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THE WORLD HEALTH ORGANIZATION’S FRAMEWORK CONVENTION ON TOBACCO CONTROL, FREE TRADE AND THE AMERICAN EXAMPLE

by Alicia M. Bartkowski*

INTRODUCTION

Public health has emerged as one of the most important issues of our global age.1 According to estimates, some three million deaths are attributable to smoking annually, and that number may rise to ten million within 30 or 40 years.2 The World Health Organization (WHO) is in the process of developing an international framework convention for tobacco control in order to work towards the “adoption of comprehensive tobacco policies” and methods to cope “with aspects of tobacco control that transcend national boundaries.”3 At the same time, however, seven metric tons of tobacco are produced per year.4 This makes tobacco the world’s most grown non-food crop, grown in more than 100 countries across six continents.5 Many developing countries also account for about 80% of the world’s production of tobacco, counting on the crop as a major source of foreign income.6 Currently, no states favor a world government that would dictate uniform behavior for all.7 Competing interests of health and finance must be balanced in a way addressing issues of the health epidemic posed by tobacco consumption against the possibility of significantly altering

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6 Id.
production and profitability. Many nations, including the United States, are interested in what may come of such an agreement. In the United States, public attitude toward smoking began to shift in the 1990s, and much tobacco litigation occurred which may provide the structure for the possible claims that may arise under an international framework convention on tobacco control. However, the World Health Organization has no judicial body of its own, so consideration must also be given as to where such claims will be taken if a dispute were to arise.

The focus of this note will be based on these areas. Part I reviews the general structure and powers of the World Health Organization. Part II provides an in-depth look at the proposed Framework Convention for Tobacco Control, including areas of proposed protocols: tax measures, regulation of contents, packaging and labeling, advertising, promotion and sponsorship and smuggling. Part III discusses the implications of the Framework Convention on Tobacco Control on the concept of Free Trade. Part IV examines the competing interests that the World Health Organization will need to be aware of when developing the Framework Convention on Tobacco Control, including the effects on various nations in the world. Part V discusses tobacco litigation in the United States, which may serve as a potential model for the claims that may arise in connection with the Framework Convention on Tobacco Control. Finally, Part VI focuses on potential arenas in which disputes of the Framework Convention on Tobacco Control may be brought if agreement cannot be reached between the parties.

WORLD HEALTH ORGANIZATION

The World Health Organization (WHO) was created in 1948 and is responsible for monitoring world health and working towards “the attainment by all peoples of the highest possible level of health.” As the United Nations agency chosen to coordinate international health work, the WHO has the responsibility of achieving health goals of the UN Charter. Countries, which are members of the United Nations, may become members of the WHO by accepting its Constitution. In addition, other countries may be admitted as

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10 Malcolm, supra note 3 at 7.
12 Constitution of the World Health Organization, art. 1, para. 1. (The WHO Constitution was signed on 22 July 1946 and went into effect on 7 April 1948).

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members when their application has been approved by a simple majority vote of the World Health Assembly.\textsuperscript{15} The Members or other authorities may also admit territories not responsible for the conduct of their international relations as Associate Members upon application made on their behalf responsible for their international relations.\textsuperscript{16} Members of the WHO are grouped according to regional distribution.\textsuperscript{17} Currently, the WHO consists of 192 Member States, including 46 countries in Africa, 35 countries in the Americas, 22 countries in the Eastern Mediterranean, 51 countries in Europe, 11 countries in South-East Asia and 27 countries of the Western Pacific.\textsuperscript{18} The WHO performs its functions through three principal bodies: World Health Assembly (WHA), the Executive Board and the Secretariat.\textsuperscript{19}

The World Health Assembly (WHA) is the supreme decision-making body for the WHO, it meets in Geneva in May each year, and is attended by delegations from all 192 Member States.\textsuperscript{20} Its main function is to determine the policies of the Organization.\textsuperscript{21} Article 19 of the World Health Organization's Constitution states, "the Health Assembly shall have the authority to adopt conventions or agreements with respect to any matter within the competence of the Organization."\textsuperscript{22} Under Article 21, the WHO grants the WHA the power to make regulations in five areas: (1) sanitary and quarantine regulations; (2) nomenclatures on diseases, causes of death, and public health practices; (3) standards for diagnostic procedures for international use; (4) standards for the safety, purity, and potency of biological, pharmaceutical, and similar products moving in international commerce.\textsuperscript{23}

The Health Assembly appoints the Director-General, supervises the financial policies of the Organization, and reviews and approves the proposed program budget.\textsuperscript{24} It also considers reports of the Executive Board, instructing in regard to matters, which further action, study, investigation or report may be required.\textsuperscript{25} The Executive Board is composed of thirty-two members technically qualified in the field of health, and members are elected for three-year terms.\textsuperscript{26} The main Board meeting, at which the agenda for the Health Assembly is agreed upon and resolutions for forwarding to the Health Assembly are adopted, is held in January, and another meeting is held in May, immediately after the meeting

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} World Health Organization, Member States, at http://www3.who.int/whosis/member_states/member_states.cfm?path=whosis_member_states_membrestateslist&language=english (last visited March 29, 2003).
\textsuperscript{21} Id.
\textsuperscript{22} Constitution of the World Health Organization, art. 19 para. 1.
\textsuperscript{23} Id.
\textsuperscript{24} World Health Organization, supra note 20.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
of the Health Assembly, for more administrative matters. The main functions of the Board are to give effect to the decisions and policies of the Health Assembly, to advise it and to facilitate its work.

Some 3500 health and other experts and support staff on fixed-term appointments staff the Secretariat of the WHO, working at headquarters, in the six regional offices, and in countries. The six regional offices are located in Africa, the Eastern Mediterranean, Europe, South-East Asia and the Western Pacific.

The Organization is headed by the Director-General, who is appointed by the Health Assembly on the nomination of the Executive Board. The current Director-General is Dr Gro Harlem Brundtland.

Under Articles 21 and 23 of the WHO Constitution, the Health Assembly has authority to make recommendations to Members with respect to any matter within the competence of the Organization. These regulations come into force for all Members, after due notice has been given of their adoption by the Health Assembly. However, under Article 22 of the WHO Constitution, Members may notify the Director-General of rejection or reservation within the period stated in the notice to the items adopted under Article 21, thereby opting out of them. Adopted resolutions are soft law, intended to have binding effects creating obligations and rights, even though there may be this possibility opting out. Despite this authority, the WHO rarely uses its legislative powers.

However, this changed in 1996. In Resolution 17 of the 49th World Health Assembly, member states recognized the unique capacity of the WHO to serve as a platform for the adoption of a Convention dealing with tobacco control and began working toward this measure.

Resolution WHA52.18 established an intergovernmental negotiating body for the convention, which is open to all member states. The negotiating body’s role is to draft and negotiate the proposed WHO framework, for the Framework Convention on Tobacco Control and possible protocols. The

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27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
37 *Id.*
40 *Id.*
Resolution further established a working group on the Convention open to all member states in order to prepare the work of the intergovernmental negotiating body.  

Resolution WHA 53.16 stated that the proposed draft elements for a framework convention established a sound basis for initiating the negotiations by the Intergovernmental Negotiating Body. The Negotiating Body was also called upon to commence its negotiations with an initial focus on the draft framework convention, without prejudice to future discussions on possible related protocols, and to examine the question of an extended participation as observers of nongovernmental organizations according to the criteria to be established by the body.

The most recent resolution WHA54.18, called for member states to be aware of affiliations between the tobacco industry and member delegations. Further, the WHO and Member States should be alert to any efforts by the tobacco industry to continue its subversive practice and to assure the integrity of health policy development in any WHO meeting and in national governments.

Therefore, for the first time in history, the World Health Organization has proposed to create the world's first set of multilateral negotiated rules devoted entirely to a public health issue. The WHO will develop a Framework Convention on Tobacco Control (FCTC), with the intention of combating the tobacco epidemic.

FRAMEWORK CONVENTION ON TOBACCO CONTROL

The Framework Convention on Tobacco Control (FCTC) approach will allow Member States to proceed in two stages: (1) The Framework Convention will establish the legal parameters and structures of the public health tool and (2) the Protocols will be separate agreements that will make up the substantive part of the agreement. The WHO intends to have the FCTC ready for signature no later than May of 2003. Suggested Protocols may include such specific obligations as: pricing, smuggling, tax-free tobacco products, advertising/sponsorships, internet advertising/trade, testing methods, package design/labeling, information sharing, and agricultural diversification.

According to the Preamble of the most recent draft of the Framework Convention on Tobacco Control, "the spread of the tobacco epidemic is a global problem that calls for the widest possible international cooperation and the

41 Id.
43 Id.
45 Id. at ¶1.
participation of all countries in an effective, appropriate and coordinated international response."7 In early documents, the WHO stated its intention to follow a step-by-step implementation of the FCTC, “[member] states will adopt a framework convention that calls for cooperation in achieving broadly stated goals, leaving open the possibility that the parties to the convention will subsequently conclude separate protocols containing specific measures designed to implement those goals.” 48 Since the introduction of the FCTC, a Working Group and an Intergovernmental Negotiating Body (INB) began drafting what will ultimately become the FCTC.49 While the actual provisions of the FCTC projected to be released in May 2003 may differ from that of the most current draft released on June 25, 2002, it is most likely that the basic principles of this discussion will remain the same.

The WHO quotes the preamble to its Constitution stating that “the enjoyment of the highest attainable standard of health [as] one of the fundamental rights of every human being” as a source for creation of the FCTC.50 Article 3 of the Drafting Convention states that the objective of the FCTC and “its related protocols is to protect present and future generations from devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework...”51 The latest proposed Draft of the FCTC lays out the organs essential to its function. These include: a Conference of the Parties as an implementation mechanism;52 a Secretariat;53 a scientific subsidiary54 and a dispute settlement body.55

Under Article 5 of the proposed draft, each Party is obligated to pass domestic legislation and make public policy according to the terms of the FCTC and to the protocols to which it is a Party.56 The remaining parts of the draft deal with measures relating to the reduction of demand for tobacco, reduction of the supply of tobacco, protection of the environment, liability and compensation, and scientific and technical cooperation and communication of information.57 Each State will take on a general obligation to adopt measures “to the extent possible within the means at its disposal and its capabilities.”58

49 WHA Res 52.18, supra note 39.
50 Id.
51 FCTC Text, supra note 47 at 4.
52 Id. at 15-16.
53 Id. at 16-17.
54 Id. at 13-14.
55 Id. at 18.
56 Id. at 5-6.
57 See id. at 4-15.
58 Id. at 5.
There are five types of tobacco control measures that may generate disputes if a signatory state enacts them under the FCTC voluntarily or by obligation under a follow-up protocol:\textsuperscript{59} (i) pricing and tax measures under Article 6;\textsuperscript{60} (ii) regulations on the contents of tobacco products under Article 9;\textsuperscript{61} (iii) regulations on the packaging and labeling of tobacco products under Article 11 and Article 12;\textsuperscript{62} (iv) regulations on advertising, promotion, and sponsorship under Article 13;\textsuperscript{63} and (v) measures to deter smuggling under Article 15.\textsuperscript{64} Although States are not required under the Draft to enact domestic obligation or regulations for the majority of Articles, a footnote to Article 15 states that negotiation of such a protocol by the INB at any point before the adoption of the FCTC.\textsuperscript{65} Therefore, many areas of possible dispute may exist.

**Tax Measures**

Taxation has often been considered one of the most effective means of reducing consumption.\textsuperscript{66} According to proponents of the proposed FCTC, the international harmonization of taxes on tobacco products is necessary to avoid excessive price differences among neighboring countries.\textsuperscript{67}

Article 6 of the proposed Draft calls for the States to progressively restrict, “with a view to prohibiting, duty free sales of tobacco products,” as well as “implementing tax polices and, where applicable, price policies, on tobacco products so as to achieve a progressive reduction in tobacco consumption.”\textsuperscript{68} Although a free trade regime allows for taxes as long as there is no finding of discrimination between like products on the basis of origin under the doctrines of most favored nation status and national treatment, discrimination is possible under Article XX(b) between domestic and imported tobacco products that could be perceived as “arbitrary or unjustified” or as a disguised barrier to trade.\textsuperscript{69} Furthermore, a protocol in this area could call for mandatory elimination of tax free and duty free sales, clearly limiting the free trade of such products.\textsuperscript{70}

\textsuperscript{60} FCTC Text, supra note 47, at 6.
\textsuperscript{61} Id. at 7.
\textsuperscript{62} Id. at 7-8.
\textsuperscript{63} Id. at 8-9.
\textsuperscript{64} Id. at 10-11.
\textsuperscript{65} See Id. at 10. Footnote 1 of Article 15 provides, “there has been considerable discussion throughout the pre-negotiation and negotiation FCTC process concerning the adoption of an early protocol on illicit trade. The negotiation of such a protocol could be initiated by the INB before the FCTC is adopted, by the INB following the adopting of the FCTC, or at a later stage by the Conference of Parties.”
\textsuperscript{67} Id.
\textsuperscript{68} FCTC Text, supra note 47 at 6.
\textsuperscript{69} Eckhardt, supra note 59 at 223.
\textsuperscript{70} Id.
Regulation of Contents

Article 9 called for each Party to adopt and implement standards for “regulation of the content of tobacco products, including standards and best practices for testing and measuring...the content and emissions of such products.”\(^7\) Once again, adoption of such a protocol may lead to discrimination as with the taxing measures. Therefore, a challenging WTO member may argue that the standard is “arbitrary and unjustified” given the arbitrary nature of the setting limits on the nicotine content of cigarettes.\(^2\)

Packaging and Labeling

Article 11 calls for adoption of requirements for packaging and labeling.\(^7\)

During its case, the Thailand Cigarette panel declared:

“Other countries [have] introduced strict, non-discriminatory labeling [sic] and ingredient disclosure regulations which [allow] governments to control, and the public be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement.”\(^7\)

The Agreement on Technical Barriers to Trade (TBT) of the World Trade Organization ensures that technical regulations and standards such as packaging labeling, and marketing provides for the use of labels on products such as tobacco.\(^7\)

The TBT agreement will therefore apply in the case of disputes regarding these measures, as it would with measures regarding regulation of contents of tobacco products, since under Annex 1 of this agreement, packaging and labeling regulations are defined as “technical regulations.”\(^7\)

Therefore, labeling requirements need be non-discriminatory in nature in order to meet terms of free trade law.

Advertising, Promotion, and Sponsorship

Proponents of the FCTC feel that a total ban on advertising and sponsorship is essential in order to reduce tobacco consumption significantly and quickly.\(^7\)

Further, a ban on advertising and sponsorship should: (1) prohibit direct and

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\(^7\) FCTC Text, supra note 47 at 7.
\(^2\) Eckhardt, supra note 59 at 224.
\(^7\) FCTC Text, supra note 47 at 7.
\(^7\) Id. at art. 2.4.
\(^7\) Joossens, supra note 66 at 933.
indirect advertising; (2) include all media (such as radio, television, press, cinema advertising, the Internet, etc); (3) include bans on the sponsorship of national and international events; (4) cover the whole world, not be introduced progressively taking into account national level restrictions on tobacco advertising.  

Article 13 may be an attempt to commit States to phase out commercial marketing of tobacco products. This may be based upon the fact that the World Bank reports that comprehensive bans on advertising of tobacco products could reduce tobacco consumption in high income countries by more than six percent. However, the Thailand Cigarettes case noted possible problems with such a comprehensive ban:

A ban on advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4. Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes.

Further, principles of free expression, which are constitutionally protected in many countries, may pose problems for advertising bans, even if such bans are consistent with trade law. The Canadian Supreme Court overturned a general ban on tobacco advertising in 1995, and in October of 2000, the European Court of Justice also overturned a similar ban. In the United States, the Supreme Court upheld certain restrictions on sales of tobacco enacted in the state of Massachusetts, but found that Massachusetts ban on outdoor tobacco advertising, such as billboards, violated First Amendment freedom of expression rights.

Smuggling

According to an international report on tobacco trade, the smuggling of cigarettes grew by about 73% worldwide between 1990 and 1995. By looking

78 Id.
79 FCTC Text, supra note 47 at 9-10.
81 GATT Thailand Cigarettes Report, supra note 74 at 224.
82 Eckhardt, supra note 59 at 227.
86 Joossens, supra note 66 at 931.
at the difference between global exports and imports, it has been argued that most of the "missing" cigarettes are smuggled.  

Article 15 of the Draft Convention states that essential components of tobacco control include the elimination of all forms of illicit trade in tobacco products, including smuggling. This seems to be the most stringent requirement of the proposed Draft Convention. Section 2 of the agreement provides, "the Parties agree that measures to this end shall be transparent, well-defined, non-discriminatory and implemented in accordance with their national, regional and international obligations." Section 3 states, "each party shall adopt and implement effective legislation, executive, administrative or other measures to ensure that all unit packet and outside packaging..." Section 5 further imposes additional mandatory obligations on Parties to enact or strengthen criminal penalties for trafficking of smuggled tobacco products and to ensure that all contraband products are destroyed. While this may seem permissible, some critics contend that this area of regulation is one of trade more than public health.

**IMPLICATIONS OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL ON FREE TRADE**

According to the theory of comparative advantage, the gains from trade follow from allowing an economy to specialize where no governmental barriers exist to trade. Under this theory, efficient producers in each region are free to grow and expand production, capitalizing on their comparative advantage in the market, causing inefficient producers to drop out. Much of international economic law has been based on the theory of competitive advantage, including the World Trade Organization (WTO), which was developed in response to the cold war. In its implementation, the WTO uses the rules developed in the General Agreement on Trade and Tariffs (GATT), as well as Supplementary Agreements strengthened by its dispute settlement procedure.

While the majority of the GATT provisions are aimed at forbidding protectionism and trade-restrictive measures, exceptions exist allowing for the development and implementation of legitimate, but trade-restrictive, measures.
One such exception has become known as the Article XX (b) exception, which states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health. 98

Although the Article XX (b) exception has been employed in GATT and WTO cases, many attempts using the exception to excuse trade restrictive measures when aimed at protecting public health have failed. 99 One such case was the case of the Thailand Cigarettes. The government of Thailand passed the Tobacco Act in 1966, forbidding tobacco imports without a license. 100 The United States filed a complaint with GATT, requesting the panel to find the restriction on cigarette imports a violation of GATT Article XI:1, arguing that the Article XX(b) exception did not apply. 101 Thailand argued, it implemented its policy as an “objective of public health” and therefore qualified as an Article XX(b) exception. 102 The panel sought advice from the WHO, and acknowledged that “smoking constituted a serious risk to human health and that consequently, measures designed to reduce the consumption of cigarettes fall within the scope of Article XX(b).” 103 However, the panel noted that Article XX(b) requires that a measure be “necessary,” and that a measure to protect health could not be considered “necessary” if a reasonable alternative that would not conflict with free trade rules could be employed. 104 The panel suggested that a general ban on tobacco advertising by both foreign and domestic tobacco companies could be an alternative means to curb consumption of cigarettes based on the evidence offered by the WHO. 105

While health protection is an aspect of WTO law, the sovereign right to restrict trade for public health reasons is subject to scientific and other disciplines in order to ensure that health protection measures do not unnecessarily restrict trade. 106 Therefore, arguments have been advanced for further multilateral cooperation in the areas that have a bearing on international trade such as the environment and health. 107 However, the WTO representative

98 GATT, supra note 94 art. XX(b).
99 Eckhardt, supra note 59 at 203.
100 GATT Thailand Cigarettes Report, supra note 74 at 200.
101 Id. at 201.
102 Id. at 206.
103 Id. at 73.
104 Id. at 74.
105 Id. at 78.
106 Onzivu, supra note 34 at 240.
107 Id. at footnote 84. See Beef Hormones Case (United States and Canada v. European Union); see also WTO Appellate Body Reports on Measures Concerning Meat and Meat Products, WTO Doc.
speaking at the Third Session of the Interagency Task Force identified two principles of free trade that should be considered in order to evaluate health protecting measures: non-discrimination and necessity.\(^\text{108}\) It was explained that the non-discrimination test should consider the principles of most favored nation status and national treatment, while the necessity test "has to do with the extent to which a measure that is taken by a country to achieve a certain objective is truly necessary."\(^\text{109}\) The World Health Organization's proposed Framework Convention on Tobacco Control may represent a multinational agreement that infringes upon the rights of free trade.

OPPOSING STATE INTERESTS TO THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

An international system of law "is formed when two or more states have sufficient contact between them, and have a sufficient impact on one another's decisions to cause them to behave- at least in some measure - as part of a whole."\(^\text{110}\) An international society "exists when a group of states, conscious of certain common interests and certain common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions."\(^\text{111}\) The States are the main source of the rules of international law, and therefore the substance of the international law reflects their common interests and values.\(^\text{112}\)

States, however, are sovereign, thus able to determine for themselves what they must or may do.\(^\text{113}\) The freedom of states to control their own destinies and policies permits diversity and permits each state to chose its own social priorities.\(^\text{114}\) Few, if any, states favor a world government that would dictate uniform behavior for all.\(^\text{115}\) Therefore, any proposed rule intending to impose international uniformity faces complications due to the interests each nation has in its own sovereignty.

Many countries have raised constitutional concerns with other international agreements dealing with trade. For example, debates over state

\(^{108}\) WT/DS26/AB/R (Jan. 16, 1998). This has been the position in several WTO position papers on the subject of Trade and Environment.

\(^{109}\) WTO Ministerial Declaration, WT/MIN(01)/DEC/W/1, art. 6 (Nov. 14, 2001), available at http://www.wto.org/english/tratop_e/minist_e/min01_e/min01_14nov_e.htm.

\(^{110}\) Id.


\(^{112}\) Id. at 13.


\(^{114}\) Id.

\(^{115}\) Id.
sovereignty arose around the Canada-U.S. Free Trade Agreement of 1988.\textsuperscript{116} In the United States, the problem was debated in Congress in consideration of the WTO agreements and was then the focus of much debate during the negotiation and ratification proceedings of the North American Free Trade Agreement.\textsuperscript{117} Other WTO member states, including Canada and European Community countries, have raised constitutional issues as well.\textsuperscript{118} In the United States, the principal arguments against constitutionality are based on Article III of the Constitution, which vests the judicial power of the United States in the judiciary established by Congress; the use of a congressional-executive agreement rather than a treaty; the inadequacy of the due process guarantees; and "the sovereignty argument."\textsuperscript{119}

Further, consideration must be given to the competing interests of health and finances when discussing tobacco production and consumption.\textsuperscript{120} On one hand, a substantial risk of serious health problems arising out of the consumption of tobacco products exists.\textsuperscript{121} On the other hand, tobacco production can become essential to the survival of a given economy. State regulation can threaten the prosperity of the country by restricting productivity and the financial success of the community.\textsuperscript{122} Therefore, states are faced with the difficult task of balancing the interests of health and finance in a way that addresses issues of the health epidemic posed by tobacco consumption against the possibility of significantly altering production and profitability.\textsuperscript{123}

The International Tobacco Growers Association (ITGA)\textsuperscript{124} estimates that over 100 million people are employed in tobacco-related industries, with 33 million people employed in the actual cultivation of tobacco.\textsuperscript{125} The number of people employed by the tobacco industry alone exceeds the combined number of people employed in the sugar cane and maize industries.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item Id. In the European Community, a constitutional issue arose over the division of treaty power between the member states and the Community. In Japan, the approval of the WTO Agreement by the Diet avoided a potential controversy over the authority of the executive to conclude treaties. In Canada, the key constitutional issue was which level of government — federal or provincial — had the authority to implement parts of the WTO Agreement.
\item Id.\textsuperscript{119}
\item Williamson, \textit{supra} note 8 at 594.\textsuperscript{120}
\item Id.\textsuperscript{121}
\item Id.\textsuperscript{122}
\item Id.\textsuperscript{123}
\item See the International Tobacco Growers Association (ITGA) at http://www.tobaccoleaf.org, (last visited March 29, 2003). The ITGA was established in 1984, as the worldwide voice of tobacco farmers. The UK based organization founded by members from Argentina, Brazil, Canada, Malawi, the United States and Zimbabwe to promote and develop their common interests.\textsuperscript{124}
\item ITGA, \textit{supra} note 4.\textsuperscript{125}
\item Id.\textsuperscript{126}
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\end{footnotesize}
Tobacco is grown in 100 countries around the world, and constitutes a major cash crop in 80 developing countries. Tobacco is the primary source of income in many of these countries. For example, the Middle East and Asia produce approximately 60% of the world's tobacco, up from 40% two decades ago, while high-income countries like the United States reduced their total production percentage. Tobacco remains a highly attractive crop for developing nations for the following reasons: prices are relatively stable allowing farmers to obtain loans and plan ahead, the industry tends to be helpful to tobacco farmers, tobacco is generally non-perishable thus eliminating storage, collection and delivery problems, and tobacco provides a higher income than most cash and food crops.

The debate on the potential effect that such an agreement such as the Framework Convention for Tobacco Control would have on economies dependent upon tobacco is ongoing. The WHO states that the social and health costs of tobacco far outweigh the economic benefits of tobacco cultivation. However, four of the five countries that produce two-thirds of the world's tobacco - Brazil, China, India, and Turkey - may be forced to stop cultivating tobacco through efforts financed on their own behalf. Brazil is the largest exporter of tobacco leaf, exporting 343,000 metric tons in 1999 alone. In 1980, China exported practically no cigarettes, however, in 2001 their exports had risen to over 20 billion cigarettes, worth about $320 million US dollars. Further, estimates state that by the year 2005, the value of China's export trade is predicted to be $600 million US dollars.

Two developing countries, Zimbabwe and Kenya, depend greatly on the tobacco market. The addition of tobacco to Kenya's existing production of tea, coffee, and other products allowed the county to become more diverse in their export base, as well as reduced the country's economic risk and provided more opportunities for farmers. In 2001, 4,500 hectares of Kenya's farmland were devoted to growing tobacco, producing 7,000 metric tons. Zimbabwe's exportation has become essential to the government's ability to provide the basic foodstuffs for its citizens. After a significant population increase and droughts that decreased the availability of homegrown food products, Zimbabwe was...
forced to begin importing products it had previously provided for itself, which were paid for largely by funds from tobacco exportation.\textsuperscript{138}

Further, African governments face the dilemma of how to deal with a product which is both a health hazard and an important economic commodity that sits in a regulatory "no person's land."\textsuperscript{139} It is neither a drug nor a food product for regulatory purposes and, thus remains a legal product.\textsuperscript{140} Given this conflict of interest between health and corporate wealth, public policy on tobacco continues to be ad-hoc, with no meaningful legislation to control tobacco in Africa.\textsuperscript{141} South Africa seems to be the only area with strong tobacco control regulation.\textsuperscript{142}

In regards to markets like that of Kenya and Zimbabwe, the preamble to the proposed Draft Convention states that they must be "mindful of the social and economic difficulties that tobacco control measures may engender...and recognizing their need for access to the financial, economic and technological resources required to achieve sustainable development and to decrease their medium and long-term economic dependence upon tobacco."\textsuperscript{143} Supporters of the proposal claim that international law provides the only means for possible successful promotion of public health in areas such as Africa, where there is an "absence of viable domestic legislation."\textsuperscript{144} However, the majority of the proposed areas of regulation call for domestic regulation in furtherance of promoting the Draft Convention. So Africa may still face problems promoting public health even with the intervention of international law.

The United States has a major interest in what may come of the FCTC. In the United States, tobacco sales overseas have increased dramatically, with over $6 billion each year coming from such sales.\textsuperscript{145} As much as 40% of tobacco grown and manufactured in the United States is sold elsewhere, with major purchasers including: Japan, Belgium, Hong Kong and Saudi Arabia,\textsuperscript{146} making the United States the world's largest exporter of cigarettes.\textsuperscript{147}

Tobacco companies in the United States exported 133.9 billion cigarettes to its leading importers in 2001.\textsuperscript{148} In 1996, the United States exported 539 million pounds of leaf tobacco valued at US$ 1.39 billion.\textsuperscript{149} U.S. Tobacco Companies exported cigarettes to 121 different countries on six continents in
Thirty percent of these exports were to Asia, with most sales occurring in countries located in the Pacific Rim, specifically Japan, the Republic of Korea, Singapore, Hong Kong, Taiwan, and Malaysia. Other areas in which exports were high include the former Soviet Union, especially in the Russian and Ukrainian markets. With primary markets in Lebanon, Saudi Arabia, Turkey, Israel, and Kuwait, U.S. exports to the Middle East were also substantial. In Europe, Belgium and Cyprus were leading importers of U.S. cigarettes in 1997. In South America, Panama and Paraguay were leading importers of U.S. cigarettes that same year.

The tobacco industry remains one of the top five industries in terms of sales, assets, and profits in the United States. The area of most concentration is the South where the majority of tobacco farmers are located in six states: North Carolina, Kentucky, South Carolina, Virginia, Georgia and Tennessee.

Tobacco farming is also made possible through insurance subsidies from the federal government. The crop insurance program helps lower premiums for farmers of the country’s major crops, including tobacco. The federal government acts as a safety net for private insurance companies that write crop insurance policies. Through this insurance, tobacco farmers are protected from bad harvests and weather-related disasters. There have been several attempts to end federal crop insurance for tobacco farmers that have narrowly failed in Congress.

Six tobacco companies – R.J. Reynolds Tobacco Co.; Liggett Group, Inc.; American Brands; Lorillard Tobacco Co.; Brown & Williamson Tobacco Corp.; and Philip Morris USA – control the overwhelming majority of the

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150 Id. at 392.
151 Id.
154 Id. In 1997, U.S. exports to Belgium totaled 48.52 billion units valued at US$ 1.02 billion. During this same period of time, Cyprus imported 9.94 billion cigarettes from U.S. tobacco companies valued at US$ 42.43 million.
155 Id. In 1997, Panama imported 2.41 billion cigarettes valued at US$ 44.53 million from U.S. tobacco companies. U.S. cigarette exports to Paraguay totaled 2.23 billion units valued at US$ 43.32 million in 1997.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
162 Id.
United States' cigarette market.\textsuperscript{163} In addition, there are many industries that aid in the manufacture of cigarettes, including storage, transportation, banking, chemical, paper, cellophane and lighter manufacturers.\textsuperscript{164}

As the domestic growth leveled off and legal battles developed, the tobacco companies began diversifying.\textsuperscript{165} The tobacco companies began acquiring related industries and eventually different industries.\textsuperscript{166} Today, although the companies are not exclusively tobacco companies, the majority of their profits continue to come from the sale of tobacco products.\textsuperscript{167}

TOBACCO LITIGATION IN THE UNITED STATES AS A BLUEPRINT FOR THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

In the 1990s, several important changes significantly affecting the tobacco companies occurred in the United States. In litigation, plaintiffs began to assert novel claims that the addictive qualities of nicotine relieve the plaintiff from the burden of assuming risk.\textsuperscript{168} Plaintiffs are better financed than earlier plaintiffs.\textsuperscript{169} Previously unavailable industry information and documents have come forth.\textsuperscript{170} Furthermore, lawyers have discovered inexpensive but moderately effective ways of trying cases.\textsuperscript{171} As if not more important, public attitudes towards smoking began to shift.\textsuperscript{172}

While what happened in the United States may not provide a blueprint for the World Health Organization, it will at least have broken the ground. The suits may provide information as to what claims will have the greatest likelihood of success. Further, the suits may help the WHO with structural developments in establishing the FCTC. Therefore, the following section will provide an in-depth analysis of the history of tobacco litigation in the United States.

Early Litigation

Prior to 1996, approximately 800 lawsuits had been filed against tobacco companies.\textsuperscript{173} Of those 800 lawsuits, only 24 went to trial. In each of

\textsuperscript{163} Ross, \textit{supra} note 158 at 332.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 333.
\textsuperscript{169} Id.
\textsuperscript{172} Malcolm, \textit{supra} note 10 at 7.
\textsuperscript{173} Benjamin Weiser, \textit{Tobacco's Trials; Cigarette makers once were so hard to beat in court that many top lawyers refused to take them on. Then a group of attorneys, mostly in small Southern towns, found new ways past tobacco's defenses -- and now, the industry is hinting about a deal}, \textit{WASH. POST}, Dec. 8, 1998, at W15.
those cases, the plaintiff's claims failed. \(^7\) Early tobacco litigation consisted of individual cases where the plaintiff sought compensation for injuries caused by tobacco-related illnesses. \(^5\) Tobacco companies were able to successfully defend these cases by asserting that the plaintiffs chose to smoke and therefore assumed the risk in spite of federally mandated warning labels. \(^6\)

Trial and appellate courts rulings often favored the defendants during these early lawsuits, while juries tended to come out against them. \(^7\) The cigarette companies often used the assumption of the risk defense, and often benefited from inconclusive medical studies, which failed to prove a causal link between smoking and the plaintiffs' injuries. \(^9\) The assumption of the risk argument seemed to persuade the juries, even though some courts found that sufficient medical evidence existed to prove a causal link. \(^7\) Due to these early victories, success of future lawsuits seemed unlikely, and this seems to be the reason that few lawsuits were filed against the tobacco companies during the 1970s. \(^1\)

**Changes**

Changes began to develop leaving tobacco companies vulnerable to tort liability. In 1972, the Surgeon General published a report on the health consequences of smoking suggesting that not only could smokers face health problems, but also nonsmokers were at risk from secondhand smoke. \(^8\) Medical studies became more conclusive, indicating that smoking is a human carcinogen, in addition to causing numerous other serious diseases and afflictions. \(^1\)

Another change that occurred came in product liability law. \(^1\) Nearly every state has adopted strict liability in tort law either through common law or by statute. \(^1\) Strict liability holds manufacturers liable for defective products they produce, regardless of negligence. \(^1\) The goals strict liability seek to achieve include: compelling manufacturers to produce safer products and the notion of fairness. \(^1\) Under strict products liability, the plaintiff is not required to prove that the defendant was negligent or otherwise at fault for the harm caused by the product. \(^1\) Instead, the plaintiff must only show that the product

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\(^1\) Id.
\(^7\) Id.
\(^9\) Id. at 1033-1034.
\(^11\) Id.
\(^13\) Id. at 1032.
\(^15\) Id. at 1036.
\(^17\) Id.
\(^19\) Jacobson, supra note 175 at 1036.
\(^21\) Id.
\(^23\) Id.
\(^27\) Id. at 400-408.
\(^29\) Id. at 414.

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was somehow defective; that the product’s defect somehow caused the injury or harm to the plaintiff; and that the defendant sold the product to the plaintiff in its defective or dangerous state.\footnote{Jacobson, supra note 175 at 1037.}

Even with these important changes, tobacco companies were still winning the cases in the 1980s.\footnote{Id. at 1039.} The first major defeat for the tobacco companies came in \textit{Cipollone v. Liggett Group Inc.},\footnote{Cipollone v. Liggett Group Inc., 693 F. Supp. 208 (D.N.J. 1988), aff’d in part and rev’d in part, 893 F.2d 541 (3rd Cir. 1990).} where a jury found that the Liggett Group had failed to properly warn consumers of the known health risks associated with smoking, and that this failure to warn was the proximate cause of the plaintiff’s death.\footnote{Jacobson, supra note 175 at 1052.}

This marked the beginning of new approaches to tobacco litigation. While scientific and medical evidence was weakening the tobacco companies’ defense that cigarettes were not harmful, their main argument that smoking is a personal choice (a variation on assumption of the risk) still seemed to carry a lot of weight with courts and juries.\footnote{Wetheimer, supra note 186 at 420-21.} The argument can be clearly stated as: a person has the right to chose to smoke cigarettes, and people who choose to smoke have no one to blame but themselves.\footnote{Id.} Tobacco companies take this argument one step further and state that holding the manufacturer liable for their cigarettes interferes with a person’s right to smoke.\footnote{Id. 194}

The strength of this argument forced plaintiffs to find new ways to attack tobacco companies. One such argument came after the Food and Drug Administration announced they were investigating allegations that the tobacco industry manipulated the level of nicotine in cigarettes.\footnote{Weiser, supra note 173 at W15.} While the tobacco companies had warned consumers about the health risks associated with smoking, they had not warned people about the risk of addiction. Not only were no warnings of addiction given, but also the tobacco manufacturers were allegedly manipulating the nicotine content in cigarettes to get people addicted to cigarettes.\footnote{Id. 195}

This discovery, among others, began to surface around 1994, with the disclosure of industry documents and deposition testimony of former industry employees in private lawsuits against the industry.\footnote{See generally, LaFrance, supra note 170 at 192.} This new information shifted the focus of plaintiff suits away from liability issues stemming from the health risks of smoking and towards issues of industry misconduct.\footnote{Id. 198}

Industry misconduct issues included the industry’s knowledge of and research on the addictive properties of nicotine, suppression of health information, and evidence of marketing its products to minors.
The chain of events would trigger the settlement talks began with a class action suit filed in federal court on behalf of "all nicotine dependent persons" in the United States. Following the arguments advanced by the class action suit, state attorneys general began to file lawsuits against the tobacco companies, seeking to recover state Medicaid funds spent on health care for people suffering from injuries caused by cigarettes. Approximately, one year after the first lawsuit was filed, the tobacco companies announced that a settlement had been reached with the state attorneys general, trial lawyers, and health advocates.

**Class Action Tort Claims**

A new theory, class action tort claims, was tested in *Castano v. American Tobacco Co.* Nicotine addiction was the main theory of the case, and the class was framed to include smokers medically diagnosed as addicted as well as those who had been medically advised to quit but had not yet done so. This narrower focus, coupled with developing evidence that tobacco executives engaged in activities to conceal and misrepresent information about the addictive nature of nicotine, aided plaintiffs. The class was certified on two critical issues: (1) whether the industry had engaged in a fraudulent course of conduct; and (2) if so, whether punitive damages were warranted.

Further, an important development occurred in de-certification, *In Matter of Rhone-Poulence Rorer.* Hemophiliacs suffering from AIDS brought a class action against blood manufacturers. The plaintiff based their liability argument on the defendant's alleged failure to take reasonable care in guarding against the known risks of hepatitis (care that would have protected hemophiliacs from contracting AIDS), and in failing to take adequate care with respect to donors. The court reasoned that the claims were based on laws that varied from state to state, creating potentially significant difficulties in trying the cases in consolidated fashion. Further, certification was unfair to the industry,

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199 Weiser, at W15. The class action lawsuit was later decertified and thrown out of federal court. *Castano v. American Tobacco Co.,* 84 F.3d 734, 734 (5th Cir. 1996). The suit was refilled in more than a dozen state courts. Weiser at W15. At least one of the suits has been dismissed by a federal court. See also John Swartz & Saundra Torry, *Assault on Tobacco Slows as Pennsylvania Case Is Dismissed,* WASH. POST, Oct. 18, 1997, at A03.

200 Weiser, *supra* note 173 at W15. Mississippi was the first state to file a lawsuit against tobacco companies, filing on May 23, 1996. Thirty-nine other states followed Mississippi’s example. See also Mark Curriden, *Tobacco Seeks Talks Before Trial,* DALLAS MORN. NEWS, Oct. 11, 1997, at 1A.


204 Id.

205 Id at 333-334.

206 *In Matter of Rhone-Poulence Rorer,* 51 F.3d 1293 (7th Cir. 1995).

207 Id.

208 Rabin, *supra* note 204 at 334.
which had in fact won twelve of the thirteen individual trials that had taken place.\textsuperscript{210} This requirement would be premature because further individual trials might indicate that mass certification was unnecessary.\textsuperscript{211}

These arguments appeared in the \textit{Castano} appeal and were cited and quoted throughout the opinion.\textsuperscript{212} The court also noted a considerable number of problems that would be raised by consolidation, including: determinations of reliance, comparative fault, consumer expectations, and actual damages, which would need be addressed at some state, even if they could be disregarded at the initial phase of trial.\textsuperscript{213}

After \textit{Castano}, many similar cases were either dismissed or remained in state courts, contradicting the notion that choice of law was the essence of the tobacco consolidation concern.\textsuperscript{214} As of mid-2001, class certification of post-\textit{Castano} cases had been granted and upheld only in the state of Louisiana, but denied or remained in doubt in twenty-five other states.\textsuperscript{215}

Another case developed during this time, was \textit{Engle v. R.J. Reynolds Tobacco Co.}.\textsuperscript{216} This Florida state court class action was filed independently of \textit{Castano}, but asserted the traditional disease-related basis for claiming injury instead of an addiction-based theory.\textsuperscript{217} In 1996, a Florida intermediate court of appeals upheld the certification of a class of some 300,000-700,000 Florida smokers suffering from tobacco-related diseases.\textsuperscript{218} The case was deemed certified to determine whether the industry had engaged in deceptive conduct; whether the epidemiological evidence established a causal link between smoking and a variety of diseases from which members of the class suffered; and whether punitive damages were warranted.\textsuperscript{219} After the jury answered each of these questions affirmatively, they found that the three class representative plaintiffs were entitled to $12.7 million in compensatory damages, and in mid-2000, it found that punitive damages for the entire class were warranted in the sum of $144.8 billion.\textsuperscript{220} Subsequently, the trial court judge upheld the award, and the industry appealed.\textsuperscript{221}

Whether the plaintiffs' victory in the \textit{Engle} case will survive is highly uncertain.\textsuperscript{222} Massive punitive damage awards are routinely cut back on

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} \textit{Id}. \textit{See also}, Susan Kearns, Note, \textit{Decertification of Statewide Tobacco Class Actions}, 74 N.Y.U. L. REV. 1336 (1999).
\textsuperscript{213} Rabin, \textit{supra} note 204 at 334-35.
\textsuperscript{214} \textit{Id}. at 335.
\textsuperscript{216} \textit{Engle v. R.J. Reynolds Tobacco Co.}, 122 F. Supp. 2d 1355 (S.D. FLA 2000), \textit{reh’g denied}, \textit{motion granted}.
\textsuperscript{217} Myron Levin, \textit{Passive Aggressor: Litigation: Lawyer Stanley M. Rosenblat’s Small Firm May Seem an Unlikely Adversary for Big Tobacco, But He’s Confident He’s Up to the Challenge of His Life}, L.A. TIMES, June 8, 1997, at D1.
\textsuperscript{219} Rabin, \textit{supra} note 204 at 335.
\textsuperscript{220} \textit{Id}.
\textsuperscript{222} Rabin, \textit{supra} note 204 at 336.
appeal. Further, the prospect of thousands of trials, or in the alternative, the monumental task of subclassing cases for efficient disposition in a fashion consistent with due process, could lead the appellate courts to overturn the Engle case altogether.

The State Health Care Reimbursement Cases
The health care reimbursement claim, which was first used in a Mississippi case, was soon used in many different states, although it rested on a very different premise than Castano. The state's theory of recovery was not based on products liability law because the state was not a "direct" victim suffering from a tobacco related disease. Instead, the argument was based on a theory for relief on equitable grounds such as unjust enrichment.

In essence, the states' legal theories, which later came to include statutorily based claims, such as violation of consumer protection laws, asserted that the industry's deceptive and misleading conduct constituted a wrong against the public, as well as against individual smokers. In arguing unjust enrichment, the claim was for restitution of public tax funds that were allocated to treating indigent smokers whose health problems were allegedly the industry's responsibility. Under a similar theory of wrongfully profiting at the expense of the public through claims of conspiracy and consumer fraud, some cases went after the industry for making smoking attractive to underage youths.

The theories of recovery multiplied to include deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organizations (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation. The number of states bringing suit also multiplied, and by the summer of 1997, the number was 40.

In June 1997, after months of rumors, the states and the major tobacco companies reached a "global settlement" – which was actually a detailed legislative proposal that was presented to Congress as an effort to end the tobacco wars. The tobacco industry was now prepared to underwrite the

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223 Id.
224 Id.
225 Id. at 337.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
232 Doug Levy, Tobacco Turns Over New Leaf, Critics Say Proposed Deal Leave Bad Taste in Mouth, USA TODAY, June 23, 1997, at 1B.
233 Rabin, supra note 204 at 338.
largest civil settlement ever by paying $368.5 billion over twenty-five years to reach closure.\textsuperscript{234}

The June 1997 agreement demonstrated the threat that these new litigation strategies posed to the tobacco industry.\textsuperscript{235} Under this plan, the state health care reimbursement suits would have been settled, and the industry would have been granted immunity from all other forms of class action.\textsuperscript{236} The industry would therefore eliminate its greatest nightmare – the fear of catastrophic loss from the states themselves, certified classes of tort claimants, or third party sources, such as Blue Cross or union health plans - successfully convincing juries that the industry’s past conduct warranted potential multibillion dollar recoveries in compensatory and punitive damages for the injury victims represented in the particular cases.\textsuperscript{237} Another provision would have capped the total annual liability for awards on future individual claims at five billion dollars.\textsuperscript{238}

By mid-1997, the industry faced the possibility of being sued by virtually every state in the country, represented on a retainer basis by the most experienced and skilled tobacco lawyers, pressing a variety of common law and statutory claims.\textsuperscript{239} Other third party claims also posed a potential threat as well as the documents that told a story of industry deceit and indifference to public health considerations.\textsuperscript{240}

The negotiating parties did not realize that the “settlement” would take on a life of its own once it reached Congress.\textsuperscript{241} The McCain Bill,\textsuperscript{242} as amended, would have obligated the industry to pay $516 billion over twenty-five years, and the bill incorporated virtually all of the earlier-negotiated public health provisions.\textsuperscript{243} The bill would also eliminate the litigation immunity provisions negotiated earlier.\textsuperscript{244} However, a quick reversal occurred, and no federal legislation was enacted, most likely because of the tobacco industry’s advertising campaign as well as the backing of congressional supporters.\textsuperscript{245}

\begin{thebibliography}{99}
\bibitem{235} Id.
\bibitem{236} Id. at 339.
\bibitem{237} Id.
\bibitem{239} Id.
\bibitem{240} Id.
\bibitem{241} Id.
\bibitem{242} S. 1415, 105\textsuperscript{th} Cong. (1988).
\bibitem{243} Rabin, \textit{supra} note 204 at 339-340.
\bibitem{244} Id.
\end{thebibliography}
The industry began to settle individually with the four states that were closest to trial (Mississippi, Florida, Texas and Minnesota) and that, with the exception of Texas, presented the greatest threat of a litigation setback. Without such settlements, it would be possible to conclude that the third wave strategy proved little beyond massive additional documentation of industry wrongdoing.

The four individual state settlements did amount to some forty billion dollars to be paid out over twenty-five years, and within a year in November 1998, the industry and the remaining forty-six states had negotiated a $206 billion settlement of all outstanding state health care reimbursement claims, considerably less than the proposed June 1997 settlement. However, this new agreement did not contain any of the immunity provisions from class action litigation and punitive damages included in the earlier package.

Further, the third party claims of insurers and union health funds have been unsuccessful with courts, and are often dismissed on remoteness grounds. Similarly, a federal action seeking reimbursement for Medicare and related federal health expenditures was dismissed, apart from a RICO claim. Therefore, the industry has arguably ended any real concerns about catastrophic liability to third party claimants at a cost that is unlikely to have a substantial impact on its revenue.

Environmental Tobacco Smoke Claims

The earliest tobacco class action was filed on behalf of nonsmoking flight attendants alleging second hand smoke injuries in 1991. The flight attendants claimed to be suffering from tobacco related diseases from harm in the workplace — the airline cabins where they were regularly exposed to tobacco-using passengers prior to the 1990 ban on in flight smoking. However, the case had very little chance of succeeding. It was filed before Castano, and at a time when second hand smoke harm had not yet attracted the attention that it would after publication of the 1992 Environmental Protection Agency (EPA) report, indicating that environmental tobacco smoke as a known human lung carcinogen with no established safe level of exposure.

247 Rabin, *supra* note 204 at 340.
249 Id.
250 Id.
252 Id.
254 Rabin, *supra* note 204 at 342.
256 Id.
The case did have some major points in its favor, most importantly, a sympathetic plaintiff class (flight attendants) that could not be subjected to an assumption of the risk defense.\textsuperscript{257} Virtually everyone was familiar with the smoking section of an airplane and could identify with the exposure of the flight attendants.\textsuperscript{258} On the other hand, even after the publication of the EPA report, the data on workplace exposure remained thin; the strongest association between secondhand smoke and pulmonary disease was household exposure, especially of young children.\textsuperscript{259}

The main issue in the case became the nationwide class certification. The court of appeals stated that generic causation and industry course of conduct were questions common to the class, as well as an assessment of the egregiousness of defendant’s conduct.\textsuperscript{260} Further, any choice of law problems and individual issues of damages could be decided at a later stage.\textsuperscript{261}

However, during the trial, a $349 million settlement was announced, before these issues could be addressed.\textsuperscript{262} The tobacco industry had once again demonstrated its vulnerability, just as it did in the settlements of the four state health care reimbursement cases in Mississippi, Florida, Texas, and Minnesota.\textsuperscript{263}

**Individual Claims Revitalized**

In *Carter v. Brown & Williamson*,\textsuperscript{264} it was held the industry’s responsibility exceeded that of the plaintiff, however, it was not argued that the plaintiff was not at fault.\textsuperscript{265} Further, no claim for punitive damages was made, despite the introduction of evidence of the tobacco company’s efforts to conceal health-related information.\textsuperscript{266} The jury entered a verdict of $750,000 in compensatory damages for the plaintiff’s lung cancer.\textsuperscript{267}

However, within two years, in *Widdick v. Brown & Williamson*,\textsuperscript{268} the jury held that the industry was not responsible for the health effects of the plaintiffs’ smoking in another pair of Florida cases.\textsuperscript{269} Between March and May 1999, juries awarded verdicts of $50 million in punitive damages in the

\textsuperscript{257} Rabin, *supra* note 204 at 342.
\textsuperscript{258} Id.
\textsuperscript{259} Id. EPA report at 7-10 to 7-21.
\textsuperscript{260} Id., *supra* note 204 at 342.
\textsuperscript{261} Id.
\textsuperscript{263} Rabin, *supra* note 204 at 343.
\textsuperscript{265} Rabin, *supra* note 204 at 344.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{269} Thomas C. Tobin, *Ex-Smoker Savors Tobacco Win*, St. Petersburg Times, July 16, 2001, at 1B.
California case of Henley v. Philip Morris Inc., and $85 million in the Oregon case of Williams-Branch v. Philip Morris, Inc. By mid-2000, another multimillion dollar California jury award had been registered, but also defense verdicts before juries in Mississippi and New York; and all of the five verdicts for the plaintiffs remained on appeal except for Carter, in which the plaintiff's award was finally upheld. A California jury also handed down a three billion dollar punitive damage award in mid-2001.

The importance of the tobacco documents has become readily apparent. By the late 1990s, a tobacco litigator could build a case against the industry on the voluminous document discovery in the state health care cost recovery suits and the class action litigation, as well as the whistleblower revelations.

Even though massive liability awards now seem possible, the industry still had strong arguments. Relying on the individualistic nature of American culture, freedom of choice remains a powerful defense. This is especially true as the industry confesses to its past actions and argues it has now reformed its ways under new "enlightened leadership." This freedom of choice defense will be very successful if the documents become only a matter of historical interest, and if the industry concedes that addiction means it is very hard but nonetheless possible to quit — and this plaintiff, unlike so many other ex-smokers knowledgeable of the health risks, did not demonstrate the requisite power.

From the beginning, the industry has argued the causal link between smoking and allegedly tobacco-related diseases has never been conclusively established: correlation is not causation. However this is proved to the contrary by the voluminous findings as well as the hypocrisy revealed in the industry documents. However this does not rule out the argument that this particular plaintiff has a type of lung cancer not associated strongly with smoking, died from an independent disease, or died from lung cancer but was massively exposed to asbestos. Many of these claims may arise in connection with the FCTC.
ENFORCEMENT OF THE FCTC

Currently, the WHO has no judicial body of its own. In the event that the FCTC causes a debate about its provisions that negotiation between the parties cannot solve, they may bring their dispute to an international court. The WHO Constitution provides that disputes about the interpretation of the WHO Constitution not settled by negotiation or by the WHA will be referred to the International Court of Justice (ICJ) unless the parties agree otherwise.

The ICJ is the classic international court and the United Nations' principal judicial organ. The most significant restriction on cases before the ICJ is that the parties must be states. Advisory opinions may be authorized at the request of any body authorized by the UN Charter to make such a request, such as the WHO.

Conflicts that arise dealing with international trade issues may also be brought before the WTO Dispute Settlement Body (DSB) Panels and Appellate Body (AB). Like the ICJ, the WTO courts only decide cases where the parties are states. However, unlike the ICJ, WTO judgments can be enforced through trade sanctions if the other party fails to comply. Dispute before the WTO bodies originate from a violation of a trade agreement, usually GATT.

The WHO may also create its own judiciary body, which would be consistent with the WHA's authority under Article 18(1) of the WHO Constitution, stating that a function of the WHA is to "establish such other institutions as it may consider desirable." Further, the WHO recently proposed a new body, the Committee of Arbitration, to interpret the International Health Resolutions. Therefore, the WHO may develop its own dispute settlement body based on the theory that problems may arise in connection with the FCTC and the WHO would have more expertise and be more efficient and consistent than the ICJ in deciding technical matters.

See generally WHO Const. Arts. 9-37.

281 See supra note 8 at 1746.
282 WHO Const. Art. 75
283 WHO Const. Art. 75
285 ICJ Statute, art. 34, cl. 1.
286 ICJ Statute, art. 65.
287 ICJ Statute, art. 65.
290 Julie H Paltrowitz, supra note 8 at 1764.
291 Laura Yavitz, supra note 8 at 1764.
292 WHO Const. Art. 18(1).
294 See supra note 8 at 1765.
CONCLUSION

The WHO is attempting to develop a Framework Convention on Tobacco Control, with the intention of combating the tobacco epidemic. This is the first time in history the WHO has proposed to create the world’s first set of multilateral negotiated rules devoted entirely to a public health issue under its rulemaking authority. While the FCTC will not be ready for signature until sometime during 2003, suggested Protocols may include such specific obligations as: pricing, smuggling, tax-free tobacco products, advertising/sponsorships, internet advertising/trade, testing methods, package design/labeling, information sharing, and agricultural diversification.

Any agreement proposed by the WHO will have implications on the free trade of tobacco. States often object to international agreements such as the FCTC upon the basis of state sovereignty rights. Further, there may be great economic implications for developed as well as developing nations of such an agreement. The United States especially has a great interest in the development of the FCTC since it is the world’s largest exporter of tobacco.

In the United States public attitude towards smoking has been shifting, and many lawsuits have arisen in this area. These lawsuits may provide information in the development of potential claims that may arise throughout the world in connection with the FCTC.

Due to the lack of judicial body of the FCTC, potential injured parties may be without a venue to raise their claim. The WHO may use the ICJ, the WTO Dispute Settlement Body and Appellate Body or may even need to develop their own judicial body in order to create a venue for the FCTC. The WHO has to keep in mind all these interests if they want the FCTC to survive, and this will require both time and effort on the part of the Organization, as well as on the part of the nations of the world.