

STOPPING THE SMUGGLERS: PROPOSALS FOR AN ADDITIONAL PROTOCOL TO THE WORLD HEALTH ORGANIZATION'S *FRAMEWORK CONVENTION ON TOBACCO CONTROL*

NEIL BOISTER* AND RICHARD BURCHILL†

[The members of the World Health Organization are currently engaging in extensive negotiations to find a way of controlling the global 'tobacco epidemic'. Central to the WHO's tobacco control efforts is a Framework Convention on Tobacco Control. Tobacco smuggling is a major contributor to the global epidemic. This article examines the necessity of a proposed protocol on the suppression of smuggling to the Framework Convention and suggests essential elements for a model protocol.]

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I INTRODUCTION

The members of the World Health Organization ('WHO') are currently engaging in extensive negotiations to find a way of controlling the 'tobacco epidemic' facing the globe.¹ Central to the WHO's efforts is a *Framework*

* BA, LLB, LLM (Natal), PhD (Nottingham); Senior Lecturer in Law, School of Law, University of Nottingham.

† BA (Maine), MA (Hull), PhD (Nottingham); McCoubrey Centre for International Law, Law School, University of Hull. The authors would like to thank Professor Scott Davidson for comments on an earlier draft.

¹ The WHO is engaged in a wide range of measures directed toward minimising the use of tobacco around the world, brought together under the 'Tobacco Free Initiative'. Further information and details on the initiative are obtainable from <<http://tobacco.who.int/>> at 30 April 2002.

Convention on Tobacco Control ('Draft Framework Convention').² Work began on the *Draft Framework Convention* in May 1999 and it is hoped that a final draft will be agreed to in 2002. The initial resolution calling for work to begin on the *Draft Framework Convention* was unanimously backed by the 191 states of the World Health Assembly, with 50 nations pledging financial and political support for the Convention at the meeting.³ The WHO simultaneously engaged in a programme of participatory consultation through a series of technical conferences.⁴ The Assembly transferred the development of the *Draft Framework Convention* to an Intergovernmental Negotiating Body, which is currently engaged in full-scale formal diplomatic negotiation.⁵

The need for the *Draft Framework Convention* is clearly explained in the preamble to the empowering resolution:

Being deeply concerned by the escalation of smoking and other forms of tobacco use world-wide, which resulted in the loss of at least 3.5 million human lives in 1998 and is expected to cause at least 10 million deaths a year by 2030 if the pandemic is not controlled, with 70% of these deaths occurring in developing countries[.]⁶

While the precise health impact of smoking continues to be debated, many countries, especially those 'producer' states in the western world where tobacco companies are usually based and where most cigarette manufacturing occurs,

² *Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group*, WHO Doc A/FCTC/INB1/2 <<http://www.who.int/gb/fctc/inb1/Einb1.htm>> at 30 April 2002; *Provisional Texts of Proposed Draft Elements for a WHO Framework Convention on Tobacco Control with Comments of the Working Group*, WHO Doc A53/12/Annex (30 April 2000).

³ *The Framework Convention on Tobacco Control: A Primer*, WHO Doc WHO/NCD/TFI/99.8 Rev.3 (2000) 2 <<http://tobacco.who.int/repository/stp41/Primeren.pdf>> at 30 April 2002.

⁴ Information and documentation concerning the technical conferences is obtainable from <<http://tobacco.who.int/page.cfm?sid=36>> at 30 April 2002.

⁵ The Intergovernmental Negotiating Body held its first meeting from 16–21 October 2000. Full information and documentation is available at <<http://www.who.int/gb/fctc/inb1/inb1.html>> at 30 April 2002. The second meeting was held from 30 April–5 May 2001. Full information and documentation is available at <<http://www.who.int/gb/fctc/inb2/inb2.html>> at 30 April 2002. The third meeting was held from 21–28 November 2001. Full information and documentation is available at <<http://www.who.int/gb/fctc/inb3/inb3.html>> at 30 April 2002. The fourth meeting was held from 18–23 March 2002. Full information and documentation is available at <<http://www.who.int/gb/fctc/inb4/inb4.html>> at 30 April 2002.

⁶ *Towards a WHO Framework Convention on Tobacco Control*, Res 52.18 (24 May 1999) <http://www.who.int/gb/EB_WHA/PDF/WHA52/ResWHA52/e18.pdf> at 30 April 2002. The Campaign for Tobacco Free Kids estimates that from the start of the negotiations on the *Draft Framework Convention* in October 1999 to March 2000, up to 1.5 million people have died from tobacco use, another grim indicator of the tobacco epidemic: see Campaign for Tobacco Free Kids, *Public Comment by the Campaign for Tobacco Free Kids to the Office of Public Health and Science, US Department of Health and Human Services Regarding the Framework Convention on Tobacco Control* (15 March 2000) ('Public Comment') <<http://tobaccofreekids.org/campaign/global/pdf/publiccomment.pdf>> at 30 April 2002.

consider smoking a potentially harmful activity.⁷ The potential harm caused by smoking is considered serious enough to justify a wide range of legal measures to suppress tobacco use and thus restrict the adverse impact of tobacco use on health.⁸ The extensive legal measures which have been taken include increased taxation and excise duties, imposition of age bans on the purchase of tobacco products, strict advertising limitations, greater disclosure of product ingredients and the creation of non-smoking areas.

II SMUGGLING AND THE GLOBAL EPIDEMIC

Measures taken to minimise the use of tobacco products in western societies have had an impact on tobacco manufacturers. The cumulative effect of anti-smoking strategies in developed countries has been an overall decrease in sales of tobacco products.⁹ However, the sale of tobacco products is an extremely lucrative business¹⁰ and tobacco manufacturers have attempted to counter anti-smoking initiatives through increased advertising and promotional activity.¹¹ Furthermore the globalised nature of the world economy has provided tobacco

⁷ See, eg, information provided by government departments of the United States <<http://www.hhs.gov/topics/smoking.html>> at 30 April 2002; the United Kingdom <<http://www.doh.gov.uk/smoke.htm>> at 30 April 2002; and Canada <<http://www.hc-sc.gc.ca/english/tobacco.htm>> at 30 April 2002. The European Union also holds similar views: see <http://www.europa.eu.int/comm/health/ph/programmes/tobacco/index_en.htm> at 30 April 2002.

⁸ For an overview of tobacco control legislation around the world, see Marlo Ann Corrao et al (eds), *Tobacco Control Country Profiles* (2000).

⁹ See, eg, Cynthia Callard, Neil Collishaw and Michelle Swenarchuk, *An Introduction to International Trade Agreements and Their Impact on Public Measures to Reduce Tobacco Use* (2001) [3]–[4] (*‘Public Measures to Reduce Tobacco Use’*) <http://www.smoke-free.ca/pdf_1/Trade&Tobacco-April%202000.pdf> at 30 April 2002. Tobacco manufacturers have recently attempted to counter this trend directly. The Czech affiliate of Philip Morris produced a report, *Public Finance Balance of Smoking in the Czech Republic*, which concluded that a less restrictive smoking policy would save the Government money through less expenditure on public services. A copy of the report and further commentary on it is available at <<http://www.ash.org.uk/html/international/html/czechstudy.html>> at 30 April 2002. Philip Morris has responded that the report should never have been released and regrets the conclusions it contained: Philip Morris, *Philip Morris Companies Inc Comments Regarding Czech Study*, Press Release (26 July 2001) 1.

¹⁰ For example, British American Tobacco’s pre-tax profits for 2001 were £2771 million: see *British American Tobacco Annual Review 2001 Financial Highlights* <<http://www.bat.com/AnnualReport2001/dirrep/download/batdr2001.pdf>> at 30 April 2002. RJ Reynolds received a net income of US\$404 million in 2000: see RJ Reynolds Tobacco Holdings Inc, *Annual Report 2000: Financial Highlights* <http://rjrt.com/IN/Pages/INPUBS_cover.asp> at 30 April 2002. Imperial Tobacco saw profits of £604 million in 2001: see Imperial Tobacco Group, *Annual Report 2001: Financial Highlights* <http://www.investis.com/imperial_tobacco/2001report/p01_ourstrategy.html> at 30 April 2002.

¹¹ See Luk Joossens, *How to Circumvent Tobacco Advertising Restrictions: The Irrelevance of the Distinction between Direct and Indirect Advertising* (2001) <<http://www.globalink.org/tobacco/docs/eu-docs/0102joossens1.doc>> at 30 April 2002; and Clive Bates, ‘Tobacco Sponsorship of Sport’ (1999) 33 *British Journal of Sports Medicine* 299. Tobacco manufacturers have also established websites that are not officially intended as a means of advertising, but as a source of corporate information. This action has been described as exploiting a legal loophole in the current laws relating to the banning of tobacco advertising on the internet: Ian Darby, ‘British American Tobacco Exploits Ad Ban Loophole’, *Marketing*, 30 March 2000, 1. See also Report of the Committee of Experts on Tobacco Industry Documents, *Tobacco Industry Strategies to Undermine Tobacco Control Activities at the World Health Organization* (2000) <<http://www.who.int/genevahearings/inquiry.html>> at 30 April 2002.

manufacturers with new opportunities for the sale and distribution of their products. In a push-down/pop-up response to the legal suppression of tobacco usage in western states, tobacco manufacturers have targeted the developing world in the development of lucrative new markets for their products.¹² Many of the developing states where these new markets are located do not appreciate being the targets of the tobacco industry and have also adopted health promotion and legal measures to attempt to minimise the use of tobacco products in their societies.¹³ There is, however, more than one way to sell a cigarette, and tobacco manufacturers have been accused of complicity in smuggling activities as a means of increasing market presence and evading restrictions on tobacco products in both developing and western societies.

Smuggling of a wide range of otherwise licit products is a common response to high levels of taxation and excise duties.¹⁴ Tobacco is no different, since high taxes are a common means used by governments to decrease tobacco use. High taxes themselves are not a direct cause of smuggling, as the tobacco industry claims. Rather, as governments have taken increased measures to minimise use, including heavy taxation of tobacco products, tobacco companies have attempted to find ways of offsetting the impact of these measures.¹⁵ Researchers estimate that almost a third of legal exports disappear into the contraband market, which

¹² See *Public Measures to Reduce Tobacco Use*, above n 9, 1–6; David Satcher, ‘Editorial: With Four Million Deaths per Year Attributable to Smoking — Why We Need an International Agreement on Tobacco Control’ (2001) 91 *American Journal of Public Health* 191. The non-governmental organisation, Third World Network, has conducted research that shows a ten per cent decrease in tobacco consumption in the developed world between 1970 and 1990 has corresponded with a 64 per cent increase in developing countries in the same period: Martin Khor, *Tobacco Convention Needs More Teeth* (1999) <<http://www.twinside.org.sg/title/teeth-cn.htm>> at 30 April 2002. British American Tobacco’s internal documents have admitted that China, where one out of every three cigarettes produced in the world is consumed, is the key to long-term success: see The Public I, *Tobacco Companies Linked to Criminal Organisations in Cigarette Smuggling: China* (30 March 2001) <http://www.public-i.org/story_02_030301.htm> at 30 April 2002.

¹³ The attitudes of developing countries have been clearly expressed in both the *Johannesburg Declaration on the Framework Convention on Tobacco Control* <http://www.fctc.org/Declaration_Johannesburg.shtml> at 30 April 2002, adopted by Algeria, Botswana, Burundi, Côte d’Ivoire, Gambia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe as at 6 April 2001; and the *Jakarta Declaration on the Framework Convention on Tobacco Control* <http://www.fctc.org/Declaration_Jakarta.shtml> at 30 April 2002, adopted by Bangladesh, Bhutan, India, Indonesia, Maldives, Myanmar, Sri Lanka and Thailand as at 6 April 2001. See also the *New Delhi Declaration* from the WHO’s International Conference on Global Tobacco Control Law, *Towards a Framework Convention on Tobacco Control* (7 January 2000) <<http://www.tobaccolaw.org/documents/english/literature/GlobalTobaccoControlLaw.pdf>> at 30 April 2002, which included participants from over 50 developing and least-developed countries from Asia, the Middle East and the Pacific. On the legal measures taken by developing states, see generally Corrao et al, above n 8.

¹⁴ See Timothy Green, *The Smugglers: An Investigation into the World of the Contemporary Smuggler* (1969) and Henry Shore, *Smuggling Days and Smuggling Ways* (1929).

¹⁵ See Campaign for Tobacco Free Kids, *Illegal Pathways to Illegal Profits: The Big Cigarette Companies and International Smuggling* (2001) 1–3 (‘*Illegal Pathways*’) <<http://tobaccofreekids.org/campaign/global/reports.shtml>> at 30 April 2002; Her Majesty’s Customs and Excise (UK), *Tackling Tobacco Smuggling* (1999) § 4 <<http://www.hm-treasury.gov.uk/mediastore/otherfiles/433.pdf>> at 30 April 2002.

leads to losses of billions of dollars in tax revenue.¹⁶ Smuggling not only causes losses to the government treasury; more crucially it exacerbates public health problems because it floods the market with cheap tobacco products, thus stimulating consumption and increasing ill health.¹⁷ The aim of suppressing smuggling is not to reduce supply for its own sake, but to help ensure the effective implementation of legal and policy measures aimed at reducing demand.¹⁸

Smuggled tobacco products do not flow neatly and predictably from low-tax to high-tax jurisdictions. Joossens and Raw have noted that smuggling occurs all over the world, even where taxes are low.¹⁹ They point out that in relation to total market sales the volumes of smuggled tobacco products are largest in Eastern Europe (about 13 per cent) and in Africa and the Middle East (about 12 per cent). Smuggled tobacco products also represent a substantial amount of the market in Latin America (about nine per cent), and are lowest in Western Europe (about seven per cent). Western Europe has the highest prices in the world by a factor of four to five, yet despite this, smuggling is on average lower than in other regions. Joossens and Raw conclude that tobacco smuggling is not primarily caused by high levels of demand but is mainly supply-side driven through actions which include smuggling. While smuggling occurs in all jurisdictions, it has become more prominent in developing states, where taxes on tobacco products are commonly low and taxation ineffective. A study commissioned by the World Bank, *Curbing the Epidemic*, concluded that other factors prominent in the developing world, such as corruption and public acceptance of black markets, also contribute to smuggling.²⁰

Tobacco manufacturers benefit directly from smuggling because, in addition to the large-scale evasion of duty, it permits avoidance of trade barriers and increased market penetration due to the affordability of their product.²¹ As explained in *Curbing the Epidemic*:

Economic theory suggests that the tobacco industry itself will benefit from the existence of smuggling. Studies of the impact of smuggling show that when smuggled cigarettes account for a high percentage of the total sold, the average price for all cigarettes, taxed and untaxed, will fall, increasing sales overall. The presence of smuggled cigarettes in a market that has hitherto been closed to

¹⁶ Luk Joossens and Martin Raw, 'How Can Cigarette Smuggling be Reduced?' (2000) 321 *British Medical Journal* 947. See also World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (1999) 63 ('*Curbing the Epidemic*') <<http://www1.worldbank.org/tobacco/reports.htm>> at 30 April 2002.

¹⁷ Joossens and Raw, above n 16, 947.

¹⁸ World Bank, *Curbing the Epidemic*, above n 16, 63.

¹⁹ Joossens and Raw, above n 16, 947.

²⁰ The study concluded that the level of smuggling tends to rise in line with the rise in the level of corruption in a country: World Bank, *Curbing the Epidemic*, above n 16, 63. See also *Illegal Pathways*, above n 15, 4; Luk Joossens, *Tobacco Smuggling* <<http://factsheets.globalink.org/en/smuggling.shtml>> at 30 April 2002.

²¹ Joossens and Raw, above n 16, 947. See also World Tobacco, *World Tobacco File 1996* (1996) which notes that 'smuggling has also helped to promote some of the world's leading brands in markets which have remained closed to foreign imports': see Campaign for Tobacco Free Kids, *Tobacco Fact Sheet: Tobacco Smuggling* (6 August 2000), 2 <<http://tobaccofreekids.org/campaign/global/docs/smuggling.pdf>> at 30 April 2002.

imported brands will help to increase the demand for those brands, and hence their market share. It will also influence governments toward keeping taxes low.²²

The nature of the smuggling process reveals how, beyond producing the product itself, tobacco companies engage in smuggling. Joossens and Raw, and the World Bank in *Curbing the Epidemic*, have identified the following as key features of modern tobacco smuggling:

- The use of containers to facilitate movement of large quantities;
- The use of international brands due to their significant marketability;
- Transport 'in transit' or 'in bond': a frequently used concession system aimed at facilitating trade, which allows the temporary suspension within a defined customs area of customs duty, excise and value added tax payable on goods originating from and/or destined for a third country. This system allows the goods to disappear into the contraband trade;
- Passage through a number of owners, often in a short time, with the aim of making it impossible to trace the final consignee and to obscure links between owners;
- The involvement of criminal networks, which find it easier to operate in states where corruption is high, authorities ineffective and other commodities are also smuggled; and
- Distribution through unofficial, unregulated local networks such as street selling, sales in pubs and bars, absence of tax stamps and the black market generally.²³

Of these features the bulk export by tobacco companies of popular international tobacco brands in transit to undeclared final consignees is critical to their participation in the smuggling process.²⁴

The lesson that there is money to be made out of tobacco smuggling has not been lost upon the major tobacco companies. Tobacco companies have been directly implicated in smuggling in a number of instances.²⁵ Furthermore, numerous allegations have been made and continue to be made of tobacco manufacturers actively promoting or being involved in the smuggling process.²⁶ British American Tobacco's ('BAT') alleged global involvement in smuggling

²² World Bank, *Curbing the Epidemic*, above n 16, 65.

²³ Ibid 63. For a discussion of these facts at length, see Joossens and Raw, above n 16.

²⁴ A container of 10 million cigarettes purchased at US\$200 000, duty not paid, is worth at least US\$1 million, taking into account excise duties, VAT and import taxes: World Bank, *Curbing the Epidemic*, above n 16, 64.

²⁵ Joossens and Raw, above n 16, 948 document a number of interesting cases. In 1998 an affiliate of RJ Reynolds Nabisco, Northern Brands, agreed to pay US\$15 million in fines and forfeitures after pleading guilty to smuggling: Joossens and Raw, above n 16, 948. A former Brown and Williamson executive pleaded guilty to trafficking cigarettes into Canada from the US in 1997. A former British American Tobacco executive was found guilty in the Hong Kong High Court of accepting US\$2.24 million in bribes to ensure that distributors Giant Island received large quantities of duty-free cigarettes destined for the Chinese mainland. The judge pointed out that British American Tobacco had failed to explain evidence suggesting that it knew it was supplying a smuggling operation. Spanish authorities seized a ship carrying 120 million RJ Reynolds cigarettes bound for the contraband market in 1997.

²⁶ National Centre for Tobacco Free Kids, *The Big Cigarette Companies and Cigarette Smuggling* (2 March 2002) <<http://tobaccofreekids.org/reports/smuggling/>> at 30 April 2002. See also *Illegal Pathways*, above n 15, ch 2–6.

has received heavy media attention.²⁷ BAT, Imperial Tobacco and Gallaher have also faced allegations of smuggling from the United Kingdom House of Commons Select Committee on Health ('UK Select Committee on Health').²⁸ Following the recommendations of the UK Select Committee on Health, the UK Department of Trade and Industry has begun an investigation into BAT's involvement in smuggling.²⁹ Calls have been made for the investigation to be extended to include Imperial Tobacco and Gallaher.³⁰ BAT, together with Philip Morris, has also been accused of involvement in smuggling by the governors of various Colombian states in a court action in the United States.³¹ Leading US tobacco company, RJ Reynolds, has also come under suspicion as the Government of Canada has brought legal proceedings against RJ Reynolds in a US District court for alleged participation in smuggling.³² The European Union, together with several member states, has also taken legal steps against RJ Reynolds alleging the company's involvement in smuggling.³³ Both the Canadian and EU cases failed at first instance but the decisions did not deal with

²⁷ See generally reports by the International Consortium of Investigative Journalists, a project of the Center for Public Integrity based in Washington, DC <<http://www.publicintegrity.org/dtaweb/index.asp?L1=30&L2=0&L3=0&L4=0&L5=0>> at 30 April 2002. From 1999–2000 journalist Duncan Campbell gave evidence to the UK Select Committee on Health: 'Notes of Evidence by Duncan Campbell in Respect of Planning, Organisation and Management of Cigarette Smuggling by British American Tobacco and Related Issues', *Inquiry into the Tobacco Industry and the Risks of Smoking* (2000) <http://www.gn.apc.org/duncan/bat/Health_Committee_Evidence_1.htm> at 30 April 2002; and <http://www.gn.apc.org/duncan/bat/Health_Committee_Evidence_2.htm> at 30 April 2002.

²⁸ UK Select Committee on Health, 'The Tobacco Industry and the Health Risks of Smoking', *Second Report of the Select Committee on Health* (2000), HC 27–1 § 202 ('*Second Report of the Select Committee*') <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmhealth/27/2707.htm>> at 30 April 2002.

²⁹ UK Department of Trade and Industry, *Byers Announces Investigation into British American Tobacco*, Press Release P/2000/73 (30 October 2000).

³⁰ Clive Bates, 'Rogue Multinational', *The Guardian* (Manchester, UK), 1 November 2000, <<http://www.guardian.co.uk>> at 30 April 2002. Following the public release of the allegations against BAT, Matthew Myers, President of the Campaign for Tobacco Free Kids, called on the US Congress and law enforcement agencies to take action against companies engaged in smuggling: Matthew Myers, *Statement: Center for Public Integrity Report Concerning British American Tobacco's Involvement in Cigarette Smuggling* (31 January 2000) <<http://tobaccofreekids.org/campaign/global/releases.shtml>> at 30 April 2002.

³¹ *Governors of Colombia v Philip Morris and British American Tobacco*, Docket No 00 Civ 2881 (EHN) (EDNY, 2000). The suit was a claim for US\$1 billion of evaded import duty under the *Racketeer Influenced and Corrupt Organizations Act of 1970*, Title IX of the *Organized Crime Control Act of 1970*, 18 USC §§ 1961–68 (1994). A Colombian Government study states that 64 per cent of cigarettes sold in Colombia are contraband. See also Joossens and Raw, above n 16.

³² *Attorney-General of Canada v RJ Reynolds Tobacco Holdings*, 103 F Supp 2d 134 (NDNY, 2000). The suit was dismissed by McAvoy J on the grounds that US courts could not be used to enforce the gathering of revenue for foreign states. Canada is expected to appeal, pointing out that McAvoy J, although considering himself bound by precedent, expressed doubt as to the validity of the revenue rule: Canadian Department of Justice, *Government to Appeal Case Against Tobacco Smuggling*, Press Release (28 July 2000) 1.

³³ *European Community v RJ Reynolds Nabisco*, 150 F Supp 2d 465 (EDNY, 2001). According to the complaint, both RJ Reynolds and Phillip Morris shipped American cigarettes to smugglers in Panama, who then re-shipped them to Europe for sale within the EU. See also Erik Schelzig and Mary Beth Warner, *Tobacco Firms Used Suspected Drug Traffickers EU Lawsuit Claims* (2001) <http://www.public-i.org/story_01_110700.htm> at 30 April 2002.

the matter of smuggling. Predictably, the tobacco companies continue to deny their involvement, despite the growing number of accusations being made against them. BAT, for example, has claimed publicly that it is against smuggling and it has explained how smuggling damages its business and reputation. It has denied that there can be a good reason for its involvement in smuggling and continues to maintain that smuggling is caused by differentials in government policies concerning tax and duty, not by tobacco companies, and that therefore only governments can halt smuggling.³⁴ BAT has pledged its willingness to 'devote considerable effort, with others, to [the] elimination [of smuggling].'³⁵ Imperial Tobacco has also pledged support for efforts to control smuggling but is sceptical about the ability of current policies to end smuggling.³⁶

Whatever the legal merits of particular cases, to suggest that tobacco companies have no idea where their products are heading is disingenuous. It would be kind to accept, for example, that in 1997 major tobacco companies exported more than 1520 million cigarettes from the UK to Andorra — which has a population of 63 000 — with reckless indifference to the fact that they were destined to be smuggled out of Andorra.³⁷ The particular legal loophole being exploited by tobacco companies is the difficulty of proving intentional participation by the tobacco companies in smuggling. As a spokesman for Gallaher said when interviewed on the BBC:

We will sell cigarettes legally to our distributors in various countries. If ... those distributors subsequently sell those products on to other people who are going to illegally bring them back into this country, that is something outside of our control.³⁸

A similar explanation has been given by BAT in its position paper submitted to the UK Select Committee on Health entitled *Smuggling: Our View*. In that paper BAT attributes smuggling to the actions of governments, such as high tax differentials or weak border controls, and excuses itself, arguing that tobacco companies have no control over their 'diverse and myriad secondary supply chains.'³⁹ The UK Select Committee on Health rejected this abdication of responsibility, stating that the regulation of tobacco usage depends 'on a responsible approach being taken by the tobacco companies.'⁴⁰ But how are they to be made to behave responsibly? The sale, marketing and smuggling of

³⁴ BAT has publicised its responses to allegations of smuggling: BAT, *Smuggling: Our View*, Press Release (16 February 2000) ('*Smuggling: Our View*'); BAT, *Additional Submission: Smuggling Allegations*, Press Release (8 March 2000) ('*Additional Submission: Smuggling Allegations*').

³⁵ BAT, *Additional Submission: Smuggling Allegations*, above n 34.

³⁶ Imperial Tobacco Group, *Annual Report 2001: Financial Highlights*, above n 10, 9.

³⁷ See The Public I, *Tobacco Companies Linked to Criminal Organizations in Cigarette Smuggling: Cyprus and the Middle East* (11 April 2001) <<http://www.public-i.org/story%5F07%5F030301.htm>> at 30 April 2002. See also Joossens and Raw, above n 16, 948.

³⁸ Cited by Joossens and Raw, above n 16, 949.

³⁹ BAT, *Smuggling: Our View*, above n 34, 1.

⁴⁰ UK Select Committee on Health, *Second Report of the Select Committee*, above n 28, § 230.

tobacco products are global activities. Therefore, in order for the suppression of smuggling to be effective, efforts must be international in nature.⁴¹

Governments and international organisations recognise the need for a global effort aimed at minimising the harmful effects of tobacco usage along with the illegal activities associated with tobacco products. There will be no retreat from taxation in order to achieve the former goal. The World Bank Report notes that, despite warnings from tobacco companies that higher taxes are an incentive for smuggling,⁴² taxation remains one of the most effective methods for reducing tobacco consumption, and that the appropriate response to smuggling is to suppress smuggling,⁴³ not decrease taxation.⁴⁴ Governments appear to support this view.⁴⁵ Legislators in developed states appear to recognise that raising taxes and employing other measures to suppress tobacco consumption and promote public health at the domestic level, without doing anything at the international level to prevent smuggling to developing states, is also untenable. It is difficult, however, to determine from their official rhetoric how far these developed states are prepared to go in constraining tobacco companies' activities abroad. Both the UK and the EU have declared support for global efforts at tobacco control.⁴⁶ The EU has recognised the need to cooperate with third-world countries to reduce the health impact of tobacco usage, to support the WHO's development of the *Draft*

⁴¹ The suppression of cigarette smuggling in Spain between 1995 and 1999 is one of the few examples of successful enforcement action against smuggling. It indicates the importance of international cooperation in the gathering and sharing of intelligence, customs activity and the use of technology, as well as of shifting the focus from street level distribution to container level import. In 1995 smuggled cigarettes had a 15 per cent share of the Spanish market. Close collaboration between the authorities in Spain, France, Britain, Ireland, Andorra and the European Anti-Fraud Office ('OLAF') reduced this share to 5 per cent by mid 1999. Legal cigarette sales increased from 78 to 89 billion cigarettes and tax revenue by 25 per cent: Joossens and Raw, above n 16, 948.

⁴² In *Smuggling: Our View*, above n 34, 1, BAT argues that: 'Smuggling is caused by high tax differentials between neighbouring areas, weak border controls, and import restrictions and bans'.

⁴³ World Bank, *Curbing the Epidemic*, above n 16, 63.

⁴⁴ This is a common refrain of tobacco manufacturers: see, eg, Martin Broughton, BAT Chairman, 'Preserving Freedom of Choice while Protecting Public Health' (Paper presented at the 1999 Annual Meeting of the World Economic Forum, Davos, Switzerland, 30 January 1999). The Canadian experience is a good example of why tax reduction is not the answer. After Canada reduced its taxes in 1994 in the face of major smuggling activity, the real price of cigarettes fell by a third, the prevalence of smoking increased in teenagers from 16 per cent to 20 per cent, and in the population as a whole, tax revenues fell by more than C\$1200 million, more than twice as much as predicted: Joossens and Raw, above n 16, 948. See also The National Centre for Tobacco Free Kids, *Increasing Federal Cigarette Taxes Will Not Create a Black Market in the United States* (1 November 1999) <<http://tobaccofreekids.org/campaign/global/releases.shtml>> at 30 April 2002. The US Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000) 337–59 ('*Reducing Tobacco Use*') provides an extensive discussion of the taxation issue, including the Canadian situation. For a discussion of the studies done on the impact of tobacco price and consumption, see *Reducing Tobacco Use*, 322–37.

⁴⁵ The UK Secretary of State for Health asserts that higher levels of tax and duty on tobacco products results in less consumption of tobacco products, making this a course of action the UK will continue to pursue: UK Secretary of State for Health, *Smoking Kills: A White Paper on Tobacco*, Paper No 4177 (1998) §§ 1.5–2.26 <<http://www.archive.official-documents.co.uk/document/cm41/4177/chap-01.htm>> at 30 April 2002 ('*White Paper on Tobacco*').

⁴⁶ Initiatives undertaken in these communities to control tobacco consumption are described at <<http://www.tobacco-control.org/>> at 30 April 2002.

Framework Convention actively, and to deny support for tobacco-related activity in development programs. The EU sees its work as a step towards a global strategy in minimising the use of tobacco products.⁴⁷ The UK Government also recognises that the harmful effects of tobacco use are a global problem and has declared its support for global action.⁴⁸ It has expressed support for international codes of conduct for tobacco manufacturers and for the work of the WHO, and sees itself as playing a lead role in the development of the *Draft Framework Convention*.⁴⁹ Smuggling is an area of particular concern for the UK Government and one it appears determined to fight. The problem is the extent to which its response to smuggling is, like that of many other EU members, limited to activities in Europe, and does not address the fact that the UK is the source of many of the cigarettes smuggled globally. The measures to which it is committed — stepping up the financing of customs, the development of new procedures and equipment and EU wide cooperation — are mainly aimed at restricting smuggling within Europe. Unilateral self-regulation of the tobacco industry's exports to the developing world, exports that frequently end up on the black market, is unlikely. Only the level playing field offered by an international treaty will make possible the restriction of the active supply by tobacco companies to smugglers who smuggle tobacco products into developing states.

III THE DRAFT FRAMEWORK CONVENTION

The future of global tobacco regulation depends on how far policy-makers are prepared to go in the institutionalisation of a global tobacco control strategy. In this respect developed states which are home to the major tobacco manufacturers have an important role. Governments are taking action through the development of the *Draft Framework Convention*,⁵⁰ which has been identified as a possible solution to the problem of tackling tobacco smuggling at a global level.⁵¹ The WHO's *Draft Framework Convention* seeks to address the global spread of tobacco products through a fairly comprehensive range of measures. The principal objective of the *Draft Framework Convention* is the global reduction of tobacco usage, with a view to bringing the 'tobacco epidemic' under control.⁵² Suppression of tobacco smuggling is a significant element of this objective.

The *Draft Framework Convention* exhibits an awareness of the issues involved in restricting smuggling. Paragraphs 3 and 4 of the draft Preamble reflect concern about the global spread of consumption and production of tobacco products, and the tobacco industry's promotion of the global market, particularly in developing countries. Draft paragraph 5 notes a deep concern about the illegal transboundary traffic of these products and the necessity for

⁴⁷ European Union Information Sheet, *Public Health: Cancer — Action Against Smoking* (1999) <<http://www.europa.eu.int/scadplus/leg/en/cha/c11554.htm>> at 30 April 2002.

⁴⁸ UK Secretary of State for Health, *White Paper on Tobacco*, above n 45, § 8.3.

⁴⁹ *Ibid* §§ 8.20–8.21.

⁵⁰ For a discussion of the legality of taking steps at international law to suppress tobacco, see William Onzivu, 'International and Legal Policy Framework for WHO Framework Convention on Tobacco Control' (Paper presented at the WHO Framework Conference on Global Tobacco Control Law, New Delhi, 7–9 January 2000).

⁵¹ Joossens and Raw, above n 16, 947.

⁵² *The Framework Convention on Tobacco Control: A Primer*, above n 3, 2.

coordinated action to eradicate it. It was also suggested at the Working Group that 'reference should be made [in draft paragraph 5] to legal transboundary transactions between countries, which were probably contributing to the consumption of tobacco in other countries.'⁵³ Taxation of tobacco products is one of the central demand-reduction strategies in the substantive provisions of the *Draft Framework Convention*,⁵⁴ and it seeks to prevent the violation of tax laws by smuggling.⁵⁵ The general obligation suggested in this regard, although subject to a best efforts clause, envisaged parties taking appropriate legal/administrative measures to prevent and combat smuggling and probably to cooperate in the legal pursuit of smugglers.⁵⁶ Parties would also be under an obligation to ensure that tobacco products carry a statement specifying the designated point of sale for the product.⁵⁷ The *Draft Framework Convention* also envisages a provision obliging parties to undertake measures to improve cooperation between national administrations and to monitor and collect data on the illegal, tax free and cross-border trade in tobacco products.⁵⁸ Finally, the *Draft Framework Convention* envisages the preparation of a Protocol to the Framework Convention on Tobacco Control, the objective of which would be the implementation of measures to eliminate smuggling, to be negotiated by the Conference of the Parties to be established by the Convention at some future date. The Protocol would be negotiated by the Conference of the Parties,⁵⁹ unless the Member States choose to do so at the same time as they negotiate the Framework Convention on Tobacco Control itself.⁶⁰ The Protocol would be concerned mainly with interstate law enforcement cooperation and information exchange. It was suggested at the Working Group that the scope of the anti-smuggling provisions be expanded to include tax infringements in the tobacco trade as well as corruption resulting from the illicit traffic.⁶¹ The anti-smuggling provisions in the *Draft Framework Convention* have three major thrusts: law enforcement cooperation, regulation of tobacco exports by manufacturers, and data gathering and sharing.

The Intergovernmental Negotiating Body which took up the task of developing the *Draft Framework Convention* has not progressed matters much further. The latest development is the *Chair's Text of a Framework Convention on Tobacco Control* ('*Chair's Text*').⁶² Reference to smuggling is limited to Chapter One, 'Measures Related to the Supply of Tobacco (Illicit Trade in Tobacco Products)'. In draft article 1 the parties recognise that the elimination of all forms of illicit trade in tobacco products, including smuggling, is crucial to tobacco control. In draft article 2 the parties agree that the measures to this end shall be transparent, non-discriminatory and implemented in accordance with

⁵³ *Draft Framework Convention*, above n 2, 6.

⁵⁴ *Ibid* pt II, art 2.

⁵⁵ *Ibid* pt II, D.

⁵⁶ *Ibid* pt II, D(1).

⁵⁷ *Ibid* pt II, D(2).

⁵⁸ *Ibid* pt II, D(3).

⁵⁹ *Ibid* pt III, A.

⁶⁰ *Ibid* pt II, D(4).

⁶¹ *Ibid* pt II, D(4).

⁶² WHO Doc A/FCT/INB2/2 (9 January 2001).

international obligations. This suggests a concern not to allow the anti-smuggling measures to violate the principle of free trade in the WTO Agreements.⁶³ The potential obligations that will have the most significant impact on the participation of tobacco companies are draft articles 3 and 4. Draft article 3 provides that each party shall adopt appropriate measures to ensure that all unit packages, packages of tobacco products and/or outside packaging of tobacco products sold for retail or wholesale purposes within its jurisdiction carry a statement indicating the following: the name of the manufacturer; the country of origin; the product batch number, including the date of production and expiry; and the country designated as the point of sale. Draft article 4 requires each party to adopt appropriate measures to ensure this packaging information appears in the principal language or languages of the country in whose territory the product is placed on the market. It is interesting that the *Chair's Text* has stopped short of imposing an obligation on parties to ensure the licensed control of manufacture and export of tobacco products, or any kind of export notification system.

Turning to the illicit market itself, draft article 5 requires each party to undertake the following legislative, executive and administrative measures in order to prevent and combat the illicit trade in tobacco products:

- a) monitoring and collection of data on cross-border trade in tobacco products, including the illicit trade;
- b) enactment and/or strengthening of criminal legislation, with appropriate penalties that prohibit the production of and trade in counterfeit and contraband cigarettes and other such tobacco products, and taking of steps to enforce such prohibition;
- c) appropriate steps to ensure that all confiscated counterfeit and contraband cigarettes and other such tobacco products are destroyed.

Draft article 6 obliges the parties to strengthen cooperation between different national and international agencies in promoting investigations, judicial prosecutions and proceedings relating to the illicit trade in tobacco products. It does not only include cooperation in respect of criminal proceedings, but would oblige states parties to cooperate in civil proceedings, a significant development given that many civil actions have been taken against tobacco companies. Draft article 6 also obliges States Parties to cooperate to promote regular exchanges of information to prevent the illicit trade pursuant to an annex to the *Draft Framework Convention*. Draft article 7 points the way to further development of anti-smuggling measures. It provides that the Conference of the Parties shall initiate the preparation of an anti-smuggling protocol if the Intergovernmental Negotiating Body does not prepare one to be adopted along with the Framework Convention on Tobacco Control.

As a whole, the provisions of the *Chair's Text* expand on those of the *Draft Framework Convention* but stop short of imposing weighty obligations on tobacco manufacturers. Indeed it appears that the whole issue of smuggling is being handled with kid gloves. A careful distinction is being maintained between

⁶³ Commentators have concluded that the *Draft Framework Convention* and WTO obligations are compatible: see Onzivu, above n 50, 2. See also *Public Measures to Reduce Tobacco Use*, above n 9, s 2.

provisions aimed at regulating the tobacco industry on the one hand, and those concerning the issue of smuggling on the other, despite the fact that regulation has a direct impact on the control of smuggling and vice versa. The success of the *Draft Framework Convention* will depend on the backing it receives from national governments, especially those in the developed states where tobacco manufacturers are based.⁶⁴ It is salutary that at the second meeting of the Intergovernmental Negotiating Body the US was widely accused of trying to water down the strength of the *Draft Framework Convention*.⁶⁵

IV A PROPOSED PROTOCOL ON SMUGGLING

In trying to devise a regime for tobacco control, tobacco should be dealt with in the same way as other dangerous products,⁶⁶ but an outright prohibition on the production and use of tobacco products is not the solution.⁶⁷ The global nature of the 'tobacco epidemic' requires widespread cooperation among the interested actors that ensures the close monitoring of the production and distribution of tobacco products, as well as the creation of global structures which support taxation measures designed to minimise the use of tobacco products. To many this may appear to be both impractical and impossible to implement.

However, international law provides a number of examples of regimes where cooperation is used to address common, but often controversial, problems. It has been suggested that the *Draft Framework Convention* might be used to oblige States Parties to render tobacco manufacturers legally responsible for smuggled cigarettes in a regime analogous to that used to control the transboundary flow of hazardous waste, in which the waste producer is held responsible if wastes are illegally dumped.⁶⁸ Article 8 of the *Basel Convention on the Transboundary Shipment of Hazardous Wastes and Their Disposal*⁶⁹ provides that the state of export of illicit traffic in hazardous waste is responsible for its re-import or

⁶⁴ The importance of taking effective action against smuggling has been voiced by legislators in the UK: *Second Report of the Select Committee*, above n 27, §§ 202–22; and in the US: Statement by Representative Doggett, Cong Rec H5370 (13 July 1999), Statement by Senator Lautenberg, Cong Rec S3258 (2 May 2000).

⁶⁵ 'No Agreement on Tobacco Treaty', *BBC News Online*, 4 May 2001 <http://news.bbc.co.uk/hi/english/health/newsid_1313000/1313255.stm> at 30 April 2002; Campaign for Tobacco Free Kids and American Lung Association, *US Proposals Would Severely Undermine Proposed Tobacco Treaty* (2 May 2001) <<http://tobaccofreekids.org/campaign/global/releases.shtml>> at 30 April 2002. Prior to the negotiations, five major public health groups underlined the importance and necessity of the US taking a strong line in the creation of the *Draft Framework Convention*: see *US Public Health Groups Call on US Delegation to the Framework Convention on Tobacco Control to Take a Leadership Role in Negotiating a Strong International Tobacco Treaty* (12 October 2000) <<http://tobaccofreekids.org/pressoffice/releases.php3?Dcount=500>> at 30 April 2002.

⁶⁶ See Joossens and Raw, above n 16, 949.

⁶⁷ World Bank, *Curbing the Epidemic*, above n 16, 58, lists four reasons: prohibited goods like illicit drugs continue to be widely used; prohibition increases criminal activity and enforcement costs; from an economic perspective, optimal tobacco consumption is not zero; and prohibition is unlikely to be politically acceptable to most states.

⁶⁸ See National Center for Tobacco Free Kids, *Comments on the Chair's Text of a Framework Convention on Tobacco Control* (March 2001) 4 <<http://tobaccofreekids.org/campaign/global/>> at 30 April 2002.

⁶⁹ Opened for signature 22 March 1989, 1673 UNTS 57, 28 ILM 657 (1989) (entered into force 5 May 1992).

disposal by an exporter. What is missing from the regime controlling transboundary movement of hazardous waste is an export control system where permission for export must be sought from the state of export and import, and an international control body must be notified of the export.⁷⁰

Arms control also provides a model. Generally, international treaties have had an influence on state behaviour in providing a means for greater control and even for the reduction of the number of weapons in existence.⁷¹ The UN is currently taking action against the smuggling of small arms and light weapons.⁷² Roughly half of the world's trade of small arms is legal, but legally exported weapons often find their way into the illicit market. The UN has emphasised that a major factor in the illicit trade is the irresponsible behaviour of states and the lack of capacity to detect and seize illicit weapons. A *Revised Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*,⁷³ which will supplement the *United Nations Convention against Transnational Organised Crime*,⁷⁴ is currently under discussion. The Protocol is intended to establish mechanisms for preventing the illicit trade in arms as well as creating means of enforcement. Central to these efforts are fairly rigorous and highly controversial provisions dealing with the labelling and marking of weapons, record-keeping of transactions and import/export controls, where states agree to cooperate and share information. Finally in the area of drug control various multi-lateral conventions, most significantly the 1961 *Single Convention on Narcotic Drugs*,⁷⁵ the 1971 *Convention on Psychotropic Substances*⁷⁶ and the 1972 *Protocol Amending the Single Convention on Narcotic Drugs*,⁷⁷ provide for a detailed system requiring the direct authorisation of the licit production and distribution of otherwise illicit drugs monitored by international organs. The regime used in the international drug conventions to regulate precursor substances — substances used to produce illicit drugs — provides a less restrictive model for the control of tobacco supply, because of the huge amounts

⁷⁰ On the weaknesses of the existing regime, see generally Fatma-Zohra Ouhachi-Vesely, Special Rapporteur on Illicit Moving and Dumping of Toxic Waste, *Report to the United Nations Commission on Human Rights: Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, UN Doc E/CN.4/2001/55 (2001) [77].

⁷¹ Daniel Bodansky, *What Makes International Agreements Effective? Some Pointers for the WHO Framework Convention on Tobacco Control*, WHO Doc WHO/NCD/TFI/99.4 (1999) 27.

⁷² Information on the UN Conference, *The Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (New York, 9–20 July 2001), is available at <<http://www.un.org/Depts/dda/CAB/smallarms/>> at 30 April 2002.

⁷³ UN Doc A/AC.254/4/Add.2/Rev.6.

⁷⁴ UN Doc A/55/383/Annex.

⁷⁵ Opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

⁷⁶ Opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976).

⁷⁷ Opened for signature 25 March 1972, 976 UNTS 105 (entered into force 8 August 1975).

of these licit substances manufactured and supplied.⁷⁸ The weakness of the regime is that it is designed to apply a suspicious transaction notification system to global trade. It may be that tobacco supply control requires something more rigorous.

Comprehensive steps directed specifically at smuggling may retard the application of the health measures in the *Draft Framework Convention* and are best contained in a Protocol to the Framework Convention on Tobacco Control.⁷⁹ The negotiations in the Intergovernmental Negotiating Group already suggest a heavily diluted *Draft Framework Convention*, which reinforces the case for leaving smuggling to a dedicated Protocol.⁸⁰ It is submitted that this Protocol should contain the following elements, borrowed freely from the various models set out above,⁸¹ to address smuggling as a whole and tobacco company participation in smuggling in particular.

A *Preamble*

The Preamble must make it clear that the general aim and object of the Protocol is the suppression of smuggling. There should be a statement which makes it clear that one of the purposes of the Protocol is to prevent the diversion of tobacco products from the licit trade into the illicit traffic. There should also be a clear statement of intent that all parties to the Protocol agree to cooperate on all matters to the best of their ability.

B *Definitions*

1 *Tobacco Products*

The Protocol would apply to all ‘tobacco products’, a term defined in article 1 of the *Draft Framework Convention*, thus linking the instruments.

2 *Illicit Manufacturing*

The Protocol would define the manufacture or assembly of tobacco products without license or authorisation by the State Party where it takes place, and without the distinguishing marks required by other provisions of the *Draft Framework Convention* and Protocol, as ‘illicit manufacturing’.

⁷⁸ See the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 449 UNTS 1696, art 12 (entered into force 11 November 1990). The system set out in art 12, which is less stringent than that used in the various drug conventions to control illicit drugs themselves, serves as a reasonably achievable model for a regulatory regime in the circumstances.

⁷⁹ See Onzivu, above n 50.

⁸⁰ Ibid. Onzivu describes the benefits of a framework convention system, allowing for separate and often contentious issues to be negotiated and added incrementally to the overall system.

⁸¹ See also comments made by Lawrence Summers, Deputy Secretary of Treasury, in his testimony before the Senate Judicial Committee on Tobacco Smuggling Issues: Office of Public Affairs, Treasury, *Deputy Secretary Lawrence Summers’ Testimony before Senate Judiciary Committee on Tobacco Smuggling Issues*, Press Release, No RR-2408 (30 April, 1998).

3 *Illicit Trafficking*

The Protocol would rest on the definition of ‘illicit trafficking’, which would be defined to include ‘the import, export, acquisition, sale, delivery, movement or transfer of tobacco products from or across the territory of one state party to that of another state party if any one of the state parties does not authorise it in accordance with this Protocol’.

C *Criminalisation*

The penal provisions of the Protocol would serve mainly to reinforce domestic customs and excise offences. The criminal offences established by the parties in terms of the Protocol would provide that ‘each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law’, both ‘the illicit manufacturing of tobacco products when conducted intentionally’ and ‘the illicit trafficking in tobacco products when conducted intentionally’. Separate provision would be made criminalising inchoate forms of these offences, such as attempts and conspiracies, as well as secondary participation, broadly defined to include ‘organising, directing, aiding, abetting, facilitating or counselling’. These offences would implicate tobacco manufacturers when the company or their employees intentionally involve themselves in trafficking. The failure to adhere to the authorisation system set out below should provide ample evidence from which an inference of intentional conduct may be drawn. It would, however, be imperative that parties agree to criminalise juridical persons such as companies, in their own right, in order to make criminalisation effective. The Protocol would also aim to harmonise penalties,⁸² and provide specifically that conviction will result in the suspension or ultimate withdrawal of a manufacturing or export/import license in addition to incarceration or financial penalties.

D *Seizure, Confiscation and Disposal*

The Protocol would oblige parties to provide in their domestic law for the power to seize suspicious consignments where there are reasonable grounds for such a suspicion, to confiscate the products upon proof of a connection with illicit conduct, and to destroy them.

E *Marking of Tobacco Products*

The Protocol would oblige parties to ensure that tobacco companies marked their products in such a manner that identified their place of manufacture and made clear when the product is intended for export purposes and, if so, whether tax had been paid. Manufacturers would be required to add prominent ‘tax paid’ stamps on duty paid packages and use special packaging for duty free packages. Various standardised pack markings, perhaps in the form of coded serial numbers, would be required in order to reveal information about the manufacturer, distributor, wholesaler and exporter, and to facilitate tracking.⁸³ Exporters would also be required to print on packets the name of the country of

⁸² World Bank, *Curbing the Epidemic*, above n 16, 65.

⁸³ *Ibid.*

final destination and health warnings in that country's national language(s) to facilitate control.⁸⁴ International products produced locally would be required to carry statements that make patent their local origin.⁸⁵

F *Requirements for the Authorisation of International Trade*

Since tobacco products pass through a large number of owners and distributors, making it difficult to track the movement of the products, the cornerstone of the Protocol would be a system for monitoring the international trade in tobacco products.⁸⁶ In order to prevent diversion into the illicit traffic, the Protocol would impose a general obligation on each party to establish and maintain an effective system of export and import authorisation or licensing, as well as a system of measures on international transit. More specifically, each party would have to ensure that exporters apply for export licenses for tobacco products.⁸⁷ The issue of such licenses would be conditional upon the importing state having issued an import license and upon transit states having given written notice that they have no objection to the transit. The export and import license and accompanying documentation would have to contain details as to the date of issuance, date of expiration, the country of export, the final consignee and any areas of transit. The details in the import license would have to be provided in advance to the transit states. The importing state would have to inform the exporting state of the receipt of the shipment. The thrust of this system would be to stop, by establishing a chain of custody, the export of tobacco products to an undeclared importer. It would mean the end of export 'in transit', as the identity of the final consignee would have to be known for the necessary authorisations to be given. Softer options are available, though less desirable: for example, a selective system for monitoring international trade including, in particular, a selective notification system of suspicious transactions.⁸⁸

G *Commercial Documents and Record Keeping*

The Protocol would oblige parties to ensure that commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents correctly identify the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and the consignee. Accurate record-keeping would be essential to maintain the integrity of the export authorisation system, and at the same time provisions would be needed in order to ensure respect for commercially sensitive information. Parties would have to be placed under an obligation to ensure that manufacturers of tobacco products keep records of their products. With respect to the international trade, this obligation would extend to ensuring that exporters

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ See Joossens and Raw, above n 16, 949.

⁸⁸ For example, the EC's voluntary approach to monitoring of chemical precursors for illicit drug manufacture in Council Regulation, 3677/90/E EC, (1990) OJ (L 357 1). The US legislation adopts an obligatory approach: see the *Chemical Diversion and Drug Trafficking Act of 1988*, 21 USC § 801 (1990).

and importers keep records of the appropriate export and import licenses, descriptions and quantities of the tobacco products, the country of export, the country of import, the transit countries and the final receipt.

H *Information*

Monitoring at a national, regional and international level is necessary to provide data on smuggling as well as on tax-free exports and imports of tobacco products.⁸⁹ Parties would be obliged to exchange two kinds of information: first, case-specific information on matters such as authorised manufacturers, dealers, importers, exporters and carriers of tobacco products; second, information on the illicit traffic itself, including information on the quantities of tobacco products seized and confiscated by parties, the identities of organised criminal groups involved, modes of smuggling (methods, means, points of dispatch, routes, etc), means for detecting smuggling (including relevant scientific and technical information), and laws used to suppress smuggling and general experiences in suppression. Parties would also be placed under an obligation to supply information on illicit trafficking to Interpol's database and the central information system of the World Customs Organisation. Parties could then access this information at will or, preferably, receive continual updates about trends in and significant cases of trafficking.

I *Law Enforcement Cooperation*

Parties would be under a general obligation to cooperate internationally in taking law enforcement measures to prevent smuggling between states, especially those states with a common border. More specifically, they would be obliged to cooperate in a range of different forms of mutual assistance ranging from formal legal measures, such as extradition for the Protocol offences, and evidence gathering, to informal direct transborder cooperation between police and customs. There should also be provisions which explicitly remove any defence based on the 'fiscal offence exception'.⁹⁰ Without this, individuals from tobacco manufacturers will be able to frustrate any attempts at extradition on the basis that one state cannot enforce the tax laws of another.

J *Training and Technical Assistance and Public Education*

Provision would be made for cooperation among parties in respect of training and technical assistance to enhance the ability of parties to combat the illicit traffic in tobacco products. Emphasis should also be placed on raising public awareness of the negative aspects of smuggling.

The measures set out above will control tobacco products by requiring manufacturing to be under license and subjecting the international trade to export/import authorisation. The scheme is not as onerous as it might be because it does not include a national system for monitoring the internal trade in tobacco products or an international organ to monitor the international trade, measures

⁸⁹ See generally Joossens, above n 20.

⁹⁰ Arising from the reluctance to become involved in another state's fiscal law, extradition has traditionally been refused in respect of tax and customs offences: see Ilias Banteks, Susan Nash and Mark Mackarel, *International Criminal Law* (2001) 147.

that would be very cumbersome. Obviously, the burden of the suggested measures will fall mainly on developed states, as their citizens are largely responsible for the production and export of tobacco products. Justice Brandeis once said that ‘sunlight is the best disinfectant’,⁹¹ but there are many powerful players likely to be loathe to expose the tobacco industry to this extent, and strong resistance can be expected from the tobacco industry to a scheme of this nature. Nonetheless, the object of the Framework Convention is to oblige States Parties to develop national tobacco control strategies. A convention invites States Parties to enter into bilateral or multilateral agreements on issues pertinent to it.⁹² There is no doubt that a protocol applying a system such as the one proposed above could be developed by willing nations. The next three years will see the first major multilateral steps taken against one of the greatest medical risks humanity creates for humanity. The time is ripe for such a measure.

V CONCLUSION

Tobacco manufacturers are aware of the global efforts to control tobacco products. They have demonstrated support for measures which attempt to limit the use of tobacco products by children, they have stressed the beneficial impact the tobacco industry has on the economy and they have emphasised that tobacco manufacturers are not evil but instead are ‘good corporate citizen[s] who maintain high ethical standards’.⁹³ Yet in spite of the pronouncements of tobacco companies that they are positively disposed towards a global regime for tobacco suppression, including measures to halt smuggling, they have not responded thus far to the efforts of the WHO to achieve such a regime.⁹⁴ This comes as no surprise as the tobacco industry is a highly competitive global market and individual companies are determined to maintain and increase market shares, as

⁹¹ Louis Brandeis, *Other People's Money* (1914) 92.

⁹² See *Draft Framework Convention*, above n 2, pt II, A(1) and (7) respectively.

⁹³ Statement of Kenneth Clarke, Deputy Chairman of BAT, *Second Report of the Select Committee*, above n 28, § 216.

⁹⁴ Philip Morris declared its support for the efforts of the WHO through the *Draft Framework Convention* but added that certain ‘principles’ must be respected. These include: all decisions on tobacco suppression should be made on the basis of a consistent public health message; measures should be taken to prevent minors from smoking; the right of adults to choose to smoke should be preserved; and all manufacturers of tobacco products should compete on a level playing field: Philip Morris Companies, *Annual Report 2000*, 24 <http://www.philipmorris.com/investors/investors_main.asp> at 30 April 2002. BAT has been less sanguine in its approach. At the BAT annual general meeting in 1999 it was stated that the WHO agenda was driven by western zealots exploiting and distorting the situation. The BAT Chairman, Martin Broughton, also claimed that the efforts of the WHO to combat the health risks of tobacco in the developing world did not correspond with the priorities of health ministers from developing countries who, it was said, put more emphasis on issues such as malnutrition, poor sanitation, infant mortality and AIDS. In a submission to the UK Select Committee on Health, a WHO representative rebutted these claims stating that the WHO had 192 members demonstrating some of the widest consensus in the international system. He stated that health ministers globally recognise the detrimental impact of tobacco usage and are working to address it. The Chinese Health Minister also provided a communication to the UK Select Committee on Health further weakening BAT’s claims by saying that China is taking an active stance toward tobacco control and fully supports the *Draft Framework Convention*: see *Second Report of the Select Committee*, above n 28, 226–7.

well as ensure the industry overall remains relatively unregulated, which in turn contributes to the lure of smuggling.⁹⁵

Lawmakers in developed states cannot, however, acquiesce in the present state of affairs. They have taken steps to provide a social defence against smoking in developed states and as a result they have been at least partly responsible for tobacco companies seeking markets, sometimes illicit, in developing states. They should use the opportunity provided by the development of the *Draft Framework Convention* to apply a system sufficiently rigorous to prevent tobacco companies from exporting huge amounts of tobacco and deliberately ignoring the diversion of these products into the illicit markets of developing states. The cornerstone of such a system must be a tobacco product export notification system. There is nothing in such a system that conflicts with the principle of free trade enshrined in the WTO framework. Article XX of the *General Agreement on Tariffs and Trade*⁹⁶ entitles states to take measures to protect public health so long as they are applied equally to imported and domestic products.⁹⁷

Tobacco companies are aware of the possibility of the kind of international regulation of the global tobacco market we have suggested. BAT, for example, appears to be embracing self-discipline in order to deflect the impact of regulation.⁹⁸ Tobacco companies may feel that they would be denied a level playing field in the international tobacco market if they were denied access to illicit markets. However, lawmakers in developed states have a compelling obligation to ensure that the citizens of developing states are given the opportunity to compete on a level playing field with those in developed states when it comes to the health hazards of tobacco consumption.⁹⁹ As stated in the introduction, it is estimated that smoking related deaths world wide will reach 10 million per year by 2030, with 70 per cent of deaths in developing countries.¹⁰⁰ One can only wonder how many of those casualties will have smoked cheap smuggled cigarettes.

⁹⁵ See the statements of Kenneth Clarke in Kevin Maguire, 'Clarke Admits BAT Link to Smuggling', *The Guardian* (Manchester, UK), 3 February 2000 <<http://www.guardian.co.uk>> at 30 April 2002.

⁹⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 190, 33 ILM 1154 (1994) (entered into force 1 January 1995), annex 1A (*General Agreements on Tariffs and Trade*).

⁹⁷ See World Bank, *Curbing the Epidemic*, above n 16, 63. See also Tobacco Free Kids, 'Tobacco and International Trade' (Paper presented at the 11th World Conference on Tobacco and Health, Chicago, 6–11 August 2000) <<http://tobaccofreekids.org/campaign/global/docs/intnl.pdf>> at 30 April 2002. For further discussion on trade and tobacco products see *Reducing Tobacco Use*, above n 44, ch 6.

⁹⁸ See Charles Batchelor, 'BAT to Crack Down on Smuggling', *Financial Times* (London, UK), 6 December 2001, 27.

⁹⁹ It has been noted that states, like the US and the UK, where the bulk of tobacco manufacturing occurs, have an important role in supporting a strong *Framework Convention on Tobacco Control*: Campaign for Tobacco Free Kids, *About the World Health Organization Framework Convention on Tobacco Control* (10 August 2000) <<http://tobaccofreekids.org/campaign/global/framework/aboutfctc.shtml>> at 30 April 2002.

¹⁰⁰ Campaign for Tobacco Free Kids, *Public Comment*, above n 6. See also US Department of Health and Human Services, *Fact Sheet: Preventing Disease and Death from Tobacco Use*, Press Release (8 January 2001).