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DEATH CLOCK

SINCE THE OPENING OF THE FIRST WORKING GROUP FOR THE FRAMEWORK CONVENTION ON TOBACCO CONTROL ON 29 OCTOBER 1999

47,366,642

PEOPLE HAVE DIED FROM TOBACCO-RELATED DISEASES (AS OF 9AM ON 17 MARCH 2010)

DON'T MOP THE COP

Today, an INB drafting group will begin discussing the critically important issues in Parts VI to X of the Protocol. FCA will be publishing some detailed commentary on the proposed institutional and financial arrangements.

But one key point needs to be made at the start.

One of the options described in the Secretariat's note on institutional and financial arrangements is that the Conference of the Parties for the Framework Convention on Tobacco Control could also act as the Meeting of the Parties to the Protocol, required by draft Article 35.

It is understandable that Parties wish to save scarce money and resources. But this would not be the right way to do it.

The Secretariat paper mentions two examples of conventions where the COPs also serve as MOPs for subsidiary protocols – the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and the Biosafety Protocol to the Convention on Biological Diversity. But these are rare examples, and they happened because in both cases the protocols added substantive details to existing conventions.

In this case the Protocol contains important additional commitments on one particular complex and distinct area of the Framework Convention.

Parties to the Protocol may differ from Parties to the Convention. Party representatives at the MOP need to have specific knowledge and expertise relevant to illicit trade but not necessarily to the many other tobacco control issues in the FCTC. Also, focus on illicit trade at a COP could divert needed attention from other critical areas.

The MOP should be held in the most cost-efficient way, but separate from the COP (for example, immediately before or after the COP). And the COP and MOP Bureaux should be kept separate for similar reasons. The real need for financial efficiency should not supercede the need for effective arrangements to supervise and discuss both the Protocol and the Framework Convention.

On the other hand, in the interests of cost savings and co-ordination, FCA supports the principle that the Convention Secretariat should also serve as Secretariat for the Protocol.

FCA was formed and remains a non-political alliance of more than 350 organisations from more than 100 countries from all WHO regions.

FCA is dedicated to the FCTC process and remains committed to supporting a strong outcome at these negotiations.

FCA values accuracy as has been shown in the Bulletin and will correct inaccuracies as they arise.

PROTOCOL REQUIREMENTS ARE LINKED AND INTERDEPENDENT

Licensing, record keeping, due diligence, tracking and tracing should not be considered as separate issues in the illicit trade protocol negotiations, but rather as interdependent components of a regulatory or compliance regime intended to protect tobacco excise tax revenue and public health.

Licensing is the foundation of a regulatory regime. Manufacturers, importers, exporters, wholesalers and brokers of tobacco products, manufacturing equipment and key inputs should be licensed to conduct business within their particular jurisdictions. The issuance of licences should be dependent upon current and past compliance with tax laws and conditions set forth by national law to obtain the licence, including records maintenance and tracing due diligence obligations. Furthermore, the licensee should be charged an appropriate fee for the licence to cover government expenditures necessary to investigate the suitability of the applicant and other administrative costs. Failure to obtain a licence should have administrative, and in extreme situations involving serious fraud, criminal sanctions.

Record keeping is essential to the success of any licensing regime. Robust audits would protect the integrity of the record-keeping process. Such audits would compare purchases of key inputs with production records and finally with products sold for domestic consumption and for export. Auditors must be able to

reconcile these figures not only to verify the proper payment of taxes on tobacco products reported to the tax authorities, but also as a means of detecting illegal manufacturing (such as undeclared or overproduction) and the diversion of key inputs to unlicensed manufacturers. Audits could also compare data reported to government regulators with those contained in business files, and verify data in a tracking and tracing regime. Submitting false records to government agencies or regulators should result in suspension or revocation of the business licence, and in extreme situations involving serious fraud, criminal sanctions.

Due diligence (customer identification and verification) and a compliance programme are also key. Compliance programmes are commonly found in the financial sector. Banks and other financial institutions are required to verify the identity of their customers, monitor account activity and report suspicious transactions to national governments as part of various international anti-money laundering regimes. Those regimes were designed to prevent the financial sector from intentionally and unintentionally being used in money laundering schemes.

The intent of the protocol is to prevent intentional and unintentional illegal conduct by the tobacco industry. As with the financial sector, the tobacco industry should be required to conduct and fund a similar compliance programme. Due diligence requires the tobacco industry to

ensure that suppliers and customers it transacts with are engaged in lawful conduct. Failure to monitor customers, or reporting of inaccurate information to government agencies, should result in suspension or revocation of the business licence, and in extreme situations involving serious fraud, criminal sanctions.

Participation in a government-controlled **tracking and tracing** regime should be a condition of licensing for at least manufacturers and importers of tobacco products. The integrity of a tracking and tracing system is dependent upon the quality of data contained in the system. Record-keeping requirements and periodic regulatory audits protect the integrity of tracking and tracing data. Failure to participate in a tracking and tracing programme, submission of false data to government agencies, or forging or altering or removing of markings should result in suspension or revocation of the business licence, and in extreme situations involving serious fraud, criminal sanctions.

The parties should recognise the interdependence of licensing, record keeping, due diligence, and tracking and tracing in their negotiation of the protocol. The result will be a stronger protocol.

*John Colledge III
Consultant, Illicit Trade and
Anti-Money Laundering*

INTERNET SALES HAVE MANY PROBLEMS, SAYS PMI

On its website, Philip Morris International outlines many of the problems associated with internet sales of tobacco products. Although PMI does not go as far as calling for a ban on internet sales, the problems highlight the need for immediate action. As far as the protocol is concerned, clearly the best remedy is a total ban on internet/remote retail sales to consumers.

A current section of PMI's website reads:

"As of January 2004, there are literally hundreds of internet websites offering to sell tobacco products of every imaginable description.

"The products on offer range from internationally recognized cigarette brands such as Marlboro and Mild Seven, more regional brands such as Regal or Gauloises, to more localized products such as clove cigarettes from Indonesia, bidis from India or cheap generic products from the USA. They also include "roll your own" and chewing tobacco.

"We oppose these third party internet websites because they suffer from one or more problems:

- They do not employ adequate safeguards to ensure that cigarettes

are marketed, sold and delivered only to adults. The internet is accessible to minors, and there is no age verification requirement upon delivery

- They openly encourage consumers to evade paying taxes. In some cases, they even purport to offer legal advice about consumers' liability (or non-liability) for the payment of taxes, advice which is often inaccurate
- They sell cigarettes intended for sale in one country that do not comport with health warning, ingredient and labelling requirements in the country where they are ultimately sold, in violation of the domestic laws".

PMI also lists violation of advertising laws, misrepresentation, sales of counterfeit product and credit card crime as problems.

*Rob Cunningham
Canadian Cancer Society*

Source: http://www.philipmorrisinternational.com/pmintl/pages/eng/stories/f002_i_trade.asp (Accessed 16 March 2010)

HOW “SERIOUS” FOR USE OF UNTOC?

When would illicit tobacco trading be sufficiently serious to justify the use of the UN Convention Against Transnational Organized Crime (UNTOC) for purposes of international co-operation?

One of the key FCA positions in regard to Part IV of the proposed protocol is that not every form of unlawful conduct involved in the illicit trade should be considered a crime, and not every crime should trigger obligations on other states to co-operate in investigation and prosecution. FCA believes that obligations to co-operate in extradition and mutual legal assistance should only be triggered if the crime is considered serious by the state concerned. If such a crime is serious, it will trigger the availability of the UNTOC thus rendering the inclusion of provisions for extradition and mutual legal assistance in the protocol itself, superfluous. But when are such crimes serious?

Certain states through their practice have provided a rationalisation of why certain forms of illicit trade should not only be crimes but serious crimes. In England and Wales the appropriate offence for tobacco smuggling is fraudulent evasion of excise duty under section 170 of the Customs and Excise Management Act 1979. When a charge is laid on indictment and the matter comes into jurisdiction of Crown Court the maximum penalty is seven years or a fine of any amount. In 1999 in *R v Ollerenshaw* ([1999] 1 Cr App R (S) 65) the Court of Appeal, after noting that parliament had provided a new maximum sentence for smuggling, held that “those who evade significant amounts of duty by such conduct should expect to go to prison”. The Court of Appeal fleshed out its description of those most deserving of higher penalty tariffs in *R v Dosanjh* ([1999] 1 Cr App R (S) 107):

The courts needed to distinguish between three broad categories of offenders: those who imported comparatively small quantities on a few occasions; those who, acting on their own, or possibly with one other, persistently imported greater quantities, and those in organised gangs, involved in importation on a large commercial scale. There was a need for a deterrent element in sentencing, particularly when significant amounts of duty were evaded by repeated organised expeditions, which led to distribution subsequently on a commercial scale. In those cases, good character and personal circumstances would be of comparatively little mitigating significance. In an attempt to achieve a greater degree of uniformity in sentencing than had always been apparent hitherto, the Court suggested the following guidelines by reference to the amount of duty evaded. In addition to the amount of duty evaded, many other factors had a role to play in sentencing. Cases involving less than £10,000 would frequently, though not always, properly be dealt with by magistrates. In any event, when the amount evaded was in thousands of pounds, custody would generally be called for, and, on a plea of guilty, sentences up to six months would be appropriate; for amounts between £10,000 and £100,000, sentences between six months and two years would generally be appropriate on a guilty plea; for amounts between £100,000 and £500,000, two to three years on a guilty plea, and up to four years, following a trial, would generally be appropriate; for amounts in excess of £500,000, sentences in the region of four years, increasing to the statutory maximum of seven years when a million pounds or more in duty was evaded, would be appropriate, following a trial, with a suitable discount for a plea of guilty.

In 2003 this guideline was replaced by more sophisticated guidelines on alcohol and tobacco smuggling issued by the UK’s Sentencing Advisory Panel (<http://www.sentencing-guidelines.gov.uk/docs/alcoholtobaccosmuggling.pdf>) that moved away from sole reliance on the level of duty not paid (although quantity remained the primary consideration) and included a focus on the involvement of organised crime (of which there was strong evidence). In this regard, the Panel isolated a range of new aggravating factors including playing an organisational role, repeated importations, using a legal business as a front, abusing an official position, threats of violence and “evidence that the offender is a professional smuggler”. Expanding on its description of a professional smuggler the Panel produced an open list of features of such evidence:

- (i) the complexity of the operation or the number of people involved, especially where a larger and more hierarchical ‘workforce’ is used to import and distribute the smuggled product, or where tasks are segmented within the workforce so that deputies or front men operate at arms’ length from the principals
- (ii) evidence of financial accounting or budgets, etc
- (iii) more diverse sourcing of products from a range of locations to obtain the cheapest supplies
- (iv) integration with apparently commercial organisation to facilitate freight movements
- (v) use of complex concealment methods such as specially adapted vehicles or forged documentation
- (vi) ability to vary methods and routes of smuggling and withstand losses from law enforcement intervention
- (vii) links with overseas organisations.

The Panel suggested longer custodial sentences for offences that involved significant quantities of dutiable goods but which also indicated a degree of professionalism and other aggravating factors. The starting points suggested were: 9 months to 3 years for revenue evaded of £100,000 to £500,000 (the equivalent of up to 3 million cigarettes); 3-5 years involving revenue evasion of £500,000 to £1 million, and 5 years plus where revenue evaded was in excess of £1 million.

Thus the UK, like other states harmed by the illicit trade, has chosen to respond to such cases by treating them as serious crime.

Three points are worth making about this. First, the choice to punish certain tobacco-related activities with a serious penalty was a domestic legislative decision and tailoring a period of deprivation of liberty to suit the particular crime was a domestic administrative and judicial process. Second, the statutory imposition of a maximum penalty of more than four years enables the activation of the UNCTOC for the purposes of international procedural co-operation with other parties to UNCTOC in regard to appropriate cases. Finally, activating the UNCTOC in order to gather evidence or extradite potential offenders does not necessitate the imposition of a sentence of four years should such a case result in a conviction.

*Professor Neil Boister
University of Canterbury
New Zealand*

CONOCE A TU CLIENTE Y LA DILIGENCIA DEBIDA

El Art. 6 del Proyecto de Protocolo de Comercio Ilícito de Productos de Tabaco aborda el hecho de fabricantes o distribuidores de cigarrillos que negocian con clientes de dudosa conducta, los integran a la cadena de distribución y luego evaden toda responsabilidad por lo que sucede posteriormente.

La FCA piensa que debería eliminarse el concepto de identificación y verificación del cliente y sustituirse por el de "diligencia debida".

Pero ¿qué es la "diligencia debida" y donde se aplica?

La "diligencia debida" es un concepto práctico que se aplica en diversas situaciones con el objetivo de encarar situaciones de alto riesgo durante el desarrollo de transacciones comerciales o actividades profesionales.

Veamos brevemente dos ejemplos:

En el sistema financiero desde algunos años atrás se comenzó con la aplicación de la "diligencia debida" (en un concepto que denominaron "know your customer" – "conoce tu cliente"), por factores de interés propio, esenciales a su funcionamiento estratégico: mejora su reputación, disminuye el riesgo de pérdidas económicas, los previene de ser demandados (litigios) y es clave para medir su riesgo de concentración, este último es un concepto amplio además de clave por su relación con el Activo de un Banco en su balance general y su calificación de riesgo.

En el ámbito profesional existen ejemplos donde algunos Estados que han instrumentado la Convención de Naciones Unidas sobre Tráfico Ilícito de Sustancias Psicotrópicas (Viena, 1988) mediante legislación que comprende la prevención de "lavado de dinero", han impuesto obligaciones a particulares que intervienen en determinados negocios comerciales susceptibles de ser alcanzados por acciones delictivas perseguidas.

Personas físicas o jurídicas dedicadas a la compra venta de antigüedades,

inmobiliarias, administradores de sociedades comerciales tienen el deber de informar a la Oficina u Agencia designada en la Ley, en caso de darse los supuestos que la legislación señale. Es decir, el Estado en la implementación de la Convención y por razones de interés público, obliga a particulares a cooperar con él en la tutela de los Bienes Jurídicos Salud Pública y Seguridad.

En efecto, cuando por negocios comerciales se pueden afectar directa o indirectamente Bienes Jurídicos que deben ser protegidos, la legislación establece ciertas pautas y pasos que deberán seguir particulares para evitar la consumación de un delito:

1) El presente Protocolo es para instrumentar el Convenio Marco Para el Control de Tabaco (CMCT – OMS), Tratado éste cuya ratificación coloca al Estado en situación jurídica de obligación en el dictado de normas jurídicas. En este caso específico (Protocolo) se persigue la Protección de los Bienes Jurídicos: Salud Pública, Hacienda Pública, Seguridad Pública, entre otros. Es entonces que por razones de interés público el Estado puede regular y limitar actividades de los particulares (personas físicas o jurídicas) para la Protección de los referidos Bienes Jurídicos.

2) El cumplimiento a cabalidad de la "diligencia debida", conlleva la adopción de medidas de prevención comercial que seguramente benefician a la persona física o jurídica que participa de buena fe en el comercio legítimo, por cuanto minimizan sus posibilidades de pérdidas económicas. A esto debe sumarse que mejora su reputación comercial de las partes, y en su conjunto, beneficia al colectivo social. La "diligencia debida" es inherente a la actividad de preparación del contrato y a su cumplimiento, razón por la cual, el costo y el desarrollo de la "diligencia debida" es de las personas físicas o jurídicas que conforman el circuito comercial.

3) En la hipótesis de producirse un incumplimiento por las personas físicas o jurídicas en el adecuado tratamiento de la "diligencia debida" se configurará una

infracción a la norma jurídica y como consecuencia recaerá una sanción sobre él o los sujetos participantes, porque a ellos fue a quien la legislación les estableció obligaciones para precisamente evitar la consumación de un delito.

En conclusión: La FCA piensa que la "diligencia debida" es una obligación y un costo que recae propiamente sobre las empresas (personas físicas o jurídicas) y no en los Estados. La responsabilidad de los Estados es de control y vigilancia de las empresas (personas físicas o jurídicas) en relación a la aplicación del principio de la "diligencia debida" en sus transacciones comerciales. El concepto de "diligencia debida" que esperamos el Protocolo incorpore, tiene como objetivo poner en práctica un análisis previo de quién será la contraparte en la relación comercial así como durante el período de ejecución del contrato; es una medida de protección y seguridad jurídica hacia los eslabones (personas – físicas o jurídicas –), que participan en la cadena de suministro.

Asimismo la FCA recomienda incluir una definición de "diligencia debida" como la "realización de una investigación apropiada antes de iniciar una relación comercial, o en el curso de ésta, con objeto de determinar si una persona jurídica o física cumple, o puede razonablemente prever que cumpla, con todas las leyes aplicables y regulaciones relativas a la eliminación del comercio ilícito de los productos del tabaco".

*Eduardo Bianco,
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Gustavo Sónora,*

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Departamento de Tabaco.*

HOLES LIKE SWISS CHEESE

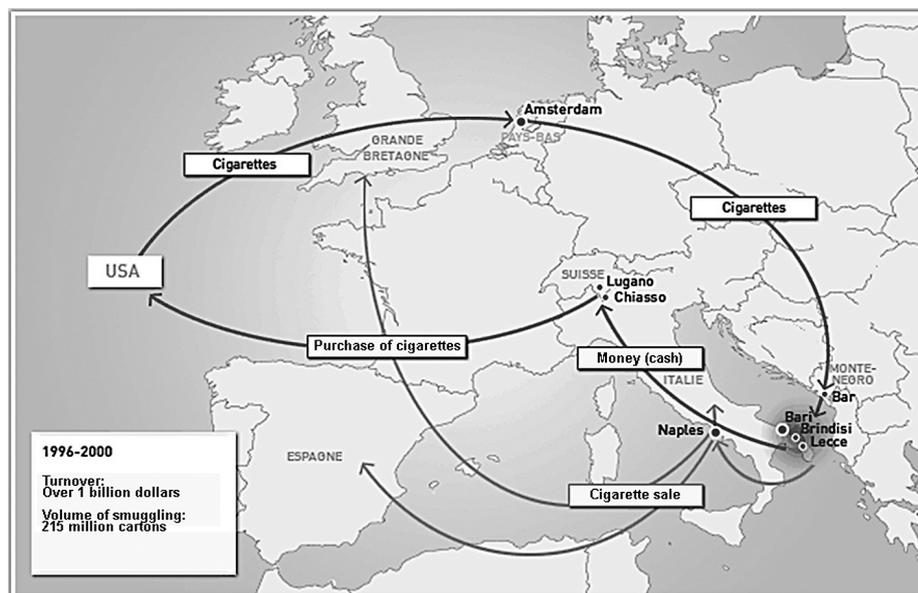
The largest legal case concerning organised crime ever to be heard by a Swiss court (see FCA Bulletin, May 2009) culminated in July last year in an extremely disappointing verdict. Of nine defendants, seven were acquitted. The remaining two were found guilty of supporting Italian criminal organisations, and received short suspended jail sentences. None of the defendants was found guilty of money laundering. The charges did not include cigarette smuggling, although this was at the heart of the case, because smuggling is not a criminal act in Switzerland - it is simply a fiscal infraction which is not subjected to penal law.

What was surprising in the court's decision was that the facts on which the charges were based had been recognised as being true. The indictment said that a total of 4.3 million crates of cigarettes - some 215 million cartons - had been smuggled, mostly to Italy, while some were also sold on the black market in Spain and Britain. The swissinfo website reported that, according to the prosecution, "Between 1994 and 2001, money from two criminal organisations based in southern Italy, the Camorra of Naples and the Sacra Corona Unita of Apulia, was channelled into the Swiss banking system via money exchange businesses in Ticino. The money

“ TOBACCO MULTINATIONALS HAVE BEEN PROMPT IN TAKING ADVANTAGE OF SWITZERLAND'S STATUS AS A LEGAL HAVEN. ”

was then invested in the purchase of cigarettes on the international 'grey' cigarette market. They were bought from duty-free, bonded warehouses in Rotterdam or Antwerp or from wholesalers and taken illegally to Montenegro, avoiding any payment of duty”.

Unfortunately, the Swiss prosecutor failed to produce convincing legal arguments that these facts were sufficient evidence of the alleged crimes with respect to Swiss law. The defendants are now free. The personal benefit they accumulated over the years



is estimated at US\$150 million.

The outcome of the trial spotlights the weakness of the Swiss legal system in fighting illicit trade. As a further example of this, Gerardo Cuomo, a main figure in the smuggling ring, was convicted of corruption by a Swiss court in Lugano, in 2001, and given a 10-month suspended prison sentence. He was extradited to Italy on account of being a member of a criminal organisation, where he was finally sentenced to seven years and four months in prison for association with the mafia.

standard (10mg tar, 1mg nicotine, 10mg CO). Cigarettes intended for export (mainly to Africa and Asia) are not subject to the standard because, the industry claims, people in these markets like the "taste" of strong cigarettes.

This exemption, combined with the total absence of due diligence in respect of bulk purchasers, makes Switzerland the ideal platform for manufacturing cigarettes that end up on the illicit market - with guaranteed impunity.

This situation is likely to worsen over the next few years. Switzerland has not ratified the FCTC and does not contemplate ratifying for at least the next five years. No wonder, then, that major tobacco multinationals have opted for Switzerland as their global sanctuary.

*Pascal Diethelm,
OxyGeneve*

Tobacco multinationals have been prompt in taking advantage of Switzerland's status as a legal haven. Not only do two of the three largest multinationals conduct their global operations from Switzerland, where they have established their headquarters (Philip Morris International in Lausanne and JTI in Geneva), but they also have large factories which mostly produce cigarettes for foreign markets.

Through intense lobbying, the companies have obtained from Swiss legislators an exemption from Swiss law that requires cigarettes to comply with the 10-1-10 EU

DIRTY ASHTRAY AWARD



ORCHID AWARD



To the many Parties supporting no distinction being made in Article 7 between products for the domestic and international markets.



The Framework Convention Alliance (FCA) is a global alliance of NGOs working to achieve the strongest possible Framework Convention on Tobacco Control. Views expressed in the Alliance Bulletin are those of the writers and do not necessarily represent those of the sponsors.

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SMOKESCREEN FOR SMUGGLING

Parties have unanimously adopted strong guidelines for Article 5.3 of the FCTC that safeguard against the tobacco industry's fundamental conflict of interest with public health. These guidelines are key to the success of the treaty's implementation and enforcement.

Today, the tobacco industry remains bent on brushing these guidelines aside and undermining the efforts of the international community to protect public health and save millions of lives. The tobacco industry's latest attempts focus on weakening the global effort to curb the illicit trade in tobacco.

Big money is at stake in these negotiations. The illicit cigarette trade is 11.6 per cent of the global market and costs governments US\$40.5 billion annually in lost revenue. A global system to track and trace tobacco products is a serious enterprise, with much to be gained or lost in its design and control.

This week's fourth round of protocol negotiations began with transnational tobacco corporations and their allies in the duty-free trade associations attempting to undermine the protocol negotiations.

Tobacco transnational corporations have benefited from – and even been complicit in – illicit trade in tobacco. Illicit trade opens new markets for brands like PMI's Marlboro, BAT's Dunhill, and JTI's Mild Seven, and addicts new customers with lower-priced tobacco products that have evaded taxes. Despite efforts by the industry to position itself as a partner in eliminating illicit trade, case studies show that the industry has had a role in tobacco smuggling in both China and former Soviet states.

The tobacco industry frames core provisions of the FCTC – including packaging and labelling requirements and tax increases – as primers for illicit trade. The industry claims that taxation causes smuggling and generic packaging promotes illicit trade, while it hides behind trade associations and front groups to dispute the connection between duty-free sales and tobacco smuggling.

However, taking the illicit tobacco trade in South Africa as an example: "Essentially, as taxes and prices have risen total consumption has fallen. A very small number of consumers have substituted their legal consumption with illicit

consumption. Predictions that higher taxes would simply drive the industry underground have not come true." (http://www.fctc.org/dmdocuments/INB3_report_illicit_trade_in_South_Africa.pdf)

And according to the expert review prepared for INB-3, "Tobacco products that are destined for duty-free sale...are often diverted into illicit trade." (FCTC/COP/INB-IT/3/INF.DOC./3)

Parties have shown that banning the sale of duty-free tobacco is a key step in reducing illicit trade. In 1999, the European Community banned duty-free sales to individuals travelling within its borders. Contraband related to duty-free declined. Bulgaria and Romania have since followed suit by banning duty-free sales at land borders with non-EU countries.

Duty-free trade associations like the European Travel Retail Confederation (ETRC), the International Association of Duty Free Stores (IAADFS) and the Tax Free World Association (TFWA) have all been aggressive in their lobbying efforts to undermine the effectiveness of the FCTC and the illicit trade protocol. These groups are a smokescreen for the tobacco industry and its arguments against an effective protocol.

IAADFS has 32 members representing tobacco interests, including British American Tobacco, Imperial Tobacco Asia, Imperial Tobacco Canada, JT International Mexico, and Philip Morris Duty Free. Philip Morris Duty Free is also a key sponsor of the trade group's 2010 Duty Free Show of the Americas. TFWA has 20 members with tobacco interests, including BAT, JT International, and Philip Morris Travel Retail Singapore.

Given the tobacco industry's historic complicity in illicit trade and the ongoing danger of interference by the tobacco industry and its allies across all provisions of the FCTC, this protocol must be consistent with FCTC Article 5.3 and its implementation guidelines. The Article 5.3 guidelines protect against interference not only by the tobacco industry, but also by organisations and individuals that work to further its interests.

*Gigi Kellett,
Corporate Accountability International*