



RESPONSE TO THE  
BRITISH AMERICAN TOBACCO POSITION PAPER ON A  
PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS TO  
THE WHO FRAMEWORK CONVENTION ON TOBACCO  
CONTROL

**Second Session of the Conference of the Parties to the WHO FCTC  
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[www.fctc.org](http://www.fctc.org)

## **Executive Summary**

Parties to the WHO Framework Convention on Tobacco Control (FCTC) recognize, in Article 15.1, that “the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting” is an essential component of tobacco control. At its first session, the Conference of the Parties (COP) to the FCTC, recognising that the elimination of illicit trade in tobacco products requires the implementation of a comprehensive system of international cooperation which includes obligations and measures additional to those specified in Article 15, established an expert group to prepare a template for a protocol on illicit trade. The template recommends the adoption of a protocol to the FCTC that includes a comprehensive set of measures including: an international system of tracking and tracing; control of the supply chain; criminalization of certain activities; strong enforcement measures; measures to eliminate money laundering; and technical assistance to aid implementation. The Framework Convention Alliance (FCA) supports this template.

Until very recently, British American Tobacco (BAT) was lobbying governments to enter into voluntary Memoranda of Understanding instead of developing a protocol aimed at eliminating illicit trade in tobacco products. As it has recently become clear to BAT that it is unlikely to succeed in preventing the development of a protocol on illicit trade, it now wants to maximize its chances of influencing the content of the protocol. BAT has publicly released a paper, “British American Tobacco’s Position on Key Elements for Inclusion in the WHO FCTC Protocol on Illicit Trade in Tobacco Products”, in which it claims that it “strongly supports the need for a protocol” on illicit trade and proffers suggestions “for creating policy that should dramatically reduce current levels of illicit trade”.

FCA firmly rejects BAT’s involvement in the development of a protocol to the FCTC on illicit trade. Parties to the FCTC explicitly recognise “the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts” (Preamble) and agree to protect their tobacco control policies from commercial and other vested interests of the tobacco industry (Article 5.3). The need to protect tobacco control efforts from industry influence is acute in the context of illicit trade, a problem significantly contributed to by the industry itself through its involvement in smuggling activities over many years. BAT in particular has a long history of both interference in tobacco control measures and lucrative participation in illicit trade in tobacco products.

Illicit trade in tobacco products significantly contributes to the global death and disease burden caused by tobacco consumption by making cigarettes cheaper, more accessible and more difficult to regulate, and deprives governments of billions of dollars in taxation, reducing the funding available for public health and other policies. These will be the primary concerns of Parties to the FCTC in negotiating a protocol on illicit trade. In contrast, the priority for BAT is to prevent smuggling of counterfeit cigarettes, which affect the market for its own manufactured tobacco products.

BAT supports measures designed to address the trade in counterfeit cigarettes, but does not support important measures recommended by the expert group to tackle the smuggling of tobacco manufacturers' own products, still the major source of illicit tobacco products throughout the world. Contrary to the recommendations made by the expert group and supported by FCA, BAT claims that the development of a global tracking and tracing regime is unnecessary and ineffective to eliminate illicit trade, rejects the creation of clear and enforceable obligations for tobacco manufacturers to control their supply chain, and does not support the implementation of licensing schemes for participants in the tobacco business. Instead, BAT proposes weaker measures to manage the tobacco supply chain, to be largely controlled by tobacco manufacturers, with the costs borne by government. BAT also wants to weaken suggested measures for the establishment of a comprehensive range of criminal offences relating to illicit trade – instead, its strongest suggestions relate to the protection of the intellectual property rights of tobacco product manufacturers in relation to counterfeit cigarettes, a matter which is already comprehensively dealt with in existing international treaties.

## Introduction

Parties to the WHO FCTC recognize, in Article 15.1, that “the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting” is an essential component of tobacco control. This is because illicit trade: makes cigarettes available at lower prices, leading to higher consumption, particularly among young people; deprives governments of billions of dollars in taxation, thereby reducing the funding available for public health and other policies; and leads to the evasion of tobacco control laws, thereby undermining the effectiveness of measures implemented by Parties under the FCTC to protect their citizens from the devastating health, social, environmental and economic consequences of tobacco consumption.

At its first session, the Conference of the Parties to the FCTC, recognising that the elimination of illicit trade in tobacco products requires the implementation of a comprehensive system of international cooperation which includes obligations and measures additional to those specified in Article 15, established an expert group to prepare a template for a protocol on illicit trade,<sup>1</sup> to be considered by the COP at its second session on 30 June – 6 July 2007. The template prepared by the expert group recommends the adoption of a protocol to the FCTC that includes a comprehensive set of measures including: an international system of tracking and tracing; control of the supply chain; criminalization of certain activities; strong enforcement measures; measures to eliminate money laundering; and technical assistance to aid implementation.<sup>2</sup> The Framework Convention Alliance supports this template.<sup>3</sup>

British American Tobacco has publicly released a position paper in which it proffers suggestions “for creating policy that should dramatically reduce current levels of illicit trade”, on the basis that it is “well placed to offer views on a package of practical measures” to achieve this end.<sup>4</sup> FCA firmly rejects BAT’s involvement in the development of a protocol to the FCTC on illicit trade. Parties to the FCTC explicitly recognise “the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts” (Preamble) and agree to protect their tobacco control policies from commercial and other vested interests of the tobacco industry (Article 5.3). The need to protect tobacco control efforts from industry influence is acute in the context of illicit trade, a problem significantly contributed to by the industry itself through its involvement in smuggling activities over many years.

BAT’s position paper argues against a number of important measures recommended in the template for a protocol on illicit trade prepared by the expert group. BAT’s proposals are designed principally to prevent trade in counterfeit cigarettes, rather than to address the smuggling of tobacco manufacturers’ own products, still the major source of illicit tobacco products throughout the world. Contrary to the recommendations made by the expert group,

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<sup>1</sup> ‘Elaboration of protocols’ (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, decision FCTC/COP1(16)).

<sup>2</sup> ‘Elaboration of a template for a protocol on illicit trade in tobacco products’ (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, provisional agenda item 5.4.1, A/FCTC/COP/2/9, 19 April 2007), available online at <[http://www.who.int/gb/ctc/PDF/cop2/FCTC\\_COP2\\_9-en.pdf](http://www.who.int/gb/ctc/PDF/cop2/FCTC_COP2_9-en.pdf)>.

<sup>3</sup> Further information may be found in the FCA briefing paper for the second session of the Conference of the Parties to the WHO FCTC, ‘A Protocol on Illicit Trade in Tobacco Products’, available online at <[www.fctc.org](http://www.fctc.org)>.

<sup>4</sup> BAT, “British American Tobacco’s Position on Key Elements for Inclusion in the WHO FCTC Protocol on Illicit Trade in Tobacco Products”, available online at: <[http://www.bat.com/oneweb/sites/uk\\_\\_3mnfen.nsf/vwPagesWebLive/DO6ZYC4S/\\$FILE/medMD6TNMBF.pdf?openelement](http://www.bat.com/oneweb/sites/uk__3mnfen.nsf/vwPagesWebLive/DO6ZYC4S/$FILE/medMD6TNMBF.pdf?openelement)>.

BAT does not support: the development of a global tracking and tracing regime; the implementation of licensing schemes for participants in the tobacco business; the creation of clear and enforceable obligations for tobacco manufacturers to control their supply chain; or the establishment of a comprehensive range of criminal offences relating to illicit trade, as these measures threaten its commercial and vested interests. Instead, BAT's strongest suggestions relate to the protection of the intellectual property rights of tobacco product manufacturers in relation to counterfeit cigarettes, a matter which is already comprehensively dealt with in existing international treaties.

This paper sets out FCA's response to the suggestions put forward by BAT, outlining BAT's involvement in smuggling activities, examining its vested interests relating to international action to address illicit trade, and analysing its specific proposals and the reasons for their divergence from the recommendations made by the expert group established under the FCTC.

### **BAT's interference in global tobacco control**

Parties to the FCTC recognise “the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts” (Preamble). Each Party to the Convention agrees that in setting and implementing their public health policies with respect to tobacco control they shall “act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law” (Article 5.3).

The FCTC excludes the tobacco industry from the development of tobacco control policies because – as recognised by Member States of the WHO in WHA Resolution 54.18 (Transparency in tobacco control process) – “the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic”. BAT, in particular, fought to block the development of the FCTC and has campaigned to discredit WHO using industry-funded research.<sup>5</sup> The UK Parliament's House of Commons Select Committee on Health criticised BAT for its irresponsible approach to the FCTC during negotiations on the treaty, and in particular for its “cheap jibes” about WHO.<sup>6</sup>

Against this background of constant interference in the development of measures to combat the global tobacco epidemic, BAT's claim to be “well placed to offer views on a package of practical measures which may be suitable for creating policy that should dramatically reduce current levels of illicit trade” should be very carefully examined.

### **BAT's involvement in smuggling**

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<sup>5</sup> Action on Smoking and Health (ASH), Christian Aid and Friends of the Earth, *BAT in its Own Words 2005: The Alternative British American Tobacco Social Report* (London: April 2005), available online at: <<http://www.ash.org.uk/html/conduct/pdfs/bat2005.pdf>>.

<sup>6</sup> Select Committee on Health, *The Tobacco Industry and the Health Risks of Smoking*, House of Commons Second Report, Session 1999-2000 (5 June 2000) [230], available online at <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmhealth/27/2702.htm>>.

BAT frames its suggestions on measures to deal with illicit trade with the claim that “[i]llicit trade adversely affects our business” and that it is a problem which “is expected to grow as future excise increases encourage more consumers to seek cheaper illegal products”. This claim ignores the reality that smuggling is in the first place a supply driven process, and that tobacco manufacturers, including BAT, have played a major role in its global development.<sup>7</sup>

BAT also states: “We, along with other international tobacco groups, have been working with governments to reduce illicit trade for some years” In fact, international tobacco groups have been heavily implicated in smuggling operations. To cite but a few examples of tobacco industry involvement in smuggling, senior tobacco industry executives have been convicted of smuggling related offences in Hong Kong and Canada, and a wholly-owned subsidiary of RJ Reynolds Tobacco Company pleaded guilty to charges related to its involvement in smuggling cigarettes from the United States into Canada. In 2003, the Canadian federal government launched a \$1.5 billion dollar lawsuit against RJ Reynolds and Japan Tobacco alleging a conspiracy to flood the Canadian market with smuggled cigarettes.<sup>8</sup>

An internal BAT document released through litigation in the United States shows that BAT’s strategy with respect to illicit trade has been to actively manage the black market in its products to achieve optimum ‘system-wide’ performance:

*“1.1.1 Market trends:*

*1.1.1.4 (iii) Continued pressures on domestic market performance and profitability rising from border business and in some markets, from excise/tax evasion. In 1993, it is estimated that nearly 6% of the total world cigarette sales of 5.4 trillion were DNP [Duty Not Paid]<sup>9</sup> sales. Eastern Europe and the Asia-Pacific region (c85bln each) accounted for the majority of this volume. Though, Western Europe (c50bln) was also significant. In relation to total market sales, DNP volumes are largest in Eastern Europe (c13%) and Africa/M. East (c12%), but are also significant in Latin America (c9%) and Western Europe (c7%). **A key issue for BAT is to ensure that the Group’s system-wide objectives and performance are given the necessary priority through the active and effective management of such business**”.*<sup>10</sup>

Recent research examining internal tobacco industry documents demonstrates that smuggling has been a hugely profitable and integral part of BAT operations in China for many years. For the Chinese government, this illicit trade represents an enormous loss of tax revenue, and has undermined restrictions on imports and stimulated demand for premium brand cigarettes.<sup>11</sup>

A series of tobacco industry papers show that smuggling was also an important part of BAT’s business activity in Vietnam, where it pursued a twin track strategy to maximise its earnings. One track was to negotiate with the Vietnamese government and the Vietnamese tobacco

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<sup>7</sup> L Joossens and M Raw, “How Can Cigarette Smuggling Be Reduced?” (14 October 2000) *British Medical Journal* 321: 947-950, available online at <<http://bmj.com/cgi/content/full/321/7266/947>>.

<sup>8</sup> Department of Justice, Canada, “Government of Canada Announces Legal Action Against Tobacco Companies” (Press release, 13 August 2003), available online at: <[http://canada.justice.gc.ca/en/news/nr/2003/doc\\_30962.html](http://canada.justice.gc.ca/en/news/nr/2003/doc_30962.html)>.

<sup>9</sup> “Duty not paid” is a euphemism for cigarettes smuggled and sold illegally. This definition is confirmed in other documents.

<sup>10</sup> “BATCo Global Five-year Plan 1994-1998” (Bates no. 500018206) [Emphasis added].

<sup>11</sup> K Lee and J Collins, “‘Key to the Future’: BAT and Smuggling in China” (July 2006) *Plosmedicine* 3(3), 228.

company, Vinataba, to produce international brand cigarettes locally. The other track was smuggling. Internal documents describe in detail the smuggling route for the 555 brand: cigarettes were produced in the UK, shipped to Singapore, sold to importers and traders in Cambodia, and then transported illegally across the border into Vietnam.<sup>12</sup>

Public statements of senior BAT personnel have also revealed the involvement of the company in smuggling. On 3 February 2000, Kenneth Clarke, in his capacity as Deputy Chairman of BAT, wrote an article for *The Guardian*, “Dilemma of a Cigarette Exporter”.<sup>13</sup> In this article, Clarke admitted publicly that the multinational company supplies cigarettes knowing they are likely to end up on the black market. Clarke stated that the company is “faced with a dilemma” because if it restricts supplies smokers switch to other brands or counterfeiters cash in. He added: “Where any government is unwilling to act or their efforts are unsuccessful, we act, completely within the law, on the basis that our brands will be available alongside those of our competitors in the smuggled as well as the legitimate market”.

In 2000, the United Kingdom government agreed to investigate allegations of smuggling by BAT. After four years the government closed the investigation without publishing its findings. Documents subsequently obtained under freedom of information legislation, supported by documents in the BAT archive, show that a private breakfast meeting was held in March 2000 between the head of BAT, Martin Broughton, the Prime Minister, Tony Blair, and the Minister in charge of the Department for Trade and Industry (DTI), Stephen Byers.<sup>14</sup> This led to a further meeting between Broughton and Byers, following which the original plan for a public inquiry was dropped, to be substituted with a watered-down inquiry conducted in secret.<sup>15</sup> At the meeting, BAT also apparently secured the DTI’s support for its legal fight against the government of Columbia, which was bringing a lawsuit against BAT in the United States in relation to smuggling allegations. BAT’s minutes of the meeting state that: “On Columbia litigation, Byers was unequivocal; he will do whatever he can”. When the DTI closed its investigation some years later, it did not publish its findings, but released a carefully worded statement which said that the government had “not uncovered material indicating a basis for launching a criminal investigation”,<sup>16</sup> not, as BAT asserted “that no evidence of illegal activity was found”.<sup>17</sup>

## **Why does BAT support a protocol on illicit trade?**

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<sup>12</sup> See, for example, B J Kemball to B D Bramley, “Vietnam – Status Report” (12 May 1995), BAT Guilford depository (Bates no 500045875-91), and Mc Phaill to O’Keeffe, “Vietnam: 12 October 1993 to 19 October 1993” (21 October 1993), BAT Guilford depository (Bates no 203472751-5), both available online at <[www.ash.org.uk/smuggling](http://www.ash.org.uk/smuggling)>; Center for Public Integrity, “Global Reach of Tobacco Company’s Involvement in Cigarette Smuggling Exposed in Company Papers” (2 February 2000), available online at: <[http://www.public-i.org/story\\_01\\_020200.htm](http://www.public-i.org/story_01_020200.htm)>.

<sup>13</sup> Available online at: <<http://www.guardian.co.uk/bat/article/0,,191288,00.html>>.

<sup>14</sup> R Evans, D Leigh, and K Maguire, “Tobacco Firm Gained Secret Access to Blair”, *The Guardian* (27 October 2004), available online at <[www.guardian.co.uk/uk\\_news/story/0,3604,1336810,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1336810,00.html)>.

<sup>15</sup> The original plan was for an inquiry to be conducted under section 432 of the Companies Act, which would have led to a public report. After the meeting with Broughton, Byers agreed to conduct the inquiry under section 447, which prohibits publication: *ibid*.

<sup>16</sup> DTI, “British American Tobacco” (Press release, 26 March 2004), available online at:

<<http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=112695&NewsAreaID=2&NavigatedFromDepartment>>.

<sup>17</sup> BAT, “Response to DTI Inquiry Outcome” (Press release, 26 March 2004), available online at <[http://www.bat.com/OneWeb/sites/uk\\_\\_3mnfen.nsf/vwPagesWebLive/DO6PUDMH](http://www.bat.com/OneWeb/sites/uk__3mnfen.nsf/vwPagesWebLive/DO6PUDMH)>.

Until very recently, BAT was lobbying governments to enter into voluntary Memoranda of Understanding instead of developing a protocol aimed at eliminating illicit trade in tobacco products. In its paper “British American Tobacco’s Position on Key Elements for Inclusion in the WHO FCTC Protocol on Illicit Trade in Tobacco Products”, BAT now claims that it “strongly supports the need for a protocol” on illicit trade. The major reason for this change in BAT’s position is that since it is now clear to BAT that it no longer has any chance of succeeding in preventing the development of a protocol on illicit trade, it wants to maximize its chances of influencing the content of the protocol.

As stated by the expert group established by the FCTC COP to prepare a template for a protocol on illicit trade, “[i]llicit trade in tobacco products significantly contributes to the global death and disease burden caused by tobacco consumption and also to the rise in tobacco consumption by making cigarettes cheaper, more accessible and more difficult to regulate”.<sup>18</sup> Illicit trade in tobacco products also deprives governments of billions of dollars in taxation, reducing the funding available for public health and other policies.<sup>19</sup> These would be the primary concerns of Parties to the FCTC in negotiating a protocol on illicit trade. In contrast, the priority for BAT is to prevent smuggling of counterfeit cigarettes, which affect the market for its own manufactured tobacco products. BAT supports measures designed to address counterfeiting, but will not support important measures recommended by the expert group to tackle the smuggling of tobacco manufacturers’ own products, still the major source of illicit tobacco products throughout the world.

The recommendations made by BAT in its position paper are ostensibly based on three principal elements for a protocol on illicit trade: 1) “improved supply chain security”; 2) “strong laws, tough penalties & effective enforcement”; and 3) “greater international co-operation”. Each of these elements must be analysed critically.

### **Element 1: “Improved Supply Chain Security”**

Under Article 15.2(b) of the FCTC, Parties agree to “consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade”. The report of the expert group established by the COP to prepare a template for a protocol on illicit trade recommends the development and implementation of an international tracking and tracing regime which would, through the coding and scanning of packs and other units, permit authorities to track the movement of tobacco products and, upon seizure, trace the route taken by a product in order to determine where it left the legitimate distribution chain.<sup>20</sup>

Contrary to the findings of the expert group, BAT claims that a global tracking and tracing regime is not necessary to combat the illicit trade in tobacco products. BAT argues that a global tracking and tracing regime “is not a proportionate measure given that an estimated 94% of global sales are transacted legally”.

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<sup>18</sup> ‘Elaboration of a template for a protocol on illicit trade in tobacco products’, above n 2, 5.

<sup>19</sup> See FCA, *How big was the illicit tobacco problem in 2006?* (Geneva, 2007).

<sup>20</sup> *Ibid.*, 8.

The FCA has collected the most recent estimates of illicit tobacco trade from a number of countries around the world. Based on that data, the FCA estimates that global illicit cigarette trade represents approximately 10.7% of global sales, or approximately 600 billion cigarettes annually.<sup>21</sup> Illicit tobacco trade could represent a loss to global government revenue of \$US 40 to 50 billion annually.<sup>22</sup> The report of the expert group concludes that “current technology allows for the implementation of a secure and cost-effective tracking and tracing system” to deal with this large-scale problem.<sup>23</sup> The costs of tracking and tracing systems are continually decreasing, and the technology to implement them is becoming more sophisticated. The savings in revenue generated through the imposition of such controls will massively outweigh the costs of their implementation. The system of pack markings recently put into operation in California, for example, is estimated to cost less than US 1 cent per pack. Cigarette tax revenue in California increased by US \$75 million in the first 26 months after new tax stamps and licensing measures were introduced.<sup>24</sup>

BAT also argues that a global tracking and tracing regime is unnecessary due to “non-effectiveness in relation to smuggled product which has gone through several changes of ownership” and “non-compliance by producers of counterfeit cigarettes”. To the contrary, a key conclusion of the expert group established by the FCTC COP was that an effective tracking and tracing system will enable the identification of the point of diversion of tobacco products from the legitimate chain of supply to the illicit market, and will enable law enforcement officials to distinguish counterfeit products from genuine or legal products by simply scanning the products.<sup>25</sup>

BAT’s position paper goes on to state that: “Nevertheless, where one of our Group companies identifies specific instances of its products being smuggled, it will consider all practical options, including the use of tracking and tracing mechanisms, to identify the point of diversion and the trader involved”. This approach is reactive in nature and fails to prevent smuggling in the first instance. Once smuggling has become established, it is much more difficult to prevent, because the illicit distribution chain has already been established and smugglers will seek another source of supply if their existing source dries up.

BAT makes a number of other arguments with respect to “improved supply chain security”. These include:

**a) “Manufacturer trading policy”**

BAT states that “every manufacturer should have in place an effective trading policy”. This refers to internal policies such as: “Know Your Customer” (KYC) policies; the sale of products commensurate to retail demand; and compliance with fiscal, trade and anti-

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<sup>21</sup> Framework Convention Alliance, *How big was the illicit tobacco problem in 2006?* (Geneva, 2007).

<sup>22</sup> Ibid.

<sup>23</sup> Elaboration of a template for a protocol on illicit trade in tobacco products, above n 2, 8.

<sup>24</sup> Bureau of State Audits, California State Auditor, *Board of Equalization: Its Implementation of the Cigarette and Tobacco Products Licensing Act of 2003 Has Helped Stem the Decline in Cigarette Tax Revenues, but It Should Update Its Estimate of Cigarette Tax Evasion* (29 June 2006, Report no 2005-034) iii, available online at <<http://www.bsa.ca.gov/pdfs/reports/2005-034.pdf>>.

<sup>25</sup> Elaboration of a template for a protocol on illicit trade in tobacco products, above n 2, 8.

money laundering laws. While such policies are desirable, it is notable that this proposal would apparently not impose legal obligations on tobacco manufacturers, a significant omission given the track record of the tobacco industry in this area. The imposition of legal duties will be a significant means by which an effective strategy to address illicit trade in tobacco products can be implemented. This is recognised in the report of the expert group established by the FCTC COP, which suggests that a protocol on illicit trade should place a number of obligations on manufacturers of tobacco products, including obligations to control the supply chain of their products and to keep and provide access to comprehensive records.<sup>26</sup>

**b) “Product coding”**

BAT suggests that “all packs should be marked by the manufacturer to enable identification of place and date of manufacture”. This implies that access to and interpretation of markings on tobacco products would be under the control of tobacco manufacturing companies. In contrast, it is implicit in the report of the expert group that in order to ensure easy and effective identification of smuggled products it is essential that – as occurs under the Philip Morris agreement with the EC – customs officials are able to access and interpret the markings independently.

In addition, product coding which is limited to the place and date of manufacture does not facilitate tracking and tracing. The report of the expert group refers to product coding that includes covert and overt markings with detailed information such as: the intended market of retail sale; the manufacturing facility at which the product was manufactured; the machine of manufacture; and the production shift during which the product was manufactured.<sup>27</sup> Similarly, the product coding used under the agreement between the EC and Philip Morris allows the identification of the first purchaser.

**c) “Tax marker system”**

BAT states that “a tax marker system should not result in any changes to existing excise credit periods”. This would seem to indicate that tax stamps might be distributed before the relevant tax has been paid, which would not be prudent.

BAT also states that “the cost of supplying the tax markers should be treated as a tax collection expense and, as such, should be borne by the government”. This would not be appropriate. Because the need for such a system of enforcement stems from the tobacco industry’s consistent failure to comply with taxation laws, the costs should be borne by the industry itself, as is the case under the EC’s agreement with Philip Morris.

**d) “Licensing”**

BAT argues that “many countries lack the administrative capacity or enforcement capability to operate a licensing system effectively; in this situation it could prove

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<sup>26</sup> Ibid, 9-10.

<sup>27</sup> Ibid, 8.

counterproductive since it burdens the honest trader with additional cost and administration whilst failing to penalise the illegal operator.” Notwithstanding this argument, the report of the expert group recognises that “[a] licensing system and the exercise of due diligence by businesses are key measures for securing the tobacco products supply chain”.<sup>28</sup> It is the failure of tobacco companies such as BAT to secure their supply chains that makes measures such as licensing necessary. For this reason, the funding and administration of the licensing system should be paid for by the manufacturer or other licensee.

e) **“Export bond”**

BAT suggests that “to secure the movement of cigarettes between excise regimes an exporter should be required to put up a financial guarantee prior to export, with the bond being forfeited if the product fails to arrive at its destination and have all the applicable taxes paid on it”. While the use of export bonds may appear to be a sensible suggestion, export bonds are administratively burdensome for customs officials, potentially limit the liability of tobacco manufacturers, and are not a suitable alternative to the comprehensive range of measures proposed in the report of the expert group established by the FCTC COP.

**Element 2: “Strong Laws, Tough Penalties & Effective Enforcement”**

Article 15 of the FCTC requires Parties to take a number of domestic measures with a view to eliminating illicit trade in tobacco products, including to “enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade” (Article 15.4(b)). The expert group’s template for a protocol on illicit trade notes that: “Establishing a comprehensive set of offences for violations of the law is fundamental to effective and practical law enforcement. Preventing and deterring the establishment of safe havens, as well as the illicit trade, are key objectives”.<sup>29</sup> While BAT recognises that “appropriate sanctions are necessary to act as a meaningful deterrent” to participation in the illicit trade in tobacco products, the arguments it puts in its position paper with respect to “strong laws, tough penalties and effective enforcement” seem to advocate weak sanctions for participation in illicit trade by tobacco manufacturers, and strong measures to increase protection for the intellectual property rights of manufacturers, a matter already dealt with under numerous international agreements. BAT’s proposals in this area include:

(a) **“Mandatory destruction of all seized illicit product – auction or resale should not be permitted”**

BAT argues that all illicit tobacco products seized by officials should be destroyed. While FCA concurs that all counterfeit tobacco products should be destroyed, manufacturers whose tobacco products have been diverted to the illicit market should be required to buy back the smuggled products. The mandatory destruction of smuggled tobacco products

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<sup>28</sup> Ibid, 6.

<sup>29</sup> Ibid, 11.

seized by enforcement officials would create a perverse incentive for tobacco manufacturers to participate in smuggling. This is because when a seizure is made, the demand does not substantially change, so that if the seized product is withdrawn from the market and destroyed, the product is effectively supplied twice, with twice the profit to the manufacturer. This problem is referred to by the expert group in its report.<sup>30</sup>

**(b) Penalties for failure to take “commercially reasonable steps”**

BAT argues that penalties such as fines and loss of licence should apply to manufacturers who do not take “commercially reasonable steps to prevent their products being smuggled”. In contrast, the report of the expert group recommends the establishment of a comprehensive range of criminal offences punishable by strong sanctions and penalties including “probation, restitution, fines, community service, incarceration or a combination thereof”.<sup>31</sup> The report also recommends that various modes of liability, such as conspiracy and aiding and abetting, be applied to the offences in question.<sup>32</sup>

The attempt by BAT to qualify the application of criminal law to “commercially reasonable” circumstances is an obvious attempt to “water down” or weaken future action to combat illicit trade and to limit its own potential liability. Where intent is a requisite element of a criminal offence there is no place for qualifications such as that suggested by BAT. Similarly, in the case of crimes with lower standards of mental culpability (such as recklessness) criminal law doctrine suggests that concerns such as the commercial reasonableness of an omission should not affect culpability.

**(c) Measures to address counterfeit**

BAT makes a number of arguments with respect to the strengthening of enforcement measures relating to counterfeit, including protection for “the right of brand owners to obtain damages against those involved in the production of counterfeit cigarettes or those knowingly supplying materials to the counterfeiters”.

While BAT may seek to protect its market by arguing for stronger measures to eliminate counterfeit, it should be recalled that extensive international rules relating to the protection of intellectual property rights already exist. A World Trade Organization (WTO) covered agreement, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement),<sup>33</sup> imposes a range of obligations upon WTO members with respect to counterfeit. Part III of the TRIPS Agreement imposes obligations relating to issues such as access to civil and administrative remedies for private parties (including tobacco companies), and the institution and enforcement of criminal laws related to trademark counterfeiting. The World Intellectual Property Organization (WIPO) also administers a range of treaties governing intellectual property that are of relevance to counterfeiting.

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<sup>30</sup> Ibid, 13.

<sup>31</sup> Ibid, 12.

<sup>32</sup> Ibid, 11.

<sup>33</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), Annex 1C (*Agreement on Trade-related Aspects of Intellectual Property Rights*) 1869 UNTS 299.

Legal mechanisms already exist, under both international law and domestic law in many countries, through which tobacco companies can protect their intellectual property. It should be recalled that the objective of the FCTC as set out in Article 3 is “to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”. In this context, the focus of a protocol on illicit trade must be the protection of health rather than the protection of the intellectual property rights of tobacco companies.

### **Element 3: “Increased International Co-operation”**

Parties to the FCTC agree to cooperate to address illicit trade, including through: reporting and exchange of information (Articles 21 and 15.5); the promotion of cooperation between relevant agencies and organizations as it relates to investigations, prosecutions, and proceedings (Article 15.6) and the provision of assistance in legal proceedings (Article 19.3); research, surveillance and exchange of information (Article 20); and cooperation in the scientific, technical, and legal fields and provision of related expertise (Article 22). The template for a protocol on illicit trade prepared by the expert group established by the FCTC COP suggests that the inclusion of provisions relating to cooperation will be an integral part of a successful strategy to eliminate the illicit trade in tobacco products. The template suggests including provisions with respect to: technical assistance and cooperation in scientific, technical and technological matters; cooperation in respect of investigation and prosecution of offences; cooperation in training of customs, law enforcement and excise and tax officials; mutual legal and administrative assistance; and extradition.<sup>34</sup>

BAT recognises that “[b]ecause illicit trade is an international cross-border and criminal issue, international co-operation and information exchange between governments and enforcement agencies is required to address this problem”.

However, this recognition is followed with the suggestion that “[i]nternational manufacturers, like us, can ... perform a valuable role by supporting national and international enforcement agencies through the provision of relevant intelligence, information and technical training”. FCA rejects the suggestion that tobacco industry involvement in the development and enforcement of measures designed to eliminate illicit tobacco trade would be appropriate. As recognised in WHA Resolution 54.18, the industry operates with the “intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic”. In accordance with the FCTC Preamble and Article 5.3, Parties to a protocol on illicit trade in tobacco products will need to be alert to efforts by the tobacco industry to undermine or subvert efforts to eliminate illicit trade. Their ability to do so could be significantly compromised by industry involvement in measures undertaken to address illicit trade.

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<sup>34</sup> Elaboration of a template for a protocol on illicit trade in tobacco products, above n 2, 17-20.