



FRAMEWORK CONVENTION
ALLIANCE
BUILDING SUPPORT FOR TOBACCO CONTROL

BULLETIN

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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

43,534,245

PEOPLE HAVE DIED FROM
TOBACCO-RELATED DISEASES
(AS OF 9AM ON 1 JULY 2009)

A THREE-WAY ALLIANCE ON TRACKING AND TRACING?

Yesterday saw a major development in discussions on tracking and tracing, as Brazil, Canada and the European Union presented a short paper on tracking and tracing in Committee A.

This is a significant change from the dynamic at INB-2, when Brazil and the EU disagreed sharply on possible models for a tracking and tracing system. Canada's endorsement of a document calling global tracking and tracing "essential in order to fight against the illicit trade in cigarettes" also appears to be a shift in position.

The new paper says that minimum standards required for a global system should be agreed at INB-3, a position strongly supported by the FCA. It also suggests that tobacco manufacturers should "be responsible for all related costs" and should "provide the required information in a manner to be determined by the Parties".

In what may signal a small change in position by the EU, the paper says "consideration should be given to...the marking of master cases, cartons and *packs* of cigarettes" (our italics).

The global tracking and tracing system would not apply to manufacturers of cigarettes for the domestic market if: 1) they were subject to "stringent controls such as a stamping/marking regime" and 2) their products were not seized outside the domestic market in amounts over a specified threshold.

This is a regrettable exemption: particularly in the case of international brands, manufactured in multiple countries, one wonders whether seizures could easily be traced back to country of

manufacture.

The paper makes no explicit mention of the international clearing house proposed in the current Chair's text. Some central point for information routing is needed to give Parties a practical form of access to each other's data.

The paper includes the following curious phrase: "An essential step in this approach will be the identification of a body (WHO) which will be responsible for securing agreement in a consistent manner with all manufacturers who will be subject to a global tracking and tracing system".

Worryingly, this seems to imply that the terms on which manufacturers feed data into the system are to be set by some sort of negotiation process with the tobacco industry, rather than mandated by governments. What is worse, the body negotiating with the industry might even be the WHO.

The FCA has long argued for data to be collected in national (or regional) databases under government control, rather than depend on access to manufacturer databases, no matter how well guaranteed this access.

In other developments, the Chair of Committee A very sensibly proposed setting up a working group on tracking and tracing. The group may start work this evening. FCA believes this offers the best chance of reaching agreement on a robust and workable system.

ADVANTAGES AND CONSEQUENCES OF SIMPLIFYING ITP LANGUAGE ON CRIMINALISATION

One of the biggest simplifications proposed by the FCA is to eliminate the 'shopping list' of criminal offences in draft Article 12.1.

Instead, the FCA suggests the protocol should simply impose a general obligation to prohibit various forms of involvement in illicit trade or of failure to co-operate with authorities in combating illicit trade. This would leave it up to individual Parties to decide whether specific items now in the Article 12.1 list would be classified as crimes, or as civil or administrative offences.

The rationale for this is practical: states take very different approaches to the classification of offences, in particular revenue offences, and criminalisation would demand agreement on which particular activities were serious enough to warrant criminalisation.

The FCA thus recommends that paragraphs 1 and 2 of draft Article 12 should be collapsed into a single paragraph. One consequence of doing so would be to remove many of the provisions for legal co-operation on crime from the protocol, allowing delegates to concentrate on negotiating their collective response to issues specific to the illicit trade, like tracking and tracing.

However, the UN Convention against Transnational Organized Crime (UNTOC) provides a detailed procedural regime that states have already agreed to impose against serious crime. To ensure Parties to this protocol have access to this regime for illicit trade-related issues, the FCA proposes that Parties be obliged to classify the most serious forms of illicit trade as 'serious crime'. This would involve imposing a penalty in their domestic legislation of at least four years deprivation of liberty for violations of this kind.

As the UNTOC presently has 149 Parties, a significant majority

of Parties to the protocol are also likely to be Parties to the UNTOC, making such an indirect link possible.

Legislating the custodial sentence of four years will only satisfy one of the legal conditions for operation of the UNTOC. Two other conditions must also be met: there must be an organised criminal group (a structured group of three or more persons) and there must be a cross-border element in the commission of the offence.

Meeting the legal conditions for the operation of UNTOC is not enough. It may sensibly remove from the FCTC Secretariat the burden of having to develop model legislation on crimes and procedures such as extradition and legal assistance and of providing technical assistance to states in their implementation and application of these new laws. But someone will have to do this job.

The UNODC has the mandate in respect of organised crime under UNTOC. It already has, strictly speaking, a mandate over organised tobacco crime. It also has significant human and technical resources developed over the period since the UNTOC was signed in Palermo in 2000. 'Toolkits' of great sophistication and detail have been developed to aid states in implementation. Regional offices work with states on a range of criminal activities in which organised crime is involved.

However, while it may have the expertise, its resources are stretched. The UNODC is probably not in a position to build capacity focusing on the illicit trade in tobacco without extra funds and a specific policy mandate from within the Conference of Parties of the UNTOC or perhaps the UN Commission on Crime Prevention and Criminal Justice.

Parties to this Protocol will need to work outside this forum to ensure that the political and financial conditions for effective action against organised transnational tobacco crimes are met.

“HIT THE BAD GUYS HARD“

IN A PUBLIC RELATIONS MOVE, BAT CLAIMS TO SUPPORT WHO IN FIGHTING ILLICIT TRADE

BAT claims to support the protocol, according to a press release the company issued on Monday.

BAT's data on illicit trade bear striking resemblance to data contained in *How Eliminating the Global Illicit Cigarette Trade Would Increase Tax Revenue and Save Lives*, published by FCA last Sunday. Namely, revenue losses of US\$20-40 billion and 660 billion illicit cigarettes. BAT cited no source for its figures.

The press release "acknowledges that legitimate tobacco industry interests are damaged by illicit trade along with those of governments". Pat Henneghan, BAT's Head of Anti-Illicit Trade, said, "This treaty can give governments the

opportunity to hit the bad guys hard - and it's vital that they do." Ad Schenk, CEO of BAT in Germany, said, "With this protocol, governments could effectively strike against the evildoers - and it's vital that they do so."

BAT executives added that "organised crime is increasingly dominating tobacco smuggling. Weapons, drugs and people traffickers are attracted by the high profits - with only minor fines or suspended jail sentences if they're caught." Unfortunately, BAT failed to mention the role of the tobacco industry in illicit trade.

BAT also calls for a "standard for global tracking and tracing rather than a 'one-size-fits-all' technology", giving each

company the opportunity to choose a system most appropriate, independent of the size of the company. The company also wants to see the entire industry covered by the protocol.

The *LA Times* cites Henneghan as saying, "The meeting is a fantastic opportunity to create a level playing field." The question is - for whom?

Press release:
http://www.bat.com/group/sites/uk_3mnfen.nsf/vwPagesWebLive/DO7TDEQD?opendocument&SKN=1

Article:
<http://www.latimes.com/business/nationworld/wire/sns-ap-eu-switzerland-tobacco-smuggling,0,7395545.story>

Susan Cavanagh
FCA

CLEARING THE SMOKE-FILLED ROOM

AN EXPOSÉ OF HOW THE TOBACCO INDUSTRY ATTEMPTS TO UNDERMINE THE GLOBAL TOBACCO TREATY AND THE ILLICIT TRADE PROTOCOL



The adoption of guidelines on the implementation of Article 5.3 of the FCTC at last November's 3rd Conference of the Parties has yet to sink in for tobacco transnationals, especially when it comes to illicit trade. Although Article 5.3 obliges ratifying countries to protect their health policies against the tobacco industry's fundamental conflict of interest with public health, interference by tobacco corporations like Philip Morris International (PMI), British American Tobacco (BAT) and Japan Tobacco (JT) still poses the single greatest threat to the implementation of the treaty's life-saving measures.

In an exposé being released today, Corporate Accountability International finds that the tobacco industry continues to cozy up to governments, partner with regulators, and hide behind front groups – in contradiction of treaty guidelines. Current tobacco industry tactics threaten the development of the protocol and the integrity of the treaty itself. Big Tobacco is not only attempting to maintain a favourable business environment and secure continued profits, it is also seeking to undermine the Article 5.3 guidelines.

BIG TOBACCO COZIES UP TO GOVERNMENTS

BAT hosted a two-day conference on the illicit tobacco trade, in Lebanon, in May 2009. This meeting provided an opportunity for BAT to get together with high-level government officials, build its case for being included in policy discussions on illicit trade, and recruit powerful political allies to oppose tobacco tax increases. These activities run counter to the Article 5.3 guidelines, which instruct Parties to limit interactions with the tobacco industry, and recognise that the tobacco industry is not and cannot be a "stakeholder" when it comes to public health goals.

THE DANGERS OF "PARTNERSHIPS" AND MOUS TO COUNTER SMUGGLING

The following cases demonstrate how far Big Tobacco will go to manipulate illicit trade policy and undermine Article 5.3, under the guise of technical assistance to government and law enforcement agencies. The Article 5.3 guidelines call on ratifying countries to reject partnerships and non-binding or non-enforceable agreements with the tobacco industry, noting that, "[t]he tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies, given that its interests are in direct conflict with the goals of public health".

- A Memorandum of Understanding (MoU) was reached in July 2008 between the **United Arab Emirates** Ministry of Economy and the Brand Owners' Protection Group for the GCC & Yemen (BPG), a tobacco industry association that deals with illicit trade. Board members include BAT and PMI. Under the agreement, UAE will allow BPG [that is, PMI and BAT] to provide, "technical and legal training to the Ministry of Economy officials, inspectors, staff and officials from other law enforcement agencies". The BPG, through service providers and members, will also participate and co-operate with the Ministry to offer law enforcers required legal assistance.

- In a rare public airing of internal tobacco industry conflict, BAT criticised **Ghana's** MoU with PMI in November 2006, noting that PMI had no registered office or contact in Ghana and that PMI's Bond Street is the number one smuggled product in the country. Other industry players said, "the Ministry of Finance and Economic Planning and CEPS [Customs Excise and Preventive Service] who were all present at the ceremony should have seen that PMI's objective for signing the MoU

was to check counterfeiting of its brands and not to stop smuggling of its genuine brands into Ghana".

HIDING BEHIND FRONT GROUPS

Big Tobacco spreads propaganda that taxation causes smuggling and generic packaging promotes illicit trade, while hiding behind trade associations and front groups to dispute the connection between duty free sales and tobacco smuggling. The tobacco industry uses two European-based duty free trade associations as a front to lobby against the FCTC illicit trade protocol and its finding that duty free sales of tobacco lead to increased smuggling. Several tobacco transnationals including Philip Morris International, British American Tobacco and Imperial Tobacco are members of the Tax Free World Association (TFWA). The TFWA is also on the managing board of the European Travel Retail Council (ETRC). Both trade associations have called upon political leaders and other travel-retail companies to lobby against the FCTC illicit trade protocol.

LOBBYING AND INFLUENCE-PEDDLING AT INB-3

Here in Geneva this week, PMI is promoting its own tracking and tracing system to Parties at an off-site briefing. BAT has a significant lobbying presence, and is allegedly circulating a position paper on the illicit trade protocol. Delegates should remember why they included Article 5.3 in the FCTC, and beware of interference by the tobacco industry and its allies in these negotiations. History has shown that when the tobacco industry shapes public health policy, the results are disastrous.

REFERENCE

www.stopcorporateabuse.org

The Heart & Stroke Foundation of Barbados was instrumental in mobilising local health NGOs and the country's largest trade union to collectively respond to statements made by BAT in the local media. BAT claimed that the Barbadian government lost Barbados dollars 1.5 million in Customs revenue due to illicit tobacco trading. The company alluded to possible inclusion in the current development of the Regional Graphic Health Warning Standard to govern retail tobacco packaging, arguing this would restrict the illicit trade in cigarettes. The following press release demonstrates the extent of solidarity against BAT's involvement in tobacco control policy development in Barbados:



Beware of Tobacco Control Interference

Holding Government Accountable

Stakeholders of the Caribbean Graphic Health Project and our civil society partners are asking the Regional Governments and the Government of Barbados to guard against the tobacco industry's interference in public health policies addressing tobacco protection. Article 5.3 of the World Health Organisation (WHO) Framework Convention on Tobacco Control obligates ratifying countries like Barbados to protect their health policies from tobacco industry's interference.

On World No Tobacco Day the statements made by the British American Tobacco (BAT), in collaboration with the Trinidad – based Carisma Marketing Services Limited (a marketing ally of BAT) and which appeared in the Sunday Sun seemed to support appropriate health warnings on primary packaging of tobacco. BAT also claimed that "the tobacco industry could play a central role in facilitating the effective introduction of packaging regulations, and was prepared to discharge this role in a cooperative and positive manner."

The WHO Tobacco Free Initiative is mandated to control the world tobacco epidemic which was caused not by a pathogen such as a microbe (germ), but by an industry whose products kill exactly when used as the manufacturers intended. Therefore the main goal of 'tobacco control' is to prevent tobacco induced diseases, disabilities and death. Note that this does not entail an actual ban on tobacco sales or smoking itself. Basically tobacco controls are public health strategies that run into direct conflict with the tobacco industry's commercial agenda.

BAT has been around since 1902 when the U.K Imperial Tobacco Company and the American Tobacco Company became a joint venture. BAT describes itself as 'the world's most international tobacco group.' It sells its brands of death in over 180 markets including 21 Caribbean countries. BAT is the number two tobacco transnational in the world and generates billions in revenue. This company is a heavy weight in the tobacco industry. Like most commercial entities the bottom-line for the tobacco industry is financial prosperity. Tobacco is one of the leading causes of disability and according to WHO it is the leading cause of preventable deaths in the world.

'It is therefore entirely predictable that the tobacco industry does what it can to ensure that effective tobacco control policies fail' (WHO), such as picture health warnings on the packages of cigarettes. There is clear evidence from the tobacco industry's own secret documents which became public through court orders, showing that tobacco companies conspired to deliberately derail the work of WHO and governments on the implementation of tobacco control life saving measures. When this industry seeks inclusion in the development of regulations and policies governing tobacco control their main intention is to frustrate, delay, prevent and undermine the process.



Barbados Consumers Research Organisation

The Barbados Diabetes Association

Barbados Workers Union

HOW THE ILLICIT TRADE CHANGED IN THE UNITED STATES

As the world entered the 21st century, the United States of America entered a new era in the history of illicit tobacco trade. The US transitioned from its long-standing and familiar role as a source and transshipment country for contraband tobacco products as more individual state and federal governments suffered significant revenue losses from interstate and international smuggling.

A series of events began in 1997 with guilty pleas in northern New York related to tobacco smuggling into Canada involving R.J. Reynolds Tobacco and others. Investigations in Europe began to focus on the roles of US manufacturers and foreign trade zones in smuggling into the European Union. Investigative journalists starting probing allegations surrounding major manufacturers. At the close of the 1990s, the G8 formed the Lyon Sub-Group to focus on transnational organised crime, with tobacco smuggling being on the group's agenda.

The US government slowly began to recognise the scope of the illicit international tobacco trade. But it was unwilling to support the Racketeer Influenced & Corrupt Organizations (RICO) civil actions filed in 2000 by the Canadian government and the European Commission against major US cigarette manufacturers for their roles in smuggling. The US government had previously filed its own civil RICO action against some of the same manufacturers but the allegations focused on health matters, not smuggling.

The Master Settlement Agreement (MSA) between 46 states and seven tobacco manufacturers, in 1998, brought changes to tobacco marketing and payments of approximately \$206 billion to plaintiff states. During the litigation, industry defendants were forced to reveal internal records which detailed deceptive trade practices, suppression of health data and their participation in illicit trade. The MSA was not perfect: non-participating manufacturers (NPM) evaded payments into escrow accounts required by the MSA and there were no enforcement tools against wholesalers and retailers buying tobacco products from the NPMs. State legislatures provided necessary legal remedies, but fraud and enforcement remained problematic.

As courtroom dramas unfolded, large volumes of counterfeit Philip Morris cigarettes began to appear in the US. Seizures included substantial amounts of product and counterfeit tax stamps, especially counterfeit California tobacco tax stamps. Not only was Philip Morris a victim, but some state governments and the US government suffered losses in tax revenue.

Tax increases in some states provided a catalyst for expanded illicit tobacco trade in the United States. Contraband tobacco smuggling from low-tax to high-tax states grew. Retailers in high-tax states started or increased purchases of untaxed

tobacco and profits increased substantially. Diversion from foreign trade zones, internet and mail order companies continued or developed as sources of contraband tobacco. In general, illicit trade within states having small populations was primarily with products such as roll-your-own tobacco, smokeless tobacco products and cigars, rather than cigarettes.

Tax increases in Canada spawned illegal tobacco manufacturing in the US. Proceeds from smuggling high-grade marijuana from Canada to the US funded illegal manufacturing plants in New York producing cigarettes blended for the Canadian contraband market. Tobacco smuggling routes into Canada, perfected in the mid-1990s, were active again.

To address rapidly expanding illicit trade, many US state governments enacted new laws requiring licensing at all levels in the supply chain, enhanced penal criminal and administrative sanctions, and asset forfeiture laws similar to those used against drug traffickers. Many states which had no law enforcement personnel focused on illegal tobacco trafficking in 2000 now have departments or units working solely against the

problem. Some state governments failed to provide necessary legislation or personnel resources to cope

ILLICIT TOBACCO TRADE IN THE US IS EXPANDING RAPIDLY AND IS LINKED TO ILLICIT TRADE AROUND THE WORLD.

with contraband. California was the only state to create a secure tax stamp system with automated tracking and tracing capabilities. Several others are in the process of adopting similar systems.

The national law enforcement response to international and interstate smuggling was complicated by transfers of agencies between the Departments of Treasury and Justice and the creation of the Department of Homeland Security. Taxation remains at the Department of Treasury, domestic criminal enforcement was moved to the Department of Justice, and the collection of taxes and duties on imported tobacco products and international smuggling is now the responsibility of the Department of Homeland Security. The Food and Drug Administration was recently added to the mix in a potential enforcement role that is not yet clearly defined.

Illicit tobacco trade in the US is expanding rapidly and is linked to illicit trade around the world. Revenue losses in the past several years likely exceeded US\$1 billion. Despite the lack of adequate legislation in every state, trained personnel, tracking and tracing in most states, and the confusing enforcement situation with federal authorities, there have been significant investigations and prosecutions on tobacco crimes in recent years.

John Colledge III
Retired Supervisory Criminal Investigator, currently Consultant on
Customs & Trade and Anti-Money Laundering

Maurice "Mo" Gilmore
Investigator with the State of Arkansas Tobacco Control

DIRTY ASHTRAY AWARD



To the United Arab Emirates for relentlessly seeking to weaken the protocol.

ORCHID AWARD



To Australia for clear thinking and leadership in Committee B.



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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INB-3: GLOSSARY OF ILLICIT TRADE PROTOCOL

NEGOTIATION PHRASE	REAL WORLD INTERPRETATION
[[Doubt]][Uncertainty]][Indecisiveness] [[Irresolution]]	Oh, just delete it
Appropriate measures	Whatever we want, including and especially nothing
Balanced approach	Keeping everyone happy , forget reducing the epidemic
Blocked customers	Delegates the CIG restaurant will refuse to sell food to between 10am and 1pm since they do not possess the bona fides to snack during these hours
Competent authorities	Does not mean relevant
Due diligence	Supposedly an " American terminology, but not defined in Microsoft's Thesaurus"
Endeavour to...	... Get up late, have a leisurely breakfast, read the newspaper and then say, "Despite my earnest endeavours I fear this Article is rather beyond our national capabilities for today..."
In accordance with national law	We don't want to change our law
...Measures, including x, y, z	Almost always read as x, y, z only
Parties may...	A phrase the tobacco industry loves, because it means Parties need not ...
Primary	According to the Thesaurus: first, principle, main, key, primary, major, key, chief and crucial. But, the chair's text actually means " Raw "
...Or other measures	See 'Appropriate'
Relevant organisations	Does not mean competent
Transport	Does not include bicycles, motorcycles, roller blades, skis, hot air balloons or parachutes
Secure	We are wondering what this means since the INB was unable to secure itself against tobacco company infiltration of the negotiations. All governments secure sensitive information, national secrets, install computer anti-virus programs, firewalls...
Should versus shall	You should brush your teeth everyday otherwise you shall need dentures later
Shall consider to adopt	See 'Endeavour'
***	 [Chair's interpretation]
Payment record versus <i>comprobante de pago</i>	We need Spanish lessons, plus lessons on arithmetic and Mexico's history
Regime versus system	Rather mysterious, need to demystify
National versus global	Act national, but think global