
PROGRAMME ON SUBSTANCE ABUSE

**Options for the Preparation
of an International Framework
Convention and Related
Protocols for Tobacco Control**

**Public Health and
International Law Considerations**



DIVISION OF MENTAL HEALTH AND
PREVENTION OF SUBSTANCE ABUSE
WORLD HEALTH ORGANIZATION

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ABSTRACT

Four factors support the present efforts toward a collective international response to tobacco-caused death and disease: (i) the scope of the damage makes tobacco a public health tragedy of the first order; (ii) the problem exists in every country; (iii) key elements -- smuggling, for instance -- transcend national boundaries; and (iv) the tobacco problem has proven itself incapable of being fully tamed by countries acting in isolation.

Moreover, with stagnant tobacco consumption in the developed world, the tobacco industry is focussing on the developing world for future growth. The death trend is certain to follow.

To address this global tobacco pandemic, the World Health Assembly's chosen instrument is a "framework convention/protocol" approach. This approach offers a degree of flexibility combined with binding obligations seldom seen in other types of instruments. However, within this treaty model options exist with respect to both the framework architecture, and the nature of protocol structure and substance.

Most existing framework/protocol treaties place organizational matters in the framework treaty and leave substantive matters for the protocols. These treaties also typically divide protocols along strict thematic lines. However, deviations from that approach may assist overall participation if suitable linkages between protocols can be made. These linkages can arise at two discrete levels: procedurally through the framework convention, or substantively through desirable connections in the protocols themselves. Variants of each of these are reviewed.

The World Health Organization has endorsed a comprehensive approach to tobacco control, and experience from many countries has shown the necessity of this approach. To be effective, a tobacco control treaty may have to be similarly comprehensive. Consequently, protocols addressing a wide range of different social, economic and legal issues are discussed. Specifically considered are protocols dealing with: product content and design; advertising, promotion and sales; package design and labelling; taxation and pricing; smuggling; cooperation and information sharing; tobacco exports; and the role of tobacco in the public sector.

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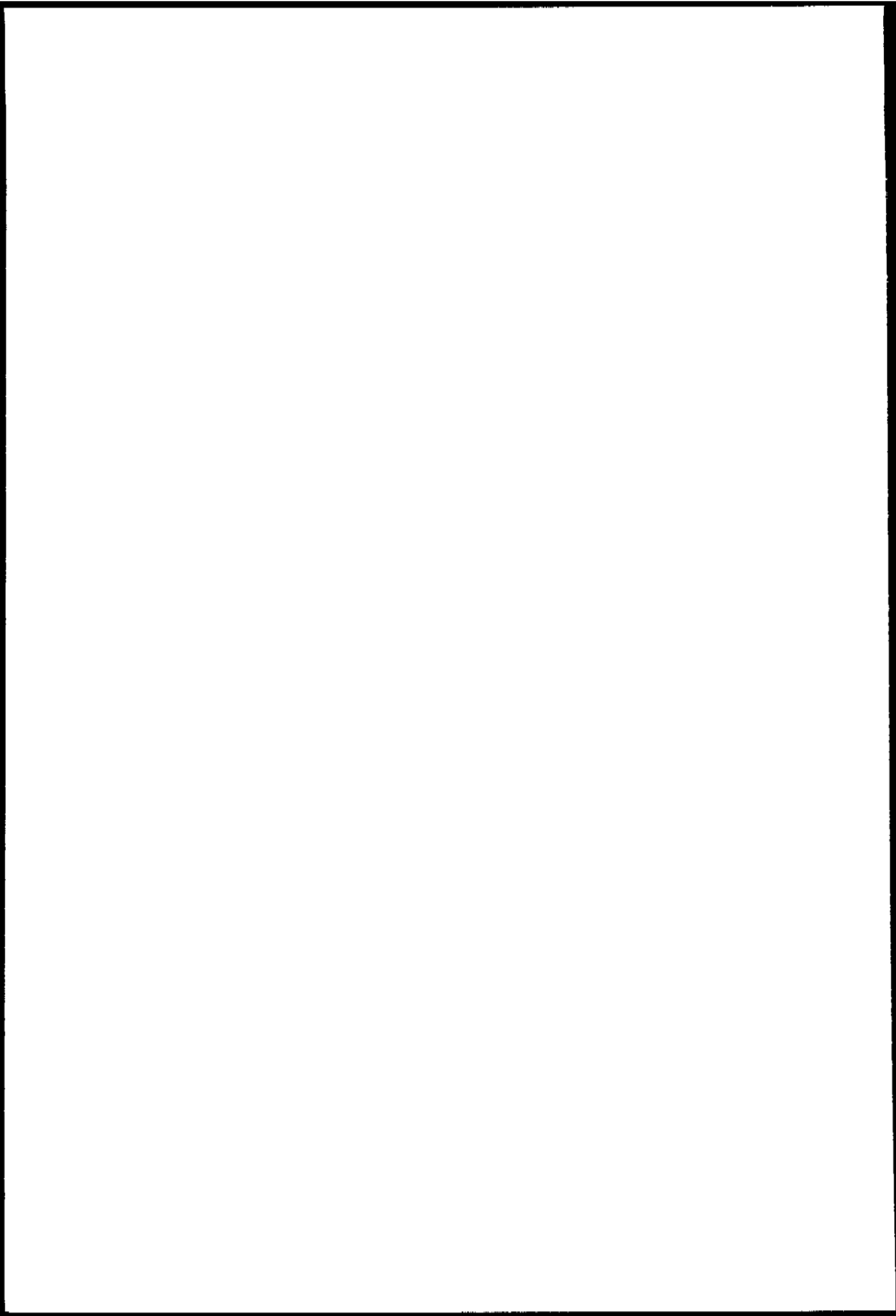
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1. INTRODUCTION

1.1 Public Health Issues

The tobacco pandemic is as sobering as the numbers are staggering. Without significant interventions, tobacco is poised to kill 500 million people presently alive.¹ About half of these victims will die in middle age, losing on average 20 to 25 years of life.² So not only are families robbed of their loved ones, countries are robbed of the economic contribution of many victims prime years.³

Although these facts alone make tobacco a global problem of the first order, tobacco is also quickly taking on a disturbing north-south perspective.

Most of the forecasted 10 million tobacco deaths per year in the decades to come will occur in the developing world,⁴ as tobacco company marketing strategies from the past decade translate into tobacco deaths in the next. No country is immune. The health, economic and social costs of tobacco consumption and production touch every country and every stratum in each society. It is designed that way by the purveyors of this tragedy.

Sadly, the United Nations was not the first global organization to weigh into this field: the tobacco companies were. Major tobacco companies have worldwide operations and financial resources exceeding those of many countries. They have been expanding into every corner of the globe, lately targeting developing countries for future growth, and doing so with aplomb!

The breadth of the problem attests to the success of these global giants, and it necessitates a coordinated response. Just as infectious diseases transcend political boundaries, leaving them incapable of being effectively eradicated by one country in isolation, tobacco companies through their marketing tactics, trade practices, political lobbying and smuggling activities, render many isolated actions at the national level doomed to incompleteness.

Widespread consensus already exists on the necessity of controlling tobacco. Over 90 countries have domestic tobacco control laws.⁵ Internationally, acknowledgement of the health and economic risks of tobacco, and support for a coordinated response is found in resolutions of the World Health Assembly (WHA)⁶ and other United Nations organizations,⁷ and in the policies of other transnational organizations such as the Pan American Health Organization (PAHO), the International Union Against Cancer (UICC), and the World Bank. With specific respect to a framework convention for tobacco control, the approach advocated in Resolution EB97.R8 of the World Health Assembly Executive Board, shows convincing support of acknowledgement of these rules. The World Health Assembly vote endorsing Resolution EB97.R8 was strong,⁸ and the very positive public statements by numerous WHA Members in relation to that vote demonstrate a belief in the importance of making a convention on tobacco control an effective reality.⁹

1.2 Legal Issues

1.2.1 Authority

As stated in Art. 3(1) of WHA Resolution 49.17, the authority of the World Health Organization to develop an international treaty on tobacco control is grounded in Article 19 of the World Health Organization's constitution. That issue, including concurrent authority of other United Nations bodies to address issues of tobacco control including promoting the creation of an international treaty on the matter, has been fully canvassed elsewhere.¹⁰ There are no legal impediments with respect to the general process, and at present there is no competing international effort comparable to the treaty approach set in motion by WHA Resolution 49.17.

1.2.2 Meaning of "Framework Convention" and "Protocol"

The framework convention/protocol process endorsed by the WHA is an increasingly common legal vehicle. It is particularly appropriate when addressing multi-faceted problems amongst a diverse set of nations. The merits of this approach have been discussed and considered by the WHA,¹¹ and will become more apparent in the body of the present work.

The term "convention" itself, viewed in the abstract, is of no great importance. The substantive provisions of the instrument define whether the obligations are binding or not, not the terminology used in the instrument's title. However, the context in which that term is used in the relevant documents indicates an intention by the WHA to create binding international legal obligations. The resulting instrument, then, will be discussed assuming it will be a binding international treaty.

The term "framework" connotes an intention to set out an organizational and/or procedural structure which relates to substantive obligations which may be defined in other instruments. However, there is much latitude about how this may be structured. Houses all have a framework, but these frameworks vary markedly in structure, and these structural differences are in addition to more superficial design elements. So, too, with framework conventions.

The framework convention structure and/or the optional protocol approach is found in numerous human rights¹² and environmental treaties.¹³ However, the applicability and desirability of these structures extends far beyond those fields. Their use in human rights and environmental instruments probably owes as much to the recent development of this approach and the recent expansive growth of human rights and environmental instruments, as to the desirability of this approach either from a substantive or procedural vantage point.

Protocols are side agreements that modify or supplement substantive legal obligations or treaty processes arising from previously- or contemporaneously-concluded treaties.¹⁴ There usually is no need for the treaty to explicitly provide for them, although modern treaties often do. Protocols which modify existing obligations can be thought of as agreements between some subset of the Parties to the framework treaty.¹⁵

More recent has been the advent of optional protocols created concurrently with the central treaty. And later yet, framework treaties whose primary function has been to organize a series of protocols.

Although the protocol approach is popular because of the flexibility it provides while still creating legally-enforceable obligations, there are other means by which this flexibility can be achieved, such as concurrent but stand-alone treaties on related subject matter,¹⁶ or liberal reservation and interpretive declaration provisions.¹⁷

1.2.3 Existing International Instruments of Relevance

While at present no legally binding international instruments exist which deal specifically with tobacco, numerous trade, commercial and human rights treaties are relevant to some aspects of tobacco control, and the designers of a tobacco-specific treaty should bear these in mind.¹⁸ Additionally, some treaties which for historical reasons do not deal with tobacco – treaties on trafficking narcotic drugs, for instance – should be considered for their approach if not their direct application.

Trade and commercial treaties are at issue because tobacco control efforts often operate by seeking to control the tobacco companies and their business practices. In recent years tobacco control measures in numerous States have raised, or allegedly raised, issues under the 1947 *General Agreement on Tariffs and Trade* (GATT),¹⁹ related agreements on intellectual property,²⁰ technical barriers to trade,²¹ as well as regional trade agreements such as the 1992 *North American Free Trade Agreement* (NAFTA),²² and its related agreements on intellectual property, regional trade agreements, and specialized commercial agreements such as the 1883 *Paris Convention for the Protection of Industrial Property*.²³

Because controls on marketing and promotion of tobacco play a central role in many comprehensive tobacco control efforts, international rights to free expression including the right to receive information, is key.²⁴ The issue is frequently raised under both domestic and international instruments, and the rights protected under these instruments should be borne in mind if protocols are to be developed restricting tobacco marketing.

2. FRAMEWORK ARCHITECTURE

2.1 General Considerations

While any framework structure necessitates some obligations residing outside the framework treaty, no single framework model is appropriate for all treaties or at all points in time. Much will depend on the specifics of the subject matter, the precise substantive obligations, the manner of enforcement or procedural obligations and, of course, the perspective of individual States.

Four issues dominate decision making regarding the structure of a framework treaty:

- (i) the allocation of legal obligations between the protocols and the framework treaty;
- (ii) the manner of division of obligations contained within the protocols;
- (iii) linkages between the various protocols; and
- (iv) the timing of the negotiation and/or entry into force of the various protocols *vis-à-vis* the framework convention.

Each is discussed in the following sections.

2.1.1 Allocation of Obligations

Options for the framework structure are best described as residing along a continuum in terms of the degree to which legal obligations are contained within the framework treaty itself.²⁵ Listed in order of increasing legal obligation with the framework convention, possible framework structures include:

- (i) a general statement of the Parties' intent, plus simple coordination of the protocol agreements (ratification/accession/withdrawal, entry into force, common definitions, settlement of conflicts between the various protocols, etc.);
- (ii) obligations of (i), plus soft legal obligations ("take appropriate measures," "in accordance with means," etc.), including agreements to cooperate;
- (iii) obligations of either (i) or (ii), plus the creation of joint institutional arrangements to facilitate the protocols (secretariats, etc.) and/or procedural obligations applicable to the various protocols (most commonly, dispute settlement);
- (iv) obligations of (i), (ii) or (iii), plus a limited group of core substantive obligations; and
- (v) a comprehensive agreement including significant substantive obligations with tailoring, most probably pertaining to the most contentious substantive issues, left for related protocols.

Treaties which do not place significant, or indeed any substantive obligations within the framework treaty should not necessarily be viewed as less meritorious, though they sometimes are.²⁶ The more appropriate measure of the relative success or failure of a framework treaty must be made in concert with its protocols. One can err both by placing too much or too little within the body of the framework treaty.

Conflicting political interests may be held out to illustrate why the flexibility of the framework convention/protocol approach is desirable; tailoring permitting more widespread acceptance than would otherwise be attainable. However, there are equally important but less overtly political rationales: institutional necessity and informational gaps.

Lack of consensus need not arise solely because of politics. States may disagree about whether sufficient information exists to make a fully reasoned evaluation of some element of the issue, and thus about the desirability, nature, or timing of a response. In these instances, a framework approach permits instruments to be drawn up for those issues upon which broad consensus currently exists, and a forum for discussion and coordination of information gathering and evaluation relating to those issues not yet resolved. By making the link between related areas of concern somewhat attenuated but still present, concurrent negotiations can occur with diminished risk that sticking points on one issue will necessarily hold back or result in avoidable concessions in another. All of this can be attributed to the merits rather than the politics of the subject matter.

Of course, a framework treaty should include those provisions necessary for and applicable to all of the anticipated protocols. These often will be the institutional and dispute settlement provisions. In addition, both the framework treaty and the protocols should be constructed with a view to minimize the impact of foreseeable future problems. An important concern will be future withdrawals or denunciations of the framework treaty and/or one or more protocols. The joint framework/protocol structure should be designed so that the various components are severable, the removal of any piece leaving the remainder as an operative, enforceable treaty.

It might also be appropriate to include within the framework some subset of desirable but not essential substantive and procedural provisions. This is particularly so if at the time of completion of the framework treaty there is momentum behind the issue which might be difficult to recapture at some later time when a subsequent protocol is being negotiated. Given the inevitable ebb and flow of public support for various issues, timing might suggest inclusion of some elements lest public opinion move elsewhere.

With respect to desirable procedural elements, a framework treaty might explicitly provide for:

- (i) non-retrogression: preventing Parties rolling-back tobacco control laws without comparable or better replacements;
- (ii) agreements: subsets of Parties being able to agree amongst themselves to rely upon one another's implementation of more stringent standards than are required in the framework of the protocols;²⁷
- (iii) the creation of rights under the framework convention or the protocols for Third States, or some subset of Third States;²⁸ and
- (iv) individual petition with respect to breaches to a body overseeing dispute resolution.

2.1.2 Division of Obligations within the Protocols

The second issue, while primarily a question of protocol structure (which is discussed in a subsequent section), also impacts upon framework structure. The treaty's framework will by necessity vary depending on whether protocols are organized thematically along substantive lines, in hierarchical terms depending on the degree of obligations, or based upon which States are the important players with respect to the issue.

2.1.3 Linkages between Protocols

While framework treaties usually create some linkage of protocols through common elements, there are both positive and negative linkages which can explicitly be written in or out.

A cleverly designed framework treaty could play off each protocol, using the desirability of one protocol as an enticement to potential Parties to ratify another protocol. Participation in the treaty could be contingent upon accepting a minimum number of the protocols which are already in existence. The framework could, for instance, stipulate that acceptance of at least three out of five protocols is required. There are obviously endless permutations along these lines allowing for refinement of the flexibility attainable through the framework/protocol approach.

Placing common elements of the protocols within the framework may be advantageous, but poor design could lead to unanticipated results. If the operation of one protocol is conditional upon the framework treaty being in force (or perhaps another protocol being in force), elements of the overall framework/protocol may fail unnecessarily if the related treaty ceases to be in force. This could be avoided if a framework/protocol system included provision for severability of its various components and, if necessary, the automatic incorporation of necessary elements from the failed component into the remaining protocols.

2.1.4 Temporal Issues

Relative timing is important on several fronts. The first temporal issue will be the framework and protocol negotiations: whether to run them concurrently or sequentially. In many instances both will occur, with some protocols moving forward at the same time as the framework while others are held back for political, technical or informational reasons.²⁹ However, that is not universally the case. The structured environment created by the institutional arrangements in a framework treaty may help prevent certain protocol negotiations from becoming unwieldy. In other areas the necessary approach will be on of a "whole package", with an acceptable framework being conditional on a complete set of protocols being negotiated at the same time.

A separate issue is the timing of consent to be bound and the entry into force. If the framework contains little in the way of concrete obligations, and the subject area requires the generation of some inertia in order to be viable, it may be desirable to have both the framework and at least some of its protocols open for signature or ratification at the same time. Conversely, the nature of some protocols may dictate that their consent to be bound and especially entry into force come at some period subsequent to the entry into force of the framework. In most instances it will be desirable for the framework treaty to explicitly provide for the accretion of presently unconsidered or unattainable protocols.

2.2 Examples of Framework Architecture

2.2.1 Geneva Long-Range Transboundary Air Pollution Convention

The 1979 *Convention On Long-Range Transboundary Air Pollution* (Geneva),³⁰ is in the mid range of the previously-described continuum, probably residing in the low end of category (iii). It consists of general statements of intent, soft obligations with self-determined standards, the creation of structures for information gathering and sharing, and institutional arrangements to facilitate sharing. The language throughout shows that it is very prospective, with virtually all of the substantive content to come in forthcoming protocols (of which there are four).

2.2.2 Vienna Ozone Convention

An oft-raised model for framework convention structure is seen in the 1985 *Vienna Convention for the Protection of the Ozone Layer*.³¹ Like the long-range pollution treaty, the *Vienna Ozone Convention* chooses the middle ground in structure, providing, as all framework conventions must, for a legal structure within which anticipated future protocols operate. To that the convention adds a few soft obligations, an overarching institutional structure, and a dispute resolution mechanism. It falls squarely within category (iii), described above.

2.2.3 South Pacific Driftnet Convention

Like the Vienna ozone and Geneva transboundary air pollution treaties, the 1989 *Convention for the Prohibition of Fishing With Long Driftnets in the South Pacific*³² sets out common institutions, definitions and a few general obligations.

However, the *South Pacific Driftnet Convention* goes further by also including core substantive obligations. While the *Vienna Ozone Convention* is peppered with terms designed to provide parties some latitude in application, in many provisions the driftnet treaty speaks of the Parties' obligation to prohibit certain activities, without qualification. This places the treaty in category (iv), as described.

2.2.4 European Convention on Human Rights

The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*³³ is an example of a category (v) treaty, as described earlier. Although it contains eight protocols, most of the main substantive obligations are found within the central treaty rather than the protocols. The protocols relate to enforcement and operating machinery of the convention's institutions, amendment of existing provisions, and additions to the convention's substantive guarantees of human rights.

3. PROTOCOLS

3.1 Options for Protocol Structure

3.1.1 Division Options

Underlying the framework/protocol approach is the premise that a division of the obligations into smaller, more manageable pieces advances the overall goal. The basis or bases upon which that division is made is, therefore, the primary structural factor to be decided with respect to protocol design. Divisions based on the following grounds are considered: (i) thematic; (ii) a variant herein termed thematic "plus"; and (iii) participant attributes. And, of course, protocols can be divided based upon combinations of these, and combinations incorporating variable obligation or temporal options, discussed within.

(i) Thematic

Most framework treaties, including all of those discussed earlier, organize protocols primarily along thematic lines. In a tobacco context there could be one protocol for tobacco smuggling, one for promotional restrictions, another for taxation, etc.

The impact of thematic-style organization is seen both with respect to negotiation and participation. Organizing protocols into discrete subject areas, particularly when there are no related, concurrent negotiations, by necessity constrains the discussion. This may be positive in that it focusses attention on issues which might otherwise be under-appreciated in an omnibus negotiation. Yet, by design the scope for bargaining and the latitude for raising possible trade offs is lessened when these must occur within a narrow range of issues.

With respect to participation, the ability to pick and choose amongst thematic protocols undoubtedly increases the likelihood of overall participation. However, it is debatable whether this style of flexibility increases the most *relevant* participation within any specific protocol.

Thematic division of protocols may have the perverse effect of undermining meaningful operation of the protocol. A protocol's value is much diminished if the states, whose participation is most crucial to its effective operation, selectively choose not to participate. If the tobacco exporting States don't subscribe, what value is a protocol on tobacco exports? And the ability of States to arrange their participation not so much by what they want, but what they want to avoid is increased if they can opt-out of one protocol and still obtain all the benefits they desire from the other protocols.

(ii) Thematic "Plus"

While there may be an attractive simplicity to having each protocol deal with one readily-identifiable subject area, such divisions, as discussed, permit selective non-participation to the detriment of the overall treaty objective. Whether the likely increase in overall participation outweighs this is a question which cannot be answered divorced from specific facts.

Nevertheless, there remains a hybrid approach: dividing the protocols mostly, but not exclusively, along thematic lines. Appropriately used, this plays on the marketing strategy of putting some "bad" in with the "good".

By inextricably incorporating provisions which some states may find less appealing in with those protocols which those same States will find quite desirable, States may accept treaty obligations that they otherwise would not have chosen. However, depending on the nature of the added provision, this approach may also decrease participation. Nor, of course, does it compel participation by a State determined not to participate.

Finally, this "add-on" approach may also be one which is particularly suited to those subject areas which by themselves do not warrant an entirely separate protocol but are, nevertheless, desirable.

(iii) Participant Attributes

Thematic division of protocols is in response to heterogeneity of the objective, but one could equally divide the invasion up depending on the attributes or the heterogeneity of the participants.

While not as common as a thematic approach, and one unlikely to be the sole grounds upon which protocols are structured, elements of this approach are found in the numerous treaties which provide for differential treatment between various groups amongst the Parties. The most widely known probably is the GATT with its explicit provisions for developing countries.³⁴ Tobacco protocols specific to, for example, developing States or States with various tobacco consumption patterns could be designed.

(iv) Level or Nature of Obligation

Akin to the above discussion, but one predicated upon also using some other basis for dividing up the protocols, is an approach where embedded within a generally applicable protocol are differing standards which depend on factors external to the protocol. Again, these factors could be a Party's development status, patterns of tobacco consumption, etc. This additional flexibility might be used to respond to economic, social or other issues otherwise beyond the purview of a tobacco control instrument.

For example, controls on tobacco leaf exports could vary between the Parties: Malawi's treatment could differ from the United States. Or controls on exports of finished product could differ depending on the relative size of exports as compared to the domestic market. This last example

would target those trans-shipment states which exploit their low tobacco tax rates causing additional damage in the state of final destination.

The obligation could be varied by combining general obligations with specific, non-mandatory suggestions as to how that obligation might be met. For example, a protocol (or perhaps the framework treaty) could require that parties implement "comprehensive tobacco control policies,"³⁵ but in the first instance leave it to the Party to determine what constitutes a set of comprehensive tobacco control policies. The treaty secretariat or another appropriate international body might then set out examples of comprehensive tobacco control policies. In meeting their obligations Parties would have the option of implementing the off-the-shelf law, tailoring that law to their specific needs, or devising their own comprehensive approach.

3.1.2 Temporal Options

Whatever the basis upon which the protocols are structured, additional possibilities exist owing to temporal variation. Protocols can be timed to further one another and the overall objective. Both protocol negotiation and entry into force can be timed so as to assist in the attainment not only of the objectives of the protocol, but also the broader treaty objectives.

3.1.3 Linkage Options

Linking protocols furthers the overall objective of the treaty. With each protocol playing off the merits of another, participation at more expansive levels may be engendered. As discussed earlier, some of the means of creating links – participation in a minimum number of protocols, etc. – are likely best placed within the framework convention itself. However, within the protocols there are possibilities to be explored.

The exact approach would vary markedly with the subject matter. In general, however, linkages occur if some additional benefit in Protocol B occurs if and only if the State is also, concurrently, a Party to Protocol A. For instance, if under a tobacco tax protocol import duties remain, these might be eliminated if both the exporting and importing States are also Parties to a protocol harmonizing product content and design. Alternatively, enforcement or dispute mechanisms provided for in one protocol might be utilized with respect to a second protocol should the State also be a Party to both protocols.

3.1.4 Enforcement Options

Although enforcement provisions often reside within the framework treaty rather than the protocols, there may be a need or a desirability to tailor these for the specific protocol at issue or, perhaps, the creation of a specific protocol with respect to enforcement. The latter approach was adopted under the 1966 *Optional Protocol to the International Covenant on Civil and Political Rights*,³⁶ which provides for the hearing and adjudication on human rights complaints from individuals in addition to the State complaints permitted under the 1966 *Convention on Civil and Political Rights*.³⁷

3.2 Options for Protocol Substance

Given that the objective of the proposed framework convention is, in part, "to encourage Member States to move progressively towards the adoption of comprehensive tobacco control policies,"³⁸ protocol possibilities range across the entirety of tobacco control measures already implemented or considered in various countries. Divided thematically, this includes:

- (i) tobacco product content and design;

- (ii) tobacco advertising, promotion and sale;
- (iii) tobacco package design and labelling;
- (iv) taxation and pricing; and
- (v) smuggling.

An indication both of what is desirable from a public health perspective, and politically feasible internationally is given in the World Health Organization's statement of what constitutes comprehensive tobacco control.³⁹

In addition, since a second stated objective of the proposed framework convention is "to address tobacco control issues that transcend national boundaries,"⁴⁰ there also could be considered a protocol or protocols dealing with:

- (vi) cooperation and information sharing; and
- (vii) tobacco exports.

Finally, protocols could be considered with respect to the role of tobacco in the public sector: state-owned tobacco enterprises, tobacco agricultural policies, and foreign development assistance involving tobacco farming or manufacture.

Each of these eight areas are discussed.

3.2.1 Tobacco Product Content and Design

Tobacco products are nicotine delivery devices. They are manufactured to effectively deliver nicotine in doses sufficient to maintain addiction and, hence, sales. This is not left to chance.

Recently disclosed tobacco company records document genetic manipulation and growing of plants with very high nicotine levels,⁴¹ introduction of ammonia to the product to enhance bio-availability of nicotine,⁴² incorporation of additives and flavour enhancers to make smoking more palatable, especially for starters,⁴³ and alteration of the physical design of cigarettes in order to trick smoking machines governments use to test the products.⁴⁴

The premise driving a protocol on product content and design could be that if tobacco products can be modified to enhance their addictiveness and consequently increase share values, conversely they can be modified to reduce tobacco's harm and thereby advance the public health interest.

Uniform worldwide standards for cigarettes have been advocated by the UICC, primarily on equity grounds; that is, that the developing world deserves products no more lethal than those mandated in many developed countries.⁴⁵ While a single standard might not be politically attainable or even desirable, it may be possible to constrain the vast range of harmful characteristics in tobacco products presently sold around the world. Several approaches exist.

A protocol could set a floor for product standards, but permit Parties to demand higher standards for public health reasons. Alternatively, differing standards could apply to different classes of Parties, or a protocol could permit each Party to opt in at a level of their choosing. The European Union has set product standards on a regional level by placing upper limits on the tar content of cigarettes.⁴⁶

Defining tobacco product standards internationally reduces the likelihood that product standards will be used as a non-tariff trade barrier to protect a domestic tobacco industry. Of course, to do so violates obligations many States have under the GATT.⁴⁷ However, the necessarily broad wording of the GATT's Art. XX(b)

exception for the protection of human health provides some latitude for disguising protection as a permissible health measure. When dealing with a product as harmful as tobacco, and with so many complex factors at play, ascertaining what does or does not fall within this exception is often problematic. International tobacco standards, then, would help flesh out the meaning of the GATT health exception in a tobacco context.

Despite positive health benefits, international tobacco standards may bring some economic dislocations. Growers of high tar tobacco will likely see a diminished market for their products as standards improve. But just as the makers of anti-personnel land mines will see a contraction in their business as a land mine ban moves forward, protecting relatively few producers by unnecessarily continuing to sacrifice the lives of many may not be a defensible public policy choice. Rather, support for substitution to other crops or lower tar tobacco plants might be considered as part of a protocol on tobacco content.⁴⁸

Increasing globalization of tobacco manufacture would seem to assist movement toward global standards. The global tobacco companies are well placed technologically and financially to engage in any research necessary to attain standards mandated on public health grounds. Some local manufacturers may be put at a disadvantage, but this will have to be weighed against the health, economic and social cost of permitting the sale of more harmful products than can be manufactured.

3.2.2 Tobacco Advertising, Promotion and Sale

The desirability of considering a coordinated international response to tobacco marketing⁴⁹ is underscored by three recent developments:

- (i) global expansion by major tobacco companies into areas previously served by domestic or regional tobacco companies;
- (ii) the internationalization of flagship brands by these companies; and
- (iii) increasing transboundary effects of the major advertising mediums.

Thus, tobacco companies market their major brands worldwide, through mediums which are beamed unimpeded across national borders and spill over into other countries where these very same brands are also smoked. And they market these brands through imagery which transcends language barriers. The result, predictably, is an undermining of domestic controls on tobacco advertising.

A major loci of advertising and promotion occurs at the point of sale. Tobacco signs adorn shops. Tobacco is placed at eye level adjacent to cash registers to prompt impulse purchases and price or other promotions entice consumers. If international controls on tobacco promotion are sought, special attention could be placed on activities at point of sale, including minimum age for tobacco purchase.

Restrictions on advertising and promotion may provide incidental benefits to smaller, local tobacco manufacturers. Usually it is the global companies which have the resources to mount extensive promotional campaigns. By removing these promotions the playing field will be substantially levelled and the comparative disadvantage local companies often experience when the global giants arrive will be somewhat lessened.

It should be noted that by restricting a major forum for competition between the tobacco companies, competitive pressures will be focussed on those remaining. For instance, if tobacco advertising is banned but prices are free to fluctuate, price competition may force tobacco prices downward making tobacco more appealing. (But, of course, this can be addressed through taxation or price controls, as discussed below).

3.2.3 Tobacco Package Design and Labelling

Tobacco company executives acknowledge that tobacco products are, broadly, fungible goods. There being little to distinguish between competing products based upon their innate characteristics.⁵⁰ The marketing of cigarettes is, therefore, about perceived images. Central to attempts to distinguish between these indistinguishable products is package design.

Tobacco advertising and promotion almost always draws its inspiration from package design. Even if the package itself does not appear, the brand name, the font style, the colours, and characteristic shapes or graphic arrangements do. So the option of controlling tobacco package design is tantamount to controlling tobacco advertising and sponsorship promotion.

The reasons for making control of tobacco package design desirable from a public health standpoint also lead to its most significant drawback: intense political and legal opposition. When countries such as Canada and Australia attempted to implement controls on package design, the tobacco industry responded with very concerted opposition. Equal or greater political opposition should be expected if this approach is adopted internationally. But, then again, the tobacco industry should be expected to oppose any controls on its operations, domestic or international, likely to do it harm.

Although a comprehensive tobacco control agenda would likely seek to regulate the information which *may* appear on the tobacco package, it almost inevitably would also address information which *must* appear. This traditionally has consisted of health messages. The educational reach of the roughly 300 billion cigarette packages sold worldwide each year creates an unsurpassed vehicle for information dissemination.

Tobacco packages target smokers and potential smokers. In comparison, billboards and ads in the electronic media cast their net broadly, reaching smokers, potential smokers and confirmed non-smokers alike, largely without distinction. Further still with each brand the tobacco marketers have carefully defined distinct subgroups within that target audience. And finally, the package speaks to the target audience at a particularly important and sensitive moment. For these reasons, package space is a critical resource for reaching smokers and potential smokers.

Language, culture and priorities clearly differ between states. While this suggests that package messages with identical content the world over are not desirable, there is much that can be agreed upon.

Given the widespread lack of full appreciation of the risks of tobacco use, it can hardly be contended that public health objectives are best met by having no health messages. While States obviously will differ as to the language and content of package messages, their public health interests are comparable to those of other States with respect to the prominence of the message size and placement, and with respect to reducing the competing or distracting imagery produced by tobacco company brand names and graphics appearing on the package.

An irreducible set of common parameters about the appearance of package messages could be agreed upon internationally. Minimum standards to be adhered to could be sought within a protocol.

Similarly, States could not tenably maintain that their public health interests are best served by permitting tobacco companies to place terms which are demonstrably misleading on packages; terminology such as "light", "mild", "smooth," *etc.* So not only may there be consensus about some elements of what must appear on tobacco packages, there may also be consensus about elements of what must not appear.

3.2.4 Taxation and Pricing

The price elasticity of tobacco -- the economic measure of the link between tobacco price and tobacco consumption -- is well documented both in the literature⁵¹ and in concrete examples from several countries.⁵² Price has a significant effect on consumption, and it is widely accepted that tax-driven price increases are probably the most effective means of dissuading tobacco consumption implemented thus far. The World Health Organization encourages tax-induced price increases and illustrates numerous options.⁵³

Increasing tobacco taxes is more difficult when one country attempts it in isolation. The threat of smuggling from adjacent, low-tax countries is a limiting factor. And with respect to increased corporate taxes, tobacco

manufacturers may threaten to leave and service the market from elsewhere, or even abandon the market entirely. The tobacco industry appreciates what leverage it has, knowing government officials will have one eye on the tobacco industry and the other on the daily nicotine needs of the populace.

Given the well-established effectiveness of tobacco taxes, and given that the impact is enhanced when tax increases are undertaken in concert with other States, a protocol on tobacco taxation warrants consideration. It could address not only tax levels, but also forms and means of applying and measuring the tax.

3.2.5 Smuggling

Although tax or price differentials between States encourage tobacco smuggling, smuggling can occur for reasons entirely unrelated to price: establishing market demand as part of a political strategy to facilitate future legal sales, for instance. So, as desirable as coordinating tobacco taxes may be, coordination will never be a full resolution of the smuggling problem. Moreover, the prime reason for addressing the tobacco pandemic via the tax system has nothing to do with smuggling. It is an effort to dissuade use through price deterrents. Finally, while cross-border price differentials will encourage smuggling, measures such as tax paid markings can minimize smuggling regardless of price differentials. These factors, combined with the enormous size⁵⁴ and importance of tobacco smuggling as a public health issue, suggests that while there is significant interplay between price, taxation and smuggling, smuggling perhaps deserves a protocol of its own.

The transboundary shipment of tobacco without the applicable duty being paid will almost inevitably constitute a criminal offence in the State into which the tobacco is being shipped. It might also be an offence in the country of origin, or in transit countries between origin and final destination. So the international problem is not so much defining the activity as a criminal offence but, rather, enforcing existing domestic law.

Options for utilizing an international instrument to encourage the effective enforcement of domestic smuggling laws include: (i) internationalizing the criminal offence of tobacco smuggling; (ii) concluding extradition agreements with respect to tobacco smuggling; (iii) agreeing to resolve the issues pursuant to the rules of private international law; and (iv) facilitating prosecutions through protocol-directed, administrative cooperation. The first three will be discussed below. The fourth parallels a general tobacco cooperation protocol discussed in a subsequent section, and is best dealt with in that section. However, it should be noted that several regional or bilateral agreements on cooperation in criminal matters presently exist.⁵⁵

To be effective any international approach would, when appropriate, need to apply to both natural persons and corporate entities involved in tobacco smuggling.

(i) Tobacco Smuggling as an International Crime

The characteristics of international crimes are worth describing. They typically deal with significant violations of basic human rights. They capture the attention of the international community either because their scope is so large, or because their existence anywhere constitutes a threat everywhere. Many international crimes involve acts whose commission contains a transnational or supranational element. And for many international crimes States in isolation are unlikely to be successful in addressing the issue solely through domestic measures. Finally, many activities constituting international crimes are often concurrently dealt with under the domestic law of most States, even if not utilizing the same terminology.⁵⁶

On every count, tobacco, tobacco smuggling, and conspiracy to smuggle tobacco share these characteristics with existing international crimes.

Life and health, the most basic of human rights, are obviously threatened by tobacco. The marketing of tobacco is an affront to the special protection afforded children because of their susceptibility.⁵⁷ The tobacco health problem -- measured in terms of death and disability -- is without equal anywhere in the world. Tobacco smuggling, constituting a third of all tobacco exports, is huge and growing; moreover, by its very

nature it often occurs across international borders. Finally, and largely because of this international element, States have had extremely limited success to date combatting smuggling through domestic measures alone.

A potential difficulty in attempting to define tobacco smuggling as an international crime is a lack of support. Despite having the characteristics of international crimes, some States may not view international tobacco smuggling on par with international crimes such as genocide or crimes against humanity. But the better analogy is narcotic trafficking. Narcotic trafficking has been restricted through multilateral international instruments since the early part of this century,⁵⁸ it is regulated as an international crime under several multilateral treaties,⁵⁹ and has been discussed by the International Law Commission for classification as a "crime against the peace and security of mankind."⁶⁰ Tobacco smuggling, being very comparable to illicit narcotics trade, might warrant comparable treatment.

In addition, like narcotic trafficking, combatting tobacco smuggling by defining it as an international crime vastly increases enforcement options. It could, for example, permit any Party with physical jurisdiction to either try a defendant or extradite them to another Party to face trial.

(ii) Extradition Agreements

A second approach would be to conclude tobacco- or smuggling-specific extradition agreements as a means of increasing the enforceability of the domestic smuggling laws of the Parties.

While the existence of regional and bilateral extradition treaties, and frequent extradition as a matter of comity, might suggest that adequate legal obligations and/or political practices already exist to deal with tobacco smuggling, recent evidence does not bear this out. Tobacco smugglers are not always extradited. When the issue is left to comity, other factors can become involved. The decision to extradite or not may be made on grounds entirely unrelated to the public health issue, and there is no consistency.

Nevertheless, many instances of international tobacco smuggling will meet the test States typically impose for extradition: (i) the charge relating to a serious crime; (ii) that crime being one for which there is dual-criminality -- that is, it constitutes a crime in both the sending and receiving States; and (iii) the defendant will be tried exclusively for the offence relating to the extradition.⁶¹ Defining tobacco smuggling as an extraditable offence appears to comport with existing international consensus on extradition.

(iii) Private International Law

Another alternative is for States to agree, through a protocol, to assist in combatting smuggling through their domestic legal structures. The rules of private international law, if a State had a treaty obligation to implement them, would assist enforcement of domestic smuggling laws. A protocol could require: (i) Parties to enforce the judgements of each other's courts; and/or (ii) a Party with physical jurisdiction over an alleged smuggler to have its courts sit and pass judgment over the defendant, utilizing the laws of the Party whose smuggling laws it is alleged were breached and the factual elements from that Party.

Examples of this sort of treaty obligation with respect to implementing foreign laws or decisions exist, most notably with respect to the enforcement of foreign arbitral awards.⁶²

3.2.6 Cooperation and Information Sharing

(i) Coordination of Industry Reporting Requirements

It is evident that good public health policies require credible, relevant and timely information upon which the policy decisions are based. An important source of information about tobacco, tobacco products, their promotion and the consequences of that promotion is the tobacco industry. However, the tobacco industry has a long history of secrecy, and will not provide this information unless required by law to do so.

Reporting requirements result in information being obtained from the primary source, the parties best placed to provide it. It provides governments with much needed information, while the tobacco companies shoulder the cost of producing this information. Also, because many of the tobacco companies maintain global operations, it sets the stage for relatively easy collection of a set of globally comparable data.

The global tobacco companies obviously have the financial resources and the business interest to collect comparable data from around the world. Their investment and other business decisions require this. However, this information can also be used to serve public health interests. This, of course, would require that the Parties seek a core set of information, most desirably in the same format, from the companies. And the global companies would benefit from this as well, for standardization between countries in which they operate simplifies their administrative practices.

(ii) Standardization and Sharing of Information Collection

For the reasons discussed above with respect to information reported by the tobacco companies, decision making may be enhanced if the situations in various countries are easily comparable. Learning from one another's successes and failures has always been an important part of progressively developing effective, comprehensive domestic tobacco control agendas.

However, not all necessary information will be obtainable from the tobacco industry. Nor will a State likely want to rely solely on tobacco companies as the source for certain information; back-up checks, if only for quality control, are probably warranted. So even with significant reporting requirements, independent collection will still be needed. And as with industry reported information, standardization for comparability purposes would be desirable.⁶³

Areas for which standardized information collection could be considered are many. While advice from experts in various fields should be sought, the following areas might be candidates:

- (i) prevalence by demographic group, including age groups too young to legally purchase tobacco (e.g. 10+);
- (ii) wholesale and retail price and tax levels;
- (iii) market share by brand, and by tar and nicotine levels;
- (iv) promotional expenditures by type (advertising, sponsorship, giveaways *etc.*), medium (television, radio, billboard, print), and brand;
- (v) employment;
- (vi) capital investment;
- (vii) imports and exports of leaf and manufactured products by destination and origin, including countries of trans-shipment;
- (viii) estimate of the size of the contraband market, with substantiating information; and
- (ix) product contents as sold and contents in the smoke upon combustion or in the fluid upon mastication.

Finally, collecting comparable information is of little value if it is not efficiently shared amongst the Parties. Establishing standard mechanisms, time frames and manners of sharing this information would be of value.

(iii) Financial and Institutional Assistance

The information collection and sharing discussed above will require new financial resources if all Parties are to produce comparable data of sufficient quality. Moreover, data without the means to interpret it, or data interpreted inconsistently between the Parties, is of limited use. If information collection and sharing were to be undertaken in earnest, resources would be required to analyse that information. The administrative tasks

of coordinating the production, collation, evaluation and dissemination of this information would also require resources.

According to the World Bank, money spent on tobacco control is very well spent. With tobacco's global net cost amounting to US\$ 200 billion per year,⁶⁴ and a cost effectiveness rivalled only by basic childhood immunisations,⁶⁵ few public investments provide greater dividends.

Arrangements for financial contributions to facilitate information collection and sharing would most likely be required. If advanced, though some of this likely would be undertaken by the relevant ministries of the Parties, there may be a need to establish, by protocol, what might be termed a "centre for tobacco policy facilitation."

Created with new money, this body could exist either under the auspices of the World Health Organization or, perhaps, be responsible directly to the Parties through a Secretariat administering the framework convention and its protocols. The latter might provide a measure of flexibility unavailable if WHO was the overseer.

In addition to performing administrative functions, a central body might include experts in the fields of tobacco policy, economics, statistics, public opinion taking, politics, law, and public relations to help Parties with tobacco policy generation, evaluation, implementation, and coordination with other Parties and other States.⁶⁶

3.2.7 Tobacco Exports

Global tobacco companies are immensely powerful political entities. They are formidable opponents to any State planning to seriously regulate them. This is the underlying reason why significant legislative gains in tobacco control have been relatively few in number and slow to progress.

Given this dynamic, global tobacco control is best advanced when the public health benefit from any legislative initiative in one State is maximized. One approach toward accomplishing this is to consider having controls on internationally traded tobacco apply both at the importing countries' end (as presently exists) and also at the point of departure from the exporting country.

Developments within the past few years provide a good rationale.

Recent reports of tobacco companies altering the product to attract and addict more smokers⁶⁷ has prompted some States to prepare to regulate the content of the tobacco product, as opposed to the just the content of advertising, etc. If forthcoming domestic content standards also applied to tobacco exports, public health in tobacco importing countries could benefit.

Such an approach could encourage an ongoing escalation of standards, in concept not unlike the ongoing reduction in tariffs obtained through GATT/WTO negotiations and extended to other countries through the most favoured nation obligation.⁶⁸

3.2.8 Tobacco in the Public Sector

(i) State-Owned Tobacco Companies

Tobacco's adverse effects on the human body do not vary with the ownership structure of the manufacturer. Domestic and imported, private or public, tobacco products kill. So there is no public health rationale for a framework convention or protocols treating domestic tobacco companies or State-owned tobacco companies any differently from any other based on those factors alone.

Moreover, tobacco control policies which discriminate based upon ownership will likely prove to violate

international trade obligations as they have done in the past.⁶⁹ Also, given the overarching importance of international trade and the central role the GATT/WTO plays in that, it is highly unlikely that a sufficient number of Parties would agree in effect to amend the application of the GATT as between themselves to permit such discrimination.

The result of these two factors is that a tobacco framework convention and its protocols, and the domestic legislation implementing these obligations would have to apply equally to foreign and domestic, private and state-owned tobacco companies.

(ii) Tobacco Agricultural Policies

The politics of tobacco control is often discordant when it comes to tobacco farming. Although the production of tobacco leaf is obviously a critical element in an industry which eventually kills people, farmers maintain a level of public sympathy not extended to the tobacco industry in many countries. Farmers typically lower income levels, their lack of cohesion, the comparatively high labour usage farming entails, and the local nature of their involvement often leaves governments reluctant to address the tobacco problem at this level. Governments seem to conclude that, while they wished their citizens would not smoke, if they are going to they might as well smoke tobacco produced by domestic farmers.

While successes on other tobacco control fronts will eventually reverberate down to the farmer, the greater threat to tobacco farming comes not from tobacco control, but from the business decisions of the global tobacco companies playing one tobacco producing country off against another by threatening to purchase tobacco from the cheapest source. So, both for health and economic reasons, thought should be given to coordinating a managed, gradual withdrawal from tobacco production if only to insulate tobacco farmers from the vicissitudes of the tobacco companies.⁷⁰

(iii) Tobacco and Development Projects/Monies

The World Bank has a formal, comprehensive policy to discourage development in or reliance upon tobacco. Except in rare instances, the World Bank does not lend for investment, or guarantee investment or loans for tobacco production, processing or marketing.⁷¹

A comparable protocol option would be for the Parties to agree not to permit their bilateral aid or trade policies to encourage tobacco production or sale.

A limited number of developing countries with a significant and potentially growing tobacco export market might find this troubling; but if so inclined they probably also would find fault with a broad range of the initiatives likely to be found in any effective tobacco control convention.

FOOTNOTES

1. "Tobacco: century's epidemic," *Tobacco Alert*, World Health Organization, Geneva, 1995, p. 4.
2. Peto R, Lopez A. "Worldwide Mortality from Current Smoking Patterns," *The Global War, Proceedings from the Seventh World Conference on Tobacco and Health*, Perth, Australia, 1990:66-68.
3. World Bank calculations place tobacco's annual net cost at \$200 billion (U.S.). Barnum H. Priorities for controlling the global economic impact of tobacco. In: Yach D, Harrison S, eds. *Proceedings of the All Africa Conference on Tobacco or Health, 14 - 17 November 1993*. Harare, Zimbabwe.
4. Peto R, et al. *Mortality from Smoking in Developed Countries, 1950-2000*, Oxford Medical Publications, Oxford University Press, 1994.
5. Roemer R. *Legislative Action to Combat the World Tobacco Epidemic*. 2nd ed., World Health Organization, Geneva, 1993. *Tobacco or Health: First Global Status Report*, World Health Organization, Geneva, 1996.
6. World Health Assembly resolutions: WHA23.32 (1970), WHA 24.48 (1971), WHA 29.55 (1976), WHA 31.56 (1978), WHA33.35 (1980), WHA39.14 (1986), WHA40.38 (1987) WHA41.25 (1988), WHA42.19 (1989), WHA43.16 (1990), WHA44.26 (1991), WHA45.20 (1992), WHA46.8 (1993), WHA48.11 (1995), and WHA49.17 (1996).
7. ECOSOC resolutions on multisectoral collaboration on tobacco or health: 1993/79 (07 September 1993); 1994/47 (29 July 1994); 1995/62 (28 July 1995).
8. World Health Assembly Executive Board Resolution EB97.R8, calling for the development of an framework convention for tobacco control, was approved by the WHA by a vote of 71 - 5, with 10 abstentions; Forty-ninth World Health Assembly, *Committee B - Summary Record of the Fifth Meeting*, Doc. A49/1996/REC/3, p. 154-162.
9. *Ibid.*
10. Taylor A, Roemer R. *International Strategy for Tobacco Control*. Geneva, World Health Organization, Geneva, 1996 (Doc. No. WHO/PSA/96.6; available on request from the Programme on Substance Abuse, World Health Organization, 1211 Geneva 27, Switzerland).
11. Taylor and Roemer, *supra* note 10; *Committee B - Summary Record of the Fifth Meeting*, *supra* note 8.
12. For example, the *International Covenant on Civil and Political Rights*, U.N.T.S. No. 14668, vol. 999, p. 171, in force 23 March 1976, and its associated *Optional Protocol*, U.N.T.S. No. 14668, vol. 999, p. 302, in force 23 March 1976.
13. For example, the *Convention on Long-Range Transboundary Air Pollution (Geneva)*, *International Legal Materials* 1979, 18: 1442, in force 16 March 1983 and its associated protocols on long-term financing (1984),

reducing sulphur emissions (1985), and nitrogen oxides (1988); *Convention for the Protection of the Ozone Layer* (Vienna), *International Legal Materials* 1977, 26: 1529; in force 22 September 1988 and its associated *Protocol on Substances that Deplete the Ozone Layer* (Montreal), *International Legal Materials* 1987, 26: 1550, in force 01 January 1989, amended 1990.

14. Gore-Booth L. *Satow's Guide to Diplomatic Practice*, 5th Edition, Longman Group, U.K., 1979, ss. 29.23 - 29.27.
15. *Convention on the Law of Treaties* (Vienna), *International Legal Materials* 1969, 8: 679, in force 27 January 1980, Art. 41.
16. For example, flexibility can also be created by concurrently negotiating related but not essentially linked treaties. This approach taken with the four 29 April 1958 ocean treaties (*Convention On The Continental Shelf*, U.N.T.S. vol. 499, p. 312, in force 10 June 1964; *Convention On Fishing And Conservation Of The Living Resources Of The High Seas*, U.N.T.S. vol. 599, p. 285, in force 20 March 1966; *Convention On The High Seas*, U.N.T.S. vol. 450, p. 82, in force 30 September 1962; and the *Convention On The Territorial Sea And The Contiguous Zone*, U.N.T.S. vol. 516, p. 205), in force 10 September 1964. A fifth treaty, an optional protocol, created joint enforcement and dispute settlement provisions (U.N.T.S. vol. 450, p. 172).

A similar approach is also seen in the four Geneva conventions of 1949 dealing with the wounded, shipwrecked, prisoners of war, and civilians (found respectively at U.N.T.S. vol. 75, p. 31; U.N.T.S. vol. 75, p. 85; U.N.T.S. vol. 75, p. 135; and U.N.T.S. vol. 75, p. 287), and also the numerous 1899 and 1907 Hague Conventions on warfare. Each of these concurrent agreements was on related subject matter, but each stands alone.
17. See generally, *Vienna Convention*, *supra* note 15, Arts. 2(1)(d), and 19 - 23.
18. Article 3(1) of World Health Assembly resolution WHA48.11 (1995) explicitly directs that the Director-General's report to the WHA on the feasibility of an international instrument on tobacco control take into account existing trade and other conventions and treaties.
19. *Basic Instruments and Selected Documents*, 1969, v. IV.
20. *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, in the *Marrakesh Agreement Establishing the World Trade Organization*; GATT Doc. MTN/FA, Part II, Annex 1.C, 15 December 1993.
21. *Tokyo Round Agreement on Technical Barriers to Trade*, 1979; C.T.S. 1988/41; *Uruguay Round Agreement on Technical Barriers to Trade*, 1993, in the *Marrakesh Agreement Establishing the World Trade Organization*; GATT Doc. MTN/FA, Part II, Annex 1.A, 15 December 1993.
22. Canada T.S. 1994/2.
23. *Convention for the Protection of Industrial Property* (Paris), U.N.T.S. No. 11851, vol. 828, p. 305, in force 20 March 1883, as amended at Brussels, 14 December 1900; Washington, 02 June 1911; The Hague, 06 November 1925; London, 02 June 1934; Lisbon, 31 October 1958; and at Stockholm, 14 July 1967.

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24. See, *inter alia*, Art. 19(2) of the *International Covenant on Civil and Political Rights*, *supra* note 12; Art. 19 of the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), 10 December 1948; Art. 13 of the *American Convention On Human Rights*, *International Legal Materials* 1970, 9: 672, in force 18 July 1978; and Art. 10(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedom*, U.N.T.S. vol. 213, p. 221, in force 3 September 1953.
 25. WHA doc. A49/4, provisional agenda item 17 is slightly misleading when it describes framework conventions as "contain[ing] no explicit obligations." While that is commonly true, the absence of substantive obligations within the framework convention is not an essential element or, indeed, dispositive of the instrument being of framework nature.
 26. See generally Pallemarts, *Hague Yearbook Int'l Law* 1988, 189; Wetstone and Rosencranz A, *Acid Rain in Europe and North America*, Washington, 1983, at p. 145; Gundling L in Flinterman C, Kwiatkowska B, and Lammers JG (eds.), *Transboundary Air Pollution*, Dordrecht, 1986,21-23.
 27. *Vienna Convention*, *supra* note 15, Art. 41.
 28. *Id.*, Art. 36.
 29. Taylor and Roemer (*supra* note 10, at para. 62), WHO Doc. A49/4 (Forty-ninth World Health Assembly. *Implementation of resolutions: Report by the Director-General*. Provisional agenda item 17. Doc. A49/4. World Health Organization. Geneva, 1996, at p. 18) and other WHO documents describe the process as one of sequential timing: first adopt the framework treaty then conclude protocols. While this is commonly the case, it is not essential. Moreover, if the framework treaty contains some substantive obligations, it is desirable that the essential elements of some protocols, if not the final form of some protocols, be worked out at the same time.
 30. *International Legal Materials* 1979, 18:1442, in force 16 March 1983.
 31. *International Legal Materials* 1987, 26:1529, in force 22 September 1988.
 32. *International Legal Materials* 1989, 29: 1454; in force 17 May 1991.
 33. *Supra* note 24.
 34. *Supra* note 19, at Arts. XXXVI through XXXVIII.
 35. This "comprehensive tobacco control policy" example comports with Article 3(2) of WHA49.17, dealing with an international framework convention for tobacco control.
 36. *Supra* note 12.

37. *Supra* note 12.
38. World Health Assembly Res. WHA49.17 (1996), Art. 3(2).
39. World Health Organization. *Guidelines for controlling and monitoring the tobacco epidemic*. Tobacco or Health Programme. World Health Organization, Geneva, 1997 (in press); the WHO's position can also be found in the collectivity of World Health Assembly resolutions, *supra* note 6, and especially in World Health Assembly resolution WHA39.14 (1986).
40. *Supra* note 38.
41. Numerous press reports and depositions from former tobacco company scientists document that a genetically engineered, high nicotine content tobacco variety termed Y-1 has been developed by Brown and Williamson Tobacco Ltd., the American subsidiary of the global tobacco giant BAT Industries plc. Internal Brown and Williamson documents, obtained during disclosure in a court case in Texas, further document that related tobacco companies, including Canada's Imperial Tobacco Limited, have had Y-1 grown for their use.
42. In a detailed deposition relating to the Castano litigation in the United States, Dr. Jeffery Wigand, former vice president of research and development for the American tobacco company Brown and Williamson, set out how his company used ammonia technology to alter the pH of tobacco smoke. Dr. Wigand states that changing the pH converts bound nicotine into the pharmacologically active free nicotine, and the effect is to increase the amount of nicotine absorbed by the smoker. See generally Hilts PJ. *Smokescreen*, 1996, Addison-Wesley Publ. Co. Ltd., p. 156 *et seq.*
43. Information on a very wide range of flavourings and additives has come to light in recent years, including: coumarin, a flavour booster which is carcinogenic; diethylene glycol, a moisturizing agent that make cigarettes milder; and eugenol, an anesthetic agent. For a general discussion on tobacco additives, see Glantz S *et al.* *The Cigarette Papers*. University of California Press, 1996, p 211 *et seq.*
44. Very small ventilation holes are often added to cigarette tubes and filters. These holes draw in extra air in upon inhalation, diluting the inhaled smoke and reducing the tar and nicotine levels measured on standardized smoking machines. Ventilation holes most often exist on so-called "light" or "mild" cigarettes. However, ventilation holes are placed at locations where the smoker places his or her fingers or lips and, consequently, many real smokers obtain more tar and more nicotine from these cigarettes than the smoking machine produces. See Kozlowski LT. Perceiving the risks of low-yield ventilated-filter cigarettes: The problem of hole-blocking. In: Covello VT, Flamm WG, Rodericks JV, Tardiff RG, (eds.) *Proceedings of the international workshop on the analysis of actual versus perceived risks*. New York, NY: Plenum, 1983:175-82.
45. Gray N. The global cigarette. *British Medical Journal* 1996, 313:1348.
46. European Union Directive 90/239/EEC, 17 May 1990, sets a maximum tar yield for cigarettes of 15 mg per cigarette as from 31 December 1992, and 12 mg per cigarettes as from 31 December 1997.
47. See generally GATT, *supra* note 19, at Art. XI.
48. See discussion *infra* at note 66 and accompanying text.

49. Numerous World Health Assembly resolutions endorse restrictions on tobacco promotion. With mounting certainty, the WHA has encouraged Member States and the Secretary General to consider restrictions on tobacco marketing, up to and including a ban on advertising in, *inter alia*, the following WHA Resolutions: WHA31.56 (1978), Arts. 1(2) and 2(3); WHA33.35 (1980), Arts. 1(1) and 2(4); WHA39.14, Arts. 3 and 4(4); WHA40.38 (1987), Art. 2; and WHA43.16 (1990), Arts. 1(2)(c).
50. Brown D. 1989. Transcript, *R.J.R.-Macdonald v. A.G. (Canada)*, 28 September 1989, p. 661. Mr. Brown was at the time the vice president of marketing at Imperial Tobacco Ltd., Canada's largest tobacco company.
51. U.S. Department of Health and Human Services. *Smoking and Health in the Americas*. Atlanta, Georgia: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Centre for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1992; DHHS Publication No. (CDC) 92-8419.
52. "Measuring the Impact of Economic Disincentives," *Tobacco Alert*, World Health Organization, Geneva, 1995.
53. "How to Use Tobacco Tax Policy to Promote Public Health," *Tobacco Alert*, World Health Organization, Geneva, 1995.

The World Health Assembly also encourages increased taxation as a deterrent to tobacco consumption, see specifically resolution WHA31.56 (1978), Art. 1(2).
54. Joossens L, and Raw M. Smuggling and cross border shopping of tobacco in Europe, *British Medical Journal* 1995, 309:1393.
55. *European Agreement on Mutual Assistance in Criminal Matters* 1959, European T.S. No. 30. The United States has concluded a large number of similar bilateral agreements, and U.N.G.A. Res. 45/117 sets out a model treaty on mutual legal cooperation.
56. While a State's domestic law might not include a crime of "genocide," the events giving rise to an international prosecution under the *Genocide Convention* (U.N.T.S. No. 1021, vol. 78, p. 277) almost assuredly would constitute murder, or conspiracy to commit murder, *etc.* under domestic law.
57. Numerous examples exist. Article 25(2) of the *Universal Declaration of Human Rights* (*supra* note 24) says "[children] are entitled to special care and assistance." The 1959 *Declaration of the Rights of the Child* (U.N.G.A. Res. 1386 (XIV)) is much more specific, saying "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." And article 19(1) of the *Convention on the Rights of the Child* (*International Legal Materials* 1989, 28: 1448) addresses the targeting of children in tobacco promotion by provides that "States Parties shall take all appropriate legislative ... measures to protect the child from all forms of ... exploitation."
58. See Jennings R. *Oppenheim's International Law*, 9th Edition, Longman Group, U.K., 1992, p 487 *et seq.*
59. *Single Convention on Narcotic Drugs* 1961, U.N.T.S. vol. 520, p. 521; *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988, *International Legal Materials* 1989, 28:493.

60. *International Law Commission Report* (42nd Session, 1990), paras. 77-88.
61. Brownlie I. *Principles of Public International Law*, 4th Edition, Clarendon Press, Oxford, 1990, p 316.
62. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N.T.S. vol. 330, p 38.
63. The World Health Assembly has promoted the standardization of smoking measurements and laboratory techniques in WHA29.55 (1976), Arts. 3(4)(a) and 3(4)(b).
64. Barnum, H. "Priorities for controlling the global economic impact of tobacco." In: Yach D, Harrison S. (eds.) *Proceedings of the All Africa Conference on Tobacco or Health*, 14 to 17 November 1993, Harare, Zimbabwe.
65. *Ibid.*
66. The World Health Assembly has endorsed the provision of assistance to governments in the formulation, implementation and evaluation of their anti-tobacco policies in, *inter alia*, the following WHA resolutions: WHA29.55 (1976), Art. 3(5); WHA31.56 (1978), Art. 2(2); WHA33.35 (1980), Art. 2(3); WHA39.14 (1986), Art. 5(3); WHA42.19 (1989), Art. 3; and WHA43.16 (1990), Art. 3(2).
67. See *supra* notes 40 - 43 and accompanying text.
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68. GATT, *supra* note 19, Art. I.
69. *USA v. Thailand*, "Restrictions on Importation of and Internal Taxes on Cigarettes," Doc. DS10/R, *B.I.S.D.* 37/200, 07 November 1990.
70. The World Health Assembly has repeatedly endorsed tobacco crop substitution and/or diversification away from tobacco, with particular sensitivity to developing countries who are particularly dependent upon tobacco. See, *inter alia*, the following WHA resolutions: WHA23.32 (1970), Art. 2(e); WHA24.48 (1971), Art. 4(iii); WHA29.55 (1976), Art. 3(6); WHA31.56 (1978), Arts. 1(4) and 2(2); WHA33.35 (1980), Art. 2(2); WHA39.14 (1986), Art. 4(8); WHA41.25 (1988), Art. (i); WHA42.19 (1989), Arts. 3(4) and 3(5); and WHA45.20 (1992), Art. 3(2).
71. "Tobacco. Operational Policy OP 4.76," *The World Bank Operational Manual*, World Bank. Washington, March 1994.

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