

**Smoking and Health Action Foundation**

**&**

**Non-Smokers' Rights Association**

**Comments on draft elements of the WHO**

**Framework Convention on Tobacco Control**

Submission to Health Canada  
by Francis Thompson, Policy Analyst  
March 16<sup>th</sup>, 2000

## **Introduction**

In any multilateral negotiation, there is always a trade-off between what is desirable and what is realistic. As NGOs that are not party to the negotiations, we are of course in no position to make the judgement call on how far Canada can go in pushing for what is desirable without putting the FCTC process in danger. Our role is thus to identify elements that we consider desirable that have not yet made it into the drafts, and to identify priorities between different items that we would wish to see. The following comments should be read in that light.

## **Creating a floor for national policies vs. dealing with transnational issues**

In the present draft, much of the FCTC would be devoted to setting minimum standards for tobacco control policies at the national level. This may well be a useful role for the FCTC in many countries; in the Canadian case, there is little obvious direct benefit, with two exceptions:

1. Ontario and Québec are below the excise tax incidence floor of two-thirds set in II.A.2 — though this will likely be corrected before the FCTC comes into force. (If it were not corrected by then, the constitutional implications would be interesting.)
2. International standards may provide another useful legal argument when defending Canadian tobacco control measures in court.

There are several possible drawbacks to including a set of minimum national standards:

1. In the trade-off between wide adherence and meaningful content, it seems unfortunate to spend negotiating capital on measures that can, at least in theory, be achieved on the national level, when we know that other measures can only be adopted internationally. More concretely, it would be highly unfortunate if countries refused to sign on to anti-smuggling measures or restrictions on cross-border advertising because of an unwillingness to institute ETS restrictions.
2. The tobacco industry will see the minimum national standards as a much easier political target for attacks on FCTC than almost any international measures.
3. As drafted at present, many of the minimum national standards seem rather difficult to implement in poorer countries.
4. Minimum standards are frequently transformed — often under heavy tobacco industry pressure — into *de facto* maximums.

A more creative approach, as suggested by Neil Collishaw, might be to establish general principles, on which all governments could agree, and provide catalogues of likely measures to achieve such goals. **Canada should spend any negotiating capital it has on truly international issues.**

### **Relationship with other international instruments**

Guiding principle I.D.4., regarding “disguised restrictions on international trade,” may make sense in abstract terms, but is likely to have a significant chilling effect in real life. The countries most affected by this provision would presumably be Third World countries, many with limited resources: tobacco transnationals regularly use a mix of trade liberalization negotiations, smuggling and advertising to force their way into previously closed or restricted national markets. (Thailand and China come to mind.) A country may have perfectly legitimate health reasons to prefer a local product over imported, manufactured cigarettes, but feel unable to defend its case appropriately in international forums.

Moreover, in real life, “national preference” policies with respect to tobacco products may well be positive for public health, even if these policies are motivated strictly by protectionism. The primary argument for trade liberalization is that it results in increased efficiencies and improved product quality; neither are objectives to be pursued with respect to tobacco products, unless “quality” is measured in terms of population impact on health.

Ideally, the FCTC should include a blanket exemption, to the effect that tobacco-control measures motivated by public health concerns trump trade rules and intellectual property issues. Perhaps more realistically, there should be some provision whereby WHO has input into whether a restriction challenged by the tobacco industry on trade grounds in fact constitutes an appropriate tobacco-control measure.

**One easily achievable provision on trade issues** should be immediately added to the FCTC, in line with policy decisions by several countries: signatory governments should agree not to co-operate in any way with the tobacco industry in attempts to achieve better access to foreign markets.

### **Tobacco taxation**

As a general rule, measures to increase the effective retail price of tobacco products are particularly important tools in reducing smoking uptake amongst young people, and in generally reducing tobacco consumption. However, tax policies also need to be examined with respect to smuggling and, perhaps more importantly, with respect to their impact on competition and profit levels.

One consistent trend running through internal tobacco industry documents on taxation is a strong preference for specific (\$X per quantity of cigarettes, of whatever variety) taxes over proportional or *ad valorem* (multiple of pre-tax price) taxes. That is because specific taxes effectively reinforce price cartels, while *ad valorem* taxes can destabilize them.

When governments significantly raise specific taxes, the industry's response to the resulting decline in volume is often to tack on an increase in their wholesale price, often large enough to actually increase total profits. Exclusively or primarily specific taxes make price wars between cigarette companies much less likely. Thus, such a tax structure can amount to a virtual licence to print money for tobacco companies — and this money is in turn available for advertising, promotional and lobbying efforts. The tobacco industry has been highly successful in getting countries to shift to specific taxes, in particular by getting others to argue that price wars on tobacco products would be harmful to public health.

*Ad valorem* taxes are not necessarily the best way to fight price cartels in the tobacco market and the resulting excess profits. Profit controls and various measures to break cartels can achieve the same objectives, without the downward pressure on prices from competition that in turn leads to higher consumption. However, industrialized countries have rarely (if ever) tackled the cartel issue head-on. In countries where cartel pricing is not firmly established, it is important that moves towards tobacco tax increases or harmonization through the FCTC process should not inadvertently create cartel situations.

In countries where there is a significant market for tobacco products other than manufactured cigarettes, a public health argument can be made for differential tax treatment of different types of products. An obvious example is Swedish chewing tobacco, *snus*, which some experts maintain is considerably less harmful than cigarettes (and less harmful than U.S. chewing tobacco). In many Third World countries, the primary competition to cigarettes manufactured by transnational tobacco companies comes from “traditional” products of various kinds. While some of these traditional products may be more harmful, on an individual basis, than imported manufactured cigarettes, they may be less harmful on a population basis — because they are less engineered to provoke addiction, or simply less attractive, and not backed by unlimited marketing resources.

In some cases, it may be sound public health policy to maintain a major price advantage for traditional tobacco products vs. imported manufactured cigarettes. Setting a 67% minimum excise tax incidence could make it difficult to maintain that price advantage.

With respect to the impact of tax policies on smuggling, it is important to note that most large-scale cigarette smuggling involves cigarettes on which no duty has been paid, not cigarettes on which taxes have been paid in a low-tax jurisdiction. For example, little U.S. tax was paid on the Canadian-made cigarettes that were shipped to the United States in the early 1990s to be smuggled back into Canada.

Nevertheless, price differentials and “spontaneous,” demand-driven smuggling do make a difference in how easy it is to organize large-scale smuggling. It would therefore be helpful to have cross-border tax floors, or some other mechanism for co-ordinating tax policy in areas where smuggling is an issue or a potential issue — as long as such co-ordination does not tie countries to a lowest common denominator. It is also important to

look at the mechanics of tax collection and how they relate to the profitability of smuggling. (See smuggling section, below.)

In conclusion, we suggest **replacing the 67% minimum tax incidence provision with a more differentiated approach:**

1. All signatories agree that tobacco tax policy is public health policy, and that tobacco taxes should be structured in such a way as to minimize the health impact of the tobacco epidemic, both in their own country and in other signatory countries.
2. Retail prices of tobacco products should reflect the relative harm of such products, as determined on a long-term population-wide basis (i.e. a product that is 20% more deadly for an individual, but 50% less attractive, may deserve a lower tax rate).
3. Minimum tax levels (as opposed to tax incidence) should be agreed upon: both absolute levels (which would likely apply in only a small number of countries), and as a multiple of average wage levels, or some other indicator of overall prosperity.
4. The prevention of price cartels should be specifically mentioned as a consideration in choosing an appropriate tax structure. In some situations, a percentage floor for *ad valorem* taxes should be set.
5. Some provision should be made for setting price floor levels at the regional level, as opposed to only the global level.

In passing, there is a very significant practical problem with the existing wording: tax incidence in the United States is nowhere near 67%; much of the price increase of the last couple of years has come from litigation settlements. It is hard to imagine the Americans signing on to the present wording.

### **Smuggling**

The prevention of smuggling clearly requires a co-ordinated international effort, and as such should be a core element of the FCTC. On this particular point, it would seem appropriate to put as much as possible in the Convention itself, rather than hiving off specific measures into a protocol.

All of the provisions of Option 2 in the provisional text seem good, as far as they go. However, no mention is made of money-laundering, nor of the seizure of the proceeds of smuggling. Yet control of supply at the source can often be more effective than enforcement at the retail level. **It would be helpful to make explicit mention of the tobacco industry as the ultimate source of supply.**

The draft Protocol is rather weak with respect to judicial co-operation. There should be some provision whereby signatories agree to make it illegal (and prosecutable) to use their country as a base to organize smuggling in other countries.

Rather than attempting to re-invent the wheel on this, it might make more sense to include a statement that the smuggling of tobacco products is as pressing an international concern as the smuggling of illicit drugs, and that systems for international co-operation on combatting drug smuggling should be extended to cigarette smuggling.

On a more immediate level, **setting up an international system of traceable tobacco product markings**, as opposed to relying on purely national systems and bilateral or multilateral co-operation, would be a highly significant measure to combat smuggling.

With respect to tax collection, signatories should commit to moving to a system of collecting tobacco taxes at the factory gate (or upon entry into the country, in the case of imports).

Also, with respect to the elimination of tax-free and duty-free cigarettes, it would make sense to include an indication of *why* duty-free cigarettes are contrary to health policy. Apart from the issue of smuggling, duty-free cigarettes amount to a decision by countries that it is acceptable to export tobacco-related disease against which the same government is attempting to protect its own citizens.

See also the section on advertising, below.

### **Disclosure**

Nowhere in the FCTC draft is any mention made of the need for international co-operation in disseminating information from tobacco-industry documents obtained through litigation or from other sources. **Countries should commit to providing tobacco industry information they have obtained that is particularly relevant to other signatories** in a prompt manner.

### **Advertising**

One highly disappointing aspect of the FCTC draft (and proposed Protocols) is that the elimination of advertising on the national level seems to take precedence over the elimination of cross-border or international advertising. Much better would be a rapid ban on cross-border advertising, or at the very least some provision that countries not allow their territory to be used to circumvent stronger advertising bans in other countries.

Moreover, as a smuggling prevention measure, there should be an immediate ban on advertising for any tobacco products not legally available in a particular country, as well as some provision to stop other advertising directed primarily at boosting demand for smuggled product. For example, there could be a provision that advertising is illegal for any brand of cigarette for which smuggled cigarettes make up more than 20% of sales. Indeed, there could be a regionalized ban: no advertising for Marlboro anywhere in South

America if smuggled cigarettes make up more than 20% of Marlboro sales in any country in South America, to take a not entirely hypothetical case.

Also, experience in Canada and other countries demonstrates that attempts to restrict only advertising aimed at children and adolescents is fruitless at best.

### **Cessation**

SHAF and NSRA have been on the record for several years now as supporting increased market access for alternative nicotine delivery systems (ANDS), such as the NRT products manufactured by pharmaceutical companies. Indeed, we have been at the forefront of discussions on the nicotine market, and on the desirability of having a more level playing field between tobacco products and ANDS.

However, there are some difficulties with the existing FCTC draft, in particular the reference to “programmes” for the treatment of tobacco dependence. In a country like Canada, cessation programming is highly cost-effective in comparison to other health interventions. On the other hand, it is not particularly cost-effective in comparison with various tobacco control policy measures. To give just one example: it costs virtually nothing to ban “light” products, which are known to be a major impediment to cessation. In an ideal world, policy and programming measures would of course go hand-in-hand. In poorer countries, widespread cessation programming does not appear terribly realistic, though it would clearly be an important step forward to integrate information on tobacco dependence into existing public health efforts. We also support the concept of improved access to alternative nicotine products through more rational regulatory frameworks.

As drafted at present, the FCTC and the Protocol on the treatment of tobacco dependence leave WHO vulnerable to the accusation that it is acting as the pharmaceutical industry’s agent in the Third World, an accusation already levelled by British American Tobacco in its efforts to derail the FCTC process. It is important that FCTC not be side-swiped by extraneous disputes, such as those involving patent protection for pharmaceuticals, if the convention is to obtain the support of important players such as China and India.

A more appropriate approach might be to simply emphasize that tobacco-control efforts cannot be restricted to attempts to prevent youth smoking, but that measures to encourage cessation are also vital. There could then be a list of such measures, including not just the treatment/programming aspects and improved access to NRT, but also the prohibition of deceptive marketing, increases in taxation, etc.