

**Commentary on**

World Health Organization  
Provisional texts of proposed draft elements  
For a WHO framework convention on tobacco control  
A/FCTC/WG/2/3  
29 February 2000

And

World Health Organization  
Possible subjects of initial protocols  
A/FCTC/WG2/4  
15 February 2000

**Ottawa, Canada**

**10 March 2000**



*PHYSICIANS FOR A SMOKE-FREE CANADA*  
*MÉDECINS POUR UN CANADA SANS FUMÉE*

---

P.O. Box 4849 Station E Ottawa Ontario K1S 5J1  
Phone (613) 233-4878 Fax (613) 567-2730 email [ccallard@cctc.ca](mailto:ccallard@cctc.ca)  
[www.smoke-free.ca](http://www.smoke-free.ca)

## **INTRODUCTION**

The World Health Organization Secretariat is to be congratulated for the speed with which it has produced drafts of the framework convention and protocols. When finalized, these will be landmark documents that have the potential of finally bringing the unchecked spread of tobacco products under global control.

### **Major strengths of draft convention and protocols**

- The Secretariat has produced documents that can become the focus of constructive debate and negotiation leading to the final products that will eventually be put forward for ratification.
- Drafts of both the framework convention and protocols have been put forward so that Member States can get a clearer idea of how these two kinds of legal instrument can work together.
- Some major priorities for international control have been identified. These include tobacco advertising, smuggling (including a ban on duty-free sales of cigarettes), and the need for technical and financial assistance to some Member States to help them implement effective comprehensive tobacco control measures.
- That being said there remains a great deal of room for improvement in the current drafts.

### **OVERALL CONCERNS:**

- The draft documents, to their detriment, confuse national and international measures. There are some problems, like smoking cessation that can be addressed most effectively entirely at the national level. There are other problems that can only be addressed through international law, like correcting and preventing the subversion of legitimate tobacco control measures through provisions in international trade agreements. The convention and protocols should give highest priority to the latter. Regrettably, it does the opposite. Most draft provisions are really national measures dressed up as proposed international law. Vital international issues are incompletely elaborated or totally ignored. The overall effect is to create a souped-up World Health Assembly resolution. Much more will be needed to turn it into a truly effective international treaty for tobacco control
- Weak set of proposed controls on smuggling

- Proposed controls on advertising are inadequate, miscast and misplaced in the draft framework convention. Proposal in the advertising protocol are better, but need to go further to specifically ban all exports of tobacco advertising, and all forms of tobacco advertising that could potentially be exported through present and future forms of electronic communication.
- Proposals for mechanisms of providing technical and financial assistance to developing countries and newly independent states are spelled out, but lack specific mechanisms of guaranteed implementation and financing.
- Because neither the Convention nor its protocols effectively address the international problems Canada faces, its implementation would make very little difference to the health of Canadians, nor would it move Canada further to reducing the harm it imposes on the health of others (through tobacco exports and international tobacco promotion events)
- The selection of "Treatment" as a priority topic for protocol does not reflect the priority needs of most populations. Moreover, the need for measures to encourage people to stop smoking is NOT the same as the need for "treatment" options. The commodification of cessation is a highly political move by WHO, done in conjunction with its partnership with pharmaceutical companies. It should be resisted by member states and NGOs. Cessation and its subset of treatment are issues that can and should be addressed at the national level. There are no evident international dimensions to these problems, and no solid justification for their inclusion in an international treaty. The protocol on treatment should be dropped entirely.
- The specific language of the framework convention poses many more risks than a convention that was a general agreement in principle, with details left for specific protocols. In fact, it defeats the whole principle of good treaty management, which drew the WHA to the framework convention-protocol structure in the first place.
- Given the concern just noted, specific measures like controls on sales to minors should probably not be included at all in the framework convention. If these specific measures remain in, other problems arise. The draft text never makes clear whether its measures would be a ceiling or a floor. (Despite general obligation no. 6, which acts as though it makes that distinction). Here are examples of different formulations that would create ceilings and floors:
  - "Prohibiting sales of tobacco products to persons under the age of 16" is a ceiling.
  - "Each member shall ensure that tobacco products are not sold to persons under the age of majority" is a flexible ceiling with stronger language;
  - "Each member shall ensure that tobacco products are not sold to persons under the age of 16 and may adopt measures to ban the sale of tobacco products to young adults" is a floor.

To the extent that specific measures are included at all, care should be taken to carefully construct them as floors, minimal measures, that Member States are free to add to in order to make them more restrictive.

- The draft text is silent on current and future threats to public health through other international instruments (specifically, investment protection and the development of investor-state dispute mechanisms or trademark protection provisions that currently exist for tobacco products under NAFTA and WTA). These problems are real and are already thwarting the adoption of effective national and international measures.

Adjoining sections provide examples of just some of the international bullying tactics of the tobacco industry, and uses and abuses of existing international laws that could be controlled through articles inserted into the framework convention. There could be clear prohibitions or over-rides on such measures, both existing and possible future ones that may threaten tobacco advertising bans, labelling requirement and other sound tobacco control measures.

Measures in this class are very important to include because they could not be accomplished through any means except international law. They could possibly be addressed through other international laws other than the framework convention on tobacco control. However, this would require specific plans and strategies for negotiation with the administrators of other international laws that are affected.

One strategy for consideration would be to prepare draft texts for inclusion in the framework convention for tobacco control and then, through negotiation, to explore the possibilities of achieving the same ends through modifications of other international laws. Customs agreements, trade agreements and intellectual property protection agreements are the main forms of treaty in question.

- The interplay between provisions in the convention and protocol needs to be carefully considered. Member States have the opportunity to ratify the documents separately. Strategic provisions can be included in one or the other to encourage more participation. If these strategic issues are not considered, however, undesirable consequences arise. The framework convention proposes a ban on tobacco advertising directed to children, while the protocol proposes a total ban on advertising. Both fail to address the truly important issue of a total ban on *exports* of tobacco advertising. But the two work together to create a perverse incentive to accept the poorly constructed partial ban in the framework convention and ignore the complete ban in the protocol, if Member States have the option of ratifying the convention but not the Protocol.

## UNADDRESSED CONCERNS:

### *Driving tobacco advertisements around the track – and around the world: Formula 1 Grand Prix Racing*

- March 12, 2000: Page B2 of the Ottawa Citizen, shows a picture of a West (Reemtsma) tobacco carton leading the first lap of the Australian Grand Prix. It is followed in second place by another West carton and in third place by a Marlboro carton. Marlboro cartons went on to finish first and second in the race. Australia has a ban on tobacco advertising, but bowed under tobacco industry pressure to make an exception for “international events”. France and Canada have exceptions to their bans on tobacco advertising that allow events like the Australian Grand Prix to be broadcast in their countries, and pictures like these to appear in their media.
- The draft framework convention is silent on this issue, and the advertising protocol is, at best, unclear on the same issue. The advertising protocol, if it does nothing else, must ban the export of all tobacco advertising, like the F1 Grand Prix. The convention itself, if it cannot call for a ban on the tobacco industry bullying tactics used to get exemptions to exports and imports of tobacco advertising in Australia, Canada and France, should at the very least call for public disclosure and international reporting of such tactics.
- These pictures were taken from Internet sites in France and Canada. Possible control on the Internet is a larger, unresolved debate, and one that cannot and should not be resolved by an international tobacco law. The advertising protocol should emphasize the need to ban exports of tobacco advertising, like the examples shown above, but should make it clear that the best way to do this is to ban all tobacco advertising and sponsorship that is or could be subject to internet publication, international broadcast and media coverage.
- The tobacco treaty should also contain measures to prevent the moving of tobacco-sponsored events to countries that are signatories of the agreement. Tobacco companies are currently to get around a coming ban on tobacco advertising in Europe and to weaken the existing ban in Turkey by moving the F1 to Turkey.



### ***Killing generic packaging by threatening compensation for expropriation of trademarks***

- In 1994, Philip Morris teamed up with the US government and threatened to demand compensation from Canada under NAFTA if it implemented plain packaging requirements. Even though this could be a very valuable public health measure, Canada has only presented much watered-down proposals on packaging ever since.
- The TRIPS agreement (part of WTA) requires that restrictions on trademarks (like advertising bans, warnings on packages, plain packaging requirements) be “justified”. This probably has the effect of inhibiting countries from adopting bans on advertising.
- The draft of the Multilateral Agreement on Investment (MAI) was even more outrageous. Any trademark restriction would trigger mandatory payment of compensation to the trademark holder. This would practically ensure tobacco companies against any future controls on advertising or packaging. MAI negotiations have been suspended, but international investment protection will resurface in other international negotiations. The framework convention should pre-empt any future protection for tobacco trademarks from advertising bans, labelling requirements and plain packaging.

### ***Unrelenting bullying of Thailand by tobacco companies, the EU, USA, UK and Japan***

- Thailand has some of the most effective tobacco control legislation in the world. Their government has been subject to unrelenting bullying over a decade by tobacco companies and the governments of their home countries, in efforts to oppose first an advertising ban and then ingredient disclosure regulations, both sound public health measures endorsed by WHO. Various protections under international law in GATT, the World Trade Agreement, TRIPS and other international agreements have been cited by the tobacco industry and their client states in their efforts to have these public health measures rolled back.
- So far the government of Thailand has prevailed, but not without having to have maintained a spirited defence of measures that should have never been attacked in the first place. How many more countries would show the same determination and resolve as Thailand in the face of such withering and unrelenting pressure from international corporate giants and the most economically powerful nations on earth?
- Trade agreement requirements that public health measures be justified sets the stage for unequal international political and judicial disputes that need never happen. The framework convention could and should spell out a set of tobacco control measures that are asserted to be valuable public health measures and not subject to further justification or attack through other international legal agreements.
- The framework convention should also put an end to international bullying by tobacco companies and their home governments of countries that wish to implement sound tobacco control measures approved by the World Health Organization.

## ***Other dubious practices***

### ***Bullying British Columbia***

- Tobacco companies are rumoured to have threatened to stop selling cigarettes in BC if the Tobacco Fee Act were implemented. Because the tobacco industry operates as a cartel with no competitors, there was reason to take this threat seriously. The Act has not yet been implemented. Such bullying tactics should be made a violation of a new international tobacco control law. The framework convention should also contain mechanisms for international reporting of such instances, and a set of remedies.
- In their opposition to B.C.'s testing and disclosure measures, tobacco companies said they would prefer standards developed by the tobacco industry-friendly ISO. At this point, public health would be best served by non-standard reporting of tobacco ingredients. Strong public health based standards may grow out of these over a period of years. Right now, the best strategy would be to encourage a multiplicity of public health based strategies in national and sub national jurisdictions.

### ***Sticks for Canada***

- When the tobacco industry threatened to remove production from Canada in 1992 unless the export tax was removed, the government quickly caved in and removed the tax. GATT (now part of the WTA) allows tobacco companies to brandish such threats with impunity. The framework convention needs to give governments international law tools to defend their sound tobacco control measures against such threats.

### ***Carrots for Kyrgyzstan***

- In 1994, BAT proposed to invest US\$42.5 million in Kyrgyzstan in return for the right to establish a private tobacco monopoly in the country, and a large number of favourable trading conditions including this one:
  - “(e) BAT Kyrgyzstan will be able to operate and trade freely, and in particular it will:...
  - (vi) have freedom to advertise;”
    - Guildford depository Box No: US077, File No: HJ0020, pp. 203477299-399
- While the Kyrgyzstan agreement is not yet fully implemented, there can be little doubt that similar clauses appeared in similar investment agreements throughout Central Europe and the former Soviet Union. The framework convention should require mandatory disclosure of such agreements, rescind (without compensation) all clauses that weaken or prohibit public health measures, and prevent their use in the future. Attempts to bully states into not signing the framework convention should also be exposed and subject to international sanction.

## **SPECIFIC COMMENTS ON DRAFT TEXT OF FCTC**

### ***Preamble: (page 2-3)***

The preamble doesn't mention the global dimension of tobacco production, promotion, and use. A global problem demands a global solution that must be more than the sum of the parts. The preamble has no references to the difficulties of restraining promotion with borderless communications, inability of domestic governments to control contraband, the need for global governance of an industry dominated by transnational companies, etc.

The preamble makes a special reference to women. This seems gratuitous and condescending. The need for affirmative action in tobacco control goes well beyond the need to include women (the absence of representation by the most affected populations, developing nations, etc is more acute). It should not be forgotten that the proportion of smokers is higher among men than women for almost all age groups in almost all countries, and that far more men than women die from tobacco use.

### ***Definitions: (page 4)***

Special care will be needed to tighten up the definitions (i.e. "regular tobacco" is an inadequate definition) and ensure that the list of tobacco products is complete. (Many, like hookah, cheroots, chutta, dhumti, pan, nass and others are missing)

### ***Objectives: (page 5)***

Four options for objectives are included. None of them include the most important objective the development of coordinated international responses to the supra-national problems presented by tobacco use and tobacco sale. It is suggested that this idea be added to Option 2 to create a clear statement of the objective.

### ***Guiding principles (page 5)***

Guiding principle no. 4 (no disguised trade measure) sticks out in a document that so carefully avoids mention of other trade aspects. The use of the word "unjustifiable" could potentially open the door to legal contestation of provisions of this treaty and the need to provide further justification. A better guiding principle based on the trade dimension might be that no country can allow trade and intellectual property considerations to have primacy over tobacco control measures at either the national or international levels. Comprehensive tobacco control, as already defined in WHA resolutions and this convention, should override other international agreements on duty-free goods, free trade and the protection of intellectual property. By way of example, the convention could spell out a long list of sound national and international tobacco control



measures and assert that all of them are justified tobacco control measures that are not subject to any complaint under any trade law, It could also be asserted that swift and severe national and international reprisals would be taken for any political or economic bullying by governments, tobacco companies or their agents in their opposition to sound tobacco control measures endorsed by this convention and such other measures as may be developed in the future by the WHO and/or the Conference of Parties. These latter suggestions propose primacy for public health over free trade. Guiding principle number 4 proposes primacy for trade over public health. As written, it has no place in a public health convention for international tobacco control.

***Obligations. General obligations (page 6)***

The language throughout is disingenuous. "Each party SHALL develop ... where appropriate... SHALL... as far as possible in accordance with the means at its disposal." Either a nation has an obligation or it doesn't under this treaty. There should be clear obligations (i.e. Each national shall report on the progress it has made) or general exhortations (i.e. Each member shall take appropriate actions to ensure that tobacco is removed from domestic consumer price index). National coordinating bodies should be under the authority of the health minister.

Most measures that follow are more properly national measures that belong in national law but not international law. These include the following measures:

- Sales to youth
- Exposure to tobacco smoke
- Regulation of the contents of tobacco products
- Regulation of tobacco product disclosures
- Eliminating subsidies, alternatives for tobacco growers
- Dedicated taxes
- Advertising, promotion and sponsorship (should appear in a protocol)
- Treatment of tobacco dependence
- Packaging and labelling (except as it applies to smuggling control)
- Education, training and public awareness

It is recommended that all of these provisions be removed from the framework convention. However, they are all important issues to be addressed at the national level. WHO could consider providing a package of guidance information to member states on how to construct comprehensive national tobacco control programs. It could include the WHO publication *Guidelines for controlling and monitoring the tobacco epidemic* and related updated supplementary guidance on the topics listed above. However the following comments would apply to these provisions before they would be considered for inclusion in such a package of information.

### ***Sales to youth***

The proposal is meaningless without a specified age. If the age chosen is less than 19, this could represent a threat to efforts in Canada to increase the federal minimum age to 19.

### ***Second hand smoke (page 7)***

It's not clear that either of these options belongs in an international instrument, especially as there is no mention of international transportation (trains, boats, flights, etc).

### ***Regulation of tobacco products and information about tobacco products (page 7)***

The case for standardized reporting has not been made, and the case for non-standardized reporting is growing. The world has been held back by ISO and FTC standards, while Canada and Massachusetts have moved ahead by ignoring international conventions and standardization. At this time, more public health progress can be made if the reporting of tobacco products is not standardized. National law is the strategically appropriate place for such measures.

### ***Eliminating subsidies, alternatives for tobacco growers***

This measure is more properly considered under national law.

### ***Dedicated tax (page 8)***

This measure does not belong in an international treaty. A more palatable formulation, even for national law, would propose expenditures from general revenue that offset part of the tobacco taxation revenue.

However, there is an opportunity to require some revenue-generating mechanism to pay for the costs of operating the treaty and protocols and other international measures. These are discussed more fully in a later section of this commentary.

### ***Advertising, promotion and sponsorship***

Option 1 & 2

Limiting these provisions to advertising "targeted at children" will essentially gut any effective measures. This is particularly disturbing, given the massive evidence that partial bans, or restrictions of this nature, have no effect on population health nor even on youth smoking. This provision would do more harm than good, even in national law. Member States should be strongly encouraged to ban all tobacco advertising by national legislation. Further comment on appropriate international advertising measures appears in the comments on the advertising protocol.

### ***Treatment of tobacco dependence***

This section reads like the "SmithKline Beecham/GlaxoWellcome/Pharmacia" clause. Until 1999, we talked of nicotine dependence and smoking cessation. Now we exhort countries to purchase treatment programs from for-profit agencies to treat 'tobacco dependence'.

This section promotes "programs" that encourage cessation, but not policies. There is ample evidence that work place bans and high taxes encourage cessation, yet these are absent. Encouraging cessation by a wide variety of policies and programs is to be encouraged through national action.

### ***Packaging and labelling (except as it applies to smuggling control) Education, training and public awareness***

Both of these topics are also subjects for national law, not international law.

### ***Tobacco taxation***

Tobacco tax harmonization among countries is a worthy topic for international action. Careful consideration will have to be given to how the provision for two-thirds of the price being tax will work in practice and over many years.

- Is there a risk that it will provide a perverse incentive whereby some states lower their taxes in the interests of global harmonization?
- Is there a risk that it will become a strait jacket in the future, when a higher minimum rate might be desirable?

The call for removing taxes from the consumer price index is not worth the risk of impeding international agreement on this issue. It is recommended that it be dropped.

### ***Ban on tax free and duty free (page 8)***

This DOES belong in an international treaty, and is international in its application.

### ***Measures to eliminate smuggling***

This is a very important topic for international control. Unfortunately the wording of the proposals in the framework convention can only be described as lame. In any case, the matter of smuggling should be dealt with entirely in the protocol that deals with this subject. Further comments on smuggling issues can be found in the section of comments on the smuggling protocol.

## ***Surveillance***

Establishing effective means of detailed global surveillance will be a vital tool in tracking progress in controlling the global tobacco epidemic. The most effective way of achieving respected standards for global surveillance will be through the framework convention. Two options are presented here, but both are flawed. Option one proposes some quite specific measures for reporting. However, common standards for reporting are not spelled out and there is a danger that the world could be locked into inflexible provisions that may be found to be irrelevant or incomplete with the passage of time. Option two proposes to defer the whole issue of defining data to be reported and reporting standards to the Conference of the Parties. However, option two is silent on the issue of obligatory reporting.

It is proposed that an acceptable solution could be to reinforce option two mandate the Conference of the Parties and its secretariat to not only formulate data to be reported but to bind signatories to report data in ways so recommended. This would, in effect give some power to the Conference of parties to make regulations under this convention. The reporting requirements could be changed from time to time as circumstances dictated.

There are already standards for international reporting of tobacco production, sales, imports and exports to the U.N. Statistical Office. However, standards for production and sales reporting are not well coordinated with standards for reporting of imports and exports. It is proposed that collaboration with the UNSO on these and related matters, and their resolution, be an additional duty assigned to the Conference of the Parties

## ***Research***

Article G.1 could be strengthened by referring to a wider range of research topics including deepening our understanding of patterns of tobacco consumption, tobacco economics, the structure and functioning of the tobacco industry and others. It could also strongly refer to cross-national and international research.

Article G.2 can be dropped because it refers to national measures only.

## ***Cooperation in the scientific, technical and legal fields***

This section is of critical importance to the success of the enterprise for a number of reasons. Most developing countries and countries of Central and Eastern Europe are in great need of technical assistance to implement national tobacco control policies and programs. As the FCTC develops and they acquire new international obligations, their needs will become even greater. The section also has strategic importance. If, through this section, countries in need can be assured that they will get the assistance they need at no further cost to their own treasuries, then they are likely to become enthusiastic supporters of the convention and related protocols.

This critical section could be further strengthened by making it clear that there will always be a guarantee of assistance being available on a multilateral basis, coordinated through the secretariat to the conference of the parties. The secretariat should have at its disposal the necessary technical and financial resources to discharge this function. Funding of such assistance will be part of the financial obligations of the signatories of this convention, and will be discussed in the comments on the financial resources section. As a strategic incentive, it could be specified that such technical and financial assistance will be available at no further cost to national treasuries to all Member States with demonstrated need for such assistance that are signatories to the convention and all its protocols.

### ***Liability and compensation***

Much of the tobacco industry is multinational in nature, and is using its multinational structures to escape liability and compensation. Despite the fact that most of its research, development, marketing and other business activities are serious threats to public health, it is able to keep detailed knowledge of most of these activities secret, in part by using its multinational structure to thwart attempts at the national level to discover the truth about tobacco.

The issue is important, but the solutions are unclear. They are likely to lie in the area of developing new areas of international law, as existing national and international law is inadequate to the task. Option 2 is preferred. It should be strengthened to also call for international measures to discover the truth about tobacco.

### ***Financial resources***

The convention and protocols are not meaningful unless the signatories are obliged to provide the technical and financial resources to make them work. The current draft imposes no obligatory financing at all.

The financing section should contain a specific guarantee of the adequate multilateral financing of a multilateral program of scientific, technical and legal cooperation, which will be available to all Member States, especially developing countries and newly independent states.

It is recommended that signatories be obliged to make a supplementary regular budget contribution to finance the newly established institutions and other aspects of implementation of this convention and related protocols.

The supplementary contribution would be an amount equal to some fixed percentage of the Member State's regular budget contribution to WHO, and would also have to reflect the actual

costs of implementation. The percentage would be a matter of negotiation, but would probably lie in the neighbourhood of 5%.

This section could also provide some non-prescriptive encouragement to Member States to provide these funds as an expenditure offsetting new revenue from a new surtax on tobacco. In this way, the “polluter pays” principle favoured by many Member States would apply.

### ***Relations between the Convention and its Protocols***

Ideally all Member States would sign the convention and all protocols. However, it may be more strategically sound to leave the signing of protocols optional or partly optional as discussed in the draft text. Negotiators should be alert to this issue and adjust this provision as necessary to achieve the best public health outcome possible.

### ***Relationship with other international conventions***

The draft text here proposes that existing rights and obligations under other treaties shall not be affected. However, some of those treaties are already impeding the implementation of effective tobacco control measures, and more may well develop in the future.

With respect to tobacco and tobacco control measures, text is needed to override certain provisions of the WTA, TRIPS, NAFTA, other regional trade agreements, the Kyoto convention on duty-free sales, and future provisions that could be in conflict with WHO recommendations for national tobacco control or international tobacco measures enacted under this convention.

Text is also needed to preserve this protection for the freedom to implement effective tobacco control measures from being diminished in effectiveness by future international agreements.

## COMMENTS ON DRAFT PROTOCOLS

### *Advertising protocol*

The advertising protocol calls for phased implementation of total bans on advertising. Except in the preamble and an oblique reference in Article 4(2)(d), it is silent on the issue of cross-border advertising.

A total ban on advertising is a laudable public health objective. Many countries have already implemented total bans on advertising and many more have partial bans on advertising. All countries with total and partial bans on advertising are unable to stop completely advertising that originates beyond their borders. Some, like Australia, have specific exemptions for sponsored events with international appeal. The need for international control in this area is critical.

Many countries may be unable or unwilling to commit to a total ban on tobacco advertising as described here, but would probably be willing to sign a protocol that dealt more forcefully and directly with international issues. However, to effectively ban export of tobacco advertising, virtually all tobacco sponsorship would need to be banned. It would be the only way to prevent their potential international transmittal through news networks, international broadcast and the Internet.

Therefore, the best strategic approach may be for negotiators to be open to some language that would allow Member States a little more flexibility concerning the exact provisions of their ban on advertising insofar as it addresses purely national concerns (Articles 2-4 of the draft protocol). At the same time, however, new articles should be added to the protocol calling in very specific terms for a strict ban on exports of tobacco advertising.

The Conference of the Parties could also be directed to devise ways of preventing the international dissemination of tobacco advertising from States that do not sign this protocol.

This approach would probably result in the best possible public health outcome. Most member states would probably be willing to sign a protocol that gave them more flexibility around the implementation of national measures on banning tobacco advertising in accordance with their own particular national situation. With specific guidance on how national tobacco control measures could be constructed, coupled with technical and financial support and strong encouragement through the conference of the parties, the rate of implementation of national bans on tobacco advertising could be expected to quicken considerably. At the same time, good progress would be made towards solution of the problem of tobacco advertising that crosses borders.

### ***Treatment protocol***

This protocol contains not a single measure that is international in character. In fact, it contains some measures that are potentially end-runs around existing national drug regulatory mechanisms (Articles 4(8) and 4(9) of Section I – Basic Obligations).

It is recommended that this draft protocol be dropped entirely from further consideration.

### ***Smuggling protocol***

This is a very important protocol. In many countries, sales of smuggled cigarettes equal or exceed sales of tax-paid cigarettes, and these countries are unable to effectively implement comprehensive tobacco control measures.

Measures proposed here are good, as far as they go. But they could go much further with a view to the elimination of smuggling.

The following measures are therefore suggested:

- Strengthen the objective to call for the elimination of tobacco smuggling.
- Articles 4(5-7) should specify that markings appear on all forms of packaging – containers, cases, cartons, packets and all others.
- Under Article 4(8) conditions of licence should be further specified to include detailed record keeping on all transactions and the obligation to report details of all transactions on a regular basis to the appropriate national authorities.
- The draft protocol is silent on the issue of counterfeit cigarettes. Specific measures are needed to prevent the production of counterfeit cigarettes in both licensed and unlicensed factories. Specific measures are also needed to find and close down unlicensed factories and to prevent the establishment of new ones.
- The elimination of duty-free sales, included in the draft framework convention, opens up the possibility of creating a very effective smuggling control measure. Once duty-free cigarettes are eliminated, there will no longer be any justification for the production of cigarettes with duty-free markings. These cigarettes currently are the source of much of the world's contraband cigarettes.



- If all cigarettes are to be taxed, through international agreement, taxes could be collected at the source, in the factory where the cigarettes are made.
- The protocol could include provisions requiring that cigarettes be manufactured in the “national dress” of the country where they will be consumed. This “national dress” will be characterized by language, health warnings, tax-paid markings and other legal requirements of the destination country. Licensed manufacturers would also be required to pay all applicable taxes to the country of destination before the cigarettes leave the factory. The new provisions would also permit signatories to collect their national tobacco taxes on each other’s territory, or have taxes collected on their behalf by the country where the cigarettes are produced. The new provisions should also oblige manufacturers and exporters, as well as manufacturing and consuming countries, to keep complete records of all tax transactions and regularly report these transactions to the appropriate national and international authorities.

## **CONCLUDING REMARKS**

The tobacco epidemic can be brought under control by a combination of legislative and programming measures. Legislative measures are required at every level, local, national and international. Progress at the local and national levels has been slow, and has often been thwarted by the near-total absence of international tobacco control measures. This weakness in the legislative armamentarium is now being addressed by the draft framework convention for tobacco control and related protocols. If done properly and effectively, international tobacco control laws would not only fill an obvious gap, but also act as a spur to stronger national and local control measures as well.

## **NEGOTIATION CONSIDERATIONS**

### ***Recommended approach – probably effective***

- Work cooperatively with all countries towards optimizing the two objectives of maximum agreement to the best international tobacco control measures

### ***Probably ineffective approach – not recommended***

- Arrive with predetermined positions and demands that seek to maximize national or parochial interest, but with little understanding of the global interest

### ***Points to ponder and things to remember***

- **Probable tobacco industry tactics to counter the proposal**
  - They will characterize this as a trick being foisted on poor countries by rich countries
  - They will work through surrogate countries where the tobacco industry is in favour and/or economically important (i.e. US, UK, Denmark, Germany, Turkey, Brazil, Cuba, Mexico, Argentina, Malawi, Zimbabwe)
  - They will concentrate on working through economic and trade ministries
- **Governments, not Health Ministers, ratify treaties**
  - Proposals recommended for ratification by Health Ministers must also get the support of cabinets and prime ministers. Compelling public health cases will need to be made and potential objections will need to be accommodated or dissipated.
- **Softball and hardball**
  - The spring meeting of the working group is still largely a public health community affair, a friendly game of softball at the Sunday picnic. Later this year negotiations will begin in earnest where representatives from foreign affairs, trade and economic ministries will have a larger say. It will be a game of hardball. Will the public health sector be ready to play hardball in the fall?

### ***The widest possible mandate for negotiators***

- It is still early in the negotiation process. Delegations can be most effective if they are well prepared and have the widest possible mandate from their principals for discretionary action. Maximum flexibility and minimum requirement to seek guidance from headquarters will serve the delegations well. Global public health will also be well served.

***In these early stages, convert naysayers, convince doubters, commit fence-sitters, interest the uninterested***

- Existing drafts of the convention and protocols may be flawed, but they can be fixed. At this stage more willing participants from more countries are needed to work towards creating a truly effective international tobacco control law, and forward-thinking delegations may wish to assign high priority to enlisting multisectoral support from many countries. Support is needed from both government and NGO sectors.