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DEATH CLOCK

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

58,358,355

PEOPLE HAVE DIED FROM
TOBACCO-RELATED DISEASES.
(AS OF 9AM GENEVA TIME
ON 29 MARCH 2012)

THE LAST ROUND

This INB is the last chance to finalize a protocol on illicit trade, as Parties will no doubt remind each other regularly over the next eight days.

So, no issues about the text can be ducked or postponed, and there is no time for posturing, game-playing, angry thumping on tables, or insistence that a particular phrasing is the only acceptable outcome.

On FCA's side, our overriding interest is in ensuring that illicit trade, or the prospect of illicit trade, does not become an obstacle to implementation of FCTC Article 6 (that is, higher tobacco taxes) and other tobacco control measures. We have tried to make only essential suggestions for changes.

In Part III (supply chain control), there will be pressure to accept the proposals of the informal working group without any substantive change. Our three suggestions involve correcting anomalies in the text. First, eliminating references to "legally binding and enforceable agreements" in draft Articles 6 and 9, as proposed by the informal working group – this wording would appear to allow any Party to contract out of obligations by signing agreements with any non-state actor. Second, the reference to key inputs in Article 5.5 would appear to preclude any research on key inputs for at least five years, and postpone any action indefinitely, and this needs to be corrected (more details in the FCA brief). Third, the reference to the location of the global information sharing focal point in Article 7.1 is, in our view, premature and should be referred to the Meeting of the Parties (MOP).

In Parts IV and V (offences and international cooperation), there is high potential for long, divisive debates. We would remind Parties that are pushing for detailed language on criminal justice issues that the Protocol will not miraculously make resources appear for national enforcement authorities, nor will it override national criminal codes. To our

knowledge, extradition for tobacco smuggling offences is quite rare.

In view of this, we encourage Parties to stick as closely as possible to language already agreed at the UNTOC (United Nations Convention against Transnational Organized Crime) table. Article 12 will need extensive discussion. In our view, references to counterfeit should be deleted, to avoid diversion of tobacco control resources into protection of tobacco companies' trademarks. There also needs to be more clarity about when Articles 30-32 (mutual legal assistance and extradition) obligations are triggered.

Another potentially long discussion will come with respect to institutional arrangements and financial resources. A minority of Parties appears to favour a single, unified budget for the FCTC COP and the ITP MOP, along with merged COP-MOP meetings.

MERGED BUDGET – A TERRIBLE IDEA

A merged budget is a terrible idea. First, it could make implementation of the Protocol dependent on the financial contributions of FCTC Parties who decide not to ratify the Protocol. Second, it would put FCTC and ITP de facto in competition for scarce resources, with unpredictable results. For example, international coordination on customs issues could end up being paid for out of health ministry tobacco control budgets.

Merged meetings are equally problematic. Particularly at the beginning, MOP sessions will have a lot of material to get through; there are also many issues around FCTC implementation to discuss at the COP table. It would be unfair to smaller delegations to be forced to choose one or the other, particularly if the COP or the MOP splits into committees. Also, officials with smuggling-control expertise are unlikely to also be tobacco-control experts, and vice-versa.

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PROCUREMENT FOR TRACKING AND TRACING SYSTEMS A COMPLICATED MATTER

Tracking and tracing is not simply a tax stamp or code on a package, carton or master case. It is an integrated government system of: product marking, pro-active, real-time tracking and searching for trade anomalies in the supply chain, and after-enforcement tracing.

Systems must be cost effective, based upon the illicit trade threat in the country and region, government-controlled, integrated with other government data, and above all - the procurement process must be transparent.

Knowledge and transparency are powerful tools in public procurement. It is important that government officials responsible for drafting requirements for tracking and tracing systems understand their primary purpose, features, limitations, costs and funding sources. In addition, governments have the responsibility to transparently deliver good governance related to the collection and protection of government revenue flows.

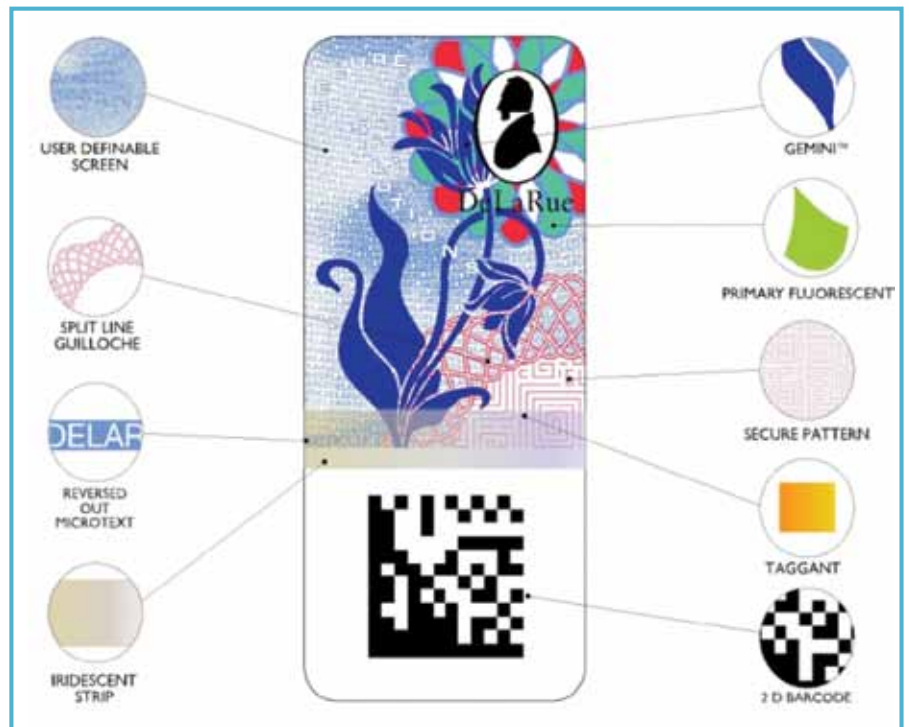
However, the tracking and tracing sections of known government-tobacco industry cooperation agreements do not meet the same level of transparency.

SALES TECHNIQUES OF VENDORS A CONCERN

Unfortunately, the discussion about tracking and tracing systems has been complicated by misinformation, false information and a general lack of understanding of the available technology and the underlying issues of tracking and tracing. As more Parties consider tracking and tracing solutions, the sales techniques of potential vendors and government procurement processes should be of concern to all stakeholders.

It is essential that government stakeholders carefully compare the features of systems offered by potential vendors in order to find one that fulfils the particular needs of their jurisdiction.

The competition among potential vendors for tracking and tracing systems began before the First Intergovernmental Negotiating Body (INB1). Currently, potential vendors include long-time secure document printers and ink suppliers, computer manufacturers, the tobacco industry and an assortment of newcomers.



Anatomy of a Tax Stamp. © De La Rue International Limited 2012.

PHILIP MORRIS CODENTIFY® SYSTEM

System selection and procurement was complicated with the entry of Philip Morris (PM) Products, S.A. into "tracking and tracing" with its system, *Codentify*®. This system is primarily focused on authentication, not revenue collection and protection. In addition to PM, British American Tobacco, Japan Tobacco International and Imperial Tobacco are actively promoting the *Codentify*® system, while several companies in the security products industry are marketing it under some sort of licensing arrangement with PM.

System costs are an important concern. *Codentify*® is frequently portrayed as less expensive than alternative systems developed by the security industry. Some security-product vendors claim increased government revenues from their systems, but *Codentify*® has made no such claims.

It is important to review the business history of potential vendors. Is security their core business? Did they conduct a thorough needs assessment for the government and provide it in advance of the bid process? Have they successfully

provided similar systems to other clients? Are those clients satisfied with their systems? Have they increased revenue collection and protection with their systems? Did they incorporate government licensing, customs, finance and commerce data into their systems? If not, why not? If linked, were there difficulties in introducing this data into a comprehensive system? Were there any hidden or unexpected costs in system implementation? Was the system implemented on-time?

System software and system security are equally important considerations in procuring tracking and tracing systems. Governments are responsible for protecting not only their data, but also the proprietary data of the entire regulated industry, in this case, the tobacco industry. This includes multi-national and local corporations. ■

John W. Colledge III

Mr. Colledge is a retired Supervisory Special Agent from the U.S. Customs Service and Department of Homeland Security, and an independent consultant on various aspects of anti-illicit trade.

BRITAIN'S SHAME IN PANAMA: TRADE INTERESTS ALLOWED TO TRUMP HEALTH

The UK government has proudly and publicly committed to putting public health concerns before the 'commercial and other vested interests of the tobacco industry'. So the recent revelation that the British Ambassador to Panama has been lobbying on behalf of British American Tobacco (BAT) was a bombshell.

A letter from the Ambassador to the government published in the Financial Times on 15 March 2012 could have been written by BAT. The timing was particularly shocking coming just before the start of this last round of negotiations on the illicit trade protocol here in Geneva this week.

The Ambassador pedalled the industry line that tobacco tax increases had inevitably led to an explosion in illicit trade, causing a 'critical situation' for BAT, which he called 'one of the most important British companies'. He went on to threaten losses of employment in Panama as a result and offered to work with the government and the 'legal industry', that is to say BAT, to come up with solutions to the growing problem of illicit trade.

LOBBYING VIOLATES COMMITMENT

Such lobbying on behalf of the tobacco industry runs completely counter to the British Government's public commitment in its Tobacco Control Plan to meet its obligations under Article 5.3, as a Party to the WHO FCTC.¹ The UK has also had a code of practice in place for diplomats since 1999 prohibiting such behaviour.²

The Foreign Office response to questioning by the Financial Times at least admitted that lobbying on behalf of the tobacco industry was inappropriate, and restated its commitment to fulfilling its obligations as an FCTC Party. However, the Foreign Office spokesperson went on to say that 'In writing, our Ambassador was following our strict guidelines on lobbying, which allow us to offer assistance to firms operating overseas, including in resolving business problems that are potentially discriminatory.' This is double-speak, since the assistance referred to clearly runs counter to the WHO FCTC and its guidelines.

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SUCH LOBBYING ON
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OBLIGATIONS UNDER
FCTC ARTICLE 5.3
”

There is a story behind this. In November of 2009, Panama increased the cigarette excise tax from 32.5 percent to 100 percent, and applied this tax to cigars and other tobacco products. Excise taxes rose from US\$11 million in 2009 to US\$22 million in 2010, and the retail price of the BAT brand Viceroy, which dominates the Panamanian market, rose from US\$1.96 to US\$3.25 per pack.³

PANAMA'S STRONG TOBACCO CONTROL

Panama has a strong and comprehensive tobacco control strategy, which BAT has challenged in court on a number of occasions. Most recently, a court challenge by BAT and Philip Morris against the Government's plans to put tobacco out of sight in shops is awaiting adjudication by the Panamanian Supreme Court. It's notable that a similar challenge by BAT and other major tobacco companies to the government in England was abandoned shortly before the case was due in court, and the legislation is due for implementation in April as planned.

If the British Embassy wants to help Panama with its illicit trade problem, it can and should do so in line with its obligations under Article 22 of the FCTC – to provide technical, scientific and legal support. It has the expertise to do so. In the late 1990s the UK had a massive and growing problem with illicit trade in cigarettes and handrolled tobacco, and

HM Revenue and Customs put in place a strong anti-smuggling strategy based on legislation and enforcement.

UK MEASURES HAVE CUT SMUGGLING

This has been highly effective in reducing the illicit market in cigarettes, from 21 percent to 10 percent, and in roll your own tobacco from 63 percent to 46 percent. This occurred simultaneously with the Government raising taxes on tobacco year on year.

Most recently in the Budget in March 2012 the UK government put tobacco taxes up by 5 percent above inflation, ignoring identical protests by the industry, including BAT in the UK, that this would lead to increased smuggling. The price of a packet of premium price cigarettes like Marlboro rose from £7.09 (US\$11.23) to £7.46 (US\$11.82) overnight. So HM Revenue and Customs can provide help and support in how to increase tobacco taxes while controlling the illicit trade.

What is not appropriate, and is completely contrary to our treaty obligations, is for the British Embassy to work with the government 'hand in hand' with the tobacco industry. As chief executive of ASH I have written to the British Foreign Minister, William Hague, asking for the British Ambassador to withdraw his letter and apologise for his behaviour. The response I have received insists that the Ambassador was acting fully in accordance with FCO guidelines. If so, then it is clear the guidelines are inadequate and must be revised to accord with the more rigorous requirements of the WHO FCTC and Article 5.3 Guidelines.

This sad and sorry tale goes to show how essential it is for civil society to monitor that Article 5.3 guidelines are observed not just in principle but in practice too, particularly when it comes to matters of tax and smuggling. ■

Deborah Arnott
Chief Executive, ASH (UK)

¹ DH Tobacco Plan – see chapter 10 and in particular the first paragraph. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_124960.pdf.

² Link to copy of the FCO guidelines from 1999. http://www.ash.org.uk/files/documents/ASH_560.pdf.

³ WHO report on tobacco control in Panama. http://www.who.int/tobacco/surveillance/policy/country_profile/pan.pdf.

COUNTERFEITING ALSO CONTROVERSIAL WITH RESPECT TO MEDICINES

For nearly four years (since the World Health Assembly's May 2008 session), WHO's work aimed at ensuring the availability of quality, safe and efficacious medicines has been bedevilled by controversy over what its role in combating 'counterfeit' medicines should be. At its heart, the controversy has centred on the term 'counterfeit' having an intellectual property meaning – as reflected in, for example, the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS Agreement).

A number of WHO member states have argued persuasively that the intellectual property (IP) interests of pharmaceutical companies should be of no concern to WHO, and that private IP rights can be enforced by the private entities that own them. According to this argument, to the extent that there is a role for intergovernmental agencies in IP protection, it should be left to those agencies with relevant mandates – for example, the World Trade Organization, the World Intellectual Property Organization, the World Customs Organization and INTERPOL.

Why should the limited resources of health agencies be spent on enforcement of private rights, where these intersect with but ultimately diverge substantially from those of public health?

THE LAST ROUND

continued from page 1

During past discussions about tracking and tracing (Article 7), there was considerable back-and-forth about interactions with the tobacco industry and control of data. This led Parties to agree on Article 7.13, which adapts a key element of the Article 5.3 Guidelines to tracking and tracing.

However, tobacco industry interference is not limited to tracking and tracing. We propose that a new article on transparency would be useful to make this point. (See our brief.) The current behaviour of the tobacco industry and the harassment of governments around the world are ample grounds to be particularly vigilant about industry interference.

ONGOING CONTEST OVER RESOURCES

Intellectual property protection is one of the most contentious areas of international law and politics. Everything that happens in international IP law takes place in the context of an ongoing contest about appropriate levels of IP protection and enforcement, and the amount of public resources that should be devoted to them.

Many large industry players aggressively push ever higher IP standards – pursuing the so-called 'IP maximalist' agenda – and virtually all international IP norm-setting is beset by conflict. The most recent example is the Anti-Counterfeiting Trade Agreement, negotiated by Australia, Canada, the European Union (represented by the European Commission and the European Union Presidency), Japan, the Republic of Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

The Agreement is widely seen as another ratcheting up of IP standards, bypassing the multilateral IP fora in which developing countries and emerging economies would not agree to such expanded standards.

FOUR YEARS OF DEBATE

The controversy over both terms and substance can be seen in the title of the working group established by the WHA to

address these issues – the Working Group on 'Substandard/Spurious/Falsely-Labelled/Falsified/Counterfeit Medical Products'. After nearly four years of often heated debate, a draft resolution will be put to the upcoming May meeting of WHA, at the recommendation of the WHO Executive Board, proposing the establishment of a new Member State mechanism for international collaboration among Member States regarding substandard/spurious/falsely-labelled/falsified/counterfeit medical products. Critically, the resolution specifies that collaboration be 'from a public health perspective, excluding trade and intellectual property considerations'.

The INB would be wise to learn the lessons of the 'counterfeit medicines' experience. Neither the WHO nor the COP (nor any body subsidiary to the COP) ought to have any role at all in protecting the tobacco industry's intellectual property. The illicit trade protocol should be concerned only with public health – through the effect of the evasion of taxes and duties on tobacco use. The protection of the tobacco industry's IP would be a recipe for governance disaster. ■

Jonathan Liberman

*McCabe Centre for Law and Cancer
The Cancer Council Victoria and the
Union for International Cancer Control*

COORDINATED TECHNICAL ASSISTANCE

Last but not least, we would ask Parties to draw lessons from the FCTC proper and spend part of the next week thinking about implementation, technical assistance and capacity-building. Effective control of illicit trade requires coordinated action by multiple ministries and agencies – which means multiple types of expertise.

Parties will have a wide variety of technical assistance needs. For example, some countries may have no particular enforcement system to collect tobacco taxes, relying on manufacturers and importers to report their production/sales volumes and remit taxes. These countries may need to develop entirely new systems to meet their Protocol

obligations. Others may have next to no capacity for investigating organised crime. And so on.

Because the Protocol cuts across many different areas, it is likely capacity-building will need to come from a number of different international organisations, with the Secretariat presumably playing a coordinating role.

None of this is impossible, but it does require planning and careful thought. We suggest the INB, as the specialized FCTC body dealing with illicit trade, needs to make a specific proposal to COP as to how capacity building and technical assistance needs can best be evaluated, and also what types of arrangements with other organisations will be needed. ■

CLEAR THINKING ABOUT COUNTERFEITING



© Action on Smoking and Health and The Campaign for Tobacco-Free Kids.

Tobacco companies love to talk about counterfeit cigarettes.

“Around 80 percent of the smuggled cigarettes bearing Philip Morris International brand names seized by law enforcement in 2009 were fake,” proclaims Phillip Morris International on its website.

In part, the industry’s focus on counterfeit is simply about protecting profits: every time a smoker in Singapore or South Africa buys a pack of counterfeit Marlboro thinking it is the real thing, that represents a pack’s worth of forgone profit for Philip Morris International.

But there is more to it than simply protecting profit. By focusing attention on counterfeit, tobacco multinationals divert attention from (still frequent) smuggling of their own products, and can portray themselves as natural allies, rather than adversaries, of enforcement authorities.

The multinationals can and do tip off authorities about shipments and routes for the import of counterfeit product. Indeed, it is probable that, as a result, the seizure rate for counterfeit is higher than for non-counterfeit.

LOBBYING AGAINST TAX INCREASES

Once a trusting collaboration is established with authorities, they are then well placed to lobby against tobacco tax increases – thereby subverting implementation of FCTC Article 6 (tax and price measures). “Put up tobacco taxes

“ **THE ONLY REASON TO PAY ATTENTION TO COUNTERFEIT PRODUCT, IN AN FCTC FORUM, IS IF COUNTERFEIT PRODUCT IS SOLD WITHOUT PAYMENT OF TAXES.** ”

again and those terrible organized crime gangs will get completely out of control,” the multinationals claim, conveniently ignoring their own history of knowingly selling into the black market. (Cf. litigation and criminal investigations by authorities in Canada, the EU and several other

places, as well as numerous pieces of investigative journalism.)

Now, counterfeiting of all sorts of products is an issue that is frequently discussed in various international fora, and notably at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the World Customs Organization (WCO) and INTERPOL. These discussions often involve several different issues, such as the mislabelling of inactive or even dangerous substances as life-saving drugs, as well as simple trademark violation (fake Rolexes etc.). There is a string of international agreements dealing with intellectual property and trademark protection, which many FCTC Parties, although not all, are also party to.

The key point is this: there is little if any evidence that counterfeit cigarettes are, on average, more hazardous to smokers than the ‘regular’, trademarked kind; thus, the only reason to pay attention to counterfeit product, in an FCTC forum, is if counterfeit product is sold without payment of taxes.

This is not necessarily the case. As the World Custom Organization notes on its website: “Counterfeit cigarettes are sometimes declared to Customs as genuine ones at the point of entry. In this way, counterfeit cigarettes are introduced into the licit market and... duties and taxes are paid...”¹ This damages the trademark holder, but neither the public treasury nor public health.

Frequently, of course, counterfeit **does** go hand-in-hand with tax evasion – but there are several provisions in the Protocol that deal with tax evasion.

Why does all this matter? Because draft Article 12(c)(i) would require Parties to establish as unlawful “counterfeiting tobacco products or manufacturing equipment used in the manufacture of tobacco products or counterfeiting packaging, applicable fiscal stamps, unique identification markings, or any other markings or labels”.

This language mixes acts that harm the public interest (the forging of tax stamps, which is dealt with in more detail in Article 12(c)(iii)), acts which may not even exist (counterfeiting manufacturing equipment

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¹ See http://www.wcoomd.org/valelearningoncustomsvaluation_oftobaccoandcigarettesmuggling.htm

DIRTY ASHTRAY AWARD



To the British Foreign Office for trying to sabotage Panama's policies on tobacco tax and smuggling.

ORCHID AWARD



Watch this space! We are looking for Party leadership in upholding transparency while dealing with the industry on the illicit tobacco trade.



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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PHILIPPINES SEEKS BIDS ON TAX STAMP SYSTEM; INDUSTRY OFFERS UNWELCOME

The Philippine Government says it will seek bids for a supplier of a stamp-security system for the country's tobacco products in the first half of 2012, in a move it hopes will minimise the smuggling of tobacco products into the country while also raising revenues.

The Philippine Bureau of Internal Revenue (BIR) says at least five foreign companies are interested in the project, but stressed that it does not want tobacco companies taking part in the bid. One of the companies that has expressed interest in the auction is Philip Morris Fortune Tobacco Corp. (PMFTC), the most dominant player in the Philippine tobacco industry, accounting for as much 90 percent of the country's market.

Switzerland's Sicpa Products Security SA in 2010 submitted an unsolicited bid for a cigarette tax stamp system. The government turned down the proposal, but the Swiss company is still eligible to join the next round of bidding. An earlier proposal by PMFTC was also turned down for conflict of interest. Five other, mostly foreign, companies have expressed interest in the project, the BIR said, without naming the firms.

Excise taxes on cigarette products account for 53 percent of all sin taxes in the Philippines. In 2010, the government raised PhP46.2 billion (US\$1.08 billion)

from sin taxes. The Republic Act 9334, which expires in 2013, provides for an 8-percent increase in excise tax rates every two years. The latest adjustment took effect last year. In its place, the government has been pushing to have sin taxes indexed, a move projected to generate an additional PhP60 billion annually.

Without indexation, the government expects to raise PhP69.298 billion in excise taxes this year. Of this amount, PhP30.266 billion will come from cigarette products.

Recent estimates of the economic costs of tobacco use, including health care costs and productivity losses from death and disease, amounted to PhP148.47 billion to PhP314.38 billion in 2003. This is equal to 7-15 times the tobacco revenue for the same year.

Cigarettes sold in the Philippines are among the cheapest in the Asian region, with the most popular brand selling for an average of less than US\$0.50. Estimates show that 17 million Filipinos currently smoke, and 240 Filipinos die from tobacco-related diseases every day. ■

SEATCA

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<https://www.interaksyon.com/article/21445/bir-to-bid-out-tobacco-tax-stamp-security-project-in-1h>
<http://www.manilastandardtoday.com/insideBusiness.htm?f=2012/january/9/business1.isx&d=2012/january/9>
<http://businessmirror.com.ph/home/top-news/21697-bidding-set-on-tobacco-security-stamp>

CLEAR THINKING

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– is there a market for fake cigarette machines, and if so, should we care?, and acts that harm solely the private interests of tobacco companies – violation of tobacco trademarks.

This kind of confused drafting is practically an invitation to Parties to spend limited illicit trade enforcement resources on the protection of industry trademarks. What it's missing, I think, is

the point that it's also the resources of the MOP, the Secretariat and WHO that would be going into the protection of industry TMs.

That is not what the FCTC is for. Article 12(c)(i) should be deleted, and Article 12(c)(ii) amended to refer only to forged fiscal stamps or unique identification markings. ■