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Tobacco, Global Public Health, and Non-Governmental Organizations: An Eminent Pandemic or Just another Legal Product

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TOBACCO, GLOBAL PUBLIC HEALTH, AND NON-GOVERNMENTAL ORGANIZATIONS: AN EMINENT PANDEMIC OR JUST ANOTHER LEGAL PRODUCT?

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"Smoking is the chief single avoidable cause of death in our society and the most important health issue of our time."¹

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^{1.} Joachim Roski & Robert Jeddeloh, *Tobacco Use Control*, MED. J. ALLINA, Winter 1997, at 8 (quoting C. Everett Koop). "Cigarette smoking remains the most important cause of preventable morbidity and early demise in developed countries." LAWRENCE M. TIERNY JR. ET AL., CURRENT MEDICAL DIAGNOSIS AND TREATMENT 5 (1997). "Cigarette

"Tobacco products have no safe level of consumption, and are the only legal consumer products that kill when used exactly as the manufacturer intends."²

I. INTRODUCTION

American actions and perspectives regarding tobacco have profoundly influenced the world in many ways. Health concerns first articulated by the Surgeon General in 1964³ led to a new paradigm in how we view tobacco, public health, and smoking in general. The Surgeon General's 1964 report proved to be a watershed in America. It was the first of many government publications to detail the unhealthy medical effects of tobacco.⁴ As a result, the U.S. government now regulates the

2. WHO, The Public Health Implications of the Economics of Tobacco (visited Mar. 30, 1999) <http://www.who.org/programmes/psa/pres2.htm>. "Tobacco is the leading preventable cause of death: cigarettes and other tobacco products kill 420,000 American smokers and 53,000 nonsmokers every year. This toll exceeds the deaths resulting from alcohol abuse, AIDS, traffic accidents, homicides, and suicides combined." STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996).

3. U.S. DEP'T HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) [hereinafter 1964 REPORT].

4. See, e.g., Nicotine in Cigarettes and Smokeless Tobacco Products is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act, 60 Fed. Reg. 41,454 (1995) [hereinafter 1995 FDA Nicotine Report]; SURGEON GENERAL, U.S. DEP'T HEALTH & HUM. SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) [hereinafter PREVENTING TOBACCO 1994]; U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISEASES (1993) [hereinafter PASSIVE SMOKING 1993]; 1990 REPORT, supra note 1, at 7-9, 37-48; SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUMAN SVCS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS (1989); SURGEON GENERAL, U.S. DEPT. OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION (1988); ADVISORY COMM. TO THE SURGEON GENERAL, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF USING SMOKELESS TOBACCO (1986) [hereinafter SMOKELESS TOBACCO 1986]; SURGEON GENERAL, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986); SURGEON GENERAL, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE (1984); SURGEON GENERAL, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CARDIOVASCULAR DISEASE (1983); 1964 REPORT, supra note 3; U.S. Center for Disease Control (CDC), CDC's TIPS - Tobacco Use in the United States (visited Mar. 21, 1999) <http://www.cdc.gov/nccdphp/osh/tobus_us.htm> (listing diseases and other adverse effects); CDC, CDC's TIPS - Maternal Smoking During Pregnancy (visited Mar. 21, 1999) <http:// www.cdc.gov/nccdphp/osh/matsmkg.htm> (describing the relationship between

smoking is the chief preventable cause of death in our society." U.S. DEP'T HEALTH & HUM. SERVS., SMOKING AND HEALTH: A NATIONAL STATUS REPORT 1 (2d ed. 1990) (statement of Louis W. Sullivan) [hereinafter 1990 REPORT]. "Smoking is emerging as the world's largest single preventable cause of illness and death." WORLD HEALTH ORGANIZATION (WHO), THE WORLD HEALTH REPORT 1995: BRIDGING THE GAPS 34 (1995) [hereinafter WORLD HEALTH REPORT 1995].

formerly unfettered tobacco industry based, in part, on continuing medical revelations.⁵ Despite a significant minority⁶ of the American

5. See Environmental Tobacco Smoke: Proceedings of the International SYMPOSIUM AT MCGILL UNIVERSITY 1989 (Donald J. Ecobichon & Joseph M. Wu eds., 1990); NAT'L RES. COUNCIL, ENVIRONMENTAL TOBACCO SMOKE MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986); A.K. Hackshaw et al., The Accumulated Evidence on Lung Cancer and Environmental Tobacco Smoke, 315 BRIT. MED. J. 980 (1997); M.R. Law et al., Environmental Tobacco Smoke Exposure and Ischaemic Heart Disease: An Evaluation of the Evidence, 315 BRIT. MED. J. 973 (Oct. 18, 1997); Eliseo J. Pérez-Stable et al., Nicotine Metabolism and Intake in Black and White Smokers, 280 JAMA 152 (1998) (suggesting racial differences may be due to behavioral and biological factors)); CNN Financial News: CEO Admits Smoking Risk (CNN cable broadcast, Aug. 21, 1997) (acknowledging a possible link between smoking and death); Filter Cigarettes Linked to Form of Cancer, TIMES UNION, Nov. 5, 1997, at A9 (use of filtered low-tar cigarettes and resultant deeper inhaling closely parallels deaths from adenocarcinoma, a cancer deep in the lungs); Robert Langreth, Secondhand Smoke, Past Tobacco Use Found to Irreversibly Damage Arteries, WALL ST. J., Jan. 14, 1998, at A3 (reporting on George Howard et al., Cigarette Smoking and Progression of Atherosclerosis: The Atherosclerosis Risk in Communities (ARIC) Study, 279 JAMA 119 (1998)); Thomas H. Maugh II, Study Links Gene Pattern to Strong Smoking Addiction Health: Finding Supports View that an Impaired Ability to Feel Pleasure Plays a Role in the Addictive Process, L.A. TIMES, Mar. 4, 1998, at A1; Nat'l Ctr. on Addiction & Substance Abuse at Columbia Univ., Fetal Tobacco Syndrome (visited Mar. 19, 1998) < http://www.casacolumbia.org/pubs/jun96/tob4.htm>; A. Ott et al., Smoking and Risk of Dementia and Alzheimer's Disease in a Population-Based Cohort Study: The Rotterdam Study, 351 THE LANCET 1840-43 (1998) (reporting on the relationship between smoking and dementia); Andrea Petersen, A Study Warns of Cigars' Role in Some Heart Diseases, WALL ST. J., Mar. 20, 1998, at B1; John Schwartz, Perez-Stable, Suffer Greater Smoking Toll, Studies Say, WASH. POST, July 8, 1998, at A3 (citing Ralph S. Caraballo et al., Racial and Ethnic Differences in Serum Cotinine Levels of Cigarette Smokers: Third National Health and Nutrition Examination Survey, 1988-1991, 280 JAMA 135 (1998) (finding that black smokers retained substantially higher levels of cotinine than white smokers); John Schwartz & Saundra Torry, Contrite Tobacco Executives Admit Health Risks Before Congress, WASH. POST, Jan. 30, 1998, at A14; Cf. Henry Weinstein, Judge Orders Tobacco Firms to Turn over Secret Papers, THE OREGONIAN, Mar. 8, 1998, at A1 (revealing industry documents indicating knowledge of tobacco's detrimental effects long before the public did); Henry Weinstein, Yearly Medicaid Cost of Smoking Put at \$12 Billion, L.A. TIMES, Mar. 10, 1998, at A1 (reporting on annual Medicaid costs without including funding from any other federal program or private insurers).

Cigarettes are now responsible for one in every five deaths in the USA.... Tobacco dependence may have a genetic component. Smokers have twice the risk of fatal heart disease, ten times the risk of lung cancer, and several times the risk of cancers of the mouth, throat, esophagus, pancreas, kidney, bladder, and cervix; a two- to threefold higher incidence of stroke and peptic ulcers (which heal less well than in nonsmokers); a two- to fourfold greater risk of fractures of the hip, wrist and vertebrae; and a twofold risk of developing cataracts.... Smokers die 5-8 years earlier than never smokers. Smoking cessation lessens the risk of death and of myocardial infarction in men and women with coronary artery disease; lessens the risk of stroke; slows the rate of progression of carotid arteriosclerosis; and is associated with a reversal of bronchitis and improved pulmonary function... The children of parents who smoke have lower birth weights, more frequent respiratory infections, less efficient pulmonary function, and a higher incidence of

mental retardation and prenatal smoking).

population that disagrees with the federal government, Congress and several executive agencies have enacted many laws and rules to regulate tobacco: including labeling,⁷ advertising,⁸ workplace rules,⁹ and reporting.¹⁰ Proposed federal regulations continue to surface.¹¹ The march to regulate tobacco consumption continues nationwide.¹² Anti-

chronic ear infections than children of non-smokers and are more likely to become smokers themselves.

TIERNY JR. ET AL., supra note 1, at 5.

6. See, e.g., U.S. Senator Ford (D-KY) announcing his opposition to a FDA rule to limit tobacco products sales and marketing to children. "It's like calling in the FBI for a speeding ticket." Senator Wendell Ford Criticized for Remark on Kids' Smoking Issues, in American Cancer Soc'y (ACS), Great American Smokeout GASP: The Dirt (visited Mar. 2, 1998) http://www.cancer.org/smokeout/thedirt/html [hereinafter The Dirt].

7. See, e.g., Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-08 (1994) [hereinafter 1986 Smokeless Tobacco Act]; Comprehensive Smoking Education Act of 1984, 15 U.S.C. §§ 1331-41 (1994); Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-41 (1994) [hereinafter 1969 Cigarette Smoking Act]; Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331-41 (1994)) [hereinafter 1965 Cigarette Labeling & Advertising Act].

8. See, e.g., Little Cigar Act of 1973, 15 U.S.C. §§ 1331-40 (1994); 1969 Cigarette Smoking Act, supra note 7; 1965 Cigarette Labeling & Advertising Act, supra note 7.

9. See, e.g., Pro-Children Act of 1994, 20 U.S.C. §§ 6081-84 (1994); Smoking Aboard Aircraft, 14 C.F.R. § 252 (1973); Prohibition Against Smoking on Scheduled Flights, 49 U.S.C. § 41706 (1994).

10. See, e.g., Federal Trade Commission, FTC Requires Cigar Companies to Supply Data on Cigar Sales and Advertising Expenditures, available in 1998 WL 49964; 1986 Smokeless Tobacco Act, supra note 7; FTC, 1997 Smokeless Tobacco Report (visited Mar. 22, 1999) http://www.ftc.gov/bcp/reports/smokeless97.htm Smokeless Tobacco Act and reporting smokeless tobacco sales and promotions).

11. See, e.g., Safety & Health: OSHA Suggests Legislating Workplace Ban; Language Would Protect Rule From Lawsuits, Daily Labor Rep. (BNA) No. 37, at A-7 (Feb. 25, 1998) (proposal to regulate smoking in the workplace); Tobacco Disclosure and Warning Act of 1997, S. 527, 105th Cong. (1997) (requiring a contents listing, tougher warnings, and explicit labeling). Compare Brad Sherman, Valley Perspective for Sake of Children, Congress Must Ban "Kiddie Packs" Tobacco Companies' Marketing Strategy Clearly Targets the Young, L.A. TIMES, Mar. 1, 1998, at B17 (proposal to ban sales of packages with less than 15 cigarettes), with Myron Levin, Tobacco Deal Spurs Bonanza for Lobbyists, Mar. 1, 1998, L.A. TIMES, at A1 (describing Single Stick Inc., an Arizona tobacco firm, that markets single cigarette packs).

12. See, e.g., CAL. LABOR CODE § 6404.5 (West Supp. 1998) (first state to ban smoking in bars, effective Jan. 1, 1998); N.Y. CITY ADMIN. CODE § 17-501 to 514 (Smoke-Free Air Act); 1986 Minn. Laws 352 § 2 (repealed 1987) (first state to ban free samples of smokeless tobacco); UTAH CODE ANN. § 76-10-102 (1995) (first state to ban outdoor advertising, excepting dealers); Minneapolis Code Ord. § 281.55 (with St. Paul, first cities to ban free samples in 1979); ARIZ. REV. STAT. ANN. § 36-601.01 (West 1993) (first state to restrict public smoking). See generally Alan Henderson, Snuff Out Attempts Aimed at Repealing Smoke-Free Bar Law to Shine Golfer's Remarks Show How You Can Drive Your Reputation into the Rough, BUS. J. (SAN JOSE), Mar. 30, 1998, available in 1998 WL 8035727 (reporting on the success of smoke-free bars and the tobacco industry's misinformation campaign); Barry Meier, New Laws Take Anti-Tobacco Penalties Straight to Kids, THE OREGONIAN, Dec. 7, 1997, at A10 (listing penalties for minors buying or possessing tobacco products such as fines up to \$1000 or suspended driving privileges); Lynne Tuohy, Proposal to Ban Sales of Tobacco Splits Small Town, THE OREGONIAN, Oct. 19, 1997, at tobacco public announcements $^{\rm 13}$ and publications $^{\rm 14}$ are relatively common.

America continues a leading role in the legal arena too. Tobacco litigation in America entered its third wave¹⁵ when states sued the tobacco industry. States claimed that the industry committed fraud, deception, and racketeering upon the public, thereby creating a causal relationship between public smoking and excess state Medicaid expenses.¹⁶ By focusing on the industry's actions in the third wave of litigation, and not the smokers' behavior, the states avoid the winning industry defense of assumption of risk because the states¹⁷ are third

15. See Heather Cooper, Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating The Hazards Associated With Tobacco Products, 16 BROOK. J. INT'L L. 275, 279-89 (1990); Paula C. Johnson, Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government, 25 SUFFOLK U.L. REV. 1, 11-16 (1991) (describing the first wave in the 1950s and 1960s, based upon fraud, negligence, and breach of warranty theories, and the second wave during the 1980s and 1990s based upon failure to warn and design defect theories); Mark D. Fridy, Note, How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking, 72 IND. L.J. 235 (1996). See generally Marc. Z. Edell, Cigarette Litigation: The Second Wave, 22 TORT & INS. L.J. 90 (1986); Donald W. Garner, Cigarette Dependency: Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423 (1980).

16. See, e.g., State v. American Tobacco Co., No. 94-1429 (Ch. Ct. Jackson County, 1994) (first state to sue the industry for Medicaid expenses). See Henry Weinstein, Big Tobacco Settles Minnesota Lawsuit for \$6.6 Billion: Accord is Reached Hours Before Jury was to Begin Deliberations. Industry Agrees to Ban Payments to Entertainment Sources and Disband Research Council, L.A. TIMES, May 9, 1998, at A1. See generally Christa Sarafa, Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act, 2 DEPAUL J. HEALTH CARE L. 123 (1997); Warren Richey, Big Tobacco Hit by Florida Strategy, Global Assault, THE OREGONIAN, Aug. 10, 1997, at G1-2; Lawrence J. Goodman, Hearings Show Quagmire of Issues in Tobacco Deal, THE OREGONIAN, Dec. 14, 1997, at A18. After individual settlements with Florida, Minnesota, Mississippi, and Texas, the tobacco industry settled with the remaining 46 states. Milo Geyelin, Tobacco Companies and 46 States Agree to \$206 Billion Tobacco Deal, WALL ST. J. EUROPE, Nov. 23, 1998, at 3, available in 1998 WL 21154753.

17. Cf. Christopher Clark, Cities Stake Claim for Share of States' Tobacco Money: Municipalities are Watching Closely an Attempt by St. Louis and a Group of Missouri Hospitals to Recoup Their Smoking-Related Costs, THE OREGONIAN, Dec. 14, 1998, at A13; Deborah Pines, Unions' Tobacco Suit Cleared to Proceed Class Action Claims Higher Health Care Costs, N.Y. L.J., Mar. 27, 1998, at 1 (reporting on Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.); Saundra Torry, Foreign Nations Sue Tobacco Companies The Governments of Guatemala, Nicaragua and Panama File Lawsuits Patterned on the Actions Brought by U.S. States, THE OREGONIAN, Jan. 19, 1999, at A5; Bob

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A14 (proposing to ban tobacco product sales).

^{13.} See Vice President Gore Launches New Campaign to Help Stop Tobacco Sales to Children, M2 PRESSWIRE, Mar. 6, 1998, available in 1998 WL 10219859; California Dep't Health Serv., California Launches Aggressive New Anti-Tobacco Advertising Campaign, (visited Feb. 16, 1998) http://www.dhs.cahwnet.gov/prssrels/1997/16-97.htm (describing counter-advertising directed at youth); Roski & Jeddeloh, supra note 1, at 15 (discussing partnering between the CDC & managed care organizations to counter-advertise).

^{14.} See GLANTZ ET AL., supra note 2 (examining 4,000 pages of formerly secret internal tobacco industry documents).

parties that never smoked.¹⁸ The tobacco companies settled out of court with the states, agreeing to payments totaling \$206 billion over the next twenty-six years. Additional conditions of the settlement are bans on advertising directed toward teens and children, and tobacco companyfunded study of programs to reduce teen smoking and prevent tobacco related disease.¹⁹ Non-smokers adopted similar strategies to sue the industry.²⁰

Changing public perceptions and laws are like tremors that shake the tobacco industry's foundation. In 1997, California removed tobacco from a list of inherently unsafe consumer products that shielded manufacturers from product liability actions.²¹ While in the 1970s Florida manufactured cigarettes and supplied them while in state prisons and hospitals, by 1994 Florida's position had changed diametrically from ratification to confrontation.²² Congressional legislation may radically

18. Cf. Sarafa, supra note 16, at 132-43. But see State ex rel. Miller v. R.J. Reynolds Tobacco Co. et al., No. CL 71048 (Polk County Dist. Ct., 1996). Judge Linda Reade dismissed part of Iowa's suit against tobacco companies and stated, "Iowa, unlike Florida, has not enacted any legislation which specifically grants the state the right to proceed directly against tobacco companies to recover for medical expenses paid by the state for alleged smoking-related illnesses." Renee Montage, Morning Edition: Iowa Smoking (Nat'l Pub. Radio broadcast, Aug. 27, 1997). Cf. Nancy Meersman, NH High Court Reinstates Tobacco Suit; Second-Hand Smoke Case Seen as Precedent Setting, THE UNION LEADER (Manchester, NH), May 30, 1998, at A1 (noting the adoption of tort law making suppliers of dangerous products subject to bystanders' negligence claims); N.H.'s Highest Court Reinstates Secondhand Smoke Lawsuit; The Estate of Roxanne Ramsey-Buckingham, an Nonsmoker Who Died of Lung Cancer, Wins the Chance to Go to Trial, PROVIDENCE SUNDAY J., May 31, 1998, at 6A, available in 1998 WL 12188143.

19. Tobacco Settlement Summary (visited June 14, 1999) <http://www.naag.org/glance.htm>; See also Multi State Settlement (visited June 14, 1999) <www.tobaccofreekids.org/html/multi-state_settlement.html> (detailing how much money each state will receive from the settlement and what plans the states have made for the money).

20. See Debbie Elliott & Scott Simon, Weekend Edition: Smoke Suit Settled (Nat'l Pub. Radio broadcast, Oct. 11, 1997) (describing settlement of the Florida flight attendant class action suit involving second-hand smoke); John Schwartz, Firms Not Liable in Secondhand Smoke Death, WASH. POST, Mar. 20, 1998, at A17 (prevailing over Mildred Wiley's estate in the first American wrongful death suit involving environmental tobacco smoke (ETS)); Robert Siegel, All Things Considered Tobacco Year in Review (Nat'l Pub. Radio broadcast, Dec. 31, 1997) (flight attendant suit). But see Myron Levin, Verdict Deals Tobacco Firms a Historic Defeat, L.A. TIMES, June 11, 1998, at A1 (reporting on a \$1 million judgment for the estate of Roland Maddox, a smoker, against Brown & Williamson that included the first punitive damages ever awarded against a cigarette company).

21. CAL. CIVIL CODE § 1714.45 (West Supp. 1998) (enabling individuals to sue tobacco companies).

22. See Sarafa, supra note 16, at 138 (citing Florida Trial Court Strikes Affirmative Defenses of Tobacco Companies, TOBACCO LITIG. REP., Feb. 14, 1997.

Van Voris, Tribal Court to Judge Tobacco, THE NAT'L L.J., Mar. 2, 1998, at A6 (describing Beaver v. American Tobacco Co. et al., No. CV97-27 (Dist. Ct. Muscogee Creek Nation, 1997) and other Native American lawsuits against the tobacco industry); Richard B. Schmidtt, Tribal Courts Draw Adroit Lawyers, WALL ST. J., Mar. 20, 1998, at B1.

alter the present situation by shifting liability on a national scale.²³

Although recent events continue to alter the American legal landscape on a regular basis, an in-depth analysis of the changes in the third wave of litigation and legislative proceedings affecting tobacco are beyond the scope of this article. This article's discussion of the changing legal strategies and results is limited to a general analysis as applicable in a global context.

Global attitudes concerning tobacco are similar to the predominate American perspective, but less pervasive in the public recognition of tobacco's dangers and set within a broader spectrum of beliefs, behaviors, and knowledge. Health issues are the leading reason for concern,²⁴ due in large part to world events in the later part of this century.²⁵ Several factors contribute to increasing tobacco consumption: rising living standards, the globalization of economies, technological innovations, and modern advertising.²⁶ Predictably, tobacco consumption increased dramatically in recent decades.²⁷ International and domestic health organizations are leaders in the anti-tobacco war.²⁸

The World Health Organization estimates that . . . [0]n current evidence, lifelong smokers, on average, have a 1 in 2 chance of dying from tobacco. And half of these, or 1 in 4 of all smokers, will die in middle age, before age seventy. Smokers who die will lose, on average, about 22 years off their normal life expectancy.

Id. See also China's Cigarette Production Down, Profits Up, AGENCE FRANCE-PRESSE, Mar. 24, 1998, available in 1998 WL 2247296.

25. See generally PAN AMERICAN HEALTH ORGANIZATION, INTERNATIONAL HEALTH: A NORTH-SOUTH DEBATE (1992).

26. WHO, Smoking Trends, in Tobacco and Health: The Facts (visited Aug. 4, 1997) http://www.who.org/programmes/psa/pres3.htm>.

27. Id. (smoking in China increased by 20% from 1985 to 1992); WHO, Tobacco Consumption (visited Aug. Mar. 22, 1999) http://www.who.int/psa/toh/Alert/apr96/3.html (documenting the 260% increase in Chinese cigarette consumption from 1970-72 to 1990-92). See generally, Chip Jones, Tobacco Growers Get Survival Strategy "Never Seen Situation So Serious," RICHMOND TIMES-DISPATCH, Mar. 7, 1998, at C1 (placing hopes on emerging markets such as Turkey and Vietnam).

28. See, e.g., organizations such as: Action on Smoking and Health, International Agency for Research on Cancer (IARC), International Union Against Cancer, International Union Against Tuberculosis and Lung Disease, Pan American Health Organization,

^{23.} See Library of Congress, Thomas Jefferson Congressional Information Web Site (visited June 14, 1999) http://thomas.loc.gov/cgi-bin.query (listing 50 bills that have been introduced to the United States Senate and House of Representatives proposing to-bacco regulation).

^{24.} See THE GLOBAL BURDEN OF DISEASE (Christopher J.L. Murray & Alan D. Lopez eds. 1996) ("By 2020, tobacco is expected to kill more people than any single disease surpassing even the HIV epidemic." Figs. 3 (DALYs [Disability-Adjusted Life Years] Attributable to Diarrhoea, HIV and Tobacco, 1990-2020) & 4 (By 2020, Tobacco is Expected to Cause More Premature Death and Disability than any Single Disease)); RICHARD PETO ET AL., MORTALITY FROM SMOKING IN DEVELOPED COUNTRIES 1950-2000 (1994); WHO, Answers to Some Commonly Asked Questions About Tobacco (visited Mar. 22, 1999) <http://www.who.int/psa/toh/Alert/jul96/E/6.htm> [hereinafter Tobacco Questions].

This article analyzes global tobacco issues within the context of non-governmental organizations (NGOs). Part II reviews the health aspects associated with tobacco. Part III examines public education and awareness in a global scope together with local, regional, and international efforts and resultant effects. Part IV addresses tobacco's effects upon children. Part V studies the matter of tobacco consumption as a vehicle for drug delivery within the scope of substance control. Part VI surveys the wide ranging economic issues that involve tobacco, including advertising, taxes, and workplace conditions. Part VII notes the call for an international framework for tobacco control and analyzes desirable subject matter for inclusion. Part VIII concludes with a summary of suggested actions to increase the effectiveness of the worldwide antitobacco struggle.

II. TOBACCO AND HEALTH

Although cigarettes are the most prevalent form of tobacco consumption, many other forms exist.²⁹ There are approximately 1.1 billion smokers worldwide, comprising about one third of the global population age fifteen and over.³⁰ Global estimates indicate 47% of men and 12% of women smoke.³¹ Many smokers begin at an early age (in many coun-

and WHO.

^{29.} Different types of cigarettes include commercially manufactured (the most common), "roll-your-own," bidis (tobacco wrapped in a temburni leaf), and kreteks (cigarettes made with tobacco and cloves). Other means of smoking tobacco include cigars, pipes, water pipes. Types of smokeless tobacco include chewing tobacco (plug, loose-leaf, and twist), pan (betel quid, a combination of sliced betel (areca) nut, tobacco, lime, catechu, and assorted spices wrapped in a betel leaf), and snuff (nasal (dry) and oral (moist)). See generally CONTROL OF TOBACCO-RELATED CANCERS AND OTHER DISEASES: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM 13 (Parkash C. Gupta et al. eds., 1992); SURGEON GENERAL ET AL., U.S. DEP'T. OF HEALTH & HUM. SERVS., SMOKING AND HEALTH IN THE AMERICAS (1992); IARC, IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Habits Other than Smoking; Betel-Quid and Areca-Nut Chewing; and Some Related Nitrosamines, 37 IARC (1985); IARC, IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Smoking, 38 IARC (1986).

^{30.} WHO, Smoking Prevalence (visited Aug. 4, 1997) <http://www.who.org/ programmes/psa/toh/Alert/apr96/2.html>.

^{31.} Id. In developed countries, 42% of men and 24% of women smoke while in developing countries 48% of men and 7% of women smoke. Male smoking varies by region (less than 30% smoke in the African region while 60% do in the western Pacific region) and national economies (37% in established market economies compared to 60% in formerly socialist central and eastern Europe). Female smoking is most prevalent in formerly socialist central and eastern Europe (28%), countries with established market economies (23%), and Latin American and Caribbean nations (21%) while in all other regions the rate is below 10%. Id. WHO, Table 2, Daily Smoking Prevalence, Men and Women Aged 15 and Early 1990s (visited 22. Over. Selected Regions. Mar. 1999) <http:// www.who.int/toh/Alert/apr96/gifs/table2.gif>; WHO, Table 3, Estimated Smoking Prevalence Among Men and Women 15 Years of Age and Over by Country, Latest Available Year (visited Aug. Mar. 22, 1999) < http://www.who.int/psa/toh/Alert/apr96/gifs/table3.gif>. For

tries the median age of initiation is below age fifteen), thereby lowering the age when a smoker will suffer smoking-related diseases and death.³² As a result of nicotine addition, nicotine tolerance increases over time and causes smokers to increase their consumption to the extent they can afford.

Tobacco is known to cause undesirable health effects. Medical sources cataloged the effects over the last few decades.³³ Although the tobacco industry and some others still generally dispute the medical knowledge implicating tobacco,³⁴ the tide has changed since the early 1960s. The addictiveness of nicotine is a material factor in continued tobacco consumption.³⁵

Smoking in developing countries became widespread in recent years. Trends indicate an increasing daily consumption per smoker as

34. See Phillip Cole & Brad Rodu, Would a Switch from Cigarettes to Smokeless Tobacco Benefit Public Health? Yes, PRIORITIES FOR LONG LIFE & GOOD HEALTH, Winter 1995, at 24 (arguing the relative safety of switching tobacco products; "Smokeless Tobacco Is A Lifesaver."); John Schwartz, Tobacco CEO Won't Make Cancer Link, Phillip Morris Chief Appears for First Time Before a Jury in Damages Case, WASH. POST, Mar. 3, 1998, at A2.

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an in depth analysis of female tobacco consumption, see CLAIRE CHOLLAT-TRAQUET, WHO, WOMEN AND TOBACCO 9-29 (1992).

^{32.} Smoking Prevalence, supra note 30. In France and Spain 40% of the population aged 18-24 smokes. Over half the men under age 35 in South Africa smoke. *Id.*

^{33.} See TIERNY JR. ET AL., supra note 1; 1995 FDA Nicotine Report, supra note 4; IARC, WHO, CANCER: CAUSES, OCCURRENCE AND CONTROL 169-80 (L. Tomatis et al. eds., 1990); WHO, The State of World Health, in THE WORLD HEALTH REPORT 1997: CONQUERING SUFFERING, ENRICHING HUMANITY 1 (1997) [hereinafter WORLD HEALTH REPORT 1997] (describing the circulatory diseases: coronary heart disease, cerebrovascular disease, cardiomyopathies, and hypertension; and fatal cancers: lung, stomach, breast, colon-rectum, mouth, liver, cervix, and esophagus, which all share tobacco consumption as a major risk factor); CHOLLAT-TRAQUET, supra note 31, at 31-56 (detailing tobacco's effects on females). See also supra notes 1, 3-5 and accompanying texts; Deborah Josefson, Passive Smoking Doubles Risk of Heart Disease, 314 BRIT. MED. J. at 1572 (1997) (reporting on study by Dr. Ichiro Kawachi of the Harvard School of Public Health). In comparison, tobacco often competes with food as a necessary item for the poverty-stricken smoker in the developing world. The indirect danger this presents is dietary deficiencies that lowers the body's resistance to diseases. SIMON CHAPMAN & WONG W. LENG, TOBACCO CONTROL IN THE THIRD WORLD: A RESOURCE ATLAS 18 (1990) (further noting that a poor Bangladeshi smoking five cigarettes daily could incur a monthly 8,000 calorie deficit (citing N. Cohen, Smoking, Health, and Survival: Prospects in Bangladesh, THE LANCET 1090-03 (1981))). But see David Leff, French Clone Human Hemoglobin in Tobacco to Avoid Contamination, BIOWORLD TODAY, Mar. 6, 1997, available in LEXIS, News Library, Curnws File (reporting on Human Hemoglobin from Transgenic Tobacco, NATURE, Mar. 6, 1997); NIST Bets on Transgenic Tobacco, Mar. 2, 1998, POINTCAST (reporting on biopharmaceutical research to develop therapeutic peptides and proteins).

^{35. 1995} FDA Nicotine Report, supra note 4, at 41, 463-520; NICOTINE ADDICTION 1988, supra note 4; TIERNY JR. ET AL., supra note 1, at 997; GLANTZ ET AL., supra note 2, at 58-107. See Schwartz, supra note 5; Smoking: One Tough Addiction (visited Feb. 27, 1998) http://www.abcnews.com/sections/living/smoking1217/index.html.

economic conditions improve worldwide.³⁶ Despite decreasing consumption in developed countries, the rapid increase in developing countries kept world consumption from decreasing.³⁷ While global cigarette consumption per adult remained steady through the early 1990s, global consumption increased as world population increased.³⁸

Increased tobacco consumption corresponds with burgeoning health effects on the world's population.³⁹ Costs are more than just individual health; they include environmental, quality of life, and economic costs.⁴⁰

37. WHO, Figure 2, Trends in per Adult Cigarette Consumption in Developed and Developing Countries, 1970-92 (visited Aug. 4, 1997) <http://www.who.org/ programmes/psa/toh/Alert/apr96/gifs/fig2.gif>; WHO, Table 4, Global and Regional Estimates and Trends in Consumption of Cigarettes per Adult 15 years and over, 1970-72 to 1990-92 (visited Aug. 4, 1997) <http://www.who.org/ programmes/psa/toh/Alert/apr96/gifs/fig4.gif>. In the early 1970s, cigarette consumption was highest in Canada, Switzerland, the United States, Australia, and the United Kingdom (in order of ranking and above 3,000 per capita). In the early 1990s, the cigarette consumption ranked highest in Poland, Greece (both above 3,500 per capita), Hungary, Japan, and the Republic of Korea (above 3,000 per capita). WHO, Table 5, Estimated per Capita Consumption of Cigarettes per Adult 15 Years and over, Selected Countries, 1970-72 to 1990-92 (visited Aug. 4, 1997) <http://www.who.org/programmes/psa/toh/Alert/apr96/gifs/table4.gif>.

38. See Tobacco Consumption, supra note 27.

39. "Tobacco causes six per cent of all deaths in the world and the mortality toll is increasing rapidly. Tobacco causes more deaths than all other forms of substance abuse combined." WHO, Tobacco or Health (visited Aug. 4, 1997) <http://www.who.org/ programmes/psa/toh.htm>. "In another three decades, unless the trend changes drastically, we can expect about 10 million people to be killed each year by tobacco products, with 70% of these deaths occurring in developing countries." WHO, Message from the Director-General of the World Health Organization for World No-Tobacco Day 1997 (visited Aug. 4, 1997) <http://www.who.int/ntday97/tale.htm>. "The biggest and sharpest increases in disease burden are expected in China and India, where the use of tobacco has grown most steeply. If current trends continue, two to three million annual tobacco-caused deaths are predicted for China alone by the 2020s." WHO, Tobacco Use: A Public Health Disaster (visited Aug. 4, 1997) <http://www.who.org/programmes/psa/toh/Alert/4-96/E/ ta3.htm>. See generally Jane Moir, Most Workers at Risk from Tobacco Smoke, S. CHINA MORNING POST, Mar. 6, 1998, at 8 (noting 80% of the workforce is at risk from ETS in Hong Kong).

40. Deforestation and chemical use are some of the environmental costs of tobacco consumption. See Acceptance Speech from President Nelson Mandela on Receiving the Tobacco or Health Commemorative Medal and Certificate (visited Feb. 14, 1998) <http:// www.who.ch/psa/tajuly1.htm> (detailing health, economic, and quality of life costs); The Economic and Human Costs of Tobacco Use, in WHO, Costs of Tobacco Use (visited Aug. 4, 1997) <http://www.who.org/programmes/psa/pres4. htm>; The Environmental Costs of Production in Panos; Tobacco: The Smoke Blows South (visited Mar. 13, 1998) <http://www.oneworld.org/panos/briefing/tobacco.htm>. Employer costs are substantial. Employee excess illness costs (e.g., healthcare claims, workers' compensation, and other benefits) were the most costly factor, over twice that of obesity, the second most costly factor. Robert L. Bertera, The Effects of Behavioral Risks on Absenteeism and Health-Care Costs in the Workplace, 33 J. OCCUP. MED. 1119-24 (1991). See Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary, 105th Cong. (1998) (statement of William L. Roper) [hereinafter Roper]. A World Bank economist estimates that tobacco use results in a global net loss of \$200 billion per year, with developing coun-

^{36.} Smoking Prevalence, supra note 30. See Robert Weissman, Tobacco Legislation Should Restrict the Overseas Marketing of Cigarettes, LEGAL TIMES, May 18, 1998, at 27.

While life expectancy lengthens, the risks of infectious diseases decreases and the likelihood of noncommunicable or chronic diseases increases.⁴¹ Chronic diseases remain incurable and the best solution, presently, is prevention. Associated with this situation is the "epidemiological transition"⁴² that occurs as the developing states become more developed. The improving world economic condition generally accelerates tobacco consumption (a detrimental lifestyle risk factor), the epidemiological transition, and the increasing burden of suffering and disease caused by tobacco. Fortunately, prevention or cessation of tobacco consumption are effective means of countering tobacco's ill effects.⁴³

Strong arguments exist for minimizing tobacco consumption. A simple economic argument posits that despite the short-term economic gains from tobacco,⁴⁴ the insidious nature of tobacco addiction and its long-term costs far outweigh the industry's economic value overall. In other words, if governments internalize the health care costs and life-time productivity losses to offset tobacco benefits (e.g., jobs and revenues), the tobacco habit is a net drain on national economies overall.⁴⁵ A moral argument also exists for keeping adolescents from consuming tobacco or becoming industry targets.⁴⁶

International law supports a fundamental right to a healthy life,⁴⁷

42. "Epidemiological transition" denotes the changing pattern of health, where *unde-veloped* states gain the problems of developed states. This includes associated diseases of developed states and the harmful effects of risky lifestyle factors such as tobacco, alcohol, and drug use, along with accidents, suicide, and violence. WORLD HEALTH REPORT 1997, *supra* note 33. See THE GLOBAL BURDEN OF DISEASE, *supra* note 24, at 1, 31-39 (describing the changing causes of death in developing countries that represent 80% of the world's population).

43. The Benefits of Quitting Smoking (visited June 14, 1999) http://www.who.int/toh/worldnotobacco99/english/Health.htm>.

45. The Causes and Consequences of a Lucrative but Dangerous Trade, in The Economic and Human Costs of Tobacco Use, supra note 40 (consuming 1,000 tons of tobacco equates to a net drain of \$27.2 million to the world economy; world consumption was over 7 million tons in 1995). In the United States, private tobacco-related medical insurance costs are almost four times the aggregate amount spent by Medicare, Medicaid, and individuals. Roski & Jeddeloh, supra note 1, at 16, fig. 1 (citing U.S. DEP'T OF HEALTH & HUM. SERVS., THE ECONOMIC IMPLICATIONS OF SMOKING AND SMOKING CESSATION (1996)). In Minnesota, lost income is nearly 150% of healthcare costs. Id. at 16, fig. 2.

46. See infra Part IV. See also Weissman, supra note 36.

47. See, e.g., "Everyone has the right to life" Universal Declaration of Human

tries suffering half the losses. Sources include direct medical care, work absenteeism, fire losses, reduced productivity, and lost income due to premature demise. WHO, Working Towards Comprehensive Tobacco Control: A Shared Responsibility (visited Aug. 4, 1997) http://www.who.org/programmes/psa/toh/Alert/4-96/E/ta5.htm>.

^{41.} WHO, World Health Report, Chapter 2, The Double Burden: Emerging Epidemics and Persistent Problems, (visited June 14, 1999) http://www.who.int/whr/1999/en/report. htm>.

^{44.} Such gains include jobs from farming, manufacturing, and sales, revenue from taxes and monopolies, and profits from a high margin manufacturing industry with a loyal customer base.

and indirectly supports anti-tobacco public health efforts.⁴⁸ States are obligated to protect their citizens' health, but, within the anti-tobacco arena, such protection is slow in coming, if it comes at all. Naturally, the state interest in its citizens' health should be balanced with personal choice. While promoting a legal and broadly accepted product, along with the individual right to consume tobacco, the tobacco industry generally prevented states from acting upon their legal obligations to protect and improve public health in this arena. Fortunately, the tide is turning against the industry due in large part to relentless efforts of NGOs.⁴⁹

The increasing predominance of global tobacco consumption causes mixed opinions. Some organizations, for example the World Health Organization (WHO) and the U.S. Department of Health and Human Services (HHS), are quite alarmed by the trends and projected statistics.⁵⁰ The WHO's Constitution obligates it to minimize tobacco's unhealthy influence.⁵¹ Although neutral in their stance, many governments implicitly condone the industry through their inaction. At the opposite end of the spectrum, the tobacco industry continues to zealously promote tobacco as a legal product. If one views the decades of medical re-

Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948). "States Parties ... recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts. 12, 1, 993 U.N.T.S. 3, 8. "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable." European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, 92. The Right to Safe and Healthy Working Conditions; *id.* at art. 11. "1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good" Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156, 164, at art. 10. "Everyone shall have the right to live in a healthy environment" Id. at art. 11.

48. Cf. supra, note 47.

49. See International Non-Governmental Coalition Against Tobacco (visited June 14, 1999) http://www.uicc.ch/ingcat/english/info/position.declar01.htm; see also Action on Smoking and Health Thailand (visited June 14, 1999) http://www.ash.org.or.th/; Campaign for Tobacco Free Kids (visited June 14, 1999) http://www.ash.org.or.th/; Campaign for Tobacco Free Kids (visited June 14, 1999) http://www.tobaccofreekids.org/; Counsel for a Tobacco-Free Ontario (visited June 14, 1999) http://www.smokefree.org.ok/>.

50. Tobacco or Health, supra note 39 ("For most tobacco related illnesses, effective treatment is rarely possible. Only prevention of tobacco-related illness will be effective in slowing the progress of the pandemic of tobacco-caused death and illness."); E. Loren Buhle, Jr., Smoking is Causing a Global Epidemic of Death (visited Feb. 27, 1998) http://cancer.med.upenn.edu/cancer_news/1994/smoke_epidemic.html>.

51. WORLD HEALTH ORGANIZATION CONSTITUTION, July 22, 1946, 14 U.N.T.S. 185 (1946) [hereinafter WHO CONSTITUTION]. "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being" *Id.* at preamble. "The objective of the [WHO Constitution] ... shall be the attainment by all peoples of the highest possible level of health." *Id.* at art. 1.

search and present statistical projections as credible, then a question arises. What, if anything, should be done about tobacco consumption and global public health? This article examines the possibilities from a global perspective viewed within the context of NGOs, while trying to find a balance between personal choice, public health, and a legal commodity.

III. PUBLIC EDUCATION AND AWARENESS

Cultural acceptance of tobacco is generally widespread and longstanding.⁵² Tobacco has been a legal product since its introduction from the New World in 1492. Thereafter, it gained popularity despite King James' 1604 admonition that "[s]moking is a custome lothesome to the Eye, hateful to the Nose, harmefull to the Braine, [and] dangerous to the Lungs....⁷⁶³ Popular culture normalized and glamorized smoking for most of this century,⁵⁴ and thereby reinforced the desirability of tobacco consumption. Often, tobacco consumption is presented as part of desirable lifestyle.⁵⁵ A cultural example that contrasts with American norms is the acceptance of *betel quid* chewing within Bangladeshi families while viewing smoking as a socially unacceptable habit.⁵⁶ Whatever the culture, a significant portion of the population views some form of tobacco consumption as acceptable. Despite cultural norms, people are commonly misinformed about risks associated with tobacco.⁵⁷

55. In China, smoking is a social institution for many people. Morning Edition: International Conference on Smoking (Nat'l Pub. Radio broadcast, Aug. 27, 1997), Mark Henderson, Rise of "New Lad" Boosts Smoking and Drinking, TIMES (London), Mar. 26, 1998, at 14; Petersen, supra note 5 (noting cigar smoking morphed to become glamorous). Aug. 27, 1997). The Chinese public usually saw Mao Zedong and Deng Xiaoping with cigarettes. Ron Scherer, Worldwide Trend: Tobacco Use Grows, CHRISTIAN SCI. MONITOR, July 17, 1996, at 1.

56. See WHO, Betel Quid Chewing Habit Amongst a Group of Bangladeshi Adolescents in East London, in Tobacco Alert July 1996 (visited Aug. 4, 1997) http://www.who.org/programmes/psa/toh/Alert/jul96/E/10.htm. "This habit is accepted as a traditional cultural feature of this community." Id.

57. See Anwar Fazal, Foreword to CHAPMAN & LENG, supra note 30, at i; Allyn L.

^{52.} For an extensive overview, see Gene Borio, *Tobacco Timeline*, (visited Mar. 26, 1998) http://www.worldchat.com/public/geaston/history.html>.

^{53.} ROBERT K. HEIMANN, TOBACCO AND AMERICANS 250 (1960) (citing KING JAMES I, A COUNTERBLASTE TO TOBACCO (1604)).

^{54.} For example, tobacco use is glamorized in movies (e.g., Humphry Bogart in CASABLANCA (Metro-Goldwyn-Mayer 1942)), television (e.g., Cigarette-Smoking Man in *The X-Files* (Twentieth Century Fox Film Corp.)), advertising (e.g., Joe Camel and the Marlboro man), and sports and arts sponsorships (see infra notes 201-03 and accompanying texts). See generally Sherryl Connelly, Health Activists Fume About Movie Smoking, THE OREGONIAN, July 26, 1998, at E4; Mark Henderson, Rise of "New Lad" Boosts Smoking and Drinking, TIMES (London), Mar. 26, 1998, at 14; Petersen, supra note 5 (noting cigar smoking morphed to become glamorous); Am. Lung Ass'n (ALA), Thumbs Up! Thumbs Down! (visited Mar. 2, 1998) http://www.lungusa.org/tutd/lastyear.html (panning and praising 1996 movies for their portrayals of tobacco).

To alter a culture's perceptions, significant efforts must be made to educate and persuade the society to accept a "cultural redefinition of smoking."⁵⁸ Public education is the first step in this process.⁵⁹ The American government attempts to alter public opinion regarding tobacco consumption with various forms of public education⁶⁰ and, ultimately, laws.⁶¹ The United States, like most countries, tends to respond to its politic. Therefore, the social and political processes usually pull the government and its statutory framework rather than government pushing society. NGOs usually are the force that initially moves society in a different direction (e.g., mobilizing initial anti-tobacco efforts in the 1960s). Similar efforts occurred internationally, but NGOs lead the anti-tobacco crusade much more than various governments.⁶²

Public education efforts are helpful, but information alone rarely changes a smoker's actions. Often, when a smoker knows that the habit is detrimental, he or she continues anyway. Information by itself usually is insufficient to alter a smoker's behavior. Common reasons as to why the smoker began smoking in the first place are peer pressure and social acceptance of the act.⁶³ Equally important is the addictive nature

58. See generally Robert A. Kagan & Jerome H. Skolnick, Banning Smoking: Compliance Without Enforcement, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 69 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Several online sites offer extensive documentation on health and industry matters. See The Lib. & Ctr. for Knowledge Mgmt., Univ. Cal. San Francisco, Tobacco Control Archives Collections (visited Feb. 14, 1998) <http:// www.library.ucsf.edu/tobacco/tacoll.html>; The Tobacco Resolution (visited May 25, 1998) <http://www.tobaccoresolution.com>; Univ. Ariz., ETS Sites (visited Feb. 14, 1998) <http://www.ahsc.arizona.edu/aztepp/ets.html> (cataloging environmental tobacco smoke information).

59. See, e.g., N.J. Family Physicians Fight Youth Smoking Through 'Tar Wars,' PR NEWSWIRE, Oct. 21, 1997, available in LEXIS, News Library, Curnws File (describing Tar Wars, "a pro-health tobacco education program . . . target[ing] fifth graders"). Philip Morris Inc. recently announced plans to air television ads to encourage children aged 10 to 14 years old not to smoke. Philip Morris Plans Ads to Warn Youth on Smoking, WASH. POST, Dec. 4, 1998, at A4.

60. For example, documenting medical research. See supra notes 1, 3 and accompanying text. Publishing information for public consumption on the internet. See, e.g. the CDC at http://www.cdc.gov, Federal Trade Comm'n (FTC) at http://www.ftc.gov, and HHS at http://www.hhs.gov.

61. See supra notes 7-12 and accompanying texts.

62. For example, events such as the 10th World Conference on Tobacco or Health (Aug. 24-28, 1997 in Beijing, China), publishing information on the internet (e.g., the WHO at ">http://www.who.org>) and in books (SMOKING AND HEALTH IN THE AMERICAS, supra note 29).

63. A 1981 Phillip Morris document states: "There is no question but peer pressure is

Taylor, An International Regulatory Strategy for Global Tobacco Control, 21 YALE J. INT'L L. 257, 266-67, n.49 (1996); Butting Out, in Int'l Dev. Res. Ctr. (IDRC), IDRC: 25 Years of Science in Action Media Review 1995-96 (visited Mar. 7, 1998) -<http://www.irdc.caa/media/erevue.html> (describing widespread misconceptions regarding tobacco). "An amateur [Gambian] wrestler . . . urgently puffed on a cigarette just before his championship match. When asked why, he answered that 'cigarettes make me strong." Id.

of nicotine, a drug present in all tobacco.⁶⁴ The Australian "Will Frank win" campaign illustrates how addictive smoking can be and how a hard-hitting campaign can succeed.⁶⁵

Anti-tobacco programs utilizing peer pressure, social acceptance, and group support can be productive.⁶⁶ NGOs take a leading and vital role in sponsoring annual events to reinforce a tobacco-free lifestyle (e.g., the World No-Tobacco Day⁶⁷ and the Great American Smokeout⁶⁸). The events typically educate the public, explain medical effects of tobacco, encourage abstinence or cessation, and support both the user and nonuser.

The World No-Tobacco Day is an example of implementing the WHO's duty "to assist in developing an informed public opinion among

64. See supra note 34 and accompanying text; PREVENTING TOBACCO 1994, supra note 4, at 30-31 (noting nicotine is as addictive as cocaine or heroin); infra notes 129-43 and accompanying text.

65. See Media Can be Important Allies in Tobacco Control, in WHO, Tobacco Control is Everybody's Business (visited Aug. 4, 1997) <http://www.who.org/programmes/ psa/toh/Alert/4-96/E/ta6.htm>. An Australian tobacco company staged a major promotional contest in 1981 to find a cowboy for a model in their cigarette ads. Tobacco control activists found a willing contestant in Frank who continued to smoke through a tracheostoma. Activists distributed posters with Frank's picture and the caption, "Will Frank win?" Despite extensive media coverage, Frank lost and the tobacco company suffered significant embarrassment. This helped lead to a later comprehensive Australian tobacco control legislation and a ban on promotional contests. *Id.* Innovative behavior modification promotions have a substantially better chance of success. *See, e.g.*, Theresa Kirsch, *What A Shot*, THE OREGONIAN, Mar. 22, 1998, at T10 (quoting a Bahamian sign: "Please Do Not Drop Your Cigarette Butts On The Ground. The Fish Crawl Out At Night To Smoke Them And We Are Trying To Get Them To Quit", and noting the complete success).

66. E.g., Jacksonville Jaguars, Foundation Program List and Description (visited Mar. 3, 1998) http://www.jaguarsnfl.com/jag_web/found/programs.htm> (listing aspects of the Nat'l Football League team's program to educate youth about the health risks of tobacco use); National Spit Tobacco Education Program's Major League Baseball Initiative, in Robert Wood Johnson Found., Media Resource Guide on Tobacco (visited Feb. 14, 1998) http://www.rwjf.org/media/tbcgde5.htm>.

67. See WHO, World No-Tobacco Day 1997 (visited Feb. 14, 1998) http://www.who.cha/psa/psa3.htm (introducing World No-Tobacco Day, May 31, 1997).

68. See ACS, Great American Smokeout (visited Mar. 22, 1999) http://www.cancer.org/gasp/main.html.

important in influencing the young not to begin smoking. A decade or more ago it was a major reason why teen-agers began to smoke. Now, it is a major reason for their not beginning to smoke." Youth Smoking: Prevalence, Trends, Implications and Related Demographic Trends (1981) (quoted in Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary, 105th Cong. (1998) (statement of Sen. Hatch)). See CHOLLAT-TRAQUET, supra note 31, at 57-70 (explaining reasons why females consume tobacco). Cf. American Heart Association and Tobacco-Free Ohio Clear the Air About Women and Smoking; Ohio Research Scientist Knows Why Women Won't Quit and How to Help, PR NEWSWIRE, Feb. 6, 1998, available in LEXIS, News Library, Curnws File (noting attitudinal differences between the sexes).

all peoples on matters of health."⁶⁹ Its manner of presentation is notably adult and addressed to a reasonable, intelligent person with a tone that is educational, strategic, and somewhat evangelical. This is the public front in the WHO's war against tobacco.⁷⁰ The WHO's web site offers anti-tobacco strategies; persuasive explanations on the extent of the "public health disaster"; a reasoned explanation detailing the comprehensive necessity and responsibility for tobacco control; collaboration tips to be used on local, national, and international levels; warnings to targeted demographic groups (e.g., women); and contacts for further action and guidance.⁷¹ The internet is an ideal medium for worldwide dissemination on an inexpensive and timely basis and as a supplement to traditional printed materials. WHO coordination with local and national NGOs creates synergy in the anti-tobacco struggle.

Over the last two decades, the Great American Smokeout evolved into a professional, positive, and engaging event. Although targeted at all smokers (most of whom are adults), the 1997 Smokeout focused on teens who compose 90% of all new smokers in the United States.⁷² Closely associated with the Smokeout is the Great American Smoke-Scream, a week-long precursor to the Smokeout, with radio, television, and newspaper affiliations.⁷³ The Smokeout's web page is slick, interactive, and geared to teens and preteens, potentially the most likely individuals to start smoking.⁷⁴ Plentiful graphics, questions and answers, and role models make the site entertaining and educational. The medium itself, a web page, is naturally familiar with today's youth. Closely allied with the Smokeout is the Campaign For Tobacco-Free Kids.⁷⁵

When properly promoted, annual events benefit from public recognition and acceptance. For example, most Americans (including smokers) positively associate the Smokeout with anti-tobacco efforts. Suc-

74. Id.

^{69.} WHO CONSTITUTION, supra note 51, at art. 2(r).

^{70.} The theme, "United for a Tobacco-Free World," indicates the struggle's extent. WHO, Message from the Director-General of the World Health Organization for the World No-Tobacco Day 1997 (visited March 22, 1999) http://www.who.int/ntday/ntday97/tale.htm.

^{71.} WHO, Tobacco Control is Everybody's Business, supra note 65.

^{72.} Tristanne L. Walliser, *The Great American Smokeout: No Ifs, Ands or Butts* (visited Dec. 24, 1997) http://www.more.abcnewsgo.com/sections/living/smokeout1120/index.html).

^{73.} ACS, Great American Smokeout: SmokeScream (visited Mar. 22, 1999) http://www.cancer.org/smokeout/scream.html.

^{75. &}quot;The Campaign For Tobacco-Free Kids is the largest private initiative ever undertaken to decrease youth tobacco use in the United States." *The Dirt, supra* note 6. Notable Campaign members include the American Academy of Pediatrics, American Cancer Society, American Heart Association, American Lung Association, American Medical Association, National Association Elementary School Principals, National Association Secondary Principals, and National Parent Teacher Association. *Id*.

cessful events like the Smokeout tend to further the event and the sponsoring NGOs goals with the NGO prospering as a result. Such events serve as bully pulpits for the promoters while presenting targeted messages. The anti-tobacco messages probably are received best when differing messages target specific groups, such as smoking cessation messages to smokers and both educational and how to organize messages for nonsmokers. Typically, such anti-tobacco advertising must be unique to capture a potential or actual smoker's attention and get the message absorbed.⁷⁶ Anti-tobacco organizations posit that it is easier to keep a potential smoker from smoking than to get a smoker to quit.⁷⁷

IV. TOBACCO'S EFFECT UPON CHILDREN

A. Influences Upon the Child

Nearly all tobacco consumers began as children.⁷⁸ Children are particularly susceptible to tobacco, both physiologically and psychologically.⁷⁹ One strategy to counter youth smoking is to promote smoking cessation programs for the benefit of both smokers and nonsmokers. Parents who smoke have a profound influence upon their children.⁸⁰ Their behavior normalizes smoking and is the dominant reason that those children are likely to also smoke.⁸¹ Although it is critical to encourage underage potential smokers to avoid the addictive habit, it is just as important to assist the present tobacco consumer, youth or adult.⁸² Tobacco consumers who begin at a younger age generally con-

^{76.} Morning Edition: Anti-Smoking Ads (Nat'l Pub. Radio radio broadcast, Aug. 27, 1997) (describing a Florida ad campaign after the state settled its suit with the tobacco industry). An example was the "Cow Fart" television ad for the preteen and young teen audience. "[W]e [took] a very unparental attitude in our advertising. In other words, the last thing you want to do is lecture this particular group. So, the idea was to make smoking as gross and unhip as possible." *Id.* The ad ran on MTV and emphasized the commonality between smoking and cows' poisonous methane gas. *Id.*

^{77.} Id. See generally C. Everett Koop, Don't Forget the Smokers, WASH. POST, Mar. 8, 1998, at C7 (arguing for a holistic approach against tobacco that prevents adolescents from beginning the habit and assists current users to quit).

^{78. &}quot;Almost 90 percent of adult smokers report beginning their use at or before age 18, and more than half became daily smokers before that age." Roper, *supra* note 40. "Nicotine addiction begins when most tobacco users are teenagers, so let's call [smoking] what it really is: a pediatric disease." 141 CONG. REC. S5915 (daily ed. May 1, 1995) (statement of Sen. Simon) (quoting FDA Commissioner David A. Kessler).

^{79.} Glenda Cooper, *Teenage Girl Smokers Risk Eating Disorders*, THE INDEP., Aug. 4, 1998, at 5 (noting the connection between smoking as a diet tool and the likelihood of eating disorders such as bulimia).

^{80.} See Roper, supra note 40.

^{81.} Youth Smoking Prevention: Hearings on S.1530 Before the Senate Comm. on Judiciary, 105th Cong. (1998) (statement of Michael C. Fiore).

^{82.} Koop, supra note 77.

sume larger quantities, have an increased risk of death from a tobaccorelated illnesses, and suffer the onset of such illnesses at a younger age.⁸³ Tobacco has life-long detrimental effects: in neonatal conditions, passively, and as a growing child.⁸⁴ Cognizant of this, the international community offers support.⁸⁵

Youths are particularly susceptible to the slick advertising⁸⁶ of the tobacco companies.⁸⁷ The pervasiveness and magnitude of tobacco ad-

83. PREVENTING TOBACCO 1994, supra note 4, at 29-30; WHO, Smoking Prevalence, supra note 30. See UNICEF, Finland's 15 year-olds Smoke Most (visited Mar. 22, 1999) http://www.unicef.org/pon96/ insmoke.htm> (noting about 12% of 15-year-olds smoke daily).

84. TIERNY JR. ET AL., supra note 1; American Lung Association, Tobacco Control General Smoking Information: Secondhand Smoke and Your Family (visited Mar. 22, 1999) http://www.lungusa.org>. See Roper, supra note 40; Tobacco Issues: Hearings on S.1415 Before the Senate Comm. on Commerce, Sci. & Transp., 105th Cong. (1998) (statement of Sen. Chafee).

85. See U.N. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, art 24, at 1465-66 (urging cooperation with U.N. efforts to minimize children's adverse health effects).

86. A report prepared for the Brown & Williamson tobacco company described an advertising approach to employ:

Thus, an attempt to reach young smokers, starters, should be based... on the following major parameters: [1] Present the cigarette as one of a few initiations into the adult world. [2] Present the cigarette as part of the illicit pleasure category of products and activities. [3] In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process. [4] To the best of your ability (considering some legal constraints), relate the cigarette to "pot", wine, beer, sex, etc.. [5] DON'T communicate health or health-related points.

Ted Bates & Co., Inc., What Have We Learned From People? A Conceptual Summarization of 18 Focus Group Interviews on the Subject of Smoking (May 26, 1975) (quoted in FTC, Staff Report on the Cigarette Advertising Investigation, reprinted in Comprehensive Smoking Education Act: Appendix to Hearings Before the Subcomm. on Health and the Env't of the Comm. on Energy and Commerce House of Representatives, 97th Cong., 2d Sess. 261-64 (1982)) (citing a Brown & Williamson document describing an advertising strategy for Viceroy cigarettes). Cf. John Schwartz, Documents Indicate Strategy of Targeting Teen Smokers Brown & Williamson Papers Date to 1972, Offer Detailed Descriptions of Marketing Efforts, WASH. POST, Feb. 5, 1998, at A3.

87. See In re R.J. Reynolds Tobacco Co., No. 9285, 1997 FTC LEXIS 118 (FTC May 28, 1997) (alleging that Reynolds knew, or should have known, its efforts to reposition the Camel brand would heighten the brand's attractiveness to underage smokers and thereby result in unfair trade practices). "In fact, after the initiation of the Joe Camel campaign, the percentage of smokers under the age of 18 who smoked Camel cigarettes became larger than the percentage of all adult smokers aged 18 and older who smoked Camel cigarettes." Id. at *2; Nicola Evans et al., Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking, 87 J. NAT'L CANCER INST. 1538 (1995) (concluding that tobacco marketing is a stronger influence in nonsmoking adolescents beginning to smoke than exposure to peer or family smokers or sociodemographic variables); Marlene Cimons, Study Finds Sharp Rise in Teenage Tobacco Use Health: One-Third Increase Overall Since 1991 Was Even Worse Among African Americans, Federal Report Says, L.A. TIMES, Apr. 3, 1998, at A1; Barry Meier, Files of Reynolds Tobacco Show Effort

vertising is apparent when one learns that cigarette companies spend \$16 million per day or \$6 billion per year.⁸⁸ Anti-tobacco forces (typically NGOs) have nothing near the financial resources that the large transnational tobacco corporations (TTCs)⁸⁹ do. However the 1968-69, free counter-advertising under the American fairness doctrine⁹⁰ proved effective against tobacco ads.⁹¹ The concept of counter-advertising is utilized today, albeit on a significantly smaller scale.⁹² Counteradvertising clearly lessens tobacco consumption and, therefore, should be implemented on a global, national, and local basis.

Some commentators present a moral argument for tobacco regulation upon the tobacco consumer's status as a minor when first beginning to smoke or otherwise use tobacco.³³ President Bill Clinton presents such an example.³⁴ Even the tobacco industry tries to avoid an

88. ACS, Great American Smokeout: FAQ (visited Mar. 16, 1999) <http://www.cancer.org/ smokeout/faq.html>. Cf. Anna Dolgov, Western Tobacco Firms Packing Russia Market Heavy Consumption, Low Taxes Make up for Lost Revenue, SAN ANTONIO EXPRESS-NEWS, Mar. 1, 1998, at 3J.

89. E.g., TTCs include the American companies (Phillip Morris, R.J. Reynolds, and American Brands) and British companies (British American Tobacco (BAT) parent of American Brands and Rothmans (a British/South American joint venture)).

90. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969) (upholding the fairness doctrine); Syracuse Peace Council v. FCC, 867 F.2d 654 (1989), cert. denied, 493 U.S. 1019 (1990) (upholding the abandonment of the fairness doctrine).

91. 132 CONG. REC. S16,862, S16,866-67 (July 17, 1986) (statement of Sen. Kennedy).

92. See Youth Smoking Prevention: Hearings on S. 1530 Before the Senate Comm. on Judiciary, 105th Cong. (1998) (statement of Gregory N. Connolly, Dir. of Mass. Tobacco Control Program, Mass. Dep't. of Pub. Health, and statement of Sen. Hatch); Bob Edwards & Debbie Elliot, Morning Edition, Teen Smoking, Part II (Nat'l Pub. Radio broadcast, June 16, 1998) (reporting on the Am. Lung Ass'n Campaign "Teens Against Tobacco Use" and Florida's "Truth Campaign"); Dan Morain, State Unveils TV Ads Against Cigars Health: Campaign Says that the Fad is "the Big New Trend in Cancer" and Says that Smoking One Stogie Has as Much Nicotine as 70 Cigarettes, L.A. TIMES, Mar. 31, 1998, at A3 (describing California's anti-tobacco ads). E.g., Grafeeties, Grafeeties, the Original Bumper Stickers for Shoes (visited Feb. 14, 1998) http://www.grafeeties.com/tobacco.htm (illustrating commercial products); WHO, supra notes 60, 61 (regarding World No-Tobacco Day); American Cancer Society, supra note 68 (regarding Great American Smokeout).

93. See Robert L. Rabin, Some Thoughts on Smoking Regulation, 43 STAN. L. REV. 475, 481 (1991) (reviewing ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES (1989)) (supporting government regulation since nearly all smokers choose to smoke as teens, the state views minors "as incapable of exercising full autonomy of choice" and, therefore, government regulation is not paternalistic).

94. See generally William J. Clinton, Remarks by President Clinton on Tobacco Legislation and America's Youth, Remarks at the Rose Garden, FED. NEWS SERV., Apr. 20, 1998, available in LEXIS, Exec. Library, Fednew File; Rick Weiss, Clinton Pushes for

on the Young, N.Y. TIMES, Jan. 15, 1998 at A12; U.S. Cigar Makers Urged Not to "Glamorize" Smoking, AAP NEWSFEED, Mar. 4, 1998, available in LEXIS, News Library, Curnws File (request by House Commerce Health & Env't Subcomm. chairman for cigar companies pledge not to engage in product placements in film or television); Henry Weinstein, R.J. Reynolds Targeted Kids, Records Show, L.A. TIMES, Jan. 15, 1998, at A1. But see Philip Morris Plans Ads to Warn Youth on Smoking, supra note 59.

image of targeting youths as customers.⁹⁶

There is close to universal agreement that children should not consume tobacco or be targeted as (potential) customers. Conversely, most smokers begin as teens.⁹⁶ Despite industry denials that it targets underage people. its advertising appeals significantly to "future" smokers.⁹⁷ This dichotomy between (a) the consequential, yet allegedly unintentional, acquisition of and alarming statistics concerning replacement smokers and (b) a hands-off attitude towards teens as potential tobacco consumers indicates an unresolved dilemma. A simplistic and onesided response would be to severely limit or prohibit advertising, yet such a concept is close to a pipe dream under some legal systems. Tobacco is a legal product, the industry is very powerful and capable, and advertising is generally accepted in the world's cultures. Naturally, there are legal issues involved too. The issue of advertising is later examined in more detail in Part VI. For now, the dichotomy between children and "unintended" advertising effects is noted along with the greater susceptibility of adolescents.

B. Support from International Law

International law adds support to state efforts to regulate tobacco and prevent children's access to it.⁹⁸ There is a substantial worldwide

97. See Center for Disease Control and Prevention (CDCP), Trends in Smoking Initiation Among Adolescents and Young Adults-United States, 1980-1989, 274 JAMA 528, 529 (1995) (noting the influence advertising has on adolescents who generally smoke the most heavily advertised brands); Evans et al., supra note 87 (noting the increasing prevalence promotional activities rather than just advertising); 43% of Teens Smoke or Chew Tobacco, CINCINNATI POST, Apr. 2, 1998, at 1A (reporting on a CDCP study noting substantial increases in tobacco consumption over the last two years). E.g., Joe Camel, a cartoon character particularly appealing to adolescents.

98. See U.N. Convention on the Rights of the Child, supra note 85, at art. 24(1) ("States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health"); Protect all Children from Tobacco, Says UNICEF, UNICEF, at

Anti-Smoking Bills in Congress, WASH. POST, Mar. 8, 1998, at A2.

^{95.} David Phelps, R.J. Reynolds Chief Denies Marketing to Kids, STAR TRIB., Mar. 6, 1998, at 1B. See generally 61 Fed. Reg. 44,396 (1996) (summarizing pro-tobacco industry arguments). But see Doug Campbell, Lorillard Documents Revealing Documents Discuss Nicotine Levels and Marketing to Teens, NEWS & REC. (Greensboro, N.C.), June 28, 1998, at A1; Kathleen J. Lester, Cowboys, Camels, and Commercial Speech: Is the Tobacco Industry's Commodification of Childhood Protected by the First Amendment?, 24 N. KY. L. REV. 615, 628-31 (1997); John Mintz & Saundra Torry, Internal R.J. Reynolds Documents Detail Cigarette Marketing Aimed at Children, WASH. POST, Jan. 15, 1998, at A1; Schwartz, supra note 34; John Schwartz, Tobacco Firms Must Reveal Documents, WASH. POST, Mar. 8, 1998, at A2 (referring to a report describing the smoking habits of children, as young as age five, that allegedly is protected by the confidentiality of the attorney-client relationship).

^{96.} American Academy of Pediatrics Analysis: First Cigarette in Grade 6 or Below Not Uncommon, Oct. 1, 1997, POINTCAST (reporting approximately 30% of high-school seniors first smoked in the sixth grade or below).

consensus regarding a child's fundamental rights, as stated in the Convention on the Rights of the Child (the Convention).⁹⁹ The United States, however, is not yet a party to the Convention, although it became a signatory on February 16, 1995.¹⁰⁰

Arguably, the Convention has the force of customary law¹⁰¹ as a result of its rapid and near universal acceptance¹⁰² and worldwide compliance due to of a sense of legal obligation.¹⁰³ The unprecedented acceptance of the Convention in such a short time by nearly all states indicates, at least, the creation of "soft law" by the parties. The Convention is "intended for adherence by states generally and [is] in fact widely accepted."¹⁰⁴ A sampling of the Convention's subjects indicates compliance by states from a legal sense of obligation (e.g., a definition of a child;¹⁰⁵ protection from narcotic drugs,¹⁰⁶ pornography,¹⁰⁷ abduction

101. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD), supra note 100, §102(2). See ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

102. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." RESTATEMENT (THIRD), *supra* note 100, §102(3). "[T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law." *Id.* §102 n.2 (quoting the North Sea Continental Shelf, 1969 I.C.J. 3, 44). U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1990 AT 191, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991) (ratified by 62 parties); U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES); U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES, *supra* note 99 at 187, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993) (ratified by 127 parties). Although this is not a case of "instant customary law," the Convention was very widely accepted for adherence by states generally.

103. Opinio juris may be inferred from states' acts indicating compliance inferring a sense of legal obligation. RESTATEMENT (THIRD), supra note 100, §102, cmt. c.

104. A practice can be generally accepted even if it is not universally followed; no precise formula indicates the required breadth of practice, "but it should reflect wide acceptance among the states particularly involved in the relevant activity." *Id.* §102, cmt. b.

105. U.N. Convention on the Rights of the Child, supra note 85, at art. 1.

106. Id. at art. 33.

107. Id. at art. 34

^{1,} U.N. Doc. CF/DOC/PR/1977/32 (1998) [hereinafter UNICEF, Protect All Children].

^{99.} The Convention has been ratified by 188 parties U.N. OFFICE OF LEGAL AFF., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1996 at 203, U.N. DOC. ST/LEG/SER.E/15, U.N. Sales No. E.97.V.5 (1997) [hereinafter MULTILATERAL TREATIES]. "UNICEF's role in advocating curbs on tobacco grows out of the 1989 U.N. Convention on the Rights of the Child, which obligates governments to safeguard the health of infants and children; protect children from drugs and exploitation; and promote health education." UNICEF, Protect All Children, supra note 98, at 3.

^{100.} See MULTILATERAL TREATIES, supra note 99. By becoming a signatory long after the Convention became effective, the United States exhibits a creeping acquiescence that partly indicates a U.S. state practice. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2), cmt. b [hereinafter RESTATEMENT (THIRD)].

and trafficking of children;¹⁰⁸ and torture¹⁰⁹). One cannot reasonably argue that "a significant number of important states" did not adopt the majority of practices (herein discussed) detailed in the Convention to prevent the Convention from becoming "general customary law."¹¹⁰ Therefore, the Convention is at least soft law and arguably has the force of customary law (excepting the controversial articles) and, in turn, is binding on states that have not yet ratified the Convention.

The Convention on the Rights of the Child offers a broad scope of protection for the world's children. The Convention states that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."¹¹¹ Although tobacco takes decades to kill, it detrimentally affects a child's growth and development and, in turn, indirectly impacts a child's "inherent right to life."¹¹² States possess a mandatory obligation to "ensure to the maximum extent possible the survival and development of the child."¹¹³ Therefore, being cognizant that tobacco imparts harmful health effects on both children and the unborn, governments have an obligation to neutralize, or at least minimize, tobacco's negative effects upon children. In particular, states possess an affirmative duty to prevent children from consuming tobacco directly or its byproducts indirectly.¹¹⁴ This can be done by a full spectrum of regulatory means.¹¹⁵

Article 13 of the Convention concerns the child's freedom of expression and receiving "information and ideas of all kinds,"¹¹⁶ including commercial speech regarding legal products. The tobacco industry has always claimed a right to advertise its products to the fullest extent possible. If one state prohibits any television ads for tobacco products, the industry complies in only that state, unless similarly required by other states. The difference between states is their legal systems (the process), not the resultant harm that affects the children and popula-

111. U.N. Convention of the Rights of the Child, supra note 85, at art. 3(1).

112. Id. at art. 6(1).

113. Id. at art. 6(2).

114. For example, from the mother in a neonatal condition or through environmental tobacco smoke (ETS).

115. For example, prohibiting sales to minors and limiting advertising.

^{108.} Id. at art. 35.

^{109.} Id. at art. 37.

^{110.} RESTATEMENT (THIRD), supra note 100, §102 cmt. b. Notwithstanding some controversial Convention topics (e.g., the minimum age for participation in armed combat or freedom of religion), the topics discussed in Articles 3, 6, 13, and 17 are generally accepted by states. See Cynthia P. Cohen, Introductory Note, in Convention of the Rights of the Child, supra note 85, at 1450.

^{116. &}quot;The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." U.N. Convention of the Rights of the Child, *supra* note 85, at art. 13(1).

tion in general.

Some states have touted tobacco's benefits in the past and, arguably, some justification may exist for advertising tobacco.¹¹⁷ However, medical evidence clearly overcomes such perceived benefits. In light of the fact that minors are viewed "as incapable of exercising full autonomy of choice,"¹¹⁸ the concept of open and uninhibited information may be restricted when the child's best interests so require.¹¹⁹

A state may exercise its police powers to protect its interests and, therefore, has the power to regulate tobacco to protect its youth. Possible restrictions are limited by what is necessary (e.g., banning television ads for tobacco products at times children are likely to be viewing), statutory mandates, and protection of the public health or the rights of others, such as environmental tobacco smoke (ETS) exposure.¹²⁰ When states regulate tobacco to protect their children, the reasons proffered are for the children's protection, not compliance with international law or custom.¹²¹ Presently, international law and custom are not significant sources of protection in the struggle to control tobacco consumption. Despite the Convention's legal authority, it has not been, nor is it likely to be, applied as a mechanism to protect children from tobacco.

121. Id.

^{117.} Smokers may rationalize the psychological and sociological benefits of their habit (qualities include relaxation and pleasure). In 1995, the Japanese Ministry of Health (MOH) reported that "tobacco has long been an item of personal preference [shikonhin], and at the present time, there are many smokers. Accordingly, some [committee members] would point out the mental and psychological benefits from smoking." KOSEISHO TABAKO KODO KEIKAKU KENTOKAI [MOH TOBACCO ACTION PLAN WORKING GROUP], KOSEISHO TABAKO KODO KEIKAKU KENTOKAI [MOH TOBACCO ACTION PLAN WORKING GROUP], KOSEISHO TABAKO KODO KEIKAKU KENTOKAI HOKOKUSHO [REPORT BY THE MOH TOBACCO ACTION PLAN WORKING GROUP] (Mar. 29, 1995), *cited in* Mark A. Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99, 105 n.132 (1997). Japan is noted for its cooperation with and lack of confrontation towards its tobacco industry, a former state-run monopoly with continuing substantial government ownership. Id. at 99-102.

^{118.} Rabin, supra note 93. "Children tend to imitate other children and they often lack the ability to foresee and avoid dangers.... [M]any children do not comprehend the nature of the risk or seriousness of nicotine addiction or the other dangerous health effects of smoking." FTC Commissioner Roscoe B. Starek, III, The ABCs at the FTC: Marketing and Advertising to Children, at *6 (1997), available in 1997 WL 441740 (addressing the Minnesota Institute of Legal Education).

^{119.} U.N. Convention of the Rights of the Child, supra note 85, at art. 13(2).

^{120.} Id. See Ed Rivera, Texas in Forefront of Teen Tobacco Battle, DALLAS MORNING NEWS, Mar. 3, 1998, at 9A (reporting the passage of Senate Bill 55, "one of the strongest and most comprehensive tobacco control packages in the country"). Senate Bill 55 becomes effective in 1998. It prohibits minors from purchasing, consuming, or possessing tobacco products except in the presence of a parent or guardian. Violations can result in fines up to \$250, community service, attendance of a tobacco education class by the minor and his/her parents, or suspension of the minor's drivers license. Senate Bill 55 prohibits outdoor advertising of tobacco products within 1,000 feet of a church or school. Identification is required of purchasers who appear younger than age 27. Self-service sales such as vending machines are generally restricted to locations closed to minors. Id.

Because states implement diverse laws and consistently uniform standards are necessary for effective global tobacco control, global standards should be determined to implement authorized protections under Article 13. Within the scope of tobacco control, the Convention authorizes and obligates states individually, and supports the idea of a framework convention for tobacco control. A framework convention for tobacco control would be instrumental in implementing global standards. With uniform standards, present generally unaccepted practices that appear in minimally regulated countries could be avoided.¹²² Although the legal authority exists, global implementation has yet to occur. A global will to regulate tobacco is evident; changing public opinion along with regulatory and legal changes indicate tobacco's zenith has passed. despite the industry's recent profitable successes.¹²³ The world is nearly ready to commit to a framework protection, and the WHO is the appropriate NGO to lead the effort for a framework convention because of its expertise and stature in the field of tobacco control.¹²⁴

Anti-tobacco public education, peer support, and advertising can lessen the rate of adolescent tobacco consumption. NGO programs and events are the most common, and probably successful, means of influencing youths.¹²⁵ The success experienced by model NGO programs indicate that all NGOs should join efforts with the media to promote the well-being and health of children as envisioned by the Convention.¹²⁶

Government regulatory measures are vital in an anti-tobacco effort as a means of setting minimum levels of behavior (e.g., sales and advertising restrictions) but are generally incapable of leading the cause.¹²⁷ NGOs are best suited to alter public opinion and spearhead the battle against the tobacco industry on local, national, regional, and global levels. NGOs can, do, and should lead governments and the public to raise the regulatory constraints on the tobacco industry. While NGOs can pull tobacco control, they are incapable of pushing it. The converse is true for governments; they often push the issue by legislative and regulatory means, but seldom are able to pull it.¹²⁸ As leaders in the antitobacco cause, NGOs increase awareness, educate, and help to focus public opinion. Examples of NGOs doing this are the American Cancer

^{122.} For example, free samples to and targeted marketing of youths. See Dolgov, supra note 88.

^{123.} For example, the U.S. legal and regulatory environment radically changed during the 1990s

^{124.} See World Health Organization Home Page, (visited June 15, 1999) http://www.who.int>.

^{125.} See generally supra notes 62-97 and accompanying text.

^{126.} Convention of the Rights of the Child, supra note 85, at art. 17.

^{127.} See World Health Organization Home Page (visited June 15, 1999) http://www.who.int>.

^{128.} A notable exception is the 1964 U.S. Surgeon General's report that changed the smoking paradigm. See 1964 REPORT, supra note 3.

Society and the WHO. NGOs are essential partners in combating underage tobacco consumption. The time is ripe for NGOs to lead a tripartite coalition of NGOs, state governments, and the public, to implement an international framework convention on tobacco control that includes regulative mechanisms to protect children from tobacco.

V. SUBSTANCE CONTROL

A. Medical Basis

Medical research has documented nicotine's effect upon the body and its psychoactive characteristics.¹²⁹ The WHO's Programme on Substance Abuse (PSA) expressly addresses tobacco as a psychoactive substance.¹³⁰ The PSA's mandate is reflected in its mission statement "to promote health for all by preventing and reducing the adverse consequences of . . . tobacco . . . use."¹³¹ The Tobacco or Health (TOH) project, an ongoing PSA program, gained significant visibility with its annual "World No-Tobacco Day."¹³² This event is an exemplary means of promoting an international anti-tobacco effort. With its global recognition and reputation, the WHO (with the PSA) is the proper international NGO to preach the anti-tobacco gospel.

Nicotine's addictiveness¹³³ has been equated to that of cocaine and heroin.¹³⁴ Tobacco is not generally considered a psychotropic¹³⁵ substance by the medical or legal fields.¹³⁶ If one considers recent medical

^{129. &}quot;Nicotine is the most prevalent psychoactive drug [and]... is only second to alcohol as the most abused drug." Community Outreach Health Information System (COHIS), Boston University Medical Center, About Nicotine Addiction (visited Mar. 19, 1998) <http://bu.edu/cohis/smoking/upsmoke/aboutnic.htm>. Psychoactive is defined as "possessing the ability to alter mood, behavior, cognitive process, or medical tension; usually applied to pharmacologic agents." STEDMAN'S MEDICAL DICTIONARY 1284 (William R. Hensyl et al. eds., 25th ed. 1990).

^{130.} See WHO, Programme on Substance Abuse: Factsheets: Trends in Substance Use and Associated Health Problems, Factsheet N.127 (visited Feb. 14, 1998) http://www.who.int/inffs/en/fact127.html>.

^{131.} The PSA mandate is "to: 1. prevent and reduce the negative health and social consequences of psycho-active substance use; 2. reduce the demand for non-medical use of psychoactive substances; and 3. assess psychoactive substances so as to advise the United Nations with regard to their regulatory control." *Id*.

^{132.} See WHO, supra note 67.

^{133.} See Susan H. Carchman, Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?, 51 FOOD & DRUG L.J. 85, 114-20 (1996); Michael L. Pianezza et al., Nicotine Metabolism Defect Reduces Smoking, 393 NATURE 750 (1998) (describing gene CYP2A6 and its relation to producing enzymes to consume nicotine).

^{134.} See PREVENTING TOBACCO 1994, supra note 4, at 30-31.

^{135.} Psychotropic is defined as "affecting the mind." STEDMAN'S MEDICAL DICTIONARY, *supra* note 129, at 1288.

^{136.} But see Arlene Levinson, Smoker Vows To Pursue Religious Fight Against Cam-

discoveries concerning nicotine and tobacco, an argument emerges to classify tobacco as a psychotropic substance. Nicotine is a unique drug with multiple characteristics that makes it difficult to classify in a single category.¹³⁷ It "exerts psychoactive (or mood-altering) effects on the brain that motivate repeated and compulsive use of the substance."¹³⁸ Nicotine has both sedating and stimulating effects upon brain activity.¹³⁹ The tobacco industry classified nicotine as "a narcotic, tranquilizer, or sedative"¹⁴⁰ and "a physiologically active . . . substance . . . [that] alters the state of the smoker by becoming a neurotransmitter and a stimulant."¹⁴¹ Medical research revealed that nicotine stimulates the release of both dopamine, a neurotransmitter, which stimulates the brain's pleasure receptors, and norepinephrine which increases alertness and energy.¹⁴² This process directly affects the tobacco consumer's cognitive functions.¹⁴³ Thus, tobacco use materially affects one's mind and body.

138. David A. Kessler et al., The Legal and Scientific Basis for FDA's Assertion of Jurisdiction over Cigarettes and Smokeless Tobacco, 277 JAMA 405 (1997) (citing SMOKELESS TOBACCO 1986, supra note 4, at 182-83; NICOTINE ADDICTION 1988, supra note 4, at 7-8, 270, 334-35).

139. Kessler et al., supra note 138 (citing R. Norton et al., Smoking, Nicotine Dose and the Lateralisation of Electrocortical Activity, 108 PSYCHOPHARMACOLOGY 473-79 (1992); W.S. Pritchard, Electroencephalegraphic Effects of Cigarette Smoking, 104 PSYCHOPHARMACOLOGY 485-90 (1991)); Robert Langreth, Kicking the Habit: Why Smokers Don't Quit; New Clues to How Nicotine Affects the Brain; Personality Traits May Predispose Some People to Addiction, WALL ST. J., May 5, 1997, at B1.

140. Kessler et al., *supra* note 138, at 407 (citing AL UDOW, WHY PEOPLE START TO SMOKE (1976), *in* 141 CONG. REC. H7646, H7663 (daily ed. July 25, 1995) (Udow was a Phillip Morris researcher)).

141. Kessler et al., supra note 138, at 407 (citing Phillip Morris Inc., Draft Report Regarding a Proposal for a "Safer" Cigarette Code-Named Table). See generally Elyse Tanouye, Kicking the Habit: Why Smokers Don't Quit; New Clues to How Nicotine Affects the Brain; Antidepressant, Other Drugs Offer New Hope, WALL ST. J., May 5, 1997, at B1. "Nicotine is the best and most effective over-the-counter antidepressant available in the world." Id.

142. Gordon B. Lindsay & Jacquie Rainey, Psychosocial and Pharmacologic Explanations of Nicotine's "Gateway Drug" Function, 67 J. SCH. HEALTH 123 (1997); David N. Leff, Why Day's First Cigarette is Best Nicotine Addiction Traced to Neurons Releasing Pleasure-Giving Dopamine, BIOWORLD TODAY, Dec. 9, 1997, available in 1998 WL 14876468; Tanouye, supra note 141; U.S. HHS: One Step Closer to Unraveling Nicotine's Addictive Properties, M2 PRESSWIRE, Jan. 26, 1998, available in 1998 WL 5047105.

143. Langreth, supra note 139.

bridge Smoking Ban, Feb. 18, 1987, available in 1987 WL 3132747.

^{137. &}quot;At low blood levels nicotine stimulates all nicotinic receptors: in sympathetic and parasympathetic ganglia, in the adrenal medulla, in the CNS [central nervous system], and on skeletal muscle. At higher concentrations it blocks the same receptors." ELAINE N. MARIEB & ELAINE N. MARIEB MARSHAL SCHLAFER, THE NURSE, PHARMACOLOGY, AND DRUG THERAPY 268 (1989).

TOBACCO, GLOBAL PUBLIC HEALTH . . .

B. Argument for an International Legal Basis

The WHO has a duty to inform the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations if the WHO finds:

(a) that the substance has the capacity to produce

(i) (1) a state of dependence, and

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(2) central nervous system stimulation or depression, resulting in hallucinations or disturbances in motor functions or thinking or behavior or perception or mood, or

(ii) similar abuse and similar ill effects as a substance in Schedule I, II, III or IV,

(b) that there is that *the substance is* being or is likely to be *abused so* as to constitute a public health and social problem warranting the placing of the substance under international control.¹⁴

Although tobacco is not abused in a manner similar to Schedule I-IV drugs (i.e., hallucinogenics, amphetamines, or barbiturates), it certainly would not be approved for over-the-counter use if it was introduced today. Tobacco consumption by underage and/or uninformed consumers can easily be construed as abuse, particularly when considering the medical effects. It resides in a gray zone between relatively harmless drugs and the inherently dangerous Schedule I-IV drugs. In comparison to Schedule I-IV substances, a tobacco consumer remains lucid while consuming tobacco and the direct medical effects persist for a relatively short time period. Tobacco is a dependence-creating substance that stimulates the central nervous system and one's cognitive functions, thoughts, behavior, perceptions, and/or moods. Therefore, tobacco meets the medical definition of a psychotropic¹⁴⁵ drug and the conditions stated in the Convention on Psychotropic Substances, article 2(4).¹⁴⁶ Hence, the WHO should classify tobacco as a psychotropic substance.

Cognizant of the subtle dangers and social acceptance of tobacco, the WHO would be reasonable in classifying tobacco as a Schedule V psychotropic substance. This would create a new category, Schedule V, to reflect the serious and insidious nature inherent in tobacco while rec-

^{144.} Convention on Psychotropic Substances, Feb. 19, 1971, 1019 U.N.T.S. 175, 178 at art. 2(4) (emphasis added).

^{145.} See STEADMAN'S MEDICAL DICTIONARY, supra note 135.

^{146.} See Convention on Psychotropic Substances, supra note 144.

ognizing that tobacco poses a smaller risk than Schedule I-IV substances. A Schedule V substance would require less regulatory control than Schedule I-IV substances. Possible regulatory controls include limits on advertising, required labeling, vendor licensing, and mandatory reporting of production and sales.

If tobacco is classified as a psychotropic substance, the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances offers regulatory assistance.¹⁴⁷ Parties possess a duty to: protect minors,¹⁴⁸ monitor the import and export of psychotropic substances,¹⁴⁹ suppress illicit trafficking in free trade zones (e.g., duty-free areas),¹⁵⁰ and furnish the United Nations with text of applicable laws and regulations along with reported domestic cases of illicit trafficking.¹⁵¹ These affirmative obligations increase tobacco awareness and control. Increased attention to unlawful tobacco distribution would naturally help to regulate tobacco within a legal context by increasing containment.

Within the context of tobacco as a legal psychotropic substance, a reasonable compromise would be to license all tobacco vendors and require universal labeling¹⁵² standards for all tobacco products (e.g., using a plain and predominate manner to maximize consumers' awareness of tobacco's health risks).¹⁵³ These universal standards should utilize thresholds that may be raised by parties individually or in concert.¹⁵⁴ The WHO, with its Tobacco or Health program, is the proper NGO to promote this plan of action because of its credibility, leadership, and recognition. Although an international legal basis exists to control tobacco as a psychotropic drug, *arguendo*, it has not been, nor is likely to be in the near future, implemented towards this predictably controversial end. Similarly, the tobacco industry will steadfastly resist efforts to mandate warning and ingredient labeling.

^{147.} Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493 [hereinafter Convention Against Illicit Trafficking].

^{148.} Id. at art. 3(5)(f).

^{149.} Id. at art. 9(2)(c).

^{150.} Id. at art. 18(1).

^{151.} Id. at art. 20(1).

^{152.} E.g., Convention on Psychotropic Substances, supra note 144, at art. 10 (addressing warnings, labeling, and advertising); WHO CONSTITUTION, supra note 51, at art. 21(e) (possessing authority to regulate advertising and labeling).

^{153.} ROB CUNNINGHAM, SMOKE & MIRRORS: THE CANADIAN TOBACCO WAR (1996) (describing "generic" warning labels).

^{154.} Convention Against Illicit Trafficking, supra note 147, at art. 24.

VI. ECONOMIC ISSUES

A. Economics

The tobacco industry is an economic juggernaut. In today's world of global economic competition, it is rare to find an industry with such high profit margins.¹⁵⁵ Investors are naturally attracted to its profitability.¹⁵⁶

The tobacco industry has oligopolistic characteristics.¹⁵⁷ There is only a handful of tobacco product manufacturers while countless growers supply the TTCs. Utilizing their vertical integration, the TTCs earn substantial profits by adding value to the tobacco and marketing it.¹⁵⁸ The farmers do well to earn a modest living, partly because they only supply a commodity. Being oligopolistic allows the TTCs to exert significant influence over the tobacco industry.¹⁵⁹ Past industry behavior reveals how jealously the TTCs protect their interests, even to the public's detriment In the past, only (some) governments have been able to confront the TTCs.¹⁶⁰

Despite modest earnings, farmers view tobacco favorably because it is one of the best paying cash crops and grows well in most environments, except the northern climates.¹⁶¹ In the past, tobacco has been

156. Tobacco Questions, supra note 24. "A successful American stock market investor, with a strong interest in tobacco stocks, summed it up this way: 'I'll tell you why I like the cigarette business. It costs a penny to make, sell it for a dollar, it's addictive and there's fantastic brand loyalty." Id. Despite the current U.S. legal climate and their population's greater suffering from tobacco, Native American tribes are building cigarette production facilities as a job creation and investment strategy. Pam Belluck, Tribe's Unlikely Business: Manufacturing Cigarettes, THE OREGONIAN, Mar. 22, 1998, at A14.

157. U.N. CONF. ON TRADE & DEV., MARKETING AND DISTRIBUTION OF TOBACCO, at 2, U.N. Doc. TD/B/C.1/205, U.N. Sales No. E.78.II.D.14 (1978). While there are countless tobacco farmers, the large TTCs generally control the production of retail tobacco products. See generally Farm Leader Lobbies for Tobacco Program, KY. J. COM. & INDUS., Oct. 2, 1997 (visited Mar. 8, 1998) http://www.aik.org/kj_10297j.html>.

158. See Convention Against Illicit Trafficking, supra note 147.

159. See CHAPMAN & LENG, supra note 33, at 44; Chip Jones, Brazil's Expansion Worries Va. Growers; Its Leaf Costs Half of American Grown, RICHMOND TIMES DISPATCH, June 29, 1998, at A1 (describing globalization effects on tobacco producers).

160. See Convention Against Illicit Trafficking supra note 147.

161. See CHAPMAN & LENG, supra note 33, at 27-29 (noting the economic infrastruc-

^{155.} Tobacco products have one of the highest markups for manufactured goods. Of 36 sectors tracked in the G-7 countries, it has the highest markup in the United States, France, United Kingdom, second highest in Germany, and below average in Canada. Similar results occur in seven other European countries. Joaquim O. Martins et al., Mark-up Ratios in Manufacturing Industries Estimates for 14 OECD Countries, OECD Doc. OCDE/GD/(96)61 (1996). See Rekha Balu & Ernest Beck, Tobacco: Sara Lee Corp. Kicks Tobacco, WALL ST. J., Apr. 8, 1998, at B1 (reporting that although the Dutch Douwe Egberts Van Nelle Tobacco unit had annual sales of only \$300 million, it contributed 6% of Sara Lee's operating income from aggregate sales of \$19.73 billion).

viewed as a source for economic growth.¹⁶² Today, governments and NGOs generally take a neutral or negative view on tobacco's economic contributions.¹⁶³ There is a dark side to tobacco's economic character, namely its costs to society. The World Bank estimated that the net global cost of tobacco to the world economy is over \$200 billion per year.¹⁶⁴ As a result, World Bank policy now discourages the use of tobacco products and grants no new loans for tobacco production, processing, or marketing.¹⁶⁵ On a more human scale, tobacco is faulted by some because acreage devoted to tobacco propagation is acreage removed from food production.¹⁶⁶

162. The World Bank funded tobacco development in the past. See infra note 164 and accompanying text; CUNNINGHAM, supra note 153, at 185-86. But see Gumisai Mutume, Southern Africa-Commodities: Save Tobacco, Save Our Economies, INTER PRESS SERV., Aug. 3, 1994, available in LEXIS, News Library, Inpres File (reporting that Zimbabwe and Malawi supply 44% and 33%, respectively, of world tobacco production). In Zimbabwe, tobacco in one of the largest employers, provides \$414 million annually (nearly 30% of export earnings), and is the single largest source of foreign exchange. Id. Tobacco furnishes 80% of Malawian exports. Zimbabwe: Tobacco's Struggle for Survival, AFR. ECON. DIG., Aug. 15, 1994, available in LEXIS, World Library, Txtlne File.

163. See CUNNINGHAM, supra note 153; Jeanne Cummings & David Wessel, Treasury Pegs Smoking's Economic Cost, WALL ST. J., Mar. 25, 1998, at A3 (reporting that U.S. smoking costs are about \$130 billion annually); Lawrence H. Summers, Tobacco Issues, FED. DOC. CLEARING HOUSE, Mar. 24, 1998, available in 1998 WL 8993691.

164. Economic Role of Tobacco Production and Exports in Countries Depending on Tobacco as a Major Source of Income, at 3, UNTAD/COM/36 (1995) (citing Howard Barnum, in WHO, WORLD NO-TOBACCO DAY 1995 TOBACCO ALERT 6-13 (1994)); Tobacco Questions, supra note 24.

165. See Report of the Secretary-General to the United Nations Economic and Social Council on the Multisectoral Collaboration on Tobacco or Health, U.N. ESCOR, at 7-8, U.N. Doc. E/1955/67 (1995).

166. See Stanley A. Taylor, Tobacco and Economic Growth in Developing Nations, BUS. CONTEMP. WORLD, Winter 1989. Raising tobacco reduces the quantity of food produced and therefore increases food prices. Id. at 55 (citing acreage data in STAT. DIV. OF THE ECON. & SOC. POL'Y DEP'T, FOOD & AGRIC. ORG., 35 1981 FAO PRODUCTION Y.B. (1982)). See also Corporate Watch, The Global Politics of Tobacco (visited Mar. 19, 1998) <http://www.corpwatch.org/feature/tobacco/ framework.htm> (noting that worldwide tobacco production utilizes land that alternatively could feed 20 million people); Pamphil H.M. Kweyah, Tobacco Expansion in Kenya: The Socio-Ecological Losses, id at 248, 248-51; Henry Muwanga-Bayego, Tobacco Growing in Uganda: The Environment and Women Pay the Price, 3 TOBACCO CONTROL 255, 255-56 (1994), cited in Susan M. Marsh, U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks, 15 WIS. INT'L L.J. 29, 38 n.32 (1996)).

ture that enables tobacco production); Gail Gibson, Churches Stumble over Morality of Tobacco Guilt and Ambiguity Clash with Profits and Tradition in Tobacco Belt, ROANOKE TIMES & WORLD NEWS, Mar. 29, 1998, at A3. See e.g., 139 CONG. REC. S446 (1993) (statement of Sen. McConnell) (noting that the average Kentucky farmer raises only three acres and there is no other alternate crop that pays as well as tobacco on such a small scale). But see CHAPMAN & LENG, supra note 33, at 30-31 (describing the increasing attractiveness of alternative crops that offer higher returns, are less labor intensive, and require fewer chemicals and fertilizers). Tobacco grows well as far north as southern Canada. CUNNINGHAM, supra note 153, at 185

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Previously, a dichotomy existed between government action to increase the trade in tobacco and government action to fight its adverse health effects.¹⁶⁷ A prime example was the U.S. trade policies during late 1970s and 1980s that utilized federal law¹⁶⁸ to open foreign markets for tobacco products.¹⁶⁹ Prominent critics decried the inconsistency in U.S. actions.¹⁷⁰ Fortunately, the U.S. government now precludes this dichotomy by not promoting tobacco products in its trade policies.¹⁷¹

B. Agricultural Subsidies

1999

Agricultural tobacco subsidies are another method of governmental support that presents problems common to subsidies and unique to tobacco. Subsidies are generally intended to support farm income, farm commodity prices, or manage commodity supplies.¹⁷² Overall, subsidies

168. Trade Act of 1974, § 301, 19 U.S.C. 2411 (1994).

169. The U.S. Trade Representative used § 301 and the threat of possible retaliation to remove trade barriers and open foreign markets for U.S. tobacco products. *E.g.*, Japan in 1979 (cigars and pipe tobacco) (46 Fed. Reg. 1388-89 (1981)); CHAPMAN & LENG, *supra* note 33, at 44-45; (Taiwan in 1986) (cigarettes); (Memorandum for the United States Trade Representative, Oct. 27, 1986, 51 Fed. Reg. 39,639 (1986)); South Korea (cigarettes) (53 Fed. Reg. 4,926-27, 20,406 (1988)); Thailand (cigarettes) (54 Fed. Reg. 23,724-25 (1989)); Thailand Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, (1991), *reprinted in* 30 I.L.M. 1122 (1991)). In contrast, Hong Kong banned smokeless tobacco in 1987 but avoided retaliatory actions while claiming the ban was an internal health matter and not a trade issue. CHAPMAN & LENG, *supra* note 33, at 44. *Cf. Health Policy: MEPs Call for Wider Overall Emphasis on Health Considerations*, EUR. REP., Mar. 14, 1998, *available in* 1998 WL 8801099 [hereinafter MEPS CALL FOR HEALTH CONSIDERATIONS]. *But see* Lloyd Doggett, *Eliminate Taxpayer Support for Big Tobacco*, CONG. PRESS RELEASES, Sept. 26, 1997, *available in* LEXIS, News Library, Curnws File.

170. Former Surgeon General C. Everett Koop stated that "it is the height of hypocrisy for the United States to export tobacco." See Barbara Rudolph, Fuming over a Hazardous Export, TIME, Oct. 2, 1989, at 82. The American Medical Association stated that U.S. trade policy "perpetuates the problem of smoking by trying to develop overseas a market that is drying up at home." A.M.A. Assails Nation's Export Policy on Tobacco, N.Y. TIMES, June 27, 1990, at A1, A12. See Weissman, supra note 36.

171. See Diana Degette, Degette Amendment Stops U.S. Promotion of Tobacco Overseas, CONG. PRESS RELEASES, Sept. 26, 1997, available in LEXIS, News Library, Curnws File; Doggett, supra note 169; Samuel Goldreich, House OK's Ending Tobacco-Export Support, WASH. TIMES, Sept. 27, 1997, at A11.

172. See Geoffrey S. Becker, An Introduction to Farm Commodity Programs (visited Apr. 17, 1998) http://www.cnie.org/nle/ag-10.html>.

31

^{167.} See 144 CONG. REC. S1801-02 (daily ed. Mar. 11, 1998) (statement of Sen. Leahy); Heidi S. Gruner, Note, The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets, 28 LAW & POL'Y INT'L BUS. 217 (1996); Heidi S. Gruner, Note, The Export of U.S. Tobacco Products to Developing Countries and Previously Closed Markets, 28 LAW & POL'Y INT'L BUS. 217 (1996); Andrea J. Hageman, Note, U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies, 1 MINN. J. GLOBAL TRADE 175 (1992); Jonathan Wike, Note, The Marlboro Man in Asia: U.S. Tobacco and Human Rights, 29 VAND. J. TRANSNAT'L L. 329, 334-38 (1996). Cf. CUNNINGHAM, supra note 153, at 186 (describing Canadian tobacco export promotions).

are often inefficient; in effect, they are more a political response than an economic solution. As decades pass, many farmers "learn" to view subsidies more like an entitlement than as an economic equalizing mechanism. Indeed, the agricultural and technological contexts have substantially changed since the Great Depression of the 1930s and the original purposes for subsidies are no longer present.¹⁷³ A problem unique to tobacco subsidies is the inherent conflict between government promotion of a legal, but harmful, agricultural product¹⁷⁴ and government actions and policies to encourage the public to avoid or discontinue use of tobacco products.¹⁷⁵

There are no simple solutions to tobacco production subsidies. A recent European Union (EU) proposal¹⁷⁶ is a notable example. The EU produces 4.6% of the world's tobacco, yet it is a low-grade quality, sells at a very low price, and is heavily subsidized.¹⁷⁷ The Mediterranean EU states, who produce the majority of EU tobacco (i.e., Italy at 39%, Greece at 36%, and Spain at 13%) are comfortable with the status quo and wish to avoid any major changes to the EC (European Community) Tobacco Regime. At the same time, the United Kingdom and Sweden argue for a phased reduction of tobacco subsidies and financial incentives to encourage tobacco producers to seek other livelihoods.¹⁷⁸ EU tobacco subsidies are particularly high (80% of the producers' revenue) when compared to other agricultural subsidies (e.g., a 15% U.K. "setaside").¹⁷⁹ Such substantial tobacco subsidies will probably become a free trade issue. Subsequently, these tobacco subsidies probably will be a source of disputes within the World Trade Organization (WTO) between producing states.¹⁸⁰ In general, agricultural subsidies continue to be a contentious issue in world trade.

Providing tobacco subsidies invokes moral and economic questions. What makes tobacco subsidies a difficult issue is the breadth of areas affected. In the EU, "the problem is really a social one; not a commodity

- 178. Id. at 4, 24-27, 30, 51-54.
- 179. Id. at 1; 581 PARL. DEB., H.L. (5th ser.) 796 (1997) (statement of Lord Brain).
- 180. See THIRTEENTH REPORT, supra note 175, at 11-12.

^{173.} See Edward Lotterman, Farm Bills and Farmers: The Effects of Subsidies Over Time, THE REGION, Dec. 1996, at 4.

^{174. &}quot;Tobacco is one of the few subsidised crops which is not eaten and which is uniquely recognised as injurious to health." 581 PARL. DEB., H.L. (5th ser.) 798 (1997) (statement of Lord Grantchester).

^{175.} See EUROPEAN COMMITTEE, THIRTEENTH REPORT 17-18, 39 (1997) (visited Apr. 17, 1998) http://www.parliment.the-stationery-office.co.uk/pa/ld199697/ldselect/ldeucom/ 073xiii/ec1301.htm> [hereinafter THIRTEENTH REPORT]; James T. O'Reilly, A Consistent Ethic of Safety Regulation: The Case for Improving Regulation Of Tobacco Products, 3 ADMIN. L.J. 215, 240-42 (1989).

^{176.} Report from the Commission to the Council on the Common Organisation of the Market in Raw Tobacco, COM(96)554.

^{177.} THIRTEENTH REPORT, supra note 175, at 4, 7.

issue."181 The situation also involves moral issues regarding government support of an addictive substance and a disingenuous argument that if the EU does not produce the tobacco someone else will.¹⁸² How can a government justify tobacco subsidies while it also attempts to minimize tobacco consumption in its population? Is it any more justifiable if the tobacco is raised only for export? Posing these questions invokes examination of the tobacco industry's legislative clout and substantial lobbying influence. Past experience illustrates that the contentious matter of tobacco subsidies is slow to change. Anti-tobacco forces must fight established economic interests and political inertia.¹⁸³ Difficult situations like this exist worldwide and plainly demonstrate the need for comprehensive change. An optimum solution is a international framework convention for tobacco control that is discussed later in Part VIII. Without global cooperation, this type of quandary will persist.

581 PARL. DEB., H.L. (5th ser.) 790 (1997) (statement of Lord Rea).

183. E.g., MEPS CALL FOR HEALTH CONSIDERATIONS, supra note 169 and accompanying text.

^{181. 581} PARL. DEB., H.L. (5th ser.) 806 (1997) (statement of Lord Donoughue). Tobacco tends to be grown in remote rural areas on very small plots with an average size... of about three acres. It also involves Napoleonic or Continental land ownership issues. There are great difficulties in changing land use.... It is an intensive crop and the social problem is that in some areas it is a, or the, major employer and important source of income.

Id. See McConnell, supra note 161. But see Lord Rea's argument:

It is possible, with a slight stretch of the imagination, to compare [EU] tobacco production with South American cocaine production or Asian opiate or heroin production. The production of crops of all these addictive substances persists despite the strong opposition of their governments because of the high price which the products command in relation to alternative crops. Efforts to persuade Thai hill farmers or Colombian peasants to grow other crops tend to fail because even if they are subsidised they bring in much less income. The price of the dangerous controlled addictive drugs is artificially high largely because of their illegality and their subsequent scarcity. In the case of European tobacco, which of course is a perfectly legal product, the reward to the farmers is artificially high solely because of the regime which is funded by the taxpayer.

⁵⁸¹ PARL. DEB., H.L. (5th ser.) 790 (1997) (statement of Lord Rea).

^{182.} Lord Rea posits:

While little of the [EU] tobacco production is consumed in Europe nearly all of it is eventually consumed in the developing world. To say that ending [EC] production would lead to its replacement "from elsewhere" avoids acknowledging the actual situation in which strong, bad quality tobacco from Europe is currently contributing to the rapidly growing epidemic of tobacco related sickness and death in the less developed world. Not only are we supplying them with a dangerous addictive substance; they also have to pay hard currency for it, although admittedly far less than it costs us in subsidising its production.

C. Advertising

Tobacco advertising is quite effective and tobacco is a legal product nearly everywhere. Some countries, like the United States, protect commercial speech and, thus, tobacco advertising.¹⁸⁴ What, if any, limitations or prohibitions can be applied to a legal product? At one end of the spectrum is a complete ban on tobacco advertising by some states.¹⁸⁵ Other states have implemented less extreme measures.¹⁸⁶ Because of the inherent differences between states, regional anti-tobacco regulations are predictably elusive. However, the EU is on the verge of implementing a regional agreement to significantly limit tobacco advertising and sponsorship.¹⁸⁷ To a lesser extent, the United States and the EU limited tobacco advertising on television and required warning labels.¹⁸⁸

Although the TTCs suffered setbacks over the last decade, the antitobacco forces are far from gaining dominance over the TTCs. Examples abound of failed efforts to limit tobacco advertising. During the 1980s and 1990s, events in Eastern Europe and Asia illustrate big tobacco's influence and its ability to increase sales despite regulatory efforts.¹⁸⁹

186. E.g., Russia banned tobacco advertising on television, front and back pages of print media, and daytime radio on Jan. 1, 1996. Scherer, *supra* note 55. On April 1, 1998, Hong Kong banned tobacco advertising on the internet. See Jane Moir, Anti-Smoking Moves Seen as Small First Step, S. CHINA MORNING POST, Feb. 21, 1998, at 4, available in LEXIS, News Library, Txtnws File.

187. See Melissa N. Kurnit, The Uncertain Future of Tobacco Advertising in the European Community, 17 B.C. INT'L & COMP. L. REV. 177 (1994); Charles Bremner, EU Vote Spells End to Tobacco Ads in Four Years, TIMES (London) (reporting the European Parliament's endorsement of draft passed by the EU ministers); Tobacco Advertising Ban Reaches Final Hurdle, THE HERALD (Glasgow), Feb. 12, 1998, at 7 (agreeing to phase out tobacco advertising and sponsorships).

188. 15 U.S.C. §§ 1331, 1333 (1994); Council Directive 89/552/EEC, art. 13, 1989 O.J. (L 298) 28; Council Directive 92/41/EEC, art. 4, 1992 O.J. (L 158) 30.

189. See Susan Meyer, Comment, New Players for the Old Tobacco Game: The Czech Republic and Romania; It's Time to Change the Rules, 17 Nw. J. INT'L L. & BUS. 1057 (1996-97). See generally Johnson, supra note 15; Levin, supra note 117. But see World Tobacco, ESTONIA Advertising Ban (July 1997) (visited Feb. 26, 1998) <http://www.marketfile.co.uk/tobademo/news/WTNEWS/ ESTONIA.1.html>; World Tobacco, HUNGARY Tobacco Advertising Given Limited Run (July 1997) (visited Feb. 26, 1998) <http://www.marketfile.co.uk/tobademo/news/WTNEWS/HUNGARY.1html> (re-

^{184.} See infra, notes 210-212.

^{185.} E.g., Afghanistan, Algeria, Australia, Bulgaria, China, Hungary, Iceland, Italy, Iraq, Jordan, Mozambique, New Zealand, Norway, Paupa New Guinea, Portugal, Romania, Singapore, and Sudan. RUTH ROEMER, WHO, LEGISLATIVE ACTION TO COMBAT THE WORLD TOBACCO EPIDEMIC 182, 205, 211, 237 (2d ed., 1993). See also CHAPMAN & LENG, supra note 33, at 65; Ross D. Petty, Advertising Law and Social Issues: The Global Perspective, 17 SUFFOLK TRANSNAT'L L. Rev. 309, 342 (1994); Neil Buckley, Belgians Back Tobacco Advertising Ban, FIN. TIMES, Jan. 10, 1997, at 2 (banning all forms of advertising and sponsorship beginning in 1999); Scherer, supra note 55.

The following example illustrates the power of TTCs to influence the law and advertising in a national market. Czechoslovakia banned tobacco advertising¹⁹⁰ before its communist government fell in 1989, but rescinded the law after President Vaclav Havel's governments came into power.¹⁹¹ Shortly thereafter, the Czechs began a "privatize or die" campaign to convert their economy into a market driven economy.¹⁹² Phillip Morris, a TTC, purchased approximately 77% of the Czech tobacco company Tabak and now dominates the Czech market.¹⁹³ Parliament banned all tobacco advertising in the 1992 Law on Consumer Protection.¹⁹⁴ Tobacco advertisers flouted the law in Prague and forced a modification of the law in their favor.¹⁹⁵ In November 1993, the Czech Parliament again banned tobacco advertising but allowed it to continue for advertising contracts in force before 1994.¹⁹⁶ Despite a proposed legislative timetable to ban the grandfathered contracts in 1994, the timetable slid back during 1994 and in May 1995, President Havel, a smoker, rejected the law for economic reasons.¹⁹⁷ In June 1995, the country again regulated tobacco but the new law is equivocal and less stringent than the Czech Voluntary Advertising Code.¹⁹⁸ The Czech Re-

192. Neil King, World Business (A Special Report): How It Works; Faster, Faster: The Czech Voucher System had One Overriding Aim: Get the Job Done Quickly, WALL ST. J. EUR., Oct. 23, 1995, at R11.

193. Tobacco Producer Disagrees with Consumer Protection Law, CTK NAT'L NEWS WIRE, Mar. 4, 1993, available in LEXIS, World Library, Allnws File [hereinafter Czech Tobacco Producer Disagrees]; Gasping, Tobacco in Eastern Europe, THE ECONOMIST, Aug. 21, 1993, at 52.

194. Czech Tobacco Producer Disagrees, supra note 193; Debate Continues on Role of Advertising in Business, CTK NATL NEWS WIRE, Sept. 9, 1993, available in LEXIS, World Library, Allnws File (citing the Consumer Protection Law 634/92) [hereinafter Debate Continues].

195. The television ban on tobacco ads continued, see Gasping, Tobacco in Eastern Europe, supra note 193; Debate Continues, supra note 194.

196. See Czech Republic: Czech Republic Bans Tobacco Advertising, EUROMARKETING, Dec. 7, 1993, available in LEXIS, World Library, USA: A Roundup of Activity, ADVER. AGE, Nov. 21, 1994, available in LEXIS, World Library, Allnws File.

197. Czech Tobacco Ban Delay, EUROMARKETING, Mar. 1, 1994, available in LEXIS, World Library, Allnws File; Thomas Kellner, Havel Vetoes Tobacco Legislation on Economic Grounds, PRAGUE POST, May 31, 1995, available in LEXIS, World Library, Allnws File; Will Tizard, Tobacco-Government Alliance 'Fruitful', PRAGUE POST, Aug. 10, 1994, available in LEXIS, World Library, Allnws File.

198. Czech Legal & Ethical Law, supra note 191; Confusion Prevents Enforcement of Tobacco Advertisement Law, CTK BUS. NEWS, Apr. 13, 1995, available in LEXIS, World

placing a 1978 law that totally banned all tobacco advertising with a lenient act) [hereinafter HUNGARY Tobacco Advertising].

^{190.} The Czechs banned cigarette advertising in March 1989. ROEMER, *supra* note 185, at 211-12.

^{191.} Id. at 212. The Czechs adopted a 1991 law regulating radio and television broadcasting and it permitted tobacco ads in the press, on billboards, and between 10:00 p.m. and 6:00 a.m. on television. MS, Legal and Ethical Regulation of Tobacco Advertising, CTK Nat'l News Wire, Aug. 13, 1995, available in LEXIS, World Library, Allnws File [hereinafter Czech Legal & Ethical Law].

public is a prime example of big tobacco's economic muscle, the industry's ability to persuasively sell its allegedly positive economic contribution to a national economy (without internalizing the negative externalities), and its will to manipulate market influences.

Arts and sports sponsorship can be considered indirect advertising. By sponsoring an event, a TTC can get corporate and/or brand logos displayed in the background (e.g., on a stadium wall, on an athlete's uniform or equipment, in a program, and/or on a television screen). Sponsorship can thus circumvent television advertising bans and gain high visibility for tobacco products. This has the effect of legitimizing and normalizing the product to viewers and tends to increase social acceptance and awareness.

Individual countries¹⁹⁹ and regional organizations²⁰⁰ have regulated tobacco sponsorship. Legislative efforts generally cannot provide a complete answer to indirect advertising. Experience proves a patchwork result occurs at best. A comprehensive mechanism is required to effectively deal with the tobacco industry.

Tobacco sponsorship has insidiously "addicted" many event organizers (e.g., automobile racing²⁰¹ and sports tournaments²⁰²). Occasion-

199. Tobacco Products Control Act, ch. 20, 11 C. Gaz. 393 (1988) (repealed 1997) (Can.) (banning sponsorship in the name of tobacco brands); Lebensmittel und Bedarfsgegenstandegestz [Foodstuffs & Goods in Daily Use Act] § 22, 1974 BGB1.I 1945, amended by 1986 BGB1.I 2610, 1987 BGB1.III 2610 (F.R.G.) (restricted display of cigarette logos in televised sports) (cited in Randall H. Stoner, Note, 200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship, 15 HASTINGS INT'L & COMP. L. REV. 639, 641, nn. 11, 12 (1992)); Voluntary Agreement between the Government and the Tobacco Industry on Sports Sponsorship to Stand at Least Until 31/10/1989, available in DEP'T HEALTH & SOCIAL SEC., FIRST REPORT OF THE COMMITTEE FOR MONITORING AGREEMENTS ON TOBACCO ADVERTISING AND SPONSORSHIP annex (1988) (restricted display of cigarette logos in televised sports) (cited in Stoner, supra note 199, at 641, n.13). See S. African Cabinet Okays Tobacco Control Bill, XINHUA NEWS AGENCY, July 29, 1998, available in LEXIS, News Library, Txtnws File (reporting on draft legislation that would permit the health minister to prohibit all tobacco advertising, including sponsorships).

200. An EU-wide ban of tobacco product advertising is close to final approval. See Council Directive 97/36/ED, 1197 O.J. (L 202) 1 (amending Council Directive 89/552/EEC); Council Adopts Common Position on Tobacco Advertising, SPICERS CTR. FOR EUROPE, Feb. 14, 1998, available in LEXIS, Eurcom Library, Spicer File; Health Ministers Pave the Way for EU-Wide Tobacco Adverts Ban, Spicers Ctr. for Europe, Dec. 6, 1998, available in LEXIS, Eurcom Library, Spicer File.

Library, Allnws File; Czech Republic: Czech Self Regulation Win, EUROMARKETING, Mar. 21, 1995, available in LEXIS, World Library, Allnws File.

ally, a conscious effort is made to avoid or remove the tobacco industry's influence.²⁰³ When tobacco-free events occur, it is often in partnership with an NGO rather than the event organizer unilaterally acquiring replacement sponsorship. In effect, NGOs serve as catalysts and thus are usually a significant factor in altering the event's dependence on TTC financial support.

The TTCs are forces not to be taken lightly. Their past behavior plainly reveals that advertising and market share are the means to the end—namely profit.²⁰⁴ They are ruthlessly efficient capitalists. Advertising plays a crucial role in the TTC's success.²⁰⁵ Counter-advertising can operate as a substantial deterrent.²⁰⁶ While governments and NGOs sometimes utilize counter-advertising, results often depend on how the message is presented. Past experience underscores the general ineffectiveness of voluntary advertising self-regulation.²⁰⁷

A new approach to limiting tobacco promotion is to proscribe the deductibility of certain advertising expenses as tax deductions.²⁰⁸ One U.S. proposal would deny tax deductions for advertising and promotional expenses when the ads target children.²⁰⁹ Although this approach

204. In Minnesota's suit against the tobacco industry, Phillip Morris' chief executive, Geoffrey Bible, testified that profitability was as important as public health. See Myron Levin, Tobacco Executive Endures 4 Hours of Tough Questioning, L.A. TIMES, Mar. 3, 1998, at A1; Profit as Important as Public's Health, Tobacco Exec Testifies, CHI. TRIB., Mar. 3, 1998, at 7.

205. E.g., advertising is critical to entice and retain "replacement" smokers. "Eightysix percent of underage smokers prefer one of the three most heavily advertised brands -Marlboro, Newport or Camel." Children's Health Preservation and Tobacco Advertising Compliance Act, S. 1902, 105th Cong. (1998). See 144 CONG. REC. S. 1902-01 (daily ed. Mar. 12, 1998) (statement of Sen. Reed).

206. See supra notes 13, 14, 90-92, and accompanying text.

207. See generally Meyer, supra note 189, at 1078-82; Levin, supra note 117, at 100-01, 103, 106;. But see Jennifer A. Lesny, Note, Tobacco Proves Addictive: The European Community's Stalled Proposal to Ban Tobacco Advertising, 26 VAND. J. TRANSNAT'L L. 149, 167-68 (1993).

208. 144 CONG. REC. S. 1902-01 (daily ed. Mar. 12, 1998) (statement of Sen. Reed).

209. "Key components of [S. 1638's] restrictions include: a prohibition on point of sale advertising except in adult only stores and tobacco outlets; a ban on outdoor advertising within 1000 feet of schools and publicly-owned playgrounds, and outdoor advertising be-

other glamorous, male-dominated sports such as Premier League football have no difficulty in attracting significant sponsorship from commercial interests outside the tobacco industry."). *Id. But see* Douglas P. Shuit, *Anti-Smoking Forces Ready to Invade Tobacco Road*, L.A. TIMES, Apr. 3, 1998, at B1 (describing anti-tobacco sponsorship of race cars).

^{202.} E.g., Virginia Slims Women's Tennis Tour.

^{203.} For example, the International Olympic Committee and WHO coordinated to make the 1994 Winter Olympics in Lillehammer, Norway, smoke-free. WORLD HEALTH REPORT 1995, supra note 1, at 61. But see Commission Welcomes FIA Move for Ban on Tobacco Sponsorship, SPICERS CTR. FOR EUROPE, Mar. 7, 1998, available in LEXIS, Eurcom Library, Spicer File (skeptically noting that the Federation Internationale de l'Automobile conditions its compliance on clear data proving the link between advertising and smoking habits).

is certain to be controversial, in the United States there are few, if any, constitutional questions posed by this tax code mechanism. There are substantially more constitutional questions posed by outright bans or substantial regulation of commercial speech.²¹⁰

Labeling tobacco products with health warnings is a common regulatory tactic that varies extensively between states. Some are relatively lax²¹¹ while other states are substantially more demanding²¹² in their re-

211. Japan requires the warning to state: "As smoking might injure your health, let's be careful not to smoke too much." Levin, *supra* note 117, at 100 (citing KITSUEN TO KENKO, SMOKING AND HEALTH 7 (Ministry of Health & Welfare Ed., 2d ed. 1993)). Hungary requires the warning to state "[s]moking seriously damages your health and that of those around you." *HUNGARY Tobacco Advertising*, *supra* note 189.

212. The United States requires four rotating warnings on cigarette packages and advertising: "smoking causes lung cancer, heart disease and may complicate pregnancy," "quitting smoking now greatly reduces serious risks to your health," "smoking by pregnant women may result in fetal injury, premature birth, and low birth weight" and "cigarette smoke contains carbon monoxide." 15 U.S.C. § 1333 (1994). For smokeless tobacco, the United States requires three rotating warnings: "this product may cause mouth cancer," "this product may cause gum disease and tooth loss" and "this product is not a safe alternative to cigarettes." 15 U.S.C. § 4402 (1994). Canada requires warnings at the top of the package's front and back. CUNNINGHAM, supra note 153, at 105-07. Cigarette and roll-your-own packages must carry the following rotating statements: "cigarettes are addictive," "tobacco smoke can harm your children," "cigarettes cause fatal lung disease," "cigarettes cause cancer," "cigarettes cause strokes and heart disease," "smoking during pregnancy can harm your baby," "smoking can kill you," and "tobacco smoke causes fatal disease in non-smokers." Id. The warnings appear in white on black or black on white, not in the package colors. Id. Australia requires six rotating warnings that cover 25% of the package front: "smoking is addictive," "smoking kills," "smoking causes heart disease," "smoking when pregnant harms your baby," "your smoking can harm others" and "smoking causes lung cancer." CDC, Tobacco Control Measures, in Australia (visited Mar. 19, 1998) <http://www.cdc.gov/nccdphp/osh/who/ australi.htm>. Cf The EU's Tobacco Labeling Directiverequires a general warning on each tobacco product, "tobacco seriously damages health," and a second, specific alternating warning. Council Directive 89/662/EEC, art. 4, 1989 O.J. (L 359) 1, amended by Council Directive 92/41/EEC, supra note 175, art. 1. Specific warnings on each cigarette or rolling tobacco packet have two mandatory warnings, "smoking causes cancer" and "smoking causes heart disease," and a choice from 14 optional warnings: "smoking causes fatal diseases," "smoking kills," "smoking can kill," "smoking when pregnant harms your baby," "protect children: don't make them breathe your smoke," "smoking damages the health of those around you," "stopping smoking reduces the risk of serious disease," "smoking causes cancer," "smoking causes chronic bron-chitis and other chest diseases," "more than (...) people die each year in (name of country) from lung cancer," "every year, (. . .) people are killed in road accidents in (name of country) times more die from their addiction to smoking," "every year, addiction to smoking claims more victims than road accidents," "smokers die younger," "don't smoke if you want to stay healthy," "save money: stop smoking," and "smoking causes addiction." Id. A specific warning, "causes cancer," is on each smokeless tobacco product. Id. Each unit packet of cigar, cigarillo, pipe tobacco, or other smoking tobacco product carries a rotating specific warning: "smoking causes cancer," "smoking causes fatal diseases," "smoking

yond those areas restricted to black-and-white text only; and, a prohibition on brandname sponsorship of sporting or entertainment events." *Id.*

^{210.} See Jeff I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U.L. REV. 1147 (1996); Stoner, *supra* note 199, at 650-58

quired warnings. When a state does not require warning labels, TTCs often avoid labeling the tobacco product.²¹³ As a result, many consumers in underdeveloped countries are unaware of the dangers associated with tobacco consumption and the breath of ingredients.²¹⁴ Therefore. labels should include both ingredients and health warnings. To enable the public to make an informed choice when consuming a product with dangerous characteristics, labeling should be standardized globally and implemented where it does not exist. Standardized labeling would mandate disclosures by the TTCs for the public benefit. Although a large part of the global public would learn some of tobacco's dangers, most probably, that would not alter their consumption habits. Overall, such labeling probably would not harm the TTC's profitability much, if at all. History shows that without international labeling standards, only a patchwork of national regulations (and matching success) results, if at all. Universally effective labeling requires an international standard. Therefore, the WHO is the appropriate NGO to press for and oversee labeling implementation within the context of an international framework convention.

Considering the gravity of tobacco's health implications, past experience with voluntary regulation, and the inherent profit oriented nature of the industry, uniform regulations on advertising should be established. Such regulations should involve time, place, and manner restrictions. The regulations should include uniform minimum global standards; the right to avoid preemption of stricter regional, national, or local law; television advertising bans; a phased elimination of sports and arts sponsorships; prohibition of free samples; and mandatory labeling including health warnings and ingredients. The economic justification for these restrictions is based upon the current high expense for health care with explosive increases certain to appear within three to four decades if current trends remain unaltered. A moral justification exists based upon the fundamental right of all people to achieve "the

damages the health of those around you," and "smoking causes heart disease." Id.

^{213.} See Johnson, supra note 15, at 38, n.194 (interviewing a R.J. Reynolds spokesperson in 1989 who revealed that RJR did not include the labels unless the law required it). But see Health: Ingredients of Tobacco to be Revealed: Producers, Importers Issued Stern Warning, BANGKOK POST, Apr. 26, 1998, at 3 (reporting on a new Thai regulation that requires tobacco importers and manufacturers to reveal the ingredients of tobacco products); Mark Moran, "Cough Up" Ingredients, Health Officials Tell Tobacco Industry, AM. MED. NEWS, Nov. 23, 1998, available in 1998 WL 20199081 (reporting the industry's unsuccessful trade secret argument to avoid disclosing cigarette ingredients in Massachusetts Superior Court).

^{214.} See Fazal, supra note 57. Typically, chemicals are part of processed tobacco. See Campbell, supra note 95 (utilizing ammonia to increase nicotine's pH and speed of absorption); Marlboro Secret Said to be Ammonia, BOSTON GLOBE, Feb. 9, 1998, at A4; Karen Mills, Witness: R.J. Reynolds Used Freon in Cigarettes from 1970-73, Apr. 1, 1998, ASSOCIATED PRESS, available in 1998 WL 6648870 (using freon to puff up tobacco volume).

highest attainable standard of health."²¹⁵ An optimum means to accomplish this goal today is through the WHO and an international framework convention on tobacco control.²¹⁶ The phrase, "think globally, act locally" is indicative of and critical to success.

D. Taxes

Excise taxes are an excellent governmental tool for modifying behavior and as a revenue source in an inelastic demand/elastic supply situation.²¹⁷ Taxes are a particularly effective means of lowering teen tobacco consumption²¹⁸ because adolescent discretionary income is limited.²¹⁹ Despite decreased sales, revenue increases because consumption falls proportionately less than the price increases. The public generally favors a sin tax over other types of taxes, such as income or sales taxes. Significant excise tax increases have proven themselves as an effective tool for decreasing tobacco consumption.²²⁰ Some states utilize higher taxes as a tobacco consumption control mechanism, but the majority can and should substantially increase tobacco excise taxes for the public benefit.²²¹ An international framework convention on tobacco control should include a platform for significantly increased uniform excise taxes.²²²

An inherent concern associated with substantially increased taxes is smuggling. The larger the relative difference in the tax rate (and hence retail price) between political entities, the greater the probability of smuggling.²²³ Although smuggling tobacco is low on the scale of pub-

220. CUNNINGHAM, supra note 153; Tobacco Taxation, supra note 205.

221. E.g., the current U.S. legislative process continues debating the extent to increase taxes.

222. See CUNNINGHAM, supra note 153, at 249.

223. See Statement by Senator Edward M. Kennedy at the Senate Democratic Tobacco Task Force Hearing on Cigarette Smuggling, FED. DOC. CLEARING HOUSE, May 4, 1998, available in 1998 WL 7323398 (criticizing big tobacco's "smoke-screen" of smuggling); Mark Suzman, Summers Dismisses Fears on Tobacco Deal, FIN. TIMES, May 1, 1998, at 6 (affirming the U.S. Treasury's ability to regulate tobacco and avoid smuggling). See generally CUNNINGHAM, supra note 153, at 125-30; Alissa J. Rubin & Henry Weinstein, Tobacco Company Affiliate Pleads Guilty in Smuggling Trade: Firm with Ties to RJR Nabisco Admits Avoiding Taxes and Aiding the Illegal Export of Cigarettes to Canada. It Agrees to \$15-Million Fine., L.A. TIMES, Dec. 23, 1998, at A10. But see Mark Johnson, Cigarette Tax Hike a Smuggler's Boon?, RICHMOND TIMES-DISPATCH, Oct. 19, 1997, at A1 (quoting Alcohol, Tobacco & Firearms Agent Joseph P. Dougherty; "(Smuggling) will in-

^{215.} WHO CONSTITUTION, supra note 51.

^{216.} See infra Part VII.

^{217.} See CUNNINGHAM, supra note 153, at 119.

^{218.} WHO, Tobacco Taxation: Turning the Economic Tables in Favour of Health, in Costs of Tobacco Use, supra note 40 [hereinafter Tobacco Taxation].

^{219.} Research indicates that a 10% price increase for tobacco products results in a 3-9% decrease in consumption. For adolescents who are more price sensitive, the consumption decrease jumps to 14%.

lic concern and prosecution, it tends to involve violence, debases public lawfulness, and can quickly acquire a large market share, thereby depriving governments of valuable revenue.²²⁴ A standard international excise tax on tobacco would tend to equalize tobacco's consumer prices between states and thus decrease smuggling by removing the black market incentive.

To smuggle, a cigarette wholesaler commonly buys from the factory and sells to an exporter. The exporter ships the cigarettes to a specially licensed warehouse just across the border and smugglers then ship the cigarettes back into the country of origin, thereby avoiding the substantial excise tax. The exporter, wholesaler, and manufacturer typically do not pay the tax.²²⁵ One method to counter tax avoidance is to directly tax all parties who distribute tobacco products from the manufacturer through the retailer, rather than only the retailer. Similarly, all tobacco distributors should be licensed by governmental authorities and all tobacco product packages should require labeling that identifies the product for domestic use or export. These tobacco regulation methods would substantially limit smuggling opportunities.²²⁶ Globally, tobacco smuggling is significant.²²⁷

Duty-free sales also offer incentives for tax avoidance by purchasing duty-free or smuggling.²²⁸ Considering the uniqueness of tobacco and the serious health implications, duty-free sales should be renegotiated to prohibit tobacco products.²²⁹ In a similar manner, tobacco sales over the internet also are a means to avoid taxes.²³⁰ Unlike duty-free sales that occur in a definite location, internet sales present a unique set of problems because of the internet's pervasive presence combined with an extraterritorial situs.²³¹ Because of the internet's nature, a regional or global situation should address taxing tobacco products to ensure equivalent taxes on tobacco despite the means of acquisition. An international convention framework for tobacco control is an ideal

228. Tobacco Control Hearing, supra note 226 (statement of Sen. Feinstein).

crease exponentially").

^{224.} See CUNNINGHAM, supra note 153, at 130; Samer Iskander, EU Defrauded of Ecu 1.4bn, FIN. TIMES, May 7, 1998, at 2; Rubin & Weinstein, supra note 223.

^{225.} See Johnson, supra note 15.

^{226.} Senate Judiciary Committee Hearing Re: Tobacco Control Legislation and the Black Market, FED. NEWS SERV., Apr. 30, 1998, available in LEXIS, News Library, Curnws File (statement of Lawrence Summers, Deputy Treasury Secretary) [hereinafter Tobacco Control Hearing].

^{227.} Approximately 6% of world cigarette production, valued at \$16 billion, is smuggled. L. Joossens & M. Raw, Smuggling and Cross Border Shopping of Tobacco in Europe, 310 BRIT. MED. J. 1393-97 (1995); Rubin & Weinstein, supra note 223.

^{229.} See CUNNINGHAM, supra note 153, at 250.

^{230.} See Quantum Research, Discount Cigarettes & Tobacco (visited Mar. 19, 1998) http://www.pricepro.com>. "Are you a smoker feeling discriminated against, >grossly overtaxed', and, searching for the best discount cigarette and tobacco prices" Id.

^{231.} See generally Quill Corp. v. South Dakota, 504 U.S. 298 (1992).

method to implement this strategy.²³²

Taxation is a proven method of modifying behavior. States should increase excise taxes to a uniform global rate thereby significantly decreasing tobacco consumption. A uniform global excise tax would be an effective tool to combat smuggling. Although regional agreements can help, the better solution has a global nature. An international framework convention for tobacco control is the best mechanism to control tax related problems stemming from nonuniform tobacco taxation. Despite the certainty that the tobacco industry will fight substantial excise tax increases, the time has never been better to implement a global solution.

E. Workplace Conditions

Smoking gives rise to issues involving workplace health conditions caused by environmental tobacco smoke (ETS).²³³ In enclosed areas, ETS becomes significantly more hazardous. Although the extent of harm resulting from ETS is debated, the World Health Assembly (WHA) "[r]ecogniz[ed] that there is no safe level of exposure to tobacco smoke²²⁴ To lead by example, the WHA urged a workplace tobacco ban at U.N. facilities.²³⁵ The WHA urged states to ban smoking on public transportation to protect people from ETS.²³⁶ Consumer groups also

^{232.} See CUNNINGHAM, supra note 153, at 249-50.

^{233.} ETS is also referred to as secondhand smoke and side-stream smoke. See generally PASSIVE SMOKING 1993, supra note 4; Henderson, supra note 12; Cal. Envtl. Protection Agency, Health Effects of Exposure to Environmental Tobacco Smoke (visited Apr. 1, 1998) < http:// www.calepa.cahwnet.gov/ oehha/docs/finalets.htm>. Debate continues regarding health risks of ETS. See Nigel Hawkes, Smoking Out the Risk, TIMES (London), Mar. 30, 1998, at 15; Major Environmental Tobacco Smoke Study Finds No Risk, PR NEWSWIRE, Mar. 10, 1998, available in LEXIS, News Library, Curnws File. But see Simon Chapman, The Hot Air on Passive Smoking; Medicine and the Media, 316 BRIT. MED. J. 945 (1998) (reporting on the alleged statistical disinformation released by tobacco industry scientists to the media; "The truth is rarely pure, and never simple. ..."); Cancer Study Criticism Tied to Tobacco Money, WASH. POST, Aug. 5, 1998, at A2 (reporting "massive evidence of a propaganda machine"); David Concar & Michael Day, Undercover Operation, NEW SCIENTIST, May 16, 1998, at 4, available in LEXIS, News Library, Curnws File.

^{234.} World Health Association Res. 44.26, 44th W.H.A., (1991) [hereinafter WHA 44.26], compiled in WHO, III HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD (1985-1992) 53 (3d ed. 1993). See WHA 39.14, infra notes 245-46 and accompanying text.

^{235.} World Health Association Res. 46.8, 46th W.H.A.. (1993) (urging the UN Secretary-General "to take the necessary steps to ban the sale and use of all kinds of tobacco").

^{236. &}quot;Aware of the technical problems of ensuring a smoke-free environment in many public conveyances, especially trains and aircraft...." WHA 44.26, *supra* note 234. See China is to Ban Smoking on All Public Transport, FIN. TIMES, Mar. 5, 1997, at 1 (effective May 1, 1997); Smoking Banned Outdoors, FIN. TIMES, Jan. 27, 1997, at 44 (reporting on smoking ban in busses, trains, schools, government offices, cinemas, and outdoors in New Delhi, India).

noted the detrimental effects of ETS in aircraft and recommended measures to restrict or ban in-flight smoking.²³⁷ ETS becomes an international issue whenever people travel between states.

Some states have regulated smoking on aircrafts,²³⁸ but many more have yet to do so. Market forces led legislative efforts to provide consumers more smoke-free flights.²³⁹ Following the WHA's lead, the International Civil Aviation Organization (ICAO) adopted Assembly Resolution A29-15, which advocated that states completely ban smoking on all international flights in Assembly Resolution A29-15.²⁴⁰ Although the ICAO Assembly cannot enforce a worldwide in-flight smoking ban, its position of global leadership carries substantial influence. Working together, ICAO and market forces made the "majority of flights... smoke-free today, especially in North America."²⁴¹ This noteworthy success is not due to the force of law but rather public desire.²⁴² For exam-

239. ICAO Summary of Replies, supra note 238. Legislation in the following states enacted a complete or partial smoking ban on international and/or domestic passenger flights: Armenia, Australia, Benin, Canada, Chile, Cuba, Ecuador, Egypt, Finland, France, Hungary, Iceland, Jordan, Moldova, Nepal, New Zealand, Norway, Oman, Pakistan, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, Sweden, Thailand, Turkey, Ukraine, United States, and Zambia. Id. Airline policies in the following states supplement legislation to provide fewer opportunities for in-flight smoking: Argentina, Austria, Bahrain, Belarus, Belize, Brazil, Burkina Faso, Cuba, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iran, Italy, Korea, Lithuania, Mauritius, Mexico, Monaco, Nepal, Netherlands, New Zealand, Norway, Panama, Qatar, Romania, Slovak Republic, South Africa, Sweden, Switzerland, Thailand, Tunisia, United Kingdom, United States, and Vietnam. Id. See Senate OKs Transportation Bill with Airline Smoking Ban, CHI. TRIB., July 25, 1998, at N15 (describing an amendment that bans smoking on international flights arriving and departing from U.S. airports); Cath Urquhart, Travel: Ban That Flies in the Face of Smokers Worldwide, DAILY TEL., Sept. 3, 1994, at 25 (reporting that American Airlines, Delta Airlines, British Airways, and Singapore Airlines instituted smoke-free transatlantic flights). See generally Pena Grants Anti-Trust Immunity for Carriers to Discuss Smoking Ban, WORLD AIRLINE NEWS, Jan. 30, 1995, available in 1995 WL 6154837.

240. Smoking Restrictions on International Passenger Flights, ASS. RES. A29-15, at I-37, ICAO Doc. 9600 (1996) [hereinafter ICAO A29-15]. The resolution urged states to "take measures as soon as possible to restrict smoking progressively on all international passenger flights with objective of implementing complete smoking bans by 1 July 1996." *Id.*

241. Letter from Dr. Claus Curdt-Christiansen, Chief of Aviation Medicine, *ICAO*, to the author (Apr. 7, 1998) (on file with author). *See ICAO Summary of Replies, supra* note 238.

242. See Canadian Airlines Bans Smoking on Daily Flights to Japan, AIRLINE MKTG. NEWS, July 6, 1994, available in 1994 WL 8734555; Delta Snuffs Out Cigarette Smoking in the Sky, AIRLINE MKTG. NEWS, Nov. 23, 1994, available in 1994 WL 8731657; Icelan-

^{237.} Breathing on a Jet Plane, How Fresh is the Air?, CONSUMER REP., Aug. 1994, at 501, 502.

^{238.} For example, the United States banned nearly all smoking on domestic flights. Smoking Aboard Aircraft, 14 C.F.R. § 252 (1997). See also U.S., Australia, Canada Sign Pact to End In-flight Smoking, WORLD AIRLINE NEWS, Nov. 11, 1994, available in 1994 WL 8731642; Summary of Replies to Questionnaire Attached to State Letter AN 5/13-97/8, App. A, ICAO Doc. A32-WP (1997) [hereinafter ICAO Summary of Replies].

ple, A29-15 lacks mandatory means to enforce its goal of smoke-free flights. A29-15 "requests" intensified studies, "requests" the ICAO and WHO to promote smoke-free travel, and "[u]rges all Contracting States . . . to restrict smoking progressively on all international passenger flights with the objective of implementing complete smoking bans."²⁴³ This is a prime example of an NGO pulling a tobacco control issue and legislation along. Despite the contentious nature of ETS regulation, legislatures continue working to protect the public in the workplace.²⁴⁴

Leadership by NGOs like ICAO and WHO are essential when workplace issues involve tobacco and transcend national boundaries. Although a compulsory international legal mechanism to protect people from ETS is lacking, ICAO and WHO leadership significantly influenced market forces and, in turn, governmental actions. Despite substantial advancements in ETS protection, much remains to be done. The international status and recognition of NGOs such as WHO and ICAO serve as a vital lens to focus regional and professional associations, and local grass roots organizations. Whereas change is slow to come for the benefit of anti-tobacco forces, the pendulum now swings in their favor.

dair Bolsters Image as First Smoke-Free European Carrier, AIRLINE MKTG. NEWS, Feb. 15, 1995, available in 1995 WL 8157552; International Airlines Hasten Move Toward Non-Smoking Markets, AIRLINE MKTG. NEWS, Aug. 31, 1994, available in 1994 WL 8734432; Martinair Imposes Smoking on All International Flights, AIRLINE MKTG. NEWS, Aug. 2, 1995, available in 1995 WL 8157865; Northwest, KLM Snuff out Smoking on More International Flights, AIRLINE MKTG. NEWS, July 19, 1995, available in 1995 WL 8157816; Three More Carriers Cut Smoking as Congress Mulls International Air Ban, AIRLINE MKTG. NEWS, Mar. 1, 1995, available in 1995 WL 8157567.

243. See ICAO A29-15, supra note 240.

^{244.} See CAL. LABOR CODE, supra note 12; N.Y. CITY ADMIN. CODE, supra note 12; ARIZ. REV. STAT. ANN., supra note 12. Local regulations that prohibit indoor smoking are based upon health concerns rather than purely economic matters. Despite the controversy, once such statutes are enacted the public generally supports them despite a vocal, opposing minority. See Bar Patrons in L.A. County Overwhelmingly Support Smoke-Free Bars, BUS. WIRE, Mar. 4, 1998, available in LEXIS, News Library, Curnws File; Dr. David R. Nielsen, Debating a Point Pro-Tobacco Arguments, Fears Fall Flat, ARIZ. REPUBLIC, Mar. 1, 1998, at EV4; HK New Anti-Smoking Measures Effective on July, XINHUA NEWS AGENCY, June 25, 1998, available in LEXIS, News Library, Txtnws File (reporting on a Hong Kong ordinance that bans smoking at indoor shopping malls, department stores, supermarkets, and banks, except for restaurants within those facilities); S. African Cabinet Okays Tobacco Control Bill, supra note 199 (reporting on draft legislation that would allow broad smoking bans in the workplace).

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VII. AN INTERNATIONAL FRAMEWORK CONVENTION FOR TOBACCO CONTROL

A. The Need for an International Legal Instrument

Since the 1980s, the WHO and the World Health Assembly (WHA) took a more active leadership role in the fight against tobacco. In the later 1980s, the WHA affirmed the causal link that tobacco consumption leads to death and disease.²⁴⁵ The WHA also affirmed that ETS is a "noxious form of environmental pollution" that violates nonsmokers' right to health.²⁴⁶ A later WHA resolution urged states to protect the public from ETS in public transport.²⁴⁷

Several countries regulate tobacco consumption and marketing.²⁴⁸ However, legislative efforts have a patchwork effect due to the industry's lobbying and influence.²⁴⁹ Without a global approach to tobacco control, further inconsistent and highly variable regulations will result.

The WHO, through the WHA, recognized the need for a comprehensive approach to the situation.²⁵⁰ After determining the feasibility of a framework convention,²⁵¹ the WHA adopted a resolution²⁵² calling on the WHO Director-General to begin developing an international framework convention for tobacco control in accordance with Article 19 of the WHO Constitution.²⁵³ The stated goals of the framework convention include the "adoption of comprehensive tobacco control policies" and methods to cope "with aspects of tobacco control that transcend national boundaries."²⁵⁴

254. Id.

^{245.} World Health Association Res. 39.14, 39th W.H.A. (1986), compiled in WHO, III HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD (1985-1992) 53 (3d ed. 1993).

^{246.} Id.

^{247.} WHA 44.26, supra note 234.

^{248.} See supra notes 7, 8, 10 and accompanying text.

^{249.} E.g., supra notes 172-74 and accompanying text. See, e.g., John Bacon, Big tobacco Set to Sign \$206 Billion Settlement, USA TODAY, Nov. 23, 1998, at 3A; Debbie Elliot & Robert Siegel, All Things Considered: Whether Tobacco (Nat'l Pub. Radio broadcast, Nov. 23, 1998);

^{250.} An International Strategy for Tobacco Control, World Health Association Res. 48.11, W.H.O., 48th W.H.A., 12th plen. mtg., Annex 1, Agenda Item 19, W.H.O. Doc. WHA48/1995/REC/1 (1995).

^{251.} International Framework Convention for Tobacco Control, W.H.A. Res. 49.17, W.H.O., 49th World Health Ass., W.H.O. Doc. WHA49/1996/REC/1 (1996).

^{252.} Id.

^{253.} WHO CONSTITUTION, supra note 51, at art. 19.

B. Progress Through an International Framework Convention

Tobacco's controversial nature makes it better suited for a framework convention rather than a detailed treaty. If the world attempted to implement a traditional treaty comprised of detailed terms, similar to the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it may never happen because parties probably would fail to agree on the explicit terms that compose such a treaty. The controversies surrounding tobacco would doom a traditional treaty from the start. A framework convention is much better suited for an initial global means of controlling tobacco. The framework treaty could list the tobacco control objectives,²⁵⁵ set forth the principles to guide the parties in implementing the objectives,²⁵⁶ and establish commitments to ensure an objective means of compliance to measure the parties' progress.²⁵⁷

Elements of "comprehensive tobacco control policies" should address the overall policy of tobacco control and further develop a program of shared information for all interested parties. States should report tobacco production, sales, exports, and imports to aid in comprehending, and eventually, comprehensive monitoring of the tobacco industry and critical areas inherent to tobacco control. Tobacco policies should deliberately address advertising, sponsorship, taxes, smuggling, and dutyfree sales. Institutions and states should increase testing and reporting of toxic constituents. Both the tobacco consumer and tobacco-free population should have full information supplied on exactly how tobacco affects people.

Standardized, detailed reporting on tobacco production and marketing are required to fully understand the variable factors relating to the industry and consumer. Market research is a vital tool for the industry's success and forces for tobacco control should possess equal knowledge as a means of ensuring their success. The WHO and its Tobacco or Health (TOH) program acquired and shared substantial knowledge regarding the industry and health matters but much remains to be learned. The WHO's leadership position and reputation make it the logical choice to continue in this capacity. The WHO and TOH program could serve as an informational clearing house for local and regional NGOs along with many governments. This is a critical role for the WHO since one organization cannot fight the anti-tobacco battle single-

^{255.} E.g., raising tobacco excise taxes; eliminating duty-free tobacco sales; controlling smuggling; regulating advertising and warning labels; reporting production, imports, exports, and sales of tobacco products; and testing and reporting of toxic ingredients.

^{256.} E.g., ensuring the world's population has full knowledge of tobacco's effects upon personal health and national economies; encouraging states to remove supports of the tobacco industry and regulate its actions; and implementing uniform standards for tobacco control on a global basis.

^{257.} E.g., implementing standardized reporting concerning all aspects of tobacco control, regulation, production, and consumption.

handedly; success requires an extensive network.²⁵⁸

Advertising objectives should address advertising bans on television and billboards and also the material role that advertising plays in underage tobacco consumption. Although the framework probably will be unable to go as far as advocating minimized advertising, such goals within the framework's scope serve as an incentive for progressive states. The framework should include labeling guidelines that include explicit health warnings and a detailed ingredients listing. By setting global baselines for advertising practices, health warnings, and ingredient labeling the field can be leveled so that consumers are informed and can make knowledgeable choices regarding the tobacco habit. The framework could add a measure of protection for underage persons. Encouraging counter-advertising could rebut the glamorization of tobacco consumption for the benefit of susceptible youths.²⁵⁹

The international framework convention for tobacco control presently possesses the highest probability of success because of (1) the certainty that a traditional, detailed treaty would never be agreed upon and (2) the public's swelling anti-tobacco sentiment and its corresponding desire for a means of tobacco control. A framework convention would certainly advance anti-tobacco efforts to a higher level. Due to the deadly serious nature of the issue, the WHA, WHO, and United Nations should implement the framework convention before the new millennium begins.

VIII. CONCLUSION

The global majority acknowledges the causal relationship between tobacco consumption and ill health. Since the 1980s, the TTCs have aggressively marketed their wares in the developing world with notable success. Despite decreasing consumption in developed states, the gains in developing states more than offset any losses the TTCs may suffer. Although some argue that a tobacco pandemic is presently amongst us, the explosive increase in tobacco consumers predicates a certain pandemic in thirty to forty years.²⁶⁰ The economic and social costs will increase proportionately with the inevitable health costs.

Around the world, many people are ignorant of tobacco's ill effects, yet are quite cognizant of the image sold to them by TTCs. Children are particularly susceptible to tobacco and its marketing. Approximately 90% of all smokers began before age eighteen.²⁶¹ The international

^{258.} See, e.g., The International Nongovernmental Coalition Against Tobacco, in WHO, International Collaboration (visited Mar. 26, 1998) http://www.who.org/psa/toh/Alert/4-96/E/ta10.htm.

^{259.} See supra notes 90-92 and accompanying text.

^{260.} See supra, notes 37-39 and accompanying text.

^{261.} See supra, note 78.

community, through the Convention, has an obligation to ensure the fundamental right of children to maximize their health and development. Arguably, this Convention also possesses the authority of customary law due to its near-universal acceptance and basic premises that tend to be followed because of a sense of legal obligation. Alternatively, the Convention is soft law. The Convention offers a legal basis and a moral argument for regulating tobacco advertising that affects impressionable youths.²⁶² Although international legal authority exists, it is not utilized to control tobacco presently and the likelihood that the Convention will be employed to regulate tobacco is quite slim. Therefore, an alternative means of international tobacco advertising regulation is essential.

Nicotine's presence in all tobacco and ongoing medical research present a reasonable basis for regulating tobacco as a drug.²⁶³ Nicotine is arguably a psychotropic drug when one considers its physiological effects. It clearly affects the central nervous system and the brain, produces dependence, and is abusable. Although it does not present the severity of danger that hallucinogenic, barbiturate, or amphetamine drugs do, it falls in a gray zone and should be regulated. Despite an arguable international legal basis for regulating tobacco as a psychotropic drug, it is highly improbable that the international community will attempt to control tobacco in such a manner. Tobacco is too controversial a subject and the industry is too powerful for the world's interested parties to regulate tobacco as a psychotropic drug. Conversely, it may be sufficient to regulate the packaging, advertising, and sale of tobacco in the form of time, place, and manner restrictions without the contentious status of being regulated as a dangerous drug. After all, tobacco generally is legal and culturally acceptable worldwide, similar to alcohol. Issues like this that transcend national borders are best handled by an international framework convention.

Advertising is the engine that propels the tobacco industry's success. The industry is a formidable economic and social force that cannot be effectively regulated by voluntary measures because penalties do not exist to ensure compliance. The TTCs are often powerful enough to in-

^{262.} See generally U.N. Convention on the Rights of the Child, supra note 85 and accompanying text.

^{263.} E.g., the U.S. Food and Drug Administration currently lobbies for authority to regulate tobacco as a nicotine delivery substance but suffered legal setbacks. See Alissa J. Rubin, Court Rules FDA Cannot Regulate Tobacco as Drug; Law: Appeals Panel's Decision Deals Key Blow to Clinton Administration's Fight to Curb Youth Smoking. Judges Say Congress Never Gave the Agency Jurisdiction, L.A. TIMES, Aug. 15, 1998, at A1 (reporting on Brown & Williamson Tobacco Corp. v. FDA, No. 97-1604 (4th Cir. Aug. 14, 1998)). See generally Susan H. Carchman, Should the FDA Regulate Nicotine-Containing Cigarettes? Has the Agency Established a Legal Basis and, If Not, Should Congress Grant It?, 51 FOOD & DRUG L.J. (1996); Barbara Noah & Lars Noah, Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products, 48 ALA. L. REV. 1 (1996).

fluence governmental actions for their benefit. The current patchwork of national regulations regarding advertising illustrates this and portends a predictable failure if the world attempted to introduce a traditional treaty to regulate tobacco. Traditional treaties would probably fail for a lack of agreement on the details. The industry's influence necessitates a global standard; a possibility with an international framework convention. An international framework convention should address advertising, ingredient listing, and warning label issues.

Taxes are an effective tool for modifying consumer behavior and as a revenue source. Significantly raising excise taxes directly impacts underage and lower income consumers who possess less disposable income. It diminishes the number of people beginning the habit and gives incentive to current consumers to decrease consumption or quit all together. A problem with substantial tax increases is the inevitable smuggling where prices vary significantly between political entities. Within a global solution, tobacco taxes and anti-smuggling efforts must be examined concurrently. Because of the health dangers associated with tobacco, duty-free sales should also be reexamined. The framework convention should encourage uniform and substantial taxation of all tobacco products. A framework convention could begin a continuing process that incrementally leads states to implement controls toward the eventual goal of standardized global tobacco control.

The international issue of ETS as a workplace health risk is gaining credence along with the concept of a nonsmoker's right to be smokefree. Businesses, individual political entities, and the United Nations have led by example and banned or limited smoking in enclosed places. In turn, workers gain significant health benefits from limiting their ETS exposure. A noteworthy example is the push by the ICAO and market forces to ban in-flight smoking. The health of passengers and particularly flight crews benefit from in-flight smoking bans while the airline industry enjoys secondary financial and safety benefits. Although ICAO lacks legal authority to enforce an in-flight smoking ban, it is in a position to lead the industry and states. Banning in-flight smoking facilitates a growing anti-tobacco public perception with commercial self-regulation and governmental regulation often following public opinion. Further strong leadership is needed to protect all workers. NGOs lead the struggle from grassroots to international levels. Without NGOs, any advances in ETS protection would be slow to come, if at all, particularly in the international context.

Without international tobacco controls, we can expect no significant progress in the anti-tobacco fight. An international framework convention for tobacco control is arguably the best method for examining all issues related to, and implementing measures for, tobacco control. The issues must be dealt with on an international basis to effectively regulate the tobacco industry, manage adverse consequences, and avoid patchwork regulations.²⁶⁴ The gravity of tobacco control requires a unified approach. The traditional treaty form would fail because meaningful consensus could not be obtained within a reasonable time. It is better to make a looser framework to build upon than stall and make no progress at all.

The WHO, through its constitution, possesses the authority to call a convention for matters within its domain. The issue of tobacco or health is clearly inside the WHO's purview. The WHO has the opportunity to lead the United Nations and improve the lives of the world's citizens. It is questionable that any other organization could accomplish the task. The WHO must take the lead and move beyond its conservative, technocratic past to prevent a tobacco pandemic.

The framework convention should contain guiding objectives and principles for implementing the objectives, as well as commitments for objectively measuring compliance. It should standardize reporting and information dissemination to better understand the issues associated with tobacco control. The time is ripe for an international framework convention for tobacco control—it is achievable and essential. The substantial likelihood of an unsuccessful traditional treaty for tobacco control contributes to the need for a framework convention. The international community has an obligation to alter the status quo and not turn away from the difficult issue of tobacco control.

Some assert that the present concerns about tobacco are much ado about nothing and tobacco is a reasonably safe and legal product, like alcohol. However, if current trends do not change, the world will assuredly experience a pandemic of monumental proportions, if it is not already. NGOs are a catalyst, in a leadership role, to implement positive change in how the world views and regulates tobacco. Without NGOs, meaningful global tobacco control will not materialize. Although international legal mechanisms exist to regulate tobacco globally, they have not been used in that capacity. Current public attitudes toward tobacco control, expansive medical and scientific evidence, and influential NGOs present the world with a unique opportunity for tobacco control through an international framework convention. The role of NGOs and the international framework convention for tobacco control will play a pivotal role in the next century's public health. Difficult choices and hard work remain for the world to gain effective tobacco control, yet it is possible within an international legal context, but only with support from NGO leadership and coordinated state commitments.

^{264.} Cf. Torry, supra note 17 (describing internationally unique lawsuits by Guatemala, Nicaragua, and Panama against the tobacco industry).