



FRAMEWORK CONVENTION  
**ALLIANCE**  
BUILDING SUPPORT FOR TOBACCO CONTROL

# BULLETIN

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## TODAY

CONVENTION  
SECRETARIAT  
LUNCHTIME BRIEFING  
ON TRACKING AND  
TRACING

## DEATH CLOCK

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

# 39,791,232

PEOPLE HAVE DIED FROM  
TOBACCO-RELATED  
DISEASES.

(AT 9 AM 21 OCTOBER 2008)

# TIME TO MOVE FORWARD

Yesterday afternoon, more than two and a half years after the first FCTC Conference of the Parties decided to start work towards a protocol on illicit trade, the negotiation of the protocol began in earnest. Since that COP-1 decision, much important work has been done. The expert group established pursuant to the COP-1 decision met twice and prepared a detailed template that was submitted to COP-2. COP-2 decided to establish the INB and recognised the template as a basis for initiating its negotiations. Parties came together for INB-1 eight months ago,

elected a Chairperson and a Bureau, and constructively discussed the

template. Since then, the Chairperson of the INB has, acting under the mandate set by COP-2, prepared a text for negotiation at INB-2.

Yesterday afternoon, we heard Parties offer their perspectives on the Chairperson's text. Two important themes emerged: that the content of the protocol, and the arrangements put in place to support it, need to ensure that it can be effectively implemented by all Parties – low-income and high-income alike; and that the protocol needs to reflect the different kinds of illicit trade problems experienced by different countries and different regions.

FCA regards these as critical principles

that should guide the negotiation of the protocol. If we are to end up with the protocol we all need, it has to be one that is capable of being ratified and effectively implemented by the maximum number of Parties. However, as we move forward with the negotiations, this must not become an excuse for a lowest common denominator outcome, but a challenge for Parties to both set a high standard that will deliver on the objectives of the protocol, and to ensure the necessary co-operation and assistance that will allow all Parties to benefit from its provisions.

*"... engage with the key concepts in the Chairperson's text, starting with measures to control the supply chain... and seek to reach agreement on the core principles..."*

At the end of yesterday's plenary session, the

Chairperson asked Parties to consider how negotiations should proceed. FCA recommends that today Parties begin to engage with the key concepts in the Chairperson's text, starting with measures to control the supply chain – licensing, customer identification and verification, tracking and tracing, record keeping, security and preventive measures, and restrictions on internet sales – and seek to reach agreement on the core principles of provisions dealing with these measures. Beneath the different perspectives aired yesterday, there is much common ground to find. Today, that process should begin.

Jonathan Liberman  
FCA Policy Director

## SPOTLIGHT ON SMUGGLING: AFRICA

Tobacco smuggling in Africa is a major and growing problem that is undermining efforts to protect public health by reducing rising smoking rates across the continent, new research has found.

A recent paper entitled *British American Tobacco and the insidious impact of illicit trade in cigarettes across Africa* found that smuggling, abetted by tobacco manufacturers, has occurred in at least 40 of Africa's 54 countries.

### SMUGGLING HARMS HEALTH AND ECONOMIC DEVELOPMENT

Tobacco smuggling is a worldwide problem. Illicit trade has been estimated as accounting for around 10.7 per cent of global cigarette sales in 2006, mostly due to smuggling and counterfeiting. By making cigarettes cheaper and more accessible, and tobacco harder to regulate, smuggling constitutes a significant cause of harm to public health.

But aside from public health, cigarette smuggling means a loss of customs revenue to African countries which limits their capacity to achieve their broader economic development goals. The Commission for Africa says that customs revenues provide up to 25 per cent of government income.

### SMUGGLING IS A BOON FOR TRANSNATIONAL TOBACCO COMPANIES

According to the research, tobacco smuggling across the continent has allowed transnational tobacco companies (TTCs) to take advantage of the situation of some African nations being among the world's poorest countries to:

- gain leverage in negotiations with governments in relation to market access and foreign investment;
- argue for minimised taxation;
- compete with each other to gain more market share and establish their brand; and
- circumvent barriers to market access posed by government restrictions or local conditions.

### BRITISH AMERICAN TOBACCO UNDER SCRUTINY

Researchers investigated internal company documents from British American Tobacco (BAT), a company which has had a huge market presence in Africa. At times, BAT's market share exceeded 90 per cent in 11 sub-Saharan African countries and amounted to around 15 per cent in Africa as a whole.

According to the findings, BAT relied on illegal channels to supply tobacco markets across Africa. Smuggling was important for the company's market entry strategy, which was driven not only by considerations of short-term financial gain but often by longer-term corporate objectives.

Although BAT denied that its companies smuggled tobacco products, the research reports that: "While distributors and local agents ran day-to-day operations, [internal company] documents describe how BAT knowingly supplied cigarettes to such parties for contraband purposes while simultaneously

relying on legal exports as cover for larger-scale smuggling."

Also, the research found that for some years BAT's sales figures showed contraband representing a high proportion of the total market in some African countries. For example, information concerning sales in 1993 of Lucky Strike (a BAT cigarette brand) suggest that contraband accounted for 45 per cent of the market in Nigeria, 14 per cent in Zaire and 12 per cent in Ghana.

The report highlights the hypocrisy of BAT's claim to corporate social responsibility and of depicting itself as working with governments worldwide to combat tobacco smuggling by having signed agreements with customs authorities in roughly 35 countries. In 2007, the company said it "looks forward to partnering with governments in the development, negotiation and implementation of an effective illicit trade protocol."

However, proposals by BAT are intended to advance its corporate interests and undermine an effective global response to tobacco smuggling. For example, BAT has given priority to the problem of counterfeit cigarettes although existing trade agreements already protect intellectual property and provide means of redress.

### DESIGNING TOBACCO CONTROL POLICY LEGISLATION

Understanding the organisation and logistics of cigarette smuggling in Africa provides insights that are essential for designing effective legislation and administrative responses.

Tobacco smuggling is highly dynamic in terms of supply routes and modes of transport – it is not primarily a result of price differentials. Policy responses cannot therefore focus entirely on current mechanisms of smuggling.

In respect of designing effective legislation for tobacco control policy, the research suggests that laws must be expansive. Procedures for amending regulations should be flexible so that kinds of smuggling that have gone unaddressed, or which authorities are unaware of, can rapidly be met by a regulatory response.

Measures to deter contraband that are limited solely to combating immediate economic benefit will fail to address opportunities for the tobacco industry to use smuggling tactically.

Imposing large fines at the corporate level combined with actively enforced criminal penalties, including imprisonment of corporate office bearers, are also necessary.

Sharing information across borders as well as reciprocal enforcement of judgments will also be essential for controlling cross-border cigarette smuggling.

### REFERENCE

Eric LeGresley, Kelley Lee, Monique E. Muggli, Preeti Patel, Jeff Collin and Richard D Hurt, *British American Tobacco and the "insidious impact of illicit trade" in cigarettes across Africa*, Tobacco Control (online edition), 10 July 2008. <http://tobaccocontrol.bmj.com/cgi/rapidpdf/tc.2008.025999v1>

# DEATH CLOCK UNVEILED



On their way to the opening plenary yesterday delegates stopped for a minute's silence to commemorate the victims of tobacco-related diseases since FCTC negotiations began at 9am on 25 October 1999.

## WTO AGREEMENT: NOT A REASON TO AVOID BANNING INTERNET SALES

Sales of tobacco products via the internet and other means of telecommunication result in the evasion of taxes and facilitate the evasion of tobacco control laws such as laws banning sales to minors. For these reasons, a number of Parties at INB-1 called for a total ban on these types of tobacco sales to be included in the Chairperson's text. However, the Chairperson's text merely proposes that Parties ensure that all of the other requirements proposed in the text also apply to sales via the internet and other means of telecommunication.

The approach adopted in the Chairperson's text is not sufficient to address the problems posed by these types of tobacco sales. An incomplete ban would be more difficult to enforce than a total ban and, therefore, less effective. Additionally, the other measures included in the text are not designed to address retailing. Applying them to these types of transactions would not address the concerns in question.

In response to comments by several Parties during INB-1, in support of a total ban on internet sales, the Chairperson yesterday explained that his proposed approach reflected concern that a total ban on the sale of tobacco products via these means would violate the World Trade Organization (WTO) Agreement.

WTO law does not, in fact, justify the omission of a total ban on internet sales from the protocol. WTO Agreements contain exceptions that preserve the lawfulness of measures necessary for the protection of human health and measures necessary to secure compliance with laws or regulations such as tax and

customs laws. Accordingly, it is not possible to make the generalisation that a total ban would violate the relevant WTO agreements. To the contrary, recent WTO case law gives a high degree of deference to regulatory measures included in international instruments like the FCTC and its protocols.

Treaties governing illicit trade in goods such as firearms and endangered species also include measures that (unlike a ban on internet and other sales) clearly violate prohibitions contained in WTO agreements. These treaties are premised on the assumption that the relevant exceptions in WTO Agreements protect the lawfulness of those measures. There is no reason for the illicit trade protocol to depart from this established international approach. On the contrary, this INB should identify those measures necessary to curb illicit trade and include them in the text of the protocol.

In conclusion, the approach in the Chairperson's text is inadequate. The WTO Agreement does not prevent the inclusion of necessary regulatory measures in a protocol and even if it did, the approach in the Chairperson's text is not sufficient to address the specific problems of these types of retailing.

Benn McGrady

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## ADDRESSING COUNTERFEIT IN AN ILLICIT TRADE PROTOCOL

Under Article 15.1 of the WHO Framework Convention on Tobacco Control (FCTC), Parties recognise that the elimination of all forms of illicit trade in tobacco products is an essential component of tobacco control. Article 15.1 refers specifically to three forms of illicit trade – smuggling, illicit manufacturing and counterfeiting.

The Chairperson's text for a protocol on illicit trade in tobacco products (Document FCTC/COP/INB-IT/2/3) proposes that Parties to a protocol be required to criminalise the counterfeiting of tobacco products and the manufacturing, selling, distributing, storing, shipping, importing or exporting of counterfeit tobacco products (Offences, sub-provisions 2(b) and 2(c)).

While addressing counterfeit is important, this approach (criminalisation) is problematic for at least three reasons.

First, counterfeiting is an intellectual property crime that usually relates to the unlawful use of a trademark. Counterfeit laws seek to prevent harm to trademark owners - in this case, tobacco companies. In contrast, Article 3 of the FCTC makes clear that the objective of the FCTC and its protocols is to prevent harm to human health that is caused by tobacco consumption. Therefore, a protocol should address the fact that counterfeit results in the evasion of taxes and other tobacco control laws but should not seek to preserve intellectual property rights such as by obliging Parties to criminalise counterfeiting itself.

Second, existing international laws already govern counterfeiting. For example, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the Paris Convention for the Protection of Industrial Property each set out a range of general obligations for the protection of trademarks that apply to counterfeit products, including tobacco products. TRIPs obliges Members of the World Trade Organization to criminalise counterfeiting, to share information, co-operate in eliminating counterfeiting and to ensure that domestic law provides remedies for trademark owners in the event of a violation of their rights.

Third, different FCTC Parties have different obligations relating to trademark protection under existing international laws. Many developing countries have exemptions under TRIPs, meaning that TRIPs does not currently oblige them to protect trademarks or to criminalise counterfeiting. Additionally, some FCTC Parties are not WTO Members or Parties to the Paris Convention. This means that if an illicit trade protocol were to include an obligation to criminalise counterfeiting it could oblige Parties to criminalise the violation of intellectual property rights with respect to tobacco products, even though the same obligations do not apply with respect to other products under international law. Requiring Parties to a protocol to provide protections to tobacco manufacturers that they are not required

to provide to manufacturers of other products is difficult to justify. Most importantly, this type of obligation could make it difficult for some FCTC Parties, particularly some developing country Parties, to ratify the protocol.

How then, should a protocol address counterfeit? One useful approach is for a protocol to encourage Parties to ensure that existing domestic laws

governing counterfeit are implemented with respect to tobacco products. Another (preventive) approach is to ensure that strong obligations are included with respect to control of the supply chain. As a recent Organisation for Economic Co-operation and Development (OECD) report concluded, measures to secure the supply chain are likely to play a significant role in preventing counterfeit. In this respect, measures such as the use of covert pack markings and licensing are important means of preventing counterfeit and ensuring the enforcement of tobacco taxes and other tobacco control laws.



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## LE TABAC ET LE TERRORISME

Les cartels du crime international ont eu des millions de dollars australiens de la vente du tabac importé illégalement en Australie, selon un article publié *The Australian*, le 11 mars 2008. Ces profits sont envoyés aux groupes liés au terrorisme au Moyen Orient.

Richard Janeczko, le manager national des investigations aux Douanes australiennes, déclara au journal *The Australian* que l'industrie du tabac illégal est en train de devenir une source potentielle lucrative de financement du terrorisme, avec les groupes criminels du Moyen Orient et du Vietnam qui sont activement engagés dans l'importation du tabac.

Il déclara aux journaux que selon des informations des agences de renforcement de la loi "Les groupes libanais responsables de l'importation et de la distribution du tabac en Australie ont des liens avec des groupes terroristes du Moyen Orient. »

La contrebande de tabac est une source de revenus qui rivalise à présent avec le commerce de drogue illicite et elle est de plus en plus dominée par les mêmes acteurs, Selon Janeczko, "C'est une question capitale et je pense que les gens sous-estiment le degré de criminalité que cela implique »

Il a estimé que la contrebande de tabac représente des millions de dollars australiens. La plus grande partie de cet argent est envoyée à des groupes par des intermédiaires et en petites quantités.

Les saisies de l'année dernière ont tourné autour de 95 millions de cigarettes et 236 tonnes de tabac représentant un manque à gagner de droits d'accises de 100 millions de dollars australiens, selon Janeczko.

La plupart de ce tabac de contrebande se fit par conteneurs par voie maritime du Vietnam, de la Chine, des Philippines et de l'Indonésie.

### LES PREUVES PRÉALABLES DU LIEN TABAC-TERRORISME

L'article de *The Australian* renforce les préoccupations au sujet des profits de la

contrebande de tabac qui sert de source de financement aux activités terroristes. Etant donné que le tabac est un produit commercialisé légalement et illégalement, il représente un médium idéal pour les groupes criminels afin de pénétrer et exploiter le système du commerce légal avec un minimum de risque de détection et un minimum de sanctions légales en cas de découverte.

L'actuelle absence de lois internationales pour faire cesser la contrebande de tabac laisse le champ libre aux réseaux de crime organisé et aux groupes terroristes qui opèrent à présent de façon très sophistiquée et fluide.

Un rapport émis en mai 2004 par le General Accounting Office (GAO) du Congrès des Etats Unis (GAO-04-163) a dénoncé la contrebande de tabac parmi les produits de contrefaçon et des drogues illicites en tant que source importante et très lucratives du financement du terrorisme. Un exemple cité est celui du Hezbollah qui, entre 1996 et 2000, a généré un profit estimé à \$1.5 millions de dollars sur l'achat des cigarettes en Caroline du Nord, un Etat où les taxes sont faibles, pour les revendre au Michigan, un Etat où les taxes sont fortes. Toute comparaison gardée, le rapport GAO fait référence au coût occasionné par l'attaque du World Trade Centre du 9/11 qui aurait représenté entre \$300,000 et \$500,000. Les Officiels du Bureau pour l'Alcool, le Tabac et les Armes à feu ont révélé au GAO que Al Qaeda et le Hamas ont aussi profité de la contrebande de tabac et des timbres contrefaits de tabac.

Dans le journal *The Police Chief* (la publication officielle de l'Association Internationale des Chefs de Police), en février 2004, William Billingslea, l'analyste principal des renseignements au Bureau des Etats Unis de l'Alcool, du Tabac, des Armes à feu et des Explosifs, écrivait : "Le trafic illégal de cigarettes rivalise aujourd'hui avec le trafic de drogue comme méthode de choix pour remplir les comptes bancaires des terroristes ».

Les investigateurs ont découvert que les trafiquants des Etats Unis et du Royaume Uni ont offert un support matériel au Hezbollah et au Real IRA (RIRA), parmi

d'autres groupes terroristes. Les recherches de l'application de la loi indiquent que des groupes liés au Parti Travailleuse Kurde (PKK), et au Jihad Islamique (Egyptien et Palestinien) ont aussi été impliqués dans la contrebande de cigarettes.

Billingslea écrit que les groupes terroristes travaillent avec des groupes de crime organisé aussi bien qu'avec des organisations de trafiquants de drogues. Les membres du Hezbollah et du Hamas ont établi des compagnies de couverture et des commerces légitimes de cigarette en Amérique du Centre et du Sud.

L'IRA était l'un des premiers groupes terroristes en Europe à utiliser la contrebande de cigarettes pour financer ses activités, selon Billingslea. Il fait référence aux estimations des trois factions principales de l'IRA (L'IRA Provisionnel, L'IRA Reel, L'IRA de continuité) qui ont produit plus de 100 millions de dollars en cinq ans, jusqu'en 2004. De plus, le Loyalist Volunteer Force et le Ulster Volunteer Force respectivement, ont levé \$3.3 millions de dollars et \$2.5 million par an,

En Turquie, une descente des lieux au centre du PKK a découvert une presse pour produire des timbres de contrefaçon pour les paquets de cigarettes, au lieu des armes et munitions, comme attendu. Le PKK a aussi amassé une grosse fortune en vendant en Iraq des cigarettes de contrebande des Etats-Unis, à travers la frontière turque.

Billingslea déclare enfin que "le nouveau visage du terrorisme" a un but précis, infiltrant des entreprises parfaitement légales qui comprennent aussi des entreprises illégales et criminelles et ressemblant plus à un groupe de crime organisé qui entreprend aussi des actes de terrorisme, plutôt qu'un groupe de terroriste qui commet des crimes. Au delà des moyens traditionnels de lever des fonds, les groupes terroristes ont aussi commencé à exploiter la liberté du réseau internet et des lacunes de la législation, pour les ventes de cigarettes.



## DIRTY ASHTRAY AWARD

To Barbados, for arguing there is no link between duty free and illicit trade when this link is well established (see yesterday's Bulletin).



## ORCHID AWARD

To Africa, for highlighting the need to overcome the disparity in capacity between rich and poor countries if the protocol is to be implemented effectively.



FRAMEWORK CONVENTION  
**ALLIANCE**

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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## INVESTIGACIÓN: COMERCIO ILÍCITO DEL TABACO NEGOCIO EN AUGE

Coincidentemente con las negociaciones sobre el tratado, hoy el Consorcio Internacional de Periodistas de Investigación publicó una serie de informes de investigación que describen el comercio ilícito del tabaco como un "negocio en auge" que "implica desde falsificadores en China y fábricas clandestinas en Rusia hasta reservas indias en Nueva York y caudillos en Pakistán y África del Norte". En base a las investigaciones de 15 países, los informes dan cuenta de las partes involucradas, incluidas las agrupaciones del crimen organizado y los grupos terroristas, como también las rutas del contrabando y las técnicas que utilizan.

Un informe detalla cómo una red de Rusia y fábricas de Europa del Este están detrás de como mínimo mil millones de dólares en cigarrillos de contrabando que están saliendo en Europa con el nombre de una marca, Jin Ling, que no tiene una participación legal en el mercado. Otros relatos incluyen a una red de contrabando china en Estados Unidos e informan que Gallaher, el fabricante de cigarrillos del Reino Unido, trabajó a través de distribuidores para canalizar grandes cantidades de cigarrillos hacia los países en vías de desarrollo.

Estos informes demuestran el motivo por el cual combatir el comercio ilícito del tabaco debe convertirse en una de las prioridades internacionales más urgentes y el motivo por el cual esta semana las naciones deben avanzar significativamente en el consenso para la celebración de un tratado sólido y efectivo para tratar este problema. El tráfico ilícito de cigarrillos implica graves consecuencias para las naciones de todo el mundo en relación con la salud pública, la seguridad nacional y la economía.

## UNDERGROUND TOBACCO A BOOMING GLOBAL BUSINESS

The International Consortium of Investigative Journalists, a project of the Center for Public Integrity, yesterday issued a hard-hitting series of investigative reports that describe the illicit tobacco trade as a "booming business" that "stretches from counterfeiters in China and renegade factories in Russia to Indian reservations in New York and warlords in Pakistan and North Africa."

*Tobacco Underground: The Booming Global Trade in Smuggled Cigarettes* brings together investigative reporting from 15 countries. The reports shed new light on the players involved in contraband tobacco – including organised crime syndicates and terrorist groups – as well as the smuggling routes and techniques they use.

One report details how a network of Russian and eastern European factories is behind at least US\$1 billion worth of contraband cigarettes pouring into Europe under the brand name Jin Ling, which has no legal market share.

A further report describes how Chinese counterfeiters obtained technology to reproduce the protective holograms on

packs of top Western cigarette brands and have become by far the world's largest suppliers of counterfeit cigarettes.

A third report finds that Gallaher, the United Kingdom cigarette manufacturer, worked through distributors to funnel large quantities of cigarettes to developing countries where there was no real market share.

Yet another report outlines how an El Paso, Texas, smuggler masterminded the trafficking of up to half a billion cigarettes across the United States, sold largely by smoke shop vendors on Indian reservations.

The reports demonstrate why combating illicit tobacco trade must become a more urgent international priority and why nations must make significant progress this week toward agreement on a strong and effective treaty to address this problem.

The complete stories are available from the Center for Public Integrity's website at <http://www.publicintegrity.org/projects/entry/887/>. The site also includes interviews with experts and video shot in the Russian factories where Jin Ling cigarettes are produced.