member States. The literature has identified these as being, for instance, the introduction of a specific dual criminality clause and streamlining the process for authentication and transmission of documents between authorities.³²⁶ Other than the addition of these modern components, both the extradition agreement and the mutual legal assistance agreement (discussed below) are considered historic because they were the first agreements concluded between the United States and the European Union that relate specifically to law enforcement, as part of the external dimension of the Area of Freedom, Security and Justice.

In addition to the extradition agreement, there has been a mutual legal assistance (herein: MLA) agreement in place between the EU and U.S. since 2010.³²⁷ The European Union defines Mutual Legal Assistance as a “form of cooperation between. . .countries for the purpose of collecting and exchanging information”.³²⁸ As such, the practice includes seizures and searches, obtaining evidence, taking statements and the exchange (between administrative and judicial authorities) of information collected therein. The Agreement enables the exchange of a wide range of personal data, with the Agreements stating that information will be exchanged for a variety of purposes including “the prevention, detection, suppression, investigation and prosecution of any specific criminal offences, and for any specific analytical purposes”.³²⁹ The Agreement also enables the exchange of sensitive personal data, though the scope of exchange is more limited for this type of data. Article 6 allows the transmission of sensitive personal data only upon the transmitting party’s determination that such data is particularly relevant to a purpose set forth in Article 5(1) of the Agreement.³³⁰ Another important component, touched upon in both Articles 4 and 5, are the digital investigations and exchange of digital evidence, including in the financial area.³³¹

The Agreement defines the U.S. authorities competent to receive Europol data broadly—these include U.S. federal authorities, but also state or local authorities

³²⁴ Art. 99 of the EPPO Regulation.

³²⁵ Art. 104 of the EPPO Regulation. For more analysis on the EPPO, see *inter alia* the contributions to: Geelhoed et al. (2018) and Ligeti et al. (2020).

³²⁶ Council of the European Union (2011), p. 9.

³²⁷ Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L 181 (Agreement on MLA).

³²⁸ European Commission (2020).

³²⁹ Agreement on MLA, Art. 5.1.

³³⁰ Agreement on MLA, Art. 5.1.

³³¹ Agreement on MLA, Art. 4.

provided that they agree to observe the provisions of the Agreement.³³² In the Exchange of Letters, which accompany the agreement, ‘competent authorities’ are defined as those responsible for functions relating to the prevention, detention, suppression, investigation and prosecution of criminal offences.³³³ The most clarity as to which authorities specifically the Agreement applies to is given in Articles 5 and 7. Article 5 of the Agreement enables the U.S. and EU Member States to integrate prosecutors and investigators into a single investigation so that greater cooperation may be made possible. Meanwhile, Article 7, outlines the role of authorities who provide assistance in the “furtherance of investigations conducted by administrative or regulatory agencies with statutory authority to refer matters for criminal prosecution”.³³⁴ The presence of both Article 5 and 7, means that the MLA Agreement applies to the cross-border exchange of information between both administrative and judicial authorities. However, the scope is limited to exchange of information for *non-criminal* judicial and administrative proceedings by Article 9 of the agreement.³³⁵

For criminal judicial proceedings, exchange of evidence under the agreement relies on the involvement of different authorities, including the political bodies and judicial actors responsible for supervising and examining cross-border requests for evidence gathering against domestic standards.³³⁶ However, the request for assistance can be rejected if referral for criminal prosecution is not being contemplated at the time when the request is being made (meaning that the matter is purely regulatory in nature).³³⁷

In relation to measures relevant to mutual assistance performed at the request of foreign authorities, the U.S. has the following rules in place. Third party enforcement requests for access to data stored in the U.S. are assessed against the probable cause standard under the Fourth Amendment³³⁸ and specific provisions of statutes, such as the Electronic Communications Privacy Act (ECPA). These requirements are most relevant for searches and seizures,³³⁹ which are not mentioned explicitly in the MLA Agreement between the U.S. and EU. However, seizures are discussed in the Exchange of Letters, which state that the competences of joint investigative teams include “exchange of information pertaining to...in rem or in person seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction”. This is directly applicable to the joint fight against

³³²Mitsilegas (2003), p. 515.

³³³Mitsilegas (2003), p. 517.

³³⁴Mitsilegas (2003), p. 517.

³³⁵Agreement on MLA, Art. 9.1(c).

³³⁶Stefan, Fuster (2018), p. 16.

³³⁷Council of the European Union (2011), p. 29.

³³⁸The Fourth Amendment limits the government’s ability to conduct searches and seizures, and warrants can be issued only with independent review by a judge.

³³⁹Stefan, Fuster (2018), p. 16.

ITT, as assets confiscated in seizures of illicit tobacco products were intended to form the instrumentalities of crime.

The United States usually considers the taking of statements and evidence as part of mutual assistance activities. Taking statements is only mentioned in the EU-U.-S. MLA Agreement in the context of video conferencing, whereby the use of videoconferencing is permitted for purposes including “taking of investigative statements”.³⁴⁰ However, statements taken by authorities are considered by the U.S. as part of ‘obtaining evidence’, which is mentioned more frequently in the Agreement. Concerning evidence the Agreement finds that the requesting State may use evidence obtained from the requested State for a variety of purposes, including, inter alia, criminal investigation, preventing threats to public security and in non-criminal judicial proceedings.³⁴¹ The Agreement further states that “generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition. . . to providing evidence or information”.³⁴² Authors have suggested that this clause is intended to prevent the EU from refusing to exchange certain information with the U.S. on grounds of “major differences in the philosophy of personal data between the U.S. and Europe”.³⁴³

Following the conclusion of the MLA Agreement, which authors have argued still holds several issues of concern for the EU,³⁴⁴ measures have been taken to overcome this obstacle. Namely through the drafting of another agreement between the U.S. and EU on “the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences”.³⁴⁵ This agreement intends to ensure a high level of protection of personal information and enhance cooperation between the U.S. and EU in relation to criminal offences, not for exchange of information in a commercial environment.³⁴⁶ Despite being recognized as a step forward in the protection of data in the context of criminal and judicial purposes, the 2016 Agreement has still come under fire for, for instance, focusing on protecting the rights of European citizens but not specifically stressing the same protections for data of European residents, as well as for continuing to put national security concerns ahead of personal data protection.³⁴⁷

³⁴⁰ Agreement on MLA, Art. 6.6.

³⁴¹ Agreement on MLA, Art. 9.1.a.

³⁴² Agreement on MLA, Art. 9.2.b.

³⁴³ Mitsilegas (2003), p. 517.

³⁴⁴ Mitsilegas (2003), p. 517.

³⁴⁵ Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016] OJ L 336/3 (Agreement on personal information).

³⁴⁶ Agreement on personal information (2016), Art 1(1).

³⁴⁷ European Association for the defence of Human Rights (2017).

11.4.3 *Influence on Other States*

The U.S. ITT continues to impact the ITT markets of its closest neighbours, Canada and Mexico. Canada and the U.S. have had ITT connection since the mid-1990s, when illicit cigarette consumption made up to 30% of the total Canadian market.³⁴⁸ According to a report by the University of Cape Town, a majority of the illicit cigarettes sold on the Canadian illicit market were legally produced in Canada”, exported untaxed to the United States and then smuggled back into Canada”.³⁴⁹ The Canadian government worked to combat the problem, but the implemented measures simply shifted the supply of illicit cigarettes to illicit manufacturing in Aboriginal communities in both the U.S. and Canada. According to a study by Schwartz at the University of Toronto, a majority of illicit cigarettes were (and continue to be in 2019) manufactured on four aboriginal reserves located in areas that border Ontario, Quebec, and the New York State.³⁵⁰

Since 2008 the Canadian government has been bringing forth new policies in order to tackle the problem of illicit tobacco products coming in from aboriginal reserves.³⁵¹ The new policies were laid out in the Contraband Tobacco Enforcement Strategy. The Strategy was especially focused on increased collaboration between authorities, as well as public education around safety and health consequences of the illicit tobacco trade.³⁵² Additional policies included tobacco stamps and a T&T system which came into force in 2010, accompanied by “a number of new enforcement initiatives in the most critical regions”, as well as the 2013 amendments to the Canadian Criminal Code with introductions of more severe sentencing for those engaged in the ITT.³⁵³

Despite the new measures, the Canadian ITT continues to make up around 11% of the total market, and continues to have a link with the United States aboriginal communities near New York State.³⁵⁴ This leads to the question of whether the problem can be solved on only one side of the border, and whether perhaps further collaboration from both sides is required to adequately provide a solution and decrease the illicit share of both the U.S. and Canadian illicit markets.

In addition to the cross-border smuggling to Canada, there are also reports on smuggling of cigarettes and other illicit tobacco products between the U.S. and Mexico. Limited sources are available on these cross-border smuggling operations. The interesting thing that does come up in sources which do discuss the cross-border ITT activity between the two countries is that—contrary to drug smuggling—there is a presence of illicit tobacco smuggling from the U.S. to Mexico, in addition to

³⁴⁸Ross (2015), p. 7.

³⁴⁹Ross (2015), p. 8.

³⁵⁰Ross (2015), p. 8; Schwartz (2019), p. 53.

³⁵¹Ross (2015), p. 11, p. 12, p. 15; Schwartz (2019), p. 53.

³⁵²Ross (2015), p. 11.

³⁵³Ross (2015), p. 12, p. 14.

³⁵⁴Schwartz (2019), p. 54.

smuggling vice versa.³⁵⁵ The incentive to smuggle into Mexico comes from the high taxes on tobacco products in Mexico.³⁵⁶ The incentive to smuggle into the U.S. comes from the profit which can be gained from interstate smuggling from low-tax states to high-tax states. Criticism as to the insufficient combatting of said ITT smuggling, has mainly focused on shortcomings of law enforcement on both sides of the border, public corruption, limited available data on the ITT and a need for improved data gathering and data sharing between U.S. and Mexico's authorities.³⁵⁷

11.5 Challenges and Potential Solutions

The central challenges of U.S. efforts to fight the ITT have proven to be a lack of prioritisation for ITT in comparison to other criminal activities, the absence of data on ITT related criminal activity, the absence of a track and trace system, and a lack of coordination among responsible agencies and levels of government. While there is consensus among U.S. commentators as to the prevalence of the aforementioned shortcomings, a number of other issues are also debated, such as: limiting product appeal for the consumer, tax harmonization measures, the continued influence of the tobacco industry on ITT, and the expansion of resources for global tobacco control.

The reasons given to explain the lack of prioritisation for ITT in comparison to other criminal activities revolve around the absence of a strong link to terrorism or a lot of violent crime in ITT criminal activity. Violent crime and criminal activities linked to terrorism are being increasingly prioritised by U.S. enforcement, which is why agencies like the ATF have been continually scaling down ITT enforcement efforts and scaling up investigations with a violent crime component.³⁵⁸ This is evident not only in the ATF's budgeting, but also in the DOJ's strategic plan for the years 2018–2022, where the threat of terrorism remains the number one strategic goal.³⁵⁹ The relatively new restructuring of ITT enforcement, though the transfer of responsibility for non-tax cigarette crimes from the ATF to the TTB, could fill the enforcement gap in the fight against ITT through increased field presence of TTB agents and a potential deterrent effect thereof.

A further problem is the absence of data on ITT related criminal activity, which is perhaps most evident in the lack of concrete findings on the total size of the U.S. ITT market, as well as "inconsistent definitional and reporting standards across local, state, and federal agencies".³⁶⁰ The limited data leads to weaker research and the

³⁵⁵ Colledge (2012), p. 290.

³⁵⁶ Colledge (2012), p. 289.

³⁵⁷ Colledge (2012), p. 290.

³⁵⁸ National Research Council (2015), p. 141.

³⁵⁹ U.S. Department of Justice (2018c)

³⁶⁰ Prieger et al. (2015), p. 7.

need to rely on assumptions made about the most effective approaches to fight ITT.³⁶¹ Before regulation or enforcement efforts in this area can be modified, it needs to be ensured that the proposed modifications are based on current, correct and specific data. The process of improving data collection and processing starts with the two federal agencies with a central responsibility in ITT enforcement (the ATF and the TTB),³⁶² but also concerns state and local enforcement agencies and international partners in the fight against ITT.

Another method to tackle ITT is a Track and Trace System (T&T System). A T&T system can be used to monitor involvement of illicit actors in the ITT, but can also be used to identify participation of licit tobacco industry companies in the diversion of tobacco products to illicit markets.³⁶³ Studies have found that a T&T system (similar to that already in place in California, Massachusetts and Michigan) could be an important component in the fight against ITT on a national scale, but only if it encompassed “low-tax as well as high-tax jurisdictions, and if those jurisdictions learn how to share and use the resulting information”.³⁶⁴

Most of the proposed measures for tackling the ITT in the U.S., from tax harmonization and track and trace to increased information sharing and more well-rounded enforcement, require collaboration between states and international partners. As was explained above, there are a multitude of agencies which lack clear leadership, and therefore also fail to coordinate to the level necessary to effectively combat ITT. The lack of coordination is best exemplified by efforts to combat smuggling from Native American reservations. This type of smuggling creates conflicts between different levels of government because while the federal government is entitled to regulate commerce between the states and Native American tribes, it is still difficult to enforce policy within reservations due to the rights of tribes to self-govern. The issue further creates tensions between state governments, because high-tax jurisdiction states, like New York, are eager to resolve the problem and limit smuggling from Native American reservations—while in other states, where tobacco production is a critical component of the state economy, governments are eager to limit increased regulation of tobacco on the whole. Furthermore, as smuggling from Native American tribes affects the U.S.’ neighbours, like Canada, the problem calls for cross-border cooperation with Canadian authorities.

As to debated solutions to the ITT, a primary one is limiting product appeal for the consumer. In this regard, the 2000 Tobacco Control Act and the FDA as its main regulatory authority are central. Considering that one of the key features of the act is the requirement “that new tobacco products do not have greater potential for initiating or maintaining dependence than existing products”, the FDA’s role in implementing new products standards and packaging requirements takes center stage. The graphic packaging design warning and product standard limitations

³⁶¹ National Research Council (2015), p. 152.

³⁶² Prieger et al. (2015), p. 7.

³⁶³ Gilmore et al. (2019), p. 127.

³⁶⁴ DeFeo et al. (2018), p. iii.

(such as that on nicotine content) are intended to limit the appeal of the product to the consumer, and thereby decrease consumption. Product requirements, like nicotine content, are contested by the tobacco industry, which claims that these measures will lead to a growth of the illicit tobacco market.³⁶⁵

Though these claims have been considered to be largely unsubstantiated,³⁶⁶ regulatory reform aimed at limiting product appeal to the consumer ought to be carefully performed with consideration of the effects that regulations of the licit market will have on the illicit market, and vice versa. On the licit market (where the main measures are product requirements, licensing and taxation) the FDA needs to be less susceptible to industry influence. The recommended nicotine content standards should be re-considered, and the 13 new graphic warnings need to be actively defended in the event of an industry brought court case.³⁶⁷

Attempts to bring in measures like further product requirements and health warnings (which there are efforts to reinstate following the first failed attempt by the FDA), can be further complemented by public education campaigns on the dangers of consuming tobacco products from both the licit and illicit markets. Public education is important because a big part of the problem with ITT in the U.S. is that the general public exhibits low levels of social disapproval for consumption of illicit tobacco products.³⁶⁸ However, even when product appeal is reduced and when education campaigns have been run, it is expected that a subset of consumers will remain uninterested in switching products or in quitting tobacco products altogether.³⁶⁹

Another debated solution is tax harmonization. As discussed earlier in the chapter, it is not possible to reduce interstate smuggling simply through the raising of federal taxes, because differences would still remain at the state level and continue to create a profit motivation for smuggling.³⁷⁰ Harmonization of state and local taxes, on the other hand, would remove the profit motive for smuggling as the price of cigarettes would be equal for consumers in every state.³⁷¹ The same is true if a rebate scheme were implemented at the federal level.³⁷² The reasons why these tax harmonization measures have not been implemented is because they remain contentious solutions. Low-tax states, being also the major producing states, continue to push against measures which would increase taxation on tobacco products,³⁷³ while high-tax states remain eager to keep taxation as a source of revenue.³⁷⁴

³⁶⁵ Lindblom (2019), p. 960.

³⁶⁶ Lindblom (2019), p. 960.

³⁶⁷ U.S. Food and Drug Administration (2020).

³⁶⁸ National Research Council (2015), p. 3.

³⁶⁹ U.S. Food and Drug Administration (2018), p. 18.

³⁷⁰ Kleiman and DeFeo (2017), p. 4.

³⁷¹ Kleiman and DeFeo (2017), p. 4.

³⁷² Kleiman and DeFeo (2017), p. 4.

³⁷³ Kleiman and DeFeo (2017), p. 3.

³⁷⁴ Kleiman and DeFeo (2017), p. 3.

A lot of the suggested solutions in the U.S. fight against ITT are already a part of the Protocol. Bollyky & Gostin see an opportunity for the United States to lead the way in the global fight against the ITT through, by harnessing the Protocol and working multilaterally through the WHO.³⁷⁵ However, this is unlikely to happen while the U.S. has not signed or ratified the Protocol, and has only signed the FCTC.

A further major challenge in the fight against ITT, both in the U.S. and globally, is that it is severely underfunded.³⁷⁶ To alleviate this problem Bollyky and Gostin have proposed measures to better feed global tobacco control financing. One such measure would be a G20 commitment to institute a surtax on tobacco consumption (the revenue of which would go into a dedicated fund administered by an independent body at the international level).³⁷⁷ If such a commitment was backed and contributed to by the U.S., along with the other G20 countries, it is estimated that the funding for ITT control globally would be four times larger than what it is at present. In this regard, experts have argued that they believe a renewed effort to ratify the Protocol would provide an opportunity to strengthen tobacco control regulations and “promote US leadership in the fight against the global tobacco epidemic.”³⁷⁸

Discussion on the Protocol links, finally, with the challenge of tobacco industry influence on U.S. tobacco policy as the U.S. domestic tobacco industry remains one of the strongest lobbyists against the ratification of the FCTC.³⁷⁹ The most prominent example of a tobacco industry lobby against an FCTC clause is that against Article 11 of the FCTC on graphic/pictorial warning.³⁸⁰ The purpose of Article 11 is to communicate information about health risks of tobacco to the consumer in the hopes of reducing the appeal of cigarettes.³⁸¹ The call for action in this regard came not only from the FCTC, but also from U.S. domestic law when the FDA was required by the Tobacco Control Act to issue regulations requiring graphic health warnings on all cigarette packs.³⁸² As discussed above, the FDA’s issuance of these regulations were challenged in court by the tobacco industry on the grounds of commercial speech violations,³⁸³ and a failure on the part of the FDA to provide substantial evidence showing that enacting their proposed graphic warnings will accomplish the objective of reducing smoking rates, as required under the Administrative Procedure Act.³⁸⁴ It remains to be seen whether the new regulations in this area will be more successful (and survive challenges in court), but what is clear is that a strong lobby from the U.S.’ domestic tobacco industry continues to contribute

³⁷⁵ Bollyky and Gostin (2010), p. 2637.

³⁷⁶ Bollyky and Gostin (2010), p. 2637.

³⁷⁷ Bollyky and Gostin (2010), p. 2637.

³⁷⁸ Bollyky and Gostin (2010), p. 2637; Mackey et al. (2014), p. 3.

³⁷⁹ Gilmore et al. (2019), p. 127.

³⁸⁰ Gilmore et al. (2019), p. 127.

³⁸¹ Dewhirst and Wonkyong (2011), p. 397.

³⁸² Family Smoking Prevention and Tobacco Control Act [2009], Sec. 903.

³⁸³ *R.J. Reynolds v FDA* (2012) 845 F.Supp.2d 266.

³⁸⁴ *Academy of Pediatrics v. FDA*.

to an anti-regulatory attitude of the federal and state governments. This is done by maintaining the narrative that further regulation of the licit tobacco market, particularly through taxation and quality standards, will lead to a growth of the illicit market and even the financing of terrorism. This narrative has been disproven a number of times in the relevant literature.³⁸⁵ Considering the anti-regulatory lobby from the tobacco industry, as well as concerns over tobacco industry involvement in illicit smuggling of tobacco products,³⁸⁶ it is important that measures, like a T&T system, are developed independently of any industry influence.³⁸⁷

References

Journal Articles

- Aigner S (2010) Mutual recognition of authorised economic operators and security measures. *World Cust J* 4(1):47–54
- Alderman J (2012) Strategies to combat illicit tobacco trade. Tobacco Control Legal Consortium, St. Paul, pp 1–14
- Bialous S (2016) The Tobacco industry and the Illicit Trade in Tobacco products. World Health Organization, Geneva, pp 1–19
- Bollyky TJ, Gostin LO (2010) The United States' engagement in global tobacco control: proposals for comprehensive funding and strategies. *JAMA* 304(23):2637–2638
- Chriqui JF et al (2008) A comprehensive review of state laws governing Internet and other delivery sales of cigarettes in the United States. *Nicotine Tobacco Res* 10(2):253–265
- Chung-Hall J, Craig L, Gravely S, Sansone N, Fong GT (2019) Impact of the WHO FCTC over the first decade: a global evidence review prepared for the impact assessment expert group. *Tobacco Control* 28(Suppl 2):s119–s128
- Colledge JW III (2012) Illicit tobacco trade between the United States and Mexico. *Salud Pública de México* 54:289–292
- Cornelius ME, Wang TW, Jamal A, Loretan CG, Neff LJ (2020) Tobacco Product Use Among Adults — United States, 2019. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a4.htm>. Accessed 30th June 2021
- Debertin DL (2001) Corporate strategy in the tobacco manufacturing industry: the case of Philip Morris. *Rev Agric Econ* 23(2):511–523
- DeFeo ML, Kleiman M, Prieger JE (2018) Combating the Illicit Trade in Tobacco products in California and at the National level through track and trace (T&T) mechanisms. SSRN: 3140073
- Gallagher AWA, Gilmore AB, Eads M (2019) Tracking and tracing the tobacco industry: potential tobacco industry influence over the EU's system for tobacco traceability and security features. *Tobacco Control*:1–7
- Gilmore AB, Gallagher AWA, Rowell A (2019) Tobacco industry's elaborate attempts to control a global track and trace system and fundamentally undermine the Illicit Trade Protocol. *Tobacco Control* 28(2):127–140
- Gostin LO, Glasner AY (2014) E-cigarettes, vaping, and youth. *JAMA* 312(6):595–596

³⁸⁵ National Research Council (2015), p. 3, pp. 39–40; Kleiman and DeFeo (2017), p. 11.

³⁸⁶ Gilmore et al. (2019), p. 127.

³⁸⁷ Gilmore et al. (2019), p. 127; Gallagher et al. (2019), p. 4.

- Jha P, Chaloupka FJ (1999) Curbing the epidemic: governments and the economics of tobacco control. *Tobacco Control* 8:196–201
- Joossens L et al (2016) Assessment of the European Union’s illicit trade agreements with the four major Transnational Tobacco Companies. *Tobacco Control* 25(3):254–260
- Kleiman MA, DeFeo ML (2017) Enforcing the law against illicit traffic in tobacco products: organizational problems and potential solutions. SSRN: 3025138
- Lindblom EN (2019) Illicit trade poses no threat to an FDA rule to minimize nicotine in smoked Tobacco products. *Am J Public Health* 109(7):960–961
- Lo C (2008) Tobacco companies assisting government agencies in fighting against illicit trade in tobacco products: regulating the cooperative relations in the protocol. *Asian J WTO Int Health Law Policy* 3:535
- Mackey TK et al (2014) Call to action: promoting domestic and global tobacco control by ratifying the framework convention on tobacco control in the United States. *PLoS Med* 11(5):1–6
- Mitsilegas V (2003) New EU-USA cooperation on extradition, mutual legal assistance and the exchange of police data. *Eur Foreign Aff Rev*:515–536
- Prieger J, Kulick JD, Kleiman MAR (2015) Countervailing Effects: What the FDA Would Have to Know to Evaluate Tobacco Regulations. SSRN:2569700
- Ribisl KM et al (2019) Strategies to reduce illicit trade of regular nicotine Tobacco products after introduction of a low-nicotine Tobacco product standard. *Am J Public Health* 109(7):1007–1014
- Stefan M, Fuster GG (2018) Cross-border Access to Electronic Data through Judicial Cooperation in Criminal Matters. CEPS Paper in Liberty and Security in Europe 2018-07
- Tosza S (2021) Role of the industry in the enforcement of the tobacco policy. Between necessary mistrust and necessary cooperation. *Utrecht Law Rev* 1/2021
- Wang X (2017) Tax avoidance and evasion: cigarette purchases from Indian reservations among US Adult Smokers, 2010–2011. *Public Health Rep* 132(3):304–308

Books and Book Chapters

- Dewhirst T, Wonkyong BL (2011) Social marketing and Tobacco control. In: Hastings G, Bryant C, Angus K (eds) *The SAGE handbook of social marketing*. Sage Publications, London, pp 391–404
- Geelhoed W, Erkelens LH, Meij AWH (2018) *Shifting perspectives on the European Public Prosecutor’s Office*. Springer
- Ligeti K, Antunes MJ, Giuffrida F (2020) *The European public prosecutor’s office at launch. Adapting national systems, transforming EU criminal law*, Wolters Kluwer
- National Research Council (2015) *Understanding the US Illicit Tobacco Market: characteristics, policy context, and lessons from international experiences*. National Academies Press, Washington DC
- Schwartz R (2019) Canada: controlling illicit tobacco trade. In: Dutta S (ed) *Confronting Illicit Tobacco Trade: A Global Review of Country Experiences*, World Bank Group Global Tobacco Control Program 2019
- Von Lampe K, Kurti M, Bae J (2014) *Land of opportunities: the illicit trade in cigarettes in the United States*. In: *Corruption, greed and crime-money: sleaze and shady economy in Europe and beyond*. Wolf Legal Publishers, Oisterwijk, pp 267–289

Online Publications

- Alcohol and Tobacco Tax and Trade Bureau (2019) Alcohol and Tobacco Tax and Trade Bureau, Fiscal Year 2020 President's Budget. <https://home.treasury.gov/system/files/266/13.-TTB-FY-2020-CJ.pdf>. Accessed 30 June 2021
- Alcohol and Tobacco Tax and Trade Bureau (2020) Congressional Budget Justification and Annual Performance Report and Plan. <https://www.ttb.gov/images/pdfs/fy2020-cj.pdf>. Accessed 30 June 2021
- Bureau of Alcohol, Tobacco, Firearms and Explosives (2020a) ATF Prevent All Cigarette Trafficking (PACT) Act Information Guide. <https://www.atf.gov/alcohol-tobacco/docs/guide/prevent-all-cigarette-trafficking-pact-act-information-guide/download>. Accessed 30 June 2021
- Bureau of Alcohol, Tobacco, Firearms and Explosives (2020b) Congressional Budget Submission Fiscal Year 2020. <https://www.justice.gov/jmd/page/file/1144651/download> Accessed 30 June 2021
- Bureau of Justice Statistics (2020) About the Bureau of Justice Statistics. <https://www.bjs.gov/index.cfm?ty=abu>. Accessed 30 June 2021
- Campaign for Tobacco-Free Kids 2020., https://www.tobaccofreekids.org/assets/global/pdfs/en/ILL_global_cig_trade_summary_en.pdf. Accessed 30 June 2021
- Chaloupka FJ et al (2015) Preventing and reducing illicit tobacco trade in the United States. <https://www.cdc.gov/tobacco/stateandcommunity/pdfs/illicit-trade-report-121815-508tagged.pdf>. Accessed 30 Aug 2021
- Council of the European Union (2011) Handbook on the practical application of the EU-U.S. Mutual Legal Assistance and Extradition Agreements. <https://www.statewatch.org/news/2011/mar/eu-council-eu-usa-mla-handbook-8024-11.pdf>. Accessed 30 June 2021
- European Association for the Defence of Human Rights (2017) Umbrella Agreement: not enough protection for European residents. <http://www.aedh.eu/en/umbrella-agreement-not-enough-protection-for-european-residents/>. Accessed 30 June 2021
- European Commission (2019) EU Customs Strategy. https://ec.europa.eu/taxation_customs/general-information-customs/eu-customs-strategy_en. Accessed 30 June 2021
- European Commission (2020) Mutual legal assistance and extradition. https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-legal-assistance-and-extradition_en. Accessed 30 June 2021
- Florko N (2020) Trump doesn't want the FDA to regulate tobacco. <https://www.statnews.com/2020/02/10/trump-doesnt-want-the-fda-to-regulate-tobacco/>. Accessed 30 June 2021
- Greenwood M (2018) White House to propose cutting the 'Alcohol' and 'Tobacco' out of ATF: report. <https://thehill.com/homenews/administration/369803-white-house-to-propose-cutting-the-alcohol-and-tobacco-out-of-atf>. Accessed 30 June 2021
- Huang D (2019) Reflecting on Progress Made in Tobacco and Nicotine Products Regulation under FDA Commissioner Gottlieb. <https://oneill.law.georgetown.edu/reflecting-on-progress-made-in-tobacco-and-nicotine-products-regulation-under-fda-commissioner-gottlieb/>. Accessed 30 June 2021
- ITG Brands (2020) ITG Brands Website. <https://www.itgbrands.com/>. Accessed 30 June 2021
- Joossens L et al (2009) How eliminating the global illicit cigarette trade would increase tax revenue and save lives. <https://theunion.org/technical-publications/how-eliminating-the-global-illicit-cigarette-trade-would-increase-tax-revenue-and-save-lives>. Accessed 30 June 2021
- LaFaive MD, Nesbit T, Drenkard ST (2016) Cigarette Taxes and Smuggling: A 2016 Update. The Mackinac Center for Public Policy. <https://www.mackinac.org/archives/2016/s2016-09.pdf>. Accessed 30 June 2021
- OECD (2020) OECD Task Force on Countering Illicit Trade (TF-CIT). <http://www.oecd.org/governance/risk/oecdtaskforceoncounteringillicittrade.htm>. Accessed 30 June 2021
- Office of the Inspector General (2020) Audits and Reviews - Bureau of Alcohol, Tobacco, Firearms, and Explosives. <https://oig.justice.gov/reports/atf.htm>. Accessed 30 June 2021

- Office of the United States Trade Representative (2019) 2019 National Trade Estimate Report on Foreign Trade Barriers. https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf. Accessed 30 June 2021
- OLAF (2017) Cigarette smuggling: Focused enforcement and new tools. https://ec.europa.eu/anti-fraud/media-corner/news/12-05-2017/cigarette-smuggling-focused-enforcement-and-new-tools_en. Accessed 30 June 2021
- Ross H (2015) Controlling Illicit Tobacco Trade: International Experience. https://tobacconomics.org/wp-content/uploads/2016/01/Ross_International_Experience_8-06-15.pdf. Accessed 30 June 2021
- Transnational Alliance to Combat Illicit Trade (2019) Mapping the Impact of Illicit Trade on the Sustainable Development Goals. https://unctad.org/meetings/en/Contribution/DITC2019_TRACIT_IllicitTradeandSDGs_fullreport_en.pdf. Accessed 30 June 2021
- U.S. Center for Disease Control and Prevention (2019b) Current Cigarette Smoking Among Adults in the United States. https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig-smoking/index.htm. Accessed 30 June 2021
- U.S. Center for Disease Control and Prevention (2019c) Progress Erased: Youth Tobacco Use Increased During 2017–2018. <https://www.cdc.gov/media/releases/2019/p0211-youth-tobacco-use-increased.html>. Accessed 30 June 2021
- U.S. Center for Disease Control and Prevention (2020) Fast Facts. https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#:~:text=Cigarette%20smoking%20is%20responsible%20for,or%201%2C300%20deaths%20every%20day. Accessed 30 June 2021
- U.S. Customs and Border Protection (2019) Philadelphia CBP Seizes more Counterfeit Electronic Cigarette Pods. <https://www.cbp.gov/newsroom/local-media-release/philadelphia-cbp-seizes-more-counterfeit-electronic-cigarette-pods>. Accessed 30 June 2021
- U.S. Department of Justice (2014) Fiscal Years 2014–2018 – Strategic Plan. <https://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf>. Accessed 30 June 2021
- U.S. Department of Justice (2016a) Five convicted in cigarette smuggling operation. <https://www.justice.gov/usao-ndwv/pr/five-convicted-cigarette-smuggling-operation>. Accessed 30 June 2021
- U.S. Department of Justice (2016b) South Florida Tobacco Importer Charged with Failure to Pay Over \$13 Million in Federal Excise Taxes. <https://www.justice.gov/usao-sdfl/pr/south-florida-tobacco-importer-charged-failure-pay-over-13-million-federal-excise-taxes>. Accessed 30 June 2021
- U.S. Department of Justice (2018a) Korean National Sentenced to Nearly 4 Years in Prison for Role in Scheme that Avoided Paying Excise Taxes on Millions of Cigarettes <https://www.justice.gov/usao-cdca/pr/korean-national-sentenced-nearly-4-years-prison-role-scheme-avoided-paying-excise-taxes>. Accessed 30 June 2021
- U.S. Department of Justice (2018b) North Country Man Sentenced to Prison, Ordered to Pay \$3.5 Million for Contraband Cigarette Sales. <https://www.justice.gov/usao-ndny/pr/north-country-man-sentenced-prison-ordered-pay-35-million-contraband-cigarette-sales>. Accessed 30 June 2021
- U.S. Department of Justice (2018c) Strategic Plan - Fiscal Years 2018–2022. <https://www.justice.gov/jmd/page/file/1071066/download>. Accessed 30 June 2021
- U.S. Department of State (2015) The Global Illicit Trade in Tobacco: A Threat to National Security. <https://2009-2017.state.gov/documents/organization/250513.pdf>. Accessed 30 June 2021

- U.S. Food and Drug Administration (2018) Illicit Trade in Tobacco Products after Implementation of an FDA Product Standard. <https://www.fda.gov/files/tobacco%20products/published/Illicit-Trade-in-Tobacco-Products-After-Implementation-of-an-FDA-Product-Standard.pdf>. Accessed 30 June 2021
- U.S. Food and Drug Administration (2020) FDA Proposes New Health Warnings for Cigarette Packs and Ads. <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/fda-proposes-new-health-warnings-cigarette-packs-and-ads>. Accessed 30 June 2021
- World Customs Organization (2018) SAFE Framework of Standards. <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/safe-package/safe-framework-of-standards.pdf?la=en>. Accessed 30 June 2021
- World Health Organization (2018) Tobacco. <http://www.who.int/news-room/fact-sheets/detail/tobacco>. Accessed 30 June 2021

Case Law

- United States District Court, District of Columbia, *R.J. Reynolds Tobacco Co. v. United States Food & Drug Administration*, Judgement, [Nos. 11–5332, 12–5063] 24 August 2012 (R.J. Reynolds v. FDA)
- United States District Court, District of Massachusetts, *American Academy of Pediatrics v. United States Food and Drug Administration*, Judgement, [No. PWG-18-883] 15 May 2019 (Academy of Pediatrics v. FDA)

Legal Documents

- Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L 181
- Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016] OJ L 336/3
- Commission Decision on determining the Union position for a Decision of the Joint Committee set up under Article 14 of the Agreement on Mutual Recognition between the European Community and the United States of America, C(2017)1323/F1
- European Parliament and Council Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L 135/53
- Explanatory Note on the Agreement on Mutual Legal Assistance between the European Union and the United States of America [2003] OJ L 181/34
- Family Smoking Prevention and Tobacco Control Act (2009)
- Internal Revenue Manuals § 9.5.5.4.5. (2004)
- Internal Revenue Manuals § 9.5.5.4.4 (2007)
- New York City Local Law 97 (2019)
- USA Patriot Improvement and Re-Authorization Act § 223 d.1. (2005)
- 15 U.S. Federal Code (U.S.C) 10A § 376 (1964)
- 5 U.S. Federal Code (U.S.C.) Ch.7 § 706(1) (1994)
- 16 U.S.C Ch. 114 § 2342 (2011);
- 26 U.S.C Ch.52 § 5701 – 5763 (2017)
- WHO Framework Convention on Tobacco Control (2005)
- WHO Protocol to Eliminate Illicit Trade in Tobacco Products (2018)

Matija Kajić is a PhD candidate at Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) and Utrecht Center for Water, Oceans and Sustainability Law (UCWOSL), Utrecht University. She currently conducts interdisciplinary research on the legal and institutional challenges shaping the governance of the EU's Circular Economy. Her Master's degree in Legal Research has diversified her research interests to include comparative U.S. law and criminal law, alongside environmental and EU law.

Stanisław Tosza is Associate Professor in Compliance and Law Enforcement at the University of Luxembourg, where he researches and teaches compliance law, comparative and European criminal law, white-collar crime, and cyberlaw, and where he is also the co-director of the Bachelor program in Law. He is the Secretary General of the AIDP (International Association of Penal Law).