By now everyone is what the British call “knackered”. The Party delegates, the Secretariat, even the NGOs are tired, exhausted and stressed.

This week has been a long, slow and sometimes painful haul. And we are fast running out of time to reach the desired destination, with only two negotiating days left. The INB clock ticks down as the death clock ticks up.

And there is no safety net.

It should be clear to all that there is absolutely no commitment and no agreed funding to continue the negotiating process beyond INB-4. This is the time to reach agreement. If the Parties do not succeed in the next 48 hours every tobacco smuggler and unlawful manufacturer on the planet will breathe a little easier, while the consumers of their lethal products breathe with a little more difficulty.

There is a mountain of text to get through, much of which is not really contentious, but all of which requires discussion and agreement. It is an intimidating prospect, but it must be faced.

At this point, FCA would suggest that the Parties face two main dangers.

They could drown slowly and horribly in a grey sea of brackets. They could get utterly lost in minor details and in semantics. Or they could fall back on the comforting but ultimately destructive process of what we could call “bloc thinking”. This is the logical fallacy common to international negotiations: country X is from my bloc, therefore they must be right, country Y is from that bloc, therefore they must be wrong. This fallacy makes decision-making simple, but it wrecks any realistic prospect of reaching agreement.

Instead, Parties need to focus ruthlessly. They must decide the issues that are most important for them. They must state their views and vital interests clearly, and work together for a compromise that will accommodate them all.

The protocol has to be a global agreement. Any supply chain controls, particularly tracking and tracing, will require a serious commitment from all the Parties involved. Since these controls involve security arrangements, the global regime will only be as strong as its weakest link. All Parties will have a direct self-interest in global co-operation, in the sharing of information and expertise and in capacity building, particularly in customs and law enforcement. They therefore have a mutual need to reach an agreement that benefits them all.

Also, although illicit trade in tobacco products is a worldwide problem, there are very important variations in how it is manifested in different regions and Parties. In some, cigarettes are by far the most significant issue. In others there are specific products subject to illicit trade but not generally found in other markets.

These varying needs and priorities must cohere into agreement, because the interests that unite the Parties in this area of public policy are more important than those that divide them. To achieve this result takes leadership, and leadership means vision, focus and a willingness to take necessary risks.

Only this can take INB-4 down the path of principled realism. This is never easy, but it is the only path that offers the prospect of an effective and robust protocol.
¿POR QUÉ TENER UN PROTOCOLO ES IMPORTANTE PARA AMÉRICA DEL SUR?

Un protocolo de comercio ilícito de productos del tabaco brinda un conjunto de herramientas útiles para tratar el problema global de la producción ilegal y el contrabando de productos del tabaco. De la misma manera, puede ayudar a resolver problemas regionales de producción y comercio ilegales de estos productos.

El MERCOSUR (Argentina, Brasil, Paraguay y Uruguay), Bolivia y Chile tienen un problema común de comercio ilegal de cigarrillos, y un protocolo como el que se está negociando podría ser un instrumento adecuado.

La producción y comercio ilegal en esta región de América del Sur tienen su origen en la diferente tributación y la desigual evolución de la administración tributaria y aduanera. Concretamente, hay países con baja carga tributaria del cigarrillo, como Paraguay y Bolivia, y otros, que con diferencias, tienen carga impositiva y precios mayores. Esta diferencia genera incentivos para instalación de plantas de producción en los países de tributación baja, como de hecho ocurrió con Paraguay.

Pero eso solo no es suficiente. Tienen que existir problemas en la administración tributaria de los países, tanto en los que se desarrolla la producción ilegal como en los bajos impuestos, y en los que reciben esa producción.

Brasil es el gran receptor de cigarrillos sin impuestos de Paraguay o que son vendidos en el mercado doméstico paraguayo con bajos impuestos, y, posteriormente, desviados ilegalmente a Brasil. Uruguay y Argentina son también países receptores de productos paraguayos. Finalmente, Bolivia, Chile y Uruguay son utilizados como países de tránsito para el transporte del producto paraguayo a mercados extra-regionales.

A su vez, todos los países tienen, en mayor o menor medida, otros problemas de comercio ilegito, en adición a los ya descriptos. Los países de la región usaron distintas políticas individuales para tratar de reducir este comercio y los resultado sí bien positivos, no son satisfactorios.

El ejemplo paradigmático de tentativas individuales de solucionar el problema es Brasil. Desde 1999, cuando eliminó la triangulación de las firmas brasileñas a través del territorio paraguayo, el país viene implementando lo más avanzado en términos de control de la producción, y, en 2008, terminó de instalar un sistema de seguimiento y localización, a nivel de paquete de cigarrillo (el SCORPIOS). Adicionalmente, Brasil tiene un sistema muy bien desarrollado de licencias de las empresas de tabaco, y exige registros de exportadores e importadores.

Eso ha permitido combatir el comercio ilegal de origen doméstico y el desvío ilegal en el comercio, pero no resuelve el problema de la oferta externa de cigarrillos sin impuestos. También ha mejorado sensiblemente el control de la extensa frontera terrestre que tiene con Paraguay, pero sin intercambio de información de ambos lados de la frontera, no habrá reducción significativa de las bandas criminales binacionales que actúan en el transporte y la distribución entre ambos países.

En materia de administración tributaria, todos los países de la región mejoraron sensiblemente sus administraciones tributarias, después de las extensas crisis fiscales de los años ochenta y primera mitad de los noventa. Paraguay, que no tuvo los mismos problemas macroeconómicos de sus vecinos, no fue forzado a mejorar y modernizar sus mecanismos de recaudación de impuestos y de persecución de la evasión fiscal.

Lo que fue virtud en los años setenta y ochenta - la relativa prudencia macroeconómica - generó una debilidad estructural para administrar las cuestiones fiscales cuando el país tuvo una creciente producción nacional de cigarrillos. Parece claro que el diferencial de impuestos entre los países del MERCOSUR tiene que ser eliminado y que las prácticas de la administración tributarias tienen que ser igualadas y coordinadas entre los países de la región.

En síntesis, las lecciones de la región después de más 20 años de comercio ilegal muestran que es necesario: armonizar los niveles tributarios, igualar las capacidades de la administración tributaria y avanzar en la coordinación y cooperación entre los países, tal cual lo pide el artículo 15 del Convenio Marco para el Control del Tabaquismo.

El protocolo en discusión en la ONI 4 es justamente una tentativa de catalogar y establecer como práctica común de los países Partes las mejores técnicas de administración tributaria en materia de cigarillos, para evitar la producción y el comercio ilegal – licencias, diligencia debida, seguimiento y localización, registros contables –; y de fijar mecanismos de intercambio de informaciones y de cooperación bilateral o internacional.

El Protocolo es importante para MERCOSUR, Chile y Bolivia, pues representa la respuesta correcta para los problemas del comercio ilícito, al enfatizar los dos elementos que hoy imposibilitan combatir efectivamente el comercio ilegal en la región: armonización y modernización de las prácticas de administración tributaria y mecanismos de cooperación e intercambio de informaciones bilaterales y multilaterales.

Roberto Iglesias
Economista, Aliança de Controle do Tabagismo (ACT), Brasil

1 Adicionalmente, el Protocolo establece también los mejores mecanismos de sanciones legales para el crimen transnacional que representa el contrabando de productos del tabaco.

CLARIFICATION: The story about the Philippines on page 6 of yesterday’s Bulletin was a reprint from another source.
In September 2005, the IRA announced that it had put all of its weapons beyond use and the process of disarmament was complete after a ceasefire lasting more than a decade. So when four years later on a damp Spring night in 2009 two young British soldiers were gunned down in cold blood, it sent shockwaves through the province of Northern Ireland and threatened the outcome of the peace agreement.

Mark Quinsey and Patrick Azimkar left their barracks in County Antrim to pick up a pizza. Minutes later they were gunned down and lay dying, the pizza deliverymen and two guards left clinging to their lives. The next day sympathy cards and floral tributes from local people marked the location of the atrocity. The shortest said it all, “Why?”

The political answer is that the assassination was carried out by a splinter group trying to derail the peace process, the Real IRA. The practical answer is that the money to buy the guns that killed the two young soldiers came from the sale of smuggled cigarettes originating on the other side of the world. The source was a quiet, unremarkable middle-aged man called Roman Vidal living in a middle-class neighbourhood in Cutler Bay, Florida.

At the time the two men died Vidal had already been arrested and charged with wire fraud, mail fraud and smuggling. His operation, importing cheap cigarettes from Panama and diverting them to the illicit trade to criminal and terrorist gangs in Germany, Ireland, Spain and the UK had been shut down. But too late for the two young soldiers and their grieving families and friends.

Vidal had been shipping black market cigarettes from Panama through Miami to criminal and terrorist gangs in Europe for four years at the time of his arrest. His modus operandi was to import cigarettes by the container load from Panama then repack them in new containers, hidden under camouflage such as wood flooring and insulation materials, for shipping on to his European contacts. A friend at the freight forwarding company would write up a false bill of lading, the document used by US Customs to track shipments, with no mention of the cigarettes, only the cover materials.

But the friend double-crossed him and began feeding information to a Federal agent who was tapping his calls and tagging his bank accounts. A textbook multi-state investigation followed, involving US Immigration and Customs Enforcement, the German Customs Investigation Service, the Irish Office of Revenue Commissioners, Her Majesty’s Revenue and Customs in the UK and the Spanish Guardia Civil. Vidal was arrested after his shipments were seized in Dublin (Ireland) and Felixstowe (England) by agents of OLAF, the European anti-fraud office. He was charged with having smuggled 2,702 master cases of cigarettes, totalling over 27 million cigarettes, on which he paid only a few thousand dollars of customs duties and taxes instead of the US$5.6 million he should have paid.

Vidal faced up to 20 years in prison but when the sentence was handed down a month ago he was sentenced to only 24 months imprisonment, followed by three years probation, and ordered to pay just US$1.5 million in restitution. He was not charged under the 1996 statute forbidding material support of terrorism, which would have led to a much longer sentence, because prosecutors would have had to demonstrate that Vidal knew his European partners were using black market cigarettes to support the Real IRA. This illustrates the need for tougher penalties for tobacco smuggling.

The Vidal case is one among many where smuggling has been linked with funding terrorism. Unusually in this case the link to terrorism was direct and could be proven. In 2002, 28-year-old Mohamad Hammoud was the first person to be convicted under the 1996 Federal law prohibiting aid to designated terrorist groups. His brother, Chawki, 37, was found guilty of charges including cigarette smuggling, credit card fraud, money laundering and racketeering. Mohamad Hammoud was sentenced to 155 years in prison, while his brother, Chawki, was sentenced to 51 months.

In a second 2002 case, the European Union filed suit in New York state against R.J. Reynolds, the North Carolina firm that makes well known international brands Camel, Winston, Doral, and Kools. The allegation was that company executives collaborated with criminal mobs to smuggle cigarettes - in the process funding listed terrorist organisations. According to the suit, the scheme continued from 1992 well into 2003. The lawsuit is still being argued in court today.

Deborah Arnott
Chief Executive, ASH
ILLICIT CIGARETTE TRADE IN THE ISLAMIC REPUBLIC OF IRAN

Based on a report by the Iranian tobacco companies and the Central Headquarters of the Fight against Smuggling, a department of the Presidential office, the illicit cigarette market share in Iran was 14 per cent of the total market of 8.3 billion cigarettes in 2007. Three studies by the Tobacco Prevention and Control Research Center in Tehran concluded that 44 per cent of the cigarettes in Tehran were illicit in 2005–06, almost 23 per cent in 2007–08 and 21 per cent in 2008-9. In Tehran, foreign brands of cigarettes are in high demand, particularly by younger smokers. Foreign cigarettes are much more likely to be smuggled than domestic cigarettes, according to the research.

After Iran ratified the FCTC in 2005, the Iranian Comprehensive National Tobacco Control Law was approved by the Parliament in 2006. After a year, the law reached the stage of providing executive directions. For example, according to the law health warning labels shall be pictorial and shall cover not less than 50 per cent of each side of the cigarette packet (Article 5); all tobacco products shall be supplied in packets displaying serial numbers, and the logo of the tobacco manufacturing company (Article 6); the licence to sell tobacco products is issued by the Ministry of Commerce under the guidelines approved by the Committee (Article 7) and selling, marketing, carrying and/or holding contraband tobacco products by all civilians are strictly forbidden and shall be liable to regulations related to Goods Smuggling (Article 14). In 2008 the guidelines of these articles were approved by the National Committee of Tobacco Control. There has been some delay in the implementation of the guidelines, but they are expected to come into force in 2010. The guidelines would include the licensing of tobacco retailers and would result in a stricter control of selling of illicit cigarettes at the distribution level. Further research has to determine whether the new legislation for licensing retailers will result in the decline of illicit cigarette sales in Iran.

Dr Gholamreza Heydari
Tobacco Prevention and Control Research Center (Tehran)


ADDRESSING COUNTERFEIT IN THE PROTOCOL ON ILLICIT TRADE IN TOBACCO PRODUCTS

Unlawful use of trademarks is not harmful to public health. Accordingly, this protocol should not require Parties to make counterfeiting of tobacco products illegal.

Although not defined in the draft text, the term “counterfeiting” refers to an intellectual property crime that relates to the unlawful use of trademarks. Laws governing counterfeit seek to prevent private harm to a trademark owner. In contrast, the focus of the illicit trade protocol should be on the public harms caused by illicit trade. These public harms include tax evasion and its consequences for tobacco control.

Intellectual property protection is already governed by at least two widely applicable international agreements. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the Paris Convention for the Protection of Industrial Property establish obligations with respect to the protection of trademarks that apply to counterfeit tobacco products. Article 61 of TRIPs obliges the 153 members of the World Trade Organization to criminalise counterfeiting. TRIPs also imposes obligations to:

- provide access for a trademark owner to a range of remedies for trademark violations
- permit trademark owners to seek the suspension of counterfeit goods from release by customs authorities
- share information and co-operate in the elimination of counterfeiting.

The Paris Convention predates TRIPs, applies to some states that are not WTO Members and also sets out basic obligations with respect to trademark protection. Articles 9 and 10 oblige parties to seize products that unlawfully bear a trademark or trade name.

Domestic laws prohibiting counterfeit are ordinarily of a general character, meaning that they prohibit counterfeiting of any trademark, irrespective of the product with which the mark is associated. Most FCTC Parties have made general policy choices about the treatment of all counterfeit goods under domestic law. Accordingly, a requirement in the protocol to take a specific approach to tobacco products could differ from Parties’ existing general approaches, particularly for Parties that are not currently obliged to prevent counterfeiting under international law. This would have the effect of elevating the protection of tobacco industry trademarks above the protection of other marks.

The illicit trade protocol might encourage Parties to ensure that existing laws relating to counterfeiting apply and are fully implemented with respect to tobacco products. However, there would be no public health gain from the protocol actually compelling Parties to prohibit acts of trademark counterfeiting.
FIGHTING THE ILLICIT TRADE IN TOBACCO PRODUCTS IN BANGLADESH

Bangladesh is a small country with a population of 150 million, thus having one of the highest population densities in the world. The average life expectancy of the population is 61 years. The literacy rate is around 65 per cent, though many of the “literate” are only marginally so. Over 40 per cent of the population lives below the poverty line with an income of a dollar a day. This means millions of people cannot afford two square meals a day. In spite of this, a large number of the families spend a substantial portion of their income on tobacco. On average a male cigarette smoker spends more than twice as much on cigarettes as household expenditure on clothing, housing, health and education taken together.

According to the World Bank, the tobacco industry benefits economically in the business of smuggled cigarettes. Internal company documents of the multinational corporation British American Tobacco in Bangladesh have noted the large volume of smuggled cigarettes entering the country. The tobacco industry is considered to knowingly encourage cigarette smuggling. Bangladesh, in particular, is a major target due to its large population, close proximity to India and preference for English-style cigarettes. Over-production of cigarettes in Bangladesh suggests that the country may act as a supplier to neighbouring India and Myanmar.

Known routes of contraband tobacco products finding their way into Bangladesh include via Albania, Egypt, Poland and Singapore. Bangladesh is a particularly key destination, probably because of its large population. Huge quantities of bidi (made from tendu leaf) from India and cheroot from Myanmar are also arriving in Bangladesh. They are predominantly consumed in border districts because they are very cheap. In addition, a substantial number of brands which are not legally imported are also available in Bangladeshi markets. They include Surya, Panama (Indonesia), Dunhill, Maiwand (UK), Lips Cherry Cigars (Netherlands), Marlboro (Switzerland), ORIS, Pine, Gurleen, Esse Lits (Korea), Imperial, Steel, Captain Black, More, Cafe Creme and Winston (US).

The availability of cheap cigarettes and other tobacco products undermines efforts to promote cessation. It further hooks people in need of help. The creation of a black market eliminates all control over sales. Apart from representing a threat to public health by encouraging consumption, smuggling deprives governments of tax revenues and supports criminal organisations and corruption. Illicit trade in tobacco products is an important element in Bangladesh's National Strategic Plan of Action for Tobacco Control 2007-2010. Unless smuggling is counteracted at both national and international levels, the impact of other tobacco control measures will be largely undermined.

Governments should adopt a multi-sectoral approach to addressing illicit trade and reaffirm the importance of partnering with civil society in the development and implementation of measures to curb illicit trade. As the illicit tobacco trade can circumvent several tobacco control measures, especially tobacco taxes, a strong protocol to combat the illicit tobacco trade is essential for effective and successful implementation of the WHO FCTC – and to reduce tobacco use and save lives around the world.

Iqbal Masud
Coordinator, Dhaka Ahsania Mission
Syed Mahbubul Alam
Program Manager, WBB Trust
Md. Abu Masud
Deputy Secretary, Ministry of Health and Family Welfare, Government of Bangladesh

Global Adult Tobacco Survey. Factsheet: Bangladesh, 2009

- 43.3% of adults (41.3 million) currently use tobacco in smoking and/or smokeless form
- 44.7% of men, 1.5% of women, and 23.0% overall (21.9 million adults) currently smoke tobacco
- 26.4% of men, 27.9% of women, and 27.2% overall (25.9 million adults) currently use smokeless tobacco
- 63.0% of workers (11.5 million adults) are exposed to tobacco smoke at the workplace

20 March 2010

Dear Delegate,

Statement on behalf of 486 NGOs from all six WHO regions

The Framework Convention on Tobacco Control (FCTC) is already one of the world’s most successful treaties, helping to bring effective tobacco control polices to countries around the globe and saving millions of lives in the process.

Tobacco control organisations working on the implementation of the FCTC all over the world are following the INB-4 negotiations with great interest. Civil society fully understands the importance of combating illicit trade as an effective measure to curb the spread of global tobacco addiction and disease.

It is the sincere hope of civil society organisations that we have strong and effective protocol text to support national governments in their tobacco control efforts to combat the illicit trade of tobacco products.

At this point of the negotiations, it is with great urgency that we express our concern over the progress on the key elements and principles of the protocol and the potential that the Parties may run out of time to reach an agreement this week.

It is of the utmost importance in the concerted effort to combat the illicit trade of tobacco that this negotiating body presents a robust draft protocol to the Fourth Conference of the Parties (COP-4) to allow for full consideration and possible approval.

Sincerely yours,

Civil society