

**INSIDE THIS ISSUE**

Parties' Obligations Under Treaties  
Shouldn't Be Set By Agreements  
with Private Actors 1

The Tobacco Industry:  
Lies and Videotape 2

Accord Imperial Tobacco – Les  
Douanes Françaises : Un  
Partenariat et Une Communication  
à L'encontre des Obligations  
de la CCLAT 3

Research on Key Inputs, Duty-free  
Not to Be Available Until 2022 4

**EVENTS**

FRAMEWORK CONVENTION  
ALLIANCE LUNCH-TIME BRIEFING

FRIDAY, 30 MARCH 2012

13.30 – 14.30

SALLE 4

TOPIC: FCA POSITIONS ON KEY  
ISSUES OF AN ILLICIT TRADE  
PROTOCOL

**DEATH CLOCK**

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

**58,373,149**

PEOPLE HAVE DIED FROM  
TOBACCO-RELATED DISEASES.  
(AS OF 9AM GENEVA TIME  
ON 30 MARCH 2012)

# PARTIES' OBLIGATIONS UNDER TREATIES SHOULDN'T BE SET BY AGREEMENTS WITH PRIVATE ACTORS



*The Death Clock was revealed in a brief ceremony on Thursday.*

Yesterday, on the first day of the INB, the phrase 'in accordance with ... legally binding and enforceable agreements', found in both Articles 6 and 9 of the draft protocol, reared its ugly head.

A number of Parties expressed concern about the meaning of these words and their potential implications.

Notwithstanding the attempts made to wave away their concerns, they were absolutely right to raise them.

The words 'in accordance with national law' are common in treaties. They are found in a number of provisions of the FCTC itself. But 'in accordance with legally binding and enforceable agreements' takes international law – and this protocol – into new and treacherous territory.

Broadly, the phrase 'in accordance with' has two possible meanings. The first is that Parties may implement a particular obligation through national law. In this sense, it is redundant. Of course, Parties are free to implement treaty obligations through national law. Under its other possible meaning (the one under which it

is not redundant), the nature, scope and extent of Parties' obligations are dependent to some extent on some other instrument – usually national law, but here, under the EU's position, agreements of the kind it has with Philip Morris, Japan Tobacco, British American Tobacco and Imperial Tobacco.

This position is completely inappropriate. Parties cannot be allowed to set the content of their obligations under the protocol – the obligations they owe other Parties under international law – by entering into agreements with third parties. This is no way to engage in multilateral, cooperative action. Even more so where there are not any agreed standards of transparency with regard to the processes for their negotiation, adoption and enforcement, or even their terms. Parties will not even know what obligations other Parties have actually committed to.

This is the case with respect to the EU's current agreements. Some of the terms of the agreements are not publicly known,

*continued on page 4*

# THE TOBACCO INDUSTRY: LIES AND VIDEOTAPE



After the introduction of plain packs, enforcement officials will find it easier to recognise illicit cigarettes. (Left an Australian plain pack, right Jin Ling, one of the most seized illicit cigarette brands in Europe).

It is always interesting to read the statements on the websites of the international tobacco companies. On 8 February 2012, we took a look at the website of Japan Tobacco International (JTI) and found the following quote:

“Unjust accusations of industry complicity in the contraband trade persist despite the fact that the grave damage contraband does to the legal tobacco industry is recognized. These accusations tarnish the reputation and credibility of the industry and have a negative effect on public opinion, already prejudiced against our industry. Moreover these accusations can, over time, erode the morale of our employees and the support of our shareholder.”

It's an amazing statement, as the tobacco industry has been strongly involved in smuggling operations, and in the last eight years paid billions of dollars in payments and fines to settle smuggling litigation in Europe and Canada, but still they pretend that they are a trustworthy source.

## Smuggling Into Iraq, Syria

From 3 to 6 November 2011, JTI sponsored a trip for journalists from Russia and Kazakhstan to Trier, Germany. Its purpose was mainly to get the journalists interested in tobacco smuggling and illicit trade. The same day, 3 November 2011, the Organized Crime and Corruption Reporting Project

released a report on the involvement of JTI in smuggling into Iraq and Syria. This report is being taken seriously by the authorities. The EU Commission, including the European Anti-Fraud Office (OLAF), is aware of the report, and OLAF is carefully evaluating the allegations therein.

**“ACCORDING TO BAT, BANS ON CIGARETTE DISPLAYS ALSO MIGHT INCREASE ILLICIT TRADE. SUCH A BAN HAS EXISTED IN CANADA FOR SOME YEARS AND THERE IS NO INDICATION AT ALL THAT IT HAS HAD AN IMPACT ON ILLICIT TRADE, WHICH BY SEVERAL REPORTS HAS BEEN FALLING SIGNIFICANTLY IN CANADA.”**

The industry has promised that they are strictly controlling their distribution network. Recent revelations say the contrary. On 29 January 2012, the UK newspaper The Observer revealed documents which show that on 27 May 2011, JTI's Middle Eastern distributor dispatched 90 million cigarettes to Syria Duty Free Shops (SDF) Ltd. Tobacco

industry representatives might be experts on smuggling, but not really in combating it.

Another look at an industry website on the same day, 8 February 2012: BAT is becoming a specialist in making simplistic videos on illicit trade. One video is called 'This is the Man' (<http://www.youtube.com/user/WelcomeToBAT>). “The black market in tobacco products is increasingly dominated by organized crime,” it says, adding, “Law enforcers say some gangs are also behind people trafficking, prostitution, gun and drug crime. Some have terrorist links. Measures such as plain packaging could increase illicit trade.”

## Display Bans Increase Illicit Trade?

According to BAT, bans on cigarette displays also might increase illicit trade. But such a ban has existed in Canada for some years and there is no indication at all that it has had an impact on illicit trade, which by several reports has been falling significantly in Canada.

The same reasoning applies to the link between plain packaging and illicit trade. The industry claims that the introduction of plain packaging will somehow lead to an increase in illicit trade, presumably because counterfeiters would find it easier to copy packs without corporate logos and other elaborate brand markings. This is a peculiar argument indeed: presumably illicit trade prevention measures such as secure markings would work just as well on packs with or without logos. In fact, plain packaging might help enforcement officials deal with certain sources of illicit trade: packages without the plain package design will be automatically illicit.

To summarise, there is absolutely no evidence anywhere in the world that tobacco control regulations increase illicit trade.

And a reminder: the tobacco industry has no credibility on combating illicit trade, because it has been so heavily involved in cigarette smuggling. ■

**Luk Joossens  
Advocacy Officer,  
Association of European Cancer  
Leagues, Belgian Foundation  
Against Cancer**

# ACCORD IMPERIAL TOBACCO – LES DOUANES FRANÇAISES : UN PARTENARIAT ET UNE COMMUNICATION À L'ENCONTRE DES OBLIGATIONS DE LA CCLAT

Alors même que la session ultime de négociations en vue de l'élaboration d'un protocole sur le commerce illicite des produits du tabac n'a pas encore eu lieu, Imperial Tobacco et les Douanes françaises annonçaient en fanfare, le 1er mars 2012, un accord dit de « de partenariat et de coopération » entre les autorités publiques et le fabricant de tabac pour lutter contre la contrebande et la contrefaçon des produits de tabac.

La nouvelle n'est pas passée inaperçue. L'opération de communication, bien rodée, où les noms des marques sont même cités, laisse clairement à penser aux journalistes, grand public et décideurs politiques que le fabricant est soucieux d'agir comme un acteur responsable et va jusqu'à financer la lutte contre le commerce illicite et former des responsables des services publics.

Au-delà de la communication du moment relayée par les agences de presse, radios, ... , le site internet du fabricant mais également celui des Douanes confèrent une respectabilité aux protagonistes et ce, en totale violation des dispositions adoptées dans le cadre du traité de la Convention Cadre pour la Lutte Anti-Tabac. Même la Ministre du Budget a salué une telle opération. Que demander de plus ?

Dans cette coopération, on entretient à dessein la confusion entre contrebande et contrefaçon, seule véritable préoccupation des fabricants dans le domaine du commerce illicite.

## Illusoire de faire confiance à des fabricants

Surtout, au moment même où le fabricant de tabac Japan Tobacco International est à nouveau soupçonné d'implications dans l'organisation de trafics et de contrebande, il apparaît clairement illusoire de vouloir et de pouvoir faire confiance à des fabricants de tabac. Des investigations ont-elles du reste été menées en ce qui concerne Imperial Tobacco en la matière ?

Preuve supplémentaire des pratiques délictueuses du fabricant, il suffit de rappeler qu'Imperial Tobacco est condamné chaque année définitivement par les tribunaux français pour des infractions relatives au non respect des législations de prévention du tabagisme, notamment dans le domaine de



Screenshot of the website of the Customs department of France.  
<http://www.douane.gouv.fr/page.asp?id=4255>

l'interdiction de la publicité. Imperial Tobacco, via la SEITA, a même été condamnée en récidive légale par la Cour d'Appel de Poitiers le 15 décembre dernier pour incitation à la consommation notamment des plus jeunes.

Au regard de l'implication passée voire toujours présente des fabricants dans l'organisation du commerce illicite des produits du tabac, la question n'est donc pas d'avoir un accord dit de coopération mais bien un texte qui s'impose aux fabricants. Il incombe aux autorités publiques de dicter leurs règles et de préserver l'intérêt général et de veiller à la non ingérence des fabricants dans les politiques publiques.

Or, l'accord tel qu'il est présenté aujourd'hui apparaît essentiellement comme un moyen pour le fabricant de redorer son image voire de saper de l'intérieur les dispositions de la CCLAT en France.

## Une violation manifeste de l'article 5.3

Les relations dites d'informations permanentes qui existent entre les services et les fabricants, sans aucune transparence constituent une violation manifeste des dispositions de l'article 5.3 du traité.

Ces relations ne sont pas sans conséquences : elles amènent, comme par hasard, les représentants des Douanes et le Ministère correspondant à s'opposer à l'instauration de paquets neutres

standardisés en affirmant que cela aurait une incidence sur le développement de la contrefaçon. L'absence de politique fiscale destinée à réduire la consommation de tabac en France en constitue une autre illustration.

Enfin, le Ministère de la Santé se bat pour une mise en œuvre de la CCLAT mais il se heurte systématiquement à des arbitrages défavorables concernant toute mesure destinée à réduire la consommation de tabac avec l'argument éculé mais repris d'une seule voix par les fabricants, buralistes, mais aussi les représentants de douanes d'un risque développement de la contrebande et de la contrefaçon !

Il est donc absolument crucial que les relations entre les fabricants et les autorités publiques fassent preuve de transparence.

Les règles dans le domaine de la lutte contre le commerce illicite doivent être conçues dans une optique de contrôle des activités des fabricants et de l'ensemble de la chaîne d'approvisionnement et en aucun cas comme l'occasion de faire la promotion d'une industrie que l'on peut assurément qualifier de « délinquante en col blanc ».

Cet accord doit être considéré avec beaucoup de sérieux d'autant plus qu'il s'appuie sur des accords européens passés avec les industriels du tabac. Il démontre que les autorités françaises, ainsi que les autorités européennes, malgré des

*continued on page 4*

## DIRTY ASHTRAY AWARD



To the EU for insisting on keeping the reference to “legally binding and enforceable agreements”, which has legal implications, without providing any explanation.

## ORCHID AWARD



To Kenya, South Africa and India for supporting the removal of “legally binding and enforceable agreements”.



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.

Framework Convention Alliance

Rue Henri-Christiné 5  
Case Postale 567  
CH-1211  
Geneva, Switzerland

Representative Office:  
FCA c/o ASH International  
701 4th Street NW, 3rd Floor  
Washington, DC 20001  
USA

Phone: +1 202 289 7155  
Fax: +1 202 289 7166  
Email: editor@fctc.org

www.fctc.org

## PARTIES' OBLIGATIONS

*continued from page 1*

and settlement of disputes under the agreements takes place in secret.

There are various other problems with the phrase. It is not clear who such agreements might be made with. Is it only the tobacco industry? Is it others? The phrase could also refer to bilateral treaties between Parties. One would need to consider how this interacts with Article 2 of the protocol.

If the EU wants to be able to implement

its obligations under the protocol through its existing agreements with tobacco manufacturers, rather than have to turn these agreements into legislation, it will be satisfied with a provision saying ‘Each Party shall, in accordance with its national law, adopt legislative, executive, administrative or other measures to ensure ...’. If it cannot accept this wording, the only conclusions open to other Parties are that the contents of their agreements with tobacco manufacturers somehow differ from what is otherwise to be agreed to in the protocol, or that there is some other game at play. ■

## RESEARCH ON KEY INPUTS, DUTY-FREE NOT TO BE AVAILABLE UNTIL 2022. WOO-HOO

During plenary discussions yesterday, consideration was given to Art. 5.5 on key inputs and to Art. 11bis.2 on duty-free. There was some discussion that five years was too long. In fact, once the calculations are made, the research on key inputs and duty-free will not be available until 2022, 10 years from now, if not longer. Wow. That is an incredibly long time.

The relevant excerpt of the text says: “Five years following the entry into force of this Protocol, the Meeting of the Parties shall ensure at its next session that evidence-based research is conducted [...]. On the basis of such research, the Meeting of the Parties shall consider further appropriate action.”

Here is how the calculations work out if it takes 24 months for the Protocol to receive 40 ratifications, and MOP is held every two years:

Nov. 2012: Approval of Protocol at COP5

Nov. 2014: Assume 24 months for there to be 40 Parties, which would be quick

Feb. 2015: Protocol comes into force 90 days after 40th ratification

Nov. 2016: First Meeting of the Parties (MOP1)

Feb. 2020: Five years after Protocol comes into force

Nov. 2020: Next Meeting of the Parties after 5th anniversary of coming into force

Nov. 2022: Research to be ready for consideration by MOP

If it takes 34 months (2 years, 10 months) for the Protocol to receive 40 ratifications, then the calculations are such that the research will not be initiated until Nov. 2022 and not ready until Nov. 2024. Woo-hoo. ■

## IMPERIAL TOBACCO

*continued from page 3*

alertes répétées, ne semblent pas prendre la mesure du risque d'ingérence de l'industrie du tabac.

Nous espérons que la communauté internationale saura leur rappeler leurs engagements et obligations.

A cet égard, l'Alliance pour la convention cadre préconise d'inclure un nouvel article dans le protocole qui stipule : « En appliquant leurs obligations dans le cadre de ce protocole, les Parties doivent garantir la plus grande transparence possible vis-à-vis de leurs interactions éventuelles avec l'industrie du tabac, y compris et de

manière non exclusive, toute activité, tout accord, tout arrangement ou tout engagement.

Enfin, en application des dispositions de la CCLAT, le protocole devrait également inclure la disposition suivante : « Les Parties devraient s'abstenir d'approuver ou d'appuyer des activités de « responsabilité sociale institutionnelle, tout comme de constituer des partenariats pour ces activités ou d'y participer ». ■

**Sylviane Ratte, International Union against Tuberculosis and Lung Disease (The Union)**

**Emmanuelle Beguinot, Directrice Comité National Contre le Tabagisme**