Strong start to negotiations must be maintained

The FCA congratulates the Parties on progress they have made so far. Having decided yesterday to continue to meet in plenary, drafting and negotiation of the illicit trade Protocol got off to a strong start.

The Parties powered their way through discussions on General Obligations, Licensing, Know Your Customer procedures, Tracking and Tracing, Record Keeping, Security and Preventative measures, and started on Internet Sales.

Views on the template

The Chair made clear he wanted to give everyone a chance to air their general views on the template in order to feed into the specific drafting which needs to take place before INB 2, later this year. Parties gave detailed comments on all of these elements of the Protocol.

On the overall template, Ghana, for the Afro group, expressed hope for a consensual outcome by the end of the process, based on the template. This view was generally supported.

Licensing

All agreed licensing was necessary but there was much discussion about exactly how it would operate. Some Parties in particular had concerns about the feasibility of operating licensing at retail level in their jurisdictions.

Track and trace

There was support for an international tracking and tracing system, but understandable concerns were raised by various Parties about the need to ensure that standards for such a system were equally applicable to developing as well developed countries. Support may be needed to enable developing countries to reap the benefits of an international tracking and tracing system. It was suggested that it would be helpful to have a working group at the next INB to look at tracking and tracing in more detail.

Drafting the Protocol

The Chair responded that he appreciated the need to take account of the differing needs of differing countries in drafting the text of the Protocol.
No reason why international trade laws should weaken the Protocol

Benn McGrady, a lawyer specialising in international trade law and tobacco control, argues that a protocol on illicit trade in tobacco products should, if anything, enhance the synergies between the elimination of illicit trade and the WTO regime.

Discussions over the past two days have included the possible relationship between a protocol on illicit trade in tobacco products and international trade agreements such as those covered by the WTO.

WTO agreements prohibit various kinds of conduct which restrict trade. However, these prohibitions are qualified by general exceptions that allow Parties to pursue a range of public policy objectives, such as the elimination of illicit trade.

For example, Article XX (d) of the General Agreement on Tariffs and Trade (GATT) permits WTO Members to impose measures that are necessary to secure compliance with laws or regulations, such as tax or customs laws or regulations.

This exception means that it is not possible to conclude that measures to eliminate illicit trade will necessarily violate the WTO covered agreements even if they appear to be trade restrictive. Specific measures should not, therefore, be omitted from a protocol as a consequence of the effect of the WTO covered agreements.

This conclusion is consistent with the approach taken in multilateral legal instruments governing illicit trade in other goods. These instruments include measures that may be restrictive of trade. For example, Article 10 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime, imposes export licensing requirements that are contrary to Article XI (quantitative restrictions) of the GATT. The inclusion of this provision is premised upon the assumption that exceptions in Article XX of the GATT extend protection to the measures.

Economic theories of international trade also support the adoption of an international system to govern illicit trade in tobacco products.

Trade in goods with negative externalities (such as tobacco products) may produce economic losses if these externalities are not internalised via taxation in the cost of the goods. Accordingly, the notion that taxation measures are enforceable is a fundamental assumption underlying economic theories relating to the benefits of trade. In addition, transaction costs are reduced where relative uniformity in regulation exists.

A protocol that facilitates the standardisation of international systems to govern illicit trade is likely, therefore, to minimise the burden upon international trade when compared to the use of approaches to a problem that differ from one jurisdiction to another.

In this context, a protocol on illicit trade in tobacco products should enhance the synergies between the elimination of illicit trade and the WTO regime.

The Protocol should seek to enhance decision-making in the context of the WTO. The terms of the Protocol should highlight the regulatory purpose and the effectiveness of the measures it includes. Such language would reinforce the necessity of particular measures as means of enforcing tax and customs laws and regulations. Additionally, depending upon the eventual content of the Protocol, it could provide that its terms prevail over those of trade agreements in the event of any conflict.

Benn McGrady will be speaking at Wednesday’s lunchtime briefing at 14.15 hours in Salle 4.
“Know Your Customer?”

John College III, former US Customs and law enforcement officer, applies his frontline experience to moving forward international efforts against the illicit tobacco trade

What do we mean by “Know Your Customer?”

Simply put, this is a policy of due diligence directed towards high risk industry customers. Two examples familiar to many are the financial and arms industries.

Banks and other financial institutions exercise due diligence with clients to ensure they are not laundering criminal proceeds or supporting international terrorism. Financial institutions report suspicious transactions to government agencies who analyze these reports in Financial Intelligence Units. Arms manufacturers and brokers industry, working with various government agencies, verify the end users of military equipment sales to prevent the illicit diversion of weapons and other military equipment.

Various international conventions recommended suspicious transaction reporting. The indicators of suspect transactions are commonly referred to as “Red Flags.” Here are some examples of “Red Flags” that may be useful in the detection of suspicious transactions in tobacco products supply chain:

**Red Flags**

- The customer or its address is similar to one of persons or entities found on the many lists maintained by parties to various international conventions, such as persons sought by Interpol, the International Court of Justice, as well as entities and persons embargoed by the United Nations.
- The customer or purchasing agent is reluctant to offer information about the end-use of the item.
- The product's capabilities do not fit the buyer's line of business. (Such as an order for cigarette packaging equipment for a bakery.)
- The item ordered is incompatible with the technical level of the country to which it is being shipped. (Such as cigarette tubes shipped to a country that has no cigarette industry.)
- The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.
- The customer has little or no business background.
- The customer is unfamiliar with the product's performance characteristics but still wants the product.
- Routine installation, training, or maintenance services are declined by the customer.
- Delivery dates are vague, or deliveries are planned for out of the way destinations.
- A freight forwarding firm is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the stated method of shipment or destination.

When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for re-export.
Los problemas globales requieren una respuesta internacional

El Convenio Marco para el Control del Tabaco de la Organización Mundial de la Salud ha sido definido por la comunidad internacional como una respuesta global para un problema mundial: la epidemia de tabaquismo.

El comercio ilícito de los productos del tabaco es también un problema global que afecta a todos los países y ninguno, en forma aislada puede resolverlo efectivamente.

En este comercio ilícito están involucradas organizaciones internacionales, incluso como lo mencionó el representante de la Organización Mundial de Aduanas, este comercio, subvenciona actividades terroristas.

Los productos contrabandeados y falsificados se movilizan a través de las fronteras, implicando que lo que un país haga o no para el control del comercio ilícito de estos productos puede afectar a otros países.

Cuando los países decidieron negociar un Protocolo sobre Comercio Ilícito reconocieron que la cooperación internacional es esencial para combatir este problema. Ninguno de nuestros países, a pesar de los esfuerzos nacionales y regionales, ha podido controlar efectivamente este tema, los expertos estiman que entre un 15 a 20 por ciento del mercado de cigarrillos es cubierto por el comercio ilegal, sea bajo la forma de contrabando o falsificación, Sólo en la región del MERCOSUR se estima que 73 mil millones de cigarrillos ilegales se comercializan anualmente lo que afecta a recaudación fiscal.

La aprobación por parte de la ONI y la posterior aplicación por los países, de un fuerte protocolo sobre comercio ilícito será una excelente herramienta que nos permitirá frenar este grave problema económico y sanitario en nuestra región.

El gran desafío que hoy enfrentan los países para desarrollar un protocolo eficaz es definir qué medidas deben integrar el mismo. Desafortunadamente la industria tabacalera ya está tratando de influenciar la posición de los países. Por ejemplo, la intervención de Honduras durante la plenaria, donde se opuso a casi todas las más importantes estrategias del Modelo de los expertos, es sumamente similar a la posición de la British American Tobacco en Centroamérica.

Afortunadamente la mayoría de los países aquí presentes apoyan fuertemente el Modelo presentado por los expertos y sugieren que se mantengan todos sus elementos.

Dentro de las medidas del Modelo de los expertos, la FCA destaca:

1. La concesión de licencias para poder vigilar y controlar a quien participa en el negocio del tabaco, con lo que se facilitará el cumplimiento de las leyes.

2. Conocer claramente los procedimientos aduaneros, para asegurarse que los participantes en el negocio del tabaco sólo realizarán transacciones con personas y entidades legítimas

3. Establecer fuertes sanciones financieras para disuadir a los fabricantes de facilitar el comercio ilícito y asegurarse que los fabricantes tengan un control sobre la cadena de suministro de sus productos.

4. Desarrollar un sistema de seguimiento y rastreo que permitan a las autoridades controlar el movimiento de los productos del tabaco a través de la cadena de suministro y distinguir entre productos legales y falsificados.

5. Mantener el registro de todas las transacciones y que las autoridades policiales tengan acceso a esta información para fines de auditoría y / o investigación.

La FCA ve el desarrollo de este Protocolo como un proceso que requiere un diálogo e intercambio de información entre países. Por esta razón es importante que no se elimine, prematuramente, ninguno de los elementos del Modelo de protocolo sobre el comercio ilícito de los productos de tabaco propuestos por el grupo de expertos.

La eliminación de uno de estos elementos disminuirá la eficacia del Protocolo y por lo tanto, su efectividad para salvar vidas y aumentar los recursos financieros en nuestros países.

La ONI 1 es el momento para que ustedes, delegados de Latinoamérica, manifiesten un fuerte compromiso, manteniendo todos los elementos del Modelo y otorguen al Presidente del ONI el mandato para desarrollar un texto que servirá como base de negociación para la ONI 2, donde las negociaciones sobre cada una de las disposiciones se desarrollarán en mayor profundidad.

Finalmente, la FCA confía plenamente en que el arduo trabajo que UDS están desarrollando culminará en el 2010, con un efectivo Protocolo sobre Comercio Ilícito del Tabaco.

Laurent Huber, Director
Eduardo Bianco, Director para Latinoamérica.
Laura Salgado, Coordinadora Regional.
Tobacco Smuggling in Africa

Hitler’s minister of propaganda, Joseph Goebbels, reportedly claimed that if a lie were repeated enough times it would become widely accepted as truth. The tobacco industry clearly subscribes to the Nazi school of propaganda. The Tobacco Institute of South Africa repeatedly claims that cigarette smuggling has increased in South Africa as a result of increases in tobacco excise taxes, and that smuggling harms the industry. In knee-jerk fashion, it repeats the myth each year at budget time, conveniently distorting the truth.

The truth is that the industry itself benefits from smuggling and encourages it. The availability of cheap illicit cigarettes keeps many price-sensitive smokers – like the poor and the young – smoking. When prices go up, instead of quitting they switch to lower-priced contraband cigarettes. Since the cigarette manufacturers supply both smugglers and the legal trade, the industry makes its profits irrespective of whether end-buyers purchase cigarettes legally or illegally. The real losers are the country’s revenue and health services.

There is ample evidence of industry complicity in smuggling. Once-secret internal tobacco industry documents reveal industry practices. The documents suggest that the tobacco companies not only colluded with smugglers by knowingly supplying them with cigarettes, but also centrally organised the process and collecting hundreds of millions of pounds worth of black market proceeds.

The documents show that the tobacco companies monitored and watched over the smuggling of their brands in about 30 African countries including Benin, Cameroon, Central African Republic, Nigeria, Niger and Sudan. From the early 1970s to at least the early 1990s, the documents bear witness to the varied roles of British American Tobacco, in smuggling operations in Africa. The company:

- used third-party intermediaries, like Sorepex, a Liechtenstein-based trading company, to ensure that its cigarettes are sold in the illegal markets:

  "Our objective now is to preserve the "façade" that SORPEEX represents between us and the sensitive markets of Togo, Benin, Niger (Unit I) and Equatorial Africa (Unit II), but at the same time, enable the BAT field force to take over the management of this important business.” Letter from BAT to SORPEEX, 1989

- protected illegal markets by investing in them and found ways to advertise its smuggled brands in countries where these brands were not legally available:

  "BHSF [Benson & Hedges Special Filter] has 80% share of imports which it has dominated for several years and enjoys country-wide distribution. ...The Unit II [Equatorial Africa] market produced a valuable contribution and it is intended to continue investment in order to protect it from further erosion. As there are no legal imports... no local media is used. However, a major campaign on the Africa No I Radio programmes transmitted from Gabon is funded from Unit II resources.” BAT (UK and Export) Limited, 1990

- condoned the concealment of contraband cigarettes:

  "Niger: Discussion was held concerning direct imports to Nigeria through Mr. Adji ... [who] would disguise the cigarette importations by calling the shipment something else, e.g. matches.” Meeting of BAT and SORPEEX, 1987

  "For the first time, Bogno will buy 300 cartons: this is the capacity of his truck, taking into account the other merchandise which will 'hide' the cigarettes. (translated from French) SORPEEX to BAT

- used a small legal market to justify advertising to build up illegal sales:

  “When the issue of Unit II [Equatorial Africa] was discussed where BATUKE [BAT UK and Export] wish to appoint a domestic importer enabling us the provide cover for advertising and GT [general trade – i.e., smuggling] business, Sir Patrick [Sheehy] felt that it was perfectly acceptable for BAT Cameroon to recommend a domestic importer for BHS.” BAT internal memo, 1991

The solution to the cigarette smuggling problem is not that which is proposed by the industry – lower excise taxes. It is instead action against criminals. Manufacturers and wholesalers who supply smugglers with cigarettes should be held liable for the tax losses arising from this criminal activity.

Africa has much to gain from the early adoption and implementation of the protocol on illicit trade.

Dr Yussuf Saloojee
Existing treaties on transnational crime and the proposed Protocol

Professor Neil Boister, an expert in transnational criminal law, outlines how the Protocol could be made consistent with existing legal frameworks.

One of the issues raised on the first day of the INB in plenary was whether the Protocol would duplicate provisions in existing treaties providing for international co-operation against transnational crime.

At a simple level, this question can be answered by reference to the fact that the Parties to these earlier treaties will not necessarily become party to the FCTC or to the proposed Protocol on illicit trade, which necessitates a new and comprehensive agreement.

The more complex answer is that of these existing treaties the vast majority of multilateral treaties deal with specific forms of criminality.

The only “general” treaty is the UN Convention on Transnational Organised Crime (UNTOC), settled at Palermo. This convention provides, however, for the criminalisation of organised criminal groups involved in serious offences and thus has its own peculiar material scope.

In the development of UNTOC the same issue of duplication also came up, raised by Australia, Austria and other States. It was decided at a very early stage that the main convention would deal with organised crime but that allied, but independent, issues of trafficking humans, people smuggling and small arms trafficking, would be dealt with in separate protocols, each of which has its own legal assistance regime.

It is thus clear that the proposed Protocol on illicit trade follows an established pattern of development.

This is entirely consistent with the two main goals of such instruments: the standardisation of criminal offences across different jurisdictions; and the establishment of a mutual assistance regime in respect of these criminal offences, in order that national boundaries do not serve to protect criminals.

There is in the nature of these instruments some overlap – one piece of national legislation may serve to meet treaty obligations in respect of a number of treaties, one set of procedures may serve many offences. But the method of international society in making a community response to crime has been to deal with each crime separately and to attach a particular procedural regime to each – which is what is proposed in the Template.

Professor Boister will be speaking at Wednesday’s lunchtime briefing at 14.15 hours in Salle 4.

Guess what...

It’s déjà vu all over again!

Listening to Japan from the floor today one could be forgiven for thinking that half a decade of FCTC negotiations had not gone by and we were back in 2003.

This article below is from Alliance Bulletin 36, 17 February 2003, FCTC INB 6, Geneva:

“Tobacco – it’s a legal product!

“You can usually tell when someone is about to sell out public health and offer justification for a weak and inadequate treaty. They start by saying, ‘Well, you have to accept that tobacco is a legal product…’

“But the legal status of tobacco has an extremely limited meaning: it means that if you make it, sell it or use it, you are not committing a criminal offence.

“It creates no additional fundamental rights that prevent governments regulating it – for example by banning its advertising and misleading branding. “Many legal products are subject to exacting legal restrictions – weapons, dangerous chemicals, asbestos, pharmaceuticals, and hazardous wastes to name just a few. ‘Tobacco is a legal product’ is the classic non sequitur rolled out by tobacco apologists everywhere.”

Japan sounded like a broken record on Tuesday, responding to almost every issue raised: “Japan does not support these measures.” It even opposed any measures at all which would require manufacturers to control their supply chain. Rather surprisingly, Japan supported licensing in principle but in practice wanted to remove the elements necessary to make it effective on the basis that they were “not proportionate.”

With the tobacco epidemic claiming 5.4 million victims a year, it is Japan’s standpoint which is not proportionate.
Canada was in the forefront of global efforts to use tax policy as an instrument of public health in the 1980s and early 1990s. In a ten-year period, tobacco tax increases played the key role in reducing per capita cigarette consumption by roughly 40 per cent and by even more among young people. But, like any market, the cigarette trade is dynamic. As taxes were increased in successive federal and provincial budgets the cigarette companies mounted a vigorous and increasingly aggressive defence of their interests while government bodies lagged in their understanding of, and reaction to, changing market dynamics.

By the early 1990s, Canadian cigarette companies had started shipping enormous and rapidly-increasing quantities of cigarettes to the United States where there was no domestic market of any significance for Canadian-style cigarettes. The market had suddenly ‘mutated’ into one that involved wide-scale illegal re-importation of Canadian cigarettes. Governments were slow to recognise what was happening and how it impacted on health and fiscal matters. There was a general tendency to dismiss accusations about the role of cigarette companies in facilitating cigarette smuggling. The market had mutated but the ideas and tools available to counter the illicit trade had not kept up, and the result was a devastating tobacco tax reduction in early 1994.

Measures were belatedly introduced that made it very unlikely that the big cigarette companies could once again undermine tobacco tax policies through the use of cross-border shipments. Cigarette taxes gradually crept back to high levels as governments sought to once again use fiscal policy to complement health policy. But the market remained dynamic, with various players including those previously involved in smuggling, looking for ways to profit. The result was that Canada was once again ‘fighting the last war’. The country, ready as it was to prevent major cigarette companies supplying smuggling networks from Canada, missed yet another mutation as the contraband trade shifted to new small scale manufacturers largely based on First Nations Reserves. The contraband trade has once again grown to nearly 20 per cent of the domestic market, governments are losing billions in revenue and public health is suffering significantly.

As measures are eventually put into place to deal with the current version of the illicit cigarette trade they will, in the absence of the sort of co-ordinated set of measures envisioned for the FCTC Protocol on Illicit Trade, almost certainly cause yet another mutation of the smuggling business. In many ways the mutating of an illicit business can be compared to the mutations of a virus. Attacking a fast-mutating virus such as that causing HIV with a single measure that ‘used to work’ is almost certain to fail. But an attack based on a combination of measures and ongoing work to further refine our interventions can show great effectiveness.

Canada will hopefully continue to show leadership on healthy fiscal policies as well as effective ways to protect such policies, but will only be successful in the long term if the global community cooperates. As WHO has long known, viruses do not respect international borders.

### Breaking news:
Results of a groundbreaking investigative project involving investigative reporters from several nations in the Balkan states, Romania, Moldova and Ukraine, and released yesterday (12 February) in Bucharest, reveal the large-scale flow of cheap, illicit contraband through ports including Odessa, in the Ukraine.

The project, entitled “Tobacco Roads”, was conducted by journalists working with the Centre for Investigative Reporting, in Sarajevo, Bosnia-Herzegovina, and the Romanian Center for Investigative Journalism in Bucharest, and elsewhere. The products included legally produced cigarettes that were being traded and shipped illegally, as well as counterfeit products from as far away as China.
The Middle East: illicit trade "dark spot"

Illicit trade in tobacco not only impedes the controlled distribution of tobacco products but also allows the groups and gangs involved in this lucrative trade to garner unlimited illegitimate profits. Unless this situation is confronted, the trade market will face major difficulties. International security may be compromised by criminal organisations wielding their illegal assets.

The drafting of a protocol to combat illicit tobacco will be a major step forward, as long as it is effectively enforced by its signatories. It will offer a new opportunity for reducing societies’ tobacco consumption. One way to curb the problem could be to impose severe sentences on distributors and sellers of illicit tobacco products. The fight against the illicit trade throughout the Middle East needs to be integrated with other methods such as forging co-operation between countries in the region, imposing stringent punishments on those breaking the law and, if necessary, destroying the confiscated illicit products.

Containing the illicit trade in the region depends on a number of important factors which may include, among other things:

- ratification and proper implementation of the FCTC by contiguous nations;
- operation of an effective supervisory mechanism by the WHO;
- expansion of co-operation among countries in the region - especially those sharing borders - in the field of information and security, as well as the establishment of stable and more powerful central governments in Iraq and Afghanistan.

A lack of international co-operation in these fields, combined with indifference, and sometimes with the complicity of governments outside the region undoubtedly risks exporting the problem to the borders of other regions, as has been the case with narcotics.

Ali Abdolahinia, MD
Research Manager
Iranian Anti Tobacco Association

Dirty Ashtray Award

To Honduras for behaving like Japan.

Orchid Award

To South Africa for calling on Parties not to weaken the template because the tobacco industry will exploit any loopholes.