

Saving the World from Big Tobacco: The Real Coalition of the Willing¹

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About the Matthew B. Ridgway Center

The Matthew B. Ridgway Center for International Security Studies at the University of Pittsburgh is dedicated to producing original and impartial analysis that informs policymakers who must confront diverse challenges to international and human security. Center programs address a range of security concerns—from the spread of terrorism and technologies of mass destruction to genocide, failed states, and the abuse of human rights in repressive regimes.

The Ridgway Center is affiliated with the Graduate School of Public and International Affairs (GSPIA) and the University Center for International Studies (UCIS), both at the University of Pittsburgh.

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It has been hypothesized that nongovernmental actors tend to gain more prominence in policy areas where there has been significant state failure. ... This does ring true for a variety of endeavors, such as the pursuit of private economic interest, the protection of the environment, and the protection of individual and group rights. A broad array of nongovernmental actors work in the international arena, performing a variety of functions. Some are stand-ins for states; others work to influence the diplomatic agendas of states.²

Global diplomatic actors- whether individual scientists or activists, or vast networks of NGOs- represent a new force in the international negotiation arena. Their ability to mobilize public opinion and political action is unprecedented and closely tied to the information revolution of the late twentieth century.³

This case study is a story in two parts. One is the story of the negotiations leading to the adoption of the first-ever public health treaty, the Framework Convention on Tobacco Control (FCTC). The other is the story of the birth and growth of a new international non-governmental network of advocates. These two parts led to an unprecedented and effective alliance of non-governmental actors and states that felt victimized by U.S. pressure. The issue was not national security, nor disarmament nor world peace, but public health and the opportunity to help forestall or mitigate the coming health pandemic of the next 50 years. The success of the alliance between civil society and the countries of Africa, South East Asia, and the island nations of the Pacific and Caribbean,⁴ was

brought about by persistence, patience and stamina on the part of both sets of actors. Civil society brought to the alliance its technical expertise in public health, its media contacts and its political contacts within friendly and not so friendly governments; the governments of the south brought their votes, their voices and their unwillingness to be bullied.

Part I: Setting the Stage

TOBACCO MARKETING: THE DISEASE VECTOR

...tobacco is the only legally available consumer product, which kills when used as intended. The Oxford Medical Companion, 1994

Cigarettes kill half of all regular users and of those half will die during the productive years of middle age, 35 - 69. Currently the death toll is almost five million per year world wide, but by 2025, the total will rise to 10 million per year and 70% of those deaths will be in the developing world. Tobacco exacts an enormous toll in health care costs, lost productivity, and pain and suffering inflicted upon smokers, passive smokers and their families.⁵ The burden of disease is perhaps more awesome since it will overwhelm the already overtaxed and inadequate health care systems of low and middle-income countries. A short list of the ills caused by or implicated by tobacco use include:

- lung cancer, cancers of the larynx, oral cavity, esophagus, bladder, pancreas, uterus, cervix, kidney and stomach;
- chronic obstructive pulmonary disease, emphysema and chronic bronchitis;
- heart disease, stroke and the progression of atherosclerosis; and

- spontaneous abortions, still births, and sudden infant death syndrome after birth.⁶

The synergies between diseases and smoking are equally as terrible.⁷

- Smoking most affects those who are ill and whose immune systems are weak (HIV) and
- Smoking causes sub-clinical tuberculosis (TB) to advance to clinical TB and possible death; one billion people worldwide may have sub-clinical TB; and in India, smoking causes 50% of TB deaths.⁸

THE INTERNATIONALIZATION OF THE DISEASE

Tobacco use spread from North America and Europe to the rest of the world as a result of industrialization, modern mass marketing techniques and the increase in international commerce.⁹ The globalization of trade in the late twentieth and early twenty first century extended modern tobacco use to the rest of the world, to low and middle-income countries. Multi-national tobacco companies now operate in over 180 countries.¹⁰

The epidemic that follows tobacco use, therefore, will now move to the developing world. Death and disease from tobacco use have already begun to decline in wealthy countries due to years of aggressive tobacco control advocacy and government action. But the epidemic has yet to hit full force in low and middle-income countries.¹¹ Moreover, the estimates of projected deaths in low and middle-income countries are based on current male smoking rates. The emerging markets for the tobacco transnational corporations are women and children. If the companies succeed (as they did in developed countries), the death toll may be even larger than currently predicted.¹²

“An important thing to understand about Big Tobacco is that its future lies, in large part, in the developing world. ‘You buy Philip Morris in the long term for their international business,’ says Bonnie Herzog, an analyst at Credit Suisse First Boston in New York City. ‘[T]hat’s their growth engine.’”¹³ This movement of tobacco marketing from developed countries to developing countries has not gone unnoticed by the intended target and is often recognized for what it is: predatory and pernicious. Patricia Lambert, legal advisor to the South African Health Minister and head of the South African delegation to the FCTC negotiations, put it this way:

[They look to the] African continent, because ... tobacco sales have decreased in those western countries where health promotion activities have been at work for many years, persuading the population that tobacco use is not a good thing, and that secondhand or environmental smoke is also not a good thing for people who don’t smoke. The tobacco industry, I think, in direct relationship to falling sales in Europe began to look at overseas markets, and Africa was one huge market for a deadly product. I personally find this utterly immoral. I can’t, despite being a reasonably good speaker of English; I can’t find words to describe its repugnancy, because you’re looking at a continent that has a tremendous burden of communicable diseases that spread quickly and easily. You have varying levels of education. You have the enormous burden of poverty. There are real issues around starvation and homelessness.

Now you come in with a product to sell, which you market as something to aspire to, to people who would do almost anything to get out of feeling poor and neglected. You then not only make them ill, but you get them to spend

meager resources on a completely toxic product. I find it immoral. So for Africa and for Africa's children, I think that's the fight we fought here for the Framework Convention on Tobacco Control.¹⁴

But the spread of tobacco use is more than just a potential public health disaster.

According to WHO: "The economic costs of tobacco use are equally devastating. In addition to the high public health costs of treating tobacco-caused diseases, tobacco kills people at the height of their productivity, depriving families of breadwinners and nations of a healthy workforce. Tobacco users are also less productive while they are alive due to increased sickness. A 1994 report estimated that the use of tobacco resulted in an annual global net loss of US\$ 200 thousand million, a third of this loss being in developing countries."¹⁵

The Secretary General of the United Nations in a report to the UN Economic and Social Council¹⁶ warned that tobacco production and consumption help to increase poverty and undermine sustainable development. "Tobacco and poverty create a vicious circle," says the report. "Tobacco increases poverty, and tobacco products tend to be more widely used among the poor."¹⁷ "The U.N.'s Millennium Development Goals (MDGs), aimed at eradicating extreme poverty and eliminating deadly diseases by 2015, are being undermined by the rise in tobacco consumption.' Therefore, the report continues, tobacco control has to be 'a key component of efforts to reduce poverty [and] improve development...'"¹⁸

THE ROLE OF THE UNITED STATES

The U.S. government played a considerable role in the development of this epidemic and impoverishment by assisting US-based tobacco companies expand

overseas. During the 1980s, the U.S. government used the threat of retaliatory trade sanctions (Section 301 of the 1974 Trade Act) to force countries in Asia to either open up their markets to imported cigarettes or face trade sanctions.¹⁹ The results were catastrophic. Smoking rates in Japan, South Korea, Thailand and Taiwan rose 10 percent higher than they would have following the massive inflow of U.S. products and sophisticated marketing techniques.²⁰ In South Korea, the smoking rate among teenage boys was 18 % in 1988. A year later, after the market was opened to U.S. imports, it rose to 30%, while rates for teenage girls climbed from 2 to 9%.²¹

The Clinton Administration substantially changed the U.S. government's trade posture and backed away from the forceful opening of foreign markets to tobacco products. It sought to increase domestic regulation of tobacco and to extend tobacco control rather than tobacco marketing to the rest of the world.²² The Administration's policy still recognized the importance of the tobacco trade to the United States but it did represent a change. That policy, as enunciated in an Executive Order of the president stated in part that:

It shall be the policy of the executive branch to take strong action to address the potential global epidemic of diseases caused by tobacco use. The executive branch shall undertake activities to increase its capacity to address global tobacco prevention and control issues through coordinated domestic action, limited bilateral assistance to individual nations, and support to multilateral organizations.

In the implementation of international trade policy, executive departments and agencies shall not promote the sale or export of tobacco or tobacco products,

or seek the reduction or removal of foreign government restrictions on the marketing and advertising of such products, provided that such restrictions are applied equally to all tobacco or tobacco products of the same type. Departments and agencies are not precluded from taking necessary actions in accordance with the requirements and remedies available under applicable United States trade laws and international agreements to ensure nondiscriminatory treatment of United States products. ...²³

Recent events suggest that U.S. policy may be changing again. The actions of the Bush administration during the negotiations on the FCTC may indicate a return to a more aggressive tobacco export policy.

Part II: Working towards a Solution

THE PROPER ROLE FOR CIVIL SOCIETY

I believe that someday someone will write the story of the role of NGOs in leading the FCTC [Framework Convention on Tobacco Control] process, not just in the last [negotiating session] but I am thinking of their role in educating the world about tobacco over the last four years. It has been tremendous and the last [session] showed that it was also tremendously successful in sustaining the debate at the right pitch.²⁴

On 24 May 1999, the World Health Assembly (WHA) passed a resolution, which set in motion a multi-year negotiation leading to the adoption of the FCTC. The World Health Organization (WHO) sponsored the FCTC as the first ever public health treaty: a treaty to combat the internationalization of the death and disease caused by tobacco marketing.

Over the next four years, a group of public health NGOs from every region of the world established a network to lobby for a strong treaty: a coalition of public health, human rights, consumer rights, women's and children's rights organizations and environmental activists. This network, which by the middle of 2004, had grown to over 200 organizations from almost 100 countries, operated on a shoestring budget with each group contributing its own expertise, materials and hard work. Working with a coalition of willing countries, such as India, Thailand, Canada, New Zealand, the island nations of the Pacific and Caribbean and the entire continent of Africa, this coalition was able to thwart the desires of the United States and other governments who sought a weak and non-binding treaty. On 1 March 2003 at around 2 a.m., the negotiations ended with most countries giving speeches of congratulations, and only the United States threatening to try to derail the treaty before the WHA could adopt it and place it before the world for ratification.

Assuming that the role played by this network of NGOs assisting low and middle-income countries was a determinant in the outcome of the negotiations, was it a proper role for NGOs to play? The United Nations recently issued a major report on the role of civil society in international negotiations and generally found it to be a positive force. As the UN noted in its report on Civil Society:²⁵ “[p]ublic opinion has become a key factor influencing intergovernmental and governmental policies and actions. The involvement of a diverse range of actors, including NGOs and private sectors, and local governments is not only essential for effective action on global priorities but is also a protection against further erosion of multilateralism.” However, this may not always be perceived as a benefit, noted the report. “Governments do not always welcome sharing what has

traditionally been their preserve. Many increasingly challenge the number and motives of civil society organizations in the United Nations- questioning their representivity, legitimacy, integrity or accountability.” In the past, governments have negotiated and discussed and compromised and threatened until agreement was reached. Now, they often must deal with civil society, which wants to enter negotiations, form alliances with like-minded governments and international organizations and attempt to be as forceful as possible in putting forth its agenda.

On the whole the report concluded:

[C]ivil society and other constituencies are important to the United Nations because their experience and social connections can help the United Nations do a better job, improve its legitimacy, identify priorities and connect it with public opinion. Civil society can also raise new issues, focus attention on the moral and ethical dimensions of decisions in the public sphere, expand resources and skills, challenge basic assumptions and priorities and protest unfair decisions. So enhanced engagement, carefully planned, will make the United Nations more effective in its actions and in its contributions to global governance. There is a synergy here, not a contest. Opportunities for working with the United Nations strengthen civil society, and this in turn empowers the United Nations, enhancing its relevance to the issues of our times.²⁶

Some, however, particularly in the Bush Administration, have questioned this role of civil society. Elaine L. Chao, U.S. Secretary of Labor, speaking before the Federalist Society stated:

...the United States has always encouraged other nations to adopt these principles of free association in civil society. These ideals make possible the formation of private organizations that play a pivotal role in opening up repressive, undemocratic regimes, as Solidarity did in Poland in the 1980s.

But what is notable, and what you need to pay attention to... is the growing alliance of unelected NGOs and multilateral bodies, such as the United Nations, its various affiliated organizations, and the European Union, to influence the politics and laws of democratic societies.

She seems to be indicating that a robust civil society is not appropriate or necessary for democracies. Moreover, she questioned the tactics of civil society in international fora.

In addition to the official delegation at a meeting, there often will be a long list of non-governmental organizations accredited as “observers....These organizations, as you can suspect, do more than observe. Sometimes they’re called upon to give presentations in special sessions. They circulate in informal social networking sessions. They take the time to attend these meetings which often last for days or even weeks. Their views help to shape the final outcome by lending international credibility and the mantel of grass roots support through ideas and recommendations...the reality is that multilateral organizations, NGOs, are becoming major, key players in global public opinion and global standard setting. Conservatives need to pay attention to these organizations and the NGOs that influence them. ²⁷

NGOs clearly performed all those functions that Chou decries during the FCTC negotiations. But were NGOs actions a cause for concern or a reason to applaud.

Patricia Lambert, head of the South African delegation would disagree with Chou's statements of concerns. She described the role of the NGOs in the FCTC negotiations thus:

The role that the NGOs have played in this negotiation process is something that I'm left admiring very deeply....The NGO community kept pace with the negotiations all the way, did enormous amounts of research in-between sessions, were constantly keeping us up to date with things that were being hidden, things by the corporations, by other governments.

So there was this percolating of information, that, speaking as an African, I can certainly say, helped us to be better informed, and therefore to take a clearer and stronger stand on things.²⁸

Thus, one's views of the propriety of NGOs involvement in international affairs in general, and in this treaty process in particular may well depend in large measure on whether one believes that the securing of a strong treaty containing a comprehensive roadmap for international tobacco control was a positive outcome.²⁹

THE CREATION OF A STRUCTURED NETWORK OF NON-GOVERNMENTAL TOBACCO CONTROL ADVOCATES³⁰

Background

Prior to the World Health Assembly decision to sponsor an international treaty to combat the diseases and early deaths caused by tobacco use, most tobacco control NGOs acted at the national and local level and met at the international level infrequently to educate one another about advances in the science and new means of confronting the

tobacco industry. As the tobacco companies looked beyond their borders for new customers, however, tobacco control activists had to try to increase their collaboration on ways to confront the industry.³¹

An early collaborative effort was the bi- and triennial world tobacco control conferences, which brought together tobacco control advocates, scientists and policymakers from around the world. First held in 1967, they have continued to serve as useful venues for the exchange of scientific and advocacy information. The other more recent effort has been the use of the Internet. One cannot overstate the importance of the Internet to help level the playing field for civil society. It provides small and geographically dispersed NGOs the ability to counter the tobacco industry's misinformation campaigns quickly and at low cost. The Internet has allowed tobacco control groups to quickly disseminate information about the industry and its agents; answer each others' scientific, economic, and strategic questions; mobilize support and international pressure; and provide other technical assistance in a quick and efficient manner.³² The service vehicle that the tobacco control NGOs have mainly used is a service called Globalink, which provides closed list servs, a home page, a news clipping service and discussion venues.³³

The FCTC creates a need for a new network

Following the resolution passed by the World Health Assembly (WHA) in 1999, staff members of the Tobacco-Free Initiative (TFI) of WHO approached Action on Smoking and Health (ASH) in London with the offer of financial assistance in order to start an international coalition that would facilitate the involvement of NGOs in the FCTC. ASH contacted a number of prominent tobacco control groups who were

primarily focused on domestic tobacco control issues and enlisted them in the process of developing the coalition. These groups included the Campaign for Tobacco-Free Kids and the American Cancer Society in the United States, ASH Thailand, the International Non-Governmental Coalition Against Tobacco (INGCAT), Consumers Association of Penang (Malaysia) and others.

Early structural needs

The primary concern in the beginning was the creation of a working structure for this new alliance. A name was chosen that reflected the initial limited focus of the network, the Framework Convention Alliance (hereafter “FCA” or “Alliance”). At a minimum the Alliance needed a closed email conference and regional contact points to bring in new members and funnel information into the Alliance and out to the membership, and small working groups and individuals to take on tasks. The form that the Alliance ultimately chose turned out to be a form called a structured network.

A structured network was the appropriate vehicle because the Alliance was a geographically dispersed group with differing economic and skill levels. It covered 21 time zones and was made up of public health groups, environmental activists, women’s and children’s rights groups, consumer activists, corporate accountability groups, human rights groups, faith based groups and more. Some were from very wealthy western NGOs who could afford to devote two or three people full time to international tobacco control, but most were from small under-funded organizations for which tobacco control was only one of many issues. It wanted to work on a voluntary basis yet had to deal with a complex issue.³⁴ Like other such networks it had two overarching needs and possible outcomes: it needed to be a communication tool so that individual NGOs could learn

from each other and quickly disseminate information to each other about the negotiations but it also wanted to be a vehicle for action, enabling disparate groups to take joint actions either in parallel in home countries or as a lobbying bloc when in Geneva, Switzerland for negotiations. In fact, coordinated lobbying was one of the main reasons for forming the FCA.

Keck and Sikkink have defined advocacy networks as “forms of organization characterized by voluntary, reciprocal and horizontal patterns of communication and exchange.”³⁵ These organizations exchange information and provide a means of communication among participants so that they can develop a common language and frame issues for groups and [the] public. Framing, they argue, is particularly important as it is a “conscious strategic effort by groups of people to fashion and share understandings of the world and of themselves that legitimize and motivate collective actions.”³⁶

Groups join a coalition or network if they accept the general framework under which it operates and see that there are benefits to their own efforts by joining. The Alliance initially required that new members subscribe to a set of core principles. Over time and through the process of discussions and the development of trust and friendships, the Alliance was able to establish consensus-lobbying positions on over ten specific substantive provisions in the FCTC. The Alliance expressed this consensus through joint position papers and press statements.

Questions of representation

But addressing form was only the first organizational requirement, addressing questions of representation were equally important. The U.N. and the Alliance realized that to be truly effective the Alliance would have to reach out and recruit more members

from low and middle-income countries. A growing concern for civil society is its ability to achieve a balance in participation between NGOs from industrialized and those from developing countries.³⁷

In March of 2000, prior to the second working group of the FCTC, the FCA held its first official meeting in Geneva. At that meeting committees were formed to pursue agreed upon activities. In furtherance of the goals discussed with the WHO to bring into the movement as many NGOs from developing countries as possible, one of the first committees established was the fundraising committee. This committee was tasked with finding funds to provide money for developing country NGOs to attend the negotiations. Over time, an initial grant provided to the Alliance by WHO was supplemented with funds from the member organizations of the FCA, as well as grants from the Open Society Institute, the Canadian International Development Agency, Swedish International Cooperation Agency, and other sources. As a result the Alliance was able to fund the attendance of a minimum of 10 to 20 groups from developing country NGOs at the six negotiating sessions, called Intergovernmental Negotiating Bodies, or INBs.

In order to ensure that the widest range of NGOs and the most diverse number of countries and regions were represented, the Alliance established that:

- the office of the coordinator be located in a developing country, initially in the offices of ASH-Thailand,
- there would be no fees and no dues to ensure maximum participation by NGOs,
- the broadest possible outreach would be conducted to low and middle income country NGOs,

- money would be sought to bring developing country NGOs to the negotiations,
- money would be sought to support the national work of some advocates,
- workshops on advocacy and media skills would be conducted,
- lobbying, media advocacy and strategy planning training would be provided for the less experienced FCA members
- briefing papers would be developed by a policy committee and submitted to the membership for approval by consensus;
- materials, such as how-to manuals on FCTC participation would be produced and made available on the website, and
- decisions would only be taken by consensus.

What the Alliance members got in return was a world's worth of education; the ability to speak to regional delegations in their own voice and culture, an education for western NGOs on needs of other countries so that Alliance positions were based on actual needs and not just on Western perceptions; an alliance with incredibly brave countries; and a strong and potentially effective public health treaty.³⁸

Part III. Negotiations on the Framework Convention on Tobacco Control begin

As a consequence of globalization, governments must turn increasingly to international cooperation to attain national public health objectives and achieve some control over the transboundary forces that affect their populations.³⁹

This quote is especially true when the threat is to developing countries, the ones that have not been the prime beneficiaries of globalization and which are in fact often negatively affected by it.

In 1996, the 49th World Health adopted resolution WHA49.17, requesting the Director-General (DG) to initiate the development of a WHO FCTC.⁴⁰ It also requested that the DG “include as part of this framework convention a strategy to encourage Member States to move progressively towards the adoption of comprehensive tobacco control policies and also to deal with aspects of tobacco control that transcend national boundaries.” But it required the efforts of a new WHO Director-General, Dr. Gro Harlem Brundtland, to push it. On 24 May 1999, the World Health Assembly paved the way for multilateral negotiations to begin on a set of rules and regulations that will govern the fight against tobacco.

VARYING LEVELS OF COUNTRY SUPPORT FOR THE FCTC

From the beginning, delegates from many of the developing countries to the FCTC were interested in strong tobacco control measures and saw the necessity of banding together. For example, Dr. Srinath Reddy of India proposed a Global Convention of Tobacco Control to Dr. Brundtland (then only a candidate for DG) at the Oslo Consultation on International Health (28 June 1997) followed by a written submission in July 1997. India went on to play a major role in the negotiations and often spoke for the WHO South-East Asia region.

But not all countries endorsed the concept of a strong FCTC. There were in fact at least four categories of country actors each with varying degrees of domestic tobacco control and different agendas in Geneva.⁴¹

- high-income countries that had instituted strong tobacco control policies domestically and wanted to see such measures adopted internationally (Canada, Australia and New Zealand). In many cases, these countries took

positions consistent with public health proposals emanating from NGOs. And a few had NGOs on their delegations.

- low and middle-income countries who either had strong tobacco control measures in place or were considering enacting them. They believed that a strong FCTC could help them domestically and ensure international pressure for others to follow (South Africa, Thailand, Poland). Many of these countries spoke out in favour of strong provisions and helped form alliances within their respective regions.
- low income states with little or no capacity to institute effective tobacco control programs and who looked to the treaty process and other states for assistance in fending off the onslaught of the tobacco companies and their client countries (tobacco producing states of Africa such as Malawi, and small Asian states, such as Cambodia, joined important regional negotiating blocks).⁴²
- high income states, home to tobacco transnational companies, who took pro-tobacco positions and tried to weaken or derail the process (US, Germany and Japan).

NGO PREPARATIONS FOR THE NEGOTIATIONS

The Alliance came to the negotiations in Geneva determined to educate delegates about the science of tobacco and tobacco control, to lobby for an effective treaty and to work with the delegates to achieve that end. The Alliance first however, had to educate itself before it could educate the delegates. Most NGOs and country delegates who

attended were neophytes in international law and treaty making and almost as many needed education in tobacco science and tobacco control.

When the U.S. NGOs, for example, first became involved in the process, they held a series of workshops on how to be effective in negotiations.⁴³ Some of the guidance made clear by all the workshop facilitators included: “feed them and they will come” (delegates are on a small per diem); do a daily newspaper and be the source of information for the delegates; shame and blame delegation positions; do exquisite research and provide complete and detailed briefings, memo, pamphlets, etc; be available with drafters to help out small delegations (have a war room staffed with science and legal experts). When the Alliance came to Geneva it applied these lessons. It

- provided science-based talking papers supporting the key FCTC provisions, and legal expertise in exposing weakening language in the successive treaty drafts;
- produced a daily bulletin with news and analysis;
- held luncheon briefings in order to educate delegates on the etiology of tobacco caused diseases and the various elements of the FCTC;⁴⁴
- provided media advocacy experts to the FCA cause, and gained effective media highlighting of the FCA’s messages;
- brought to Geneva expert witnesses to persuade the delegates to support particular positions;
- furnished a death clock that WHO Director General Brundtland unveiled at a press conference prior to each INB to dramatize the lives at stake in producing a forceful FCTC; and

- helped mobilize flurries of international letters to key country political decision makers, when requested by members in recalcitrant countries.

These activities helped educate and assist small or understaffed delegations to the negotiations and provide legal and technical support to ally governments. Dr. Caleb Otto, Director of Public Health, Bureau of Public Health, Ministry of Public Health in Palau provided this analysis:⁴⁵

It was a long, long process, and lots of fights. Sometimes I felt very alone, I mean, who was I, from a small island nation, you know, to try to deal with people from Germany, from the United States, from Norway, from Japan. And so it was very difficult at times. And then I felt like it was not my fight. I'm not doing it alone. There are many, many, many people who are doing it. And I have to say that the NGOs really had a great deal of part in my fight for it. They gave me lots of courage all the time, during the INBs. They're always there to give me support...

FORMAL NEGOTIATIONS BEGIN

The most difficult and generally the longest sub stage in formulating a new instrument is that required to negotiate its terms and text. It is this part of the process that is most clearly political, in that it involves the mediation of the various interests concerned: those that favour a strong and those that favour a weak instrument; those that desire a wide and those that prefer a narrow approach; those that prefer different approaches based on scientific perceptions or legal habits; and especially those that may wish to obtain resources from the proposed

regime and those that might have to contribute resources in order to make such a regime feasible and acceptable.⁴⁶

The work of the negotiations occurred during six Intergovernmental Negotiating Body meetings (“INBs”), starting in October 2000 and ending in March 2003.⁴⁷ A large number of countries attended each of the six negotiating sessions (on average 150-170 countries) indicating a high level of interest and state participation. The first three to four INBs helped identify the important issues and schisms and key proponents of each. The last two or three sessions involved the hard bargaining. A major and primarily a divisive role was played by the U.S. delegation particularly after INB 1 when the Bush administration policies took office.

The negotiating sessions covered a plethora of issues that were contained in the draft text, e.g. product regulation, education, prevention and cessation, second hand smoke, etc.⁴⁸ But two of the issues that produced the most contentious disputes and helped forge alliances between like-minded nations and NGOs were the regulation of advertising and the question of the relationship between trade treaties and public health concerns. These two issues emerged at the first negotiating session, at which many countries urged that the FCTC include a complete ban on tobacco advertising and promotion. The Clinton administration, which could not support a total advertising ban due to constitutional concerns, instead posited a provision that would prohibit tobacco advertising, which appealed to kids.⁴⁹ The initial draft text of the treaty also contained a trade provision that would have prioritized health concerns subservient to trade concerns, sparking much concern amongst developing countries.

Responding to what it could foresee would be contentious issues in the negotiations, the Alliance produced briefing materials relevant to these topics, held luncheon briefings for delegates to educate them on the scientific and or legal basis for provisions that would advance public health objectives and started drafting and providing alternative text language for delegates to consider.⁵⁰ At each INB, the Alliance produced side-by-side analyses of the draft text giving the Alliance's preferred language with rationales. The delegates began to become familiar with the Alliance and its work and to overcome their suspicions about civil society. Many developed relationships with individual Alliance members so that information and intelligence could be exchanged in both directions.

Before each negotiating session, WHO organized meetings of the WHO regional groupings.⁵¹ Although countries in these groups often had differing views on what measures the FCTC should contain, having them meet in the regional did allow some strong countries and strong voting blocs to emerge, for example, Thailand and India emerged as strong regional forces in the SEARO region which would be important to the negotiations. But perhaps the most important regional grouping was the AFRO group:

...AFRO was a region, and I met with my colleagues from the other 45 African countries as part of that. And we discovered that we were at something of a disadvantage in terms of how we didn't have international treaty making experience, and how not all of us understood tobacco, and tobacco control in the same way. So South Africa hosted a meeting in Johannesburg for four or five days to get positions together.

...what in fact did come out of the meeting was that we discovered that we had far more in common than what divided us. And even though we have countries that produce tobacco, we found that we had things in common. And so we made it, we issued a statement at the end of that meeting that Africa would henceforth speak with a single voice. [Johannesburg Declaration on the FCTC 14 March 2001]

[So at INB 2]... And I remember very clearly, clearing my throat, and then saying, I'm speaking... for South Africa, but I'm speaking on behalf of the 46 member states of the AFRO region. And I just felt the whole room become silent. And people's heads began to turn around. I just continued speaking but when I unpacked it afterwards I realized that if ever it came to a question of voting, there ... were 191 at that stage, now there are 192 member states. So 46 of that is almost a quarter of the house. If we then could get consensus on the issues that were important to us, if ever it came to a vote, we felt that we would carry a great deal of power against other countries that perhaps were not looking for such stringent tobacco control as we were.⁵²

The countries of AFRO remained a potent voting bloc and several countries from that region, primarily South Africa and Cote d'Ivoire, became staunch allies of the Alliance.

INB-2 was the first negotiating session attended by a delegation answerable to the Bush administration. At the first INB, the U.S. delegation under the Clinton administration had presented some pro-health positions. Under the new administration, the delegation in Geneva received instructions for a radical mid-course change. Following the directions of the new director of the U.S. Office of Global Health Affairs,

the U.S. delegation repeatedly made proposals that would have weakened critical provisions of the convention and severely undermined its potential to reduce the death and disease caused by tobacco around the world. The proposals sounded more like those of the tobacco industry and not of the world leader in public health. This should not have been surprising; the tobacco industry had invested many millions in campaign contributions to Republicans during the elections.⁵³

From the point of view of the NGO community the bright spot in the negotiations was the ability of the AFRO group to continue to speak as a block; for the first time supporting a total ad ban along with SEARO. Thailand and India continued to be reliable voices for strong treaty language. Australia, Canada, and New Zealand also expressed progressive positions.

U.S. members of the Alliance decided that the U.S. delegation and its positions needed to become a major focus of their efforts. These NGOs reported on U.S. positions to the media and to friendly Congressional offices. The idea was not only to put pressure on the Administration but also to highlight for other delegations that the U.S. actions did not represent the best public health positions. For example, following the first round of negotiations attended by Bush administration officials, Congressman Henry A. Waxman (Democrat Los Angeles)⁵⁴, in the first of many broadsides against the Administration's position during negotiations, accused the Bush administration of marching in lock step with Big Tobacco to undermine or eliminate serious global regulations to curb tobacco use. "It's either an eye-popping coincidence or a testament to the insidious influence that Philip Morris has on the Bush administration," said a letter from Waxman to the president. "The president's negotiators promoted 10 of 11 deletions requested by Philip

Morris.... The appearance is awful... The president should instruct his delegation to put public health ahead of the interests of Philip Morris.”⁵⁵

U.S. NGO’s used the Waxman letter to follow up with the media to expose the U.S. position at the negotiations. They also sought to capitalize on the resignation of the chief of delegation who had served under Clinton to highlight the change in U.S. position. They then circulated media stories about the resignation via Globalink to NGOs in other countries for use in their efforts to diminish the effect of U.S. positions and pressure. The following editorial from the *Boston Globe* summarized the situation well:

... the resignation of the top American official working on an international treaty to reduce cigarette smoking worldwide raises concern about the future of the U.S. position on this critical health issue. Thomas E. Novotny, a public health specialist and strong advocate for tobacco control, led the U.S. delegation to the WHO FCTC during the Clinton and Bush administrations. ..Novotny had reportedly been frustrated over the Bush administration’s softened stand on key issues, such as restrictions on secondhand smoke and the advertising and marketing of cigarettes.

In this context, the controversy created by Novotny’s resignation comes at a time when the United States has been denying charges that it has changed its position on a number of critical issues and international negotiations, such as the Kyoto Protocol on global warming, the Germ Warfare Accord, and the anti-Ballistic Missile Treaty. According to U.S. Rep. H A Waxman....the Bush administration is orchestrating a breath-taking reversal in U.S. policy, going from global leader on tobacco control to pulling back and advocating the tobacco

industry's positions. The U.S. should assure all countries involved in these negotiations that it is serious about its efforts to curb tobacco use. This is a golden opportunity to prove that the Bush administration is working for not against public health.⁵⁶

At INB-3, the United States used states' rights arguments as a defense against stringent requirements on most substantive issues and to argue that it could not support language requiring federal legislative action.⁵⁷ It sought to weaken key provisions but developing countries took strong positions and succeeded in keeping them under consideration as the negotiating process moved forward. Again, the AFRO block ensured that countries too often marginalized in international negotiations were represented and heard. Their representation also dispelled the tobacco industry's argument that poor countries somehow have more important things to consider than the tobacco epidemic.⁵⁸

The debate on trade surfaced as a real threat to the forward movement of negotiations. Although a majority of countries appeared to want a provision in the treaty that would have prioritized health concerns over trade treaties when those conflict, the United States wanted to retain a provision that in effect gave preference to trade treaties. Their favored language stated that "parties agree that tobacco control measures shall be transparent, non-discriminatory and implemented in accordance with their international obligations."⁵⁹ Although this language appears conciliatory, it ensures that international trade obligations (e.g. existing trade treaties) would continue to predominate.

Because of the importance of the trade language, the Alliance, in addition to producing a wealth of written materials, felt it needed to bring an expert to Geneva to

speaking to this issue. As a result, it asked Ambassador Ira Shapiro to attend the negotiations. Ambassador Shapiro had served as general counsel and chief negotiator with Japan and Canada in the Office of the United States Trade Representative under President Clinton. At the FCTC negotiations, he conducted luncheon briefings, one on one discussions with delegations, and even addressed the negotiating body itself. Ambassador Shapiro's powerful presentations helped force the removal of the provision that the U.S. favored and the inclusion in the preamble of health primacy language.

AFRO continued to be a major force for a strong and effective treaty. Its ability to maintain loyalty and cohesiveness among its members made it a target for countries favouring a non-binding and weak treaty. The AFRO meeting following INB 3 was held in Cote D'Ivoire and AFRO held firm on its strong positions and continued the practice of francophone and anglophone Africans meetings together. The importance of this was underlined by Patricia Lambert:⁶⁰

There was pressure on all of us from many different regions [in answer to a question did you get pressure from the US]. One of the tactics that was tried early on was to attempt to persuade the francophone countries that they had some special issues, which the anglophone issues weren't dealing with. And my colleague from Senegal was approached to attend specifically francophone meetings. And he said that this isn't a language issue. It's about tobacco control, and the last time I looked the cigarette sticks were the same in any language. And so we thwarted those attempts that were made by communicating with one another, by being very open and honest and transparent in our dealings with one

another. And I think that over the six meetings we built levels of trust that I think were quite unique.

THE END GAME

NEGOTIATIONS BEGIN IN EARNEST

As with any negotiations, the tough negotiations began during the last two or three sessions but these presented the NGOs and allied governments with a problem. A new chair was elected to guide the negotiations and he advocated and adhered to a policy holding that no provisions would be accepted for the draft text without consensus of all those attending. This gave a small number of dissenting countries, such as the United States, an extraordinary amount of power to disrupt the negotiations.

At INB5 the United States, Germany, Japan, and Turkey became quite vocal in their opposition to language that would unequivocally place health concerns over trade policies. Perhaps to placate those countries, WHO weighed in with an opinion that Article XXb of the GATT (language similar to that proposed by the U.S.) was sufficient to protect health.⁶¹ However, the SEARO region and Pacific Island countries continued to push for an explicit health over trade provision.⁶²

On advertising the Chair's text, instead of recognizing the overwhelming support for a total ad ban that emerged in INB-4, used weak language to promote the protection of "vulnerable groups" from advertising. The U.S. delegation maintained that a total advertising ban was a "red line they would not cross," and would not sign or accept any treaty with an ad ban provision, even if there were exemptions for countries with constitutional constraints.⁶³ Ireland spoke for 24 countries and supported an ad ban on all direct and indirect advertising leaving Germany isolated in the European Union, while

AFRO, SEARO,⁶⁴ and Pacific Island countries held firm to total ban. The World Bank also intervened in the negotiations, saying a total ban was an essential component to reduce the harm of tobacco.

The chair's handling of the negotiations led to several heated debates among delegates and NGOs. They argued that the emphasis on consensus was a trap, ensuring that the treaty would become a race to the bottom.

NGO access to the negotiations was severely curtailed, as deliberations moved from open, "general" sessions to closed "informal" sessions. NGOs began to rely heavily on allied delegations for information about the content of closed meetings, getting copies of textual proposals from these delegates and asking them to act as "conduits" to the negotiations with text and analyses. They used a war room with roving lobbyists with walkie-talkies to respond rapidly to problematic textual proposals and arguments; used advocates and experts like Ira Shapiro to meet with individual delegations and created on-the-spot analyses of each new textual proposal as well as providing new text language. Dr. Caleb Otto of Palau applauded the role that NGOs played:⁶⁵

The United States was, or whether they intentionally tried to intimidate [us], or were just intimidating by who they were, and who they brought with them, you know like lawyers, very good eloquent speakers, people who knew about the law, international law....It was hard for us to always know whether or not we were being derailed by laws, or whether there was some truth that we needed to understand. This is where I think the NGOs ...help[ed] us know what the law was about, or where... there was truth or untruth in what the U.S. was saying.

For instance, ...one of the... tactics that the United States delegation used was to say our constitution cannot allow us to do this.... And so this is where the NGOs were able to help us and say it is not entirely correct that the constitution does not allow [it]. And [the NGOs] would give us examples on ... the constitution, or .. federalismAnd we had some assistance from the NGOs to say there are instances where the federal governments [has taken action, for example on] highway traffic issues, the federal government was able to get the states to behave by saying we can give you certain money if you did this, if you want money for your highways.

The last negotiating session, INB6, was held 17 February to 1 March 2003. It began with a new and final chair's text. The chair's text outraged NGOs, as well as AFRO, SEARO, and Pacific Island countries by omitting reference to widespread support for a total ad ban. Instead, the draft reflected the much weaker positions taken by the United States and favored by the tobacco industry. At U.S. and Chinese' insistence, NGOs were shut out from all substantive negotiating sessions. NGOs received information from friendly delegations from AFRO, SEARO, and Pacific Island countries. NGOs took to picketing and street theatre outside negotiating rooms, while maintaining good contacts with friendly delegations, providing language and rationales to prop up delegations involved in trench warfare negotiations.

This last negotiation session was contentious, reflecting the deep divisions between voting blocs. After three years of negotiations, the treaty was in danger of ending up as a weak and pre-emptive document that would discourage countries from

going beyond what was contained in the text. Much of this was a result of the U.S. government's increasingly heavy-handed obstructionist efforts to weaken the treaty.

In frustration, the U.S. NGOs called a late night meeting to debate future actions. Early the next morning, they held a press conference calling on the U.S. to stop supporting the interests of Philip Morris over public health. U.S. NGOs called on the U.S. government to withdraw from FCTC negotiations rather than continue to undermine the efforts of the rest of the world to adopt a strong treaty. The American Cancer Society, the American Heart Association, the American Lung Association, and the Campaign for Tobacco Free Kids made the demand citing heightened U.S. efforts to water down nearly every provision of the treaty:

- Matt Myers, President of the Campaign for Tobacco-Free Kids: “The U.S. has...played the role of obstructionists, suggesting weakening amendments and ineffective proposals, and strong arming other delegations to support them. Rather than protecting public health, they have continuously chosen to protect the tobacco industry.”
- Al Munzer, Past President of the American Lung Association “The U.S. government has demeaned the value of ... the U.S. Constitution, by using it to defend its opposition to a ban on tobacco advertising.”
- John Seffrin, the Chief Executive Officer of the American Cancer Society “At this crucial juncture, the United States government is working methodically to weaken virtually every aspect of this treaty. This is unconscionable. We call on the U.S. government to observe the first rule of the Hippocratic Oath: do no harm. The time has come for the U.S. to stand aside and allow the rest of

the world to complete a treaty strong enough to change the course of the tobacco epidemic.”

Taking advantage of relationships built over the years of negotiations, the NGOs asked a delegate to the treaty to speak at a press conference to give evidence of the U.S. government’s bad behavior. Hatai Chitanondh of the Thai delegation told reporters about U.S. threats to delegations to accept weakened positions or risk losing U.S. aid. The story caught the media’s attention and was picked up by outlets from all over the world. Counting on the reputation that NGOs had achieved with delegates, the Alliance gave copies of the press statement to all the delegations so they would understand that the U.S. negotiators did not represent the views of the U.S. public health community. Bolstered by this support, the countries finished negotiations and finalized a strong and comprehensive treaty, including a comprehensive ad ban, one that the U.S. strongly opposed. But the U.S. was not defeated yet. It spoke angrily at the final negotiating session and vowed to get the treaty changed before it could be finally adopted. Its objections were legion and included statements that:

- The required minimum health warning size was unacceptable,
- The U.S. could not accept a prohibition on sales to or by minors, citing federalism concerns,
- It objected to the language referring to “indigenous individuals and communities” citing it as an unrecognized formulation in international law,
- It objected to advertising, sponsorship and promotion definitions as being too broad, citing constitutional concerns, and

- It was unwilling to sign a treaty that would not allow the U.S. to take reservations.

Early in the morning on 1 March 2003 the countries, fed up with U.S. intransigence, finally agreed to a strong and comprehensive treaty. But, the U.S. still had two months in which to weaken the treaty before the final adoption by the World Health Assembly.

Three weeks before the countries were to meet in Geneva to finalize the treaty, the U.S. acted to carry out its threats. Derek Yach, of the World Health Organization, alerted U.S. NGOs that the U.S. government was sending a communiqué to every government that had been involved in the negotiations, demanding changes that would significantly weaken the treaty, including the insistence that reservations be permitted, i.e. a country could opt out of any provision it found unacceptable. The communiqué contained an implicit threat that the U.S. might withhold its continued support for funding a variety of international tobacco-related activities if changes were not made

After the NGOs got a copy of the communiqué, they provided it as an exclusive to the Washington Post to garner the most media attention:

U.S. seeks to alter anti-tobacco treaty: Reservations clause sought as way out of some provisions. The Bush administration says it needs the “reservations” clause to ensure that the U.S. could disregard treaty requirements it considered constitutionally questionable. But anti-tobacco activists and foreign diplomats say the demand is an attempt to water down the treaty to benefit tobacco companies or to unravel the agreement entirely.

“I think it is impossible to reach a consensus, and this could easily be the end of the entire tobacco convention,” said Belgian negotiator Luk Joossens. “If you

open one article, it will encourage other nations to open articles they don't like. And if the reservations are included, then crucial aspects of the entire effort will be weakened. There is a lot of anger in so many countries about this American action.”

The treaty also includes tobacco-control programs that require considerable funding. The U.S. has been the largest donor to that effort, and some delegates said they believed that U.S. was using the threat of cutting off its funding to persuade to vote for its positions...William Pierce, spokesman for HHS- said the “primary concern of U.S. negotiators is that parts of the treaty could prove to be unconstitutional by interfering, for instance, with tobacco companies free speech rights. ...Senate Democratic leader Thomas A Daschle and House Democratic leader Nancy Pelosi said in a letter to the Administration “In contrast to these public statements, your Administration went to great lengths to weaken many important provisions of the treaty,... In addition to advancing weak language, the U.S. delegation also inappropriately pressured other nations to adopt U.S. positions.”⁶⁶

The story was picked up by print media and networks across the United States and was so compelling that Ellen Goodman, syndicated columnist for the Boston Globe, wrote a powerful column.⁶⁷

The U.S. NGOs immediately circulated the stories to Alliance members around the world and encouraged them to communicate directly with their governments to urge them to reject U.S. demands. The media attention was so intense that Ari Fleisher,

former press secretary for the Bush administration, had to answer questions at a White House press briefing about the position the U.S. had taken on the treaty.

All of the U.S. media attention prompted governments around the world to speak out in support of a strong treaty. The publicity made it impossible for the U.S. to pressure individual governments behind closed doors. When the U.S. efforts became a public issue, the countries that had supported the treaty began to unify in their opposition to it. By the end of the week, the United States recognized that it had no international support for its effort and was totally isolated.

When the countries finally gathered in Geneva on 21 May 2003 to vote to adopt the treaty, there were no dissents. Health and Human Services Secretary Tommy Thompson, head of the U.S. delegation, announced its capitulation and announced it would support the treaty. A strong and comprehensive treaty, containing a roadmap for countries to follow to enact effective tobacco control measures, was adopted by consensus.

A little over a year later, on June 29, 2004, when the treaty closed for signature, 167 member states, nearly 90% of the countries, had signed and over half the ratifications required for entry into force had been garnered. The FCTC has become one of the most rapidly embraced UN conventions. Expectations were that the treaty would achieve the required 40 ratifications before the close of 2004.

Part IV. Conclusion

This paper attempted to describe the events that led to the building of an effective alliance of a network of NGOs and states that felt victimized by U.S. pressure. This alliance was successful, during the negotiations of the FCTC, in thwarting U.S. attempts

to force a weak and ineffectual treaty on the negotiators. Although the case study dealt with the interaction between NGOs and nation states in a discrete negotiation, I would like to endeavor to generalize beyond the specific facts.

There is no doubt, as this case study shows, that U.S. and foreign NGOs in alliance with other state and non-state actors can have a substantial impact on short term outcomes. This clearly occurred in this case. Whether there will be long-term outcomes is yet to be seen. However, in the narrow sense the treaty, even without U.S. approval, is highly popular. By the time the treaty closed for signatures, 168 countries had signed, approximately 90% of the possible countries and the 40th ratification was secured on November 30, 2004. The treaty went into effect on February 28, 2005.

One could argue that the U.S. failure to impose its will in this case results from the secondary importance of this treaty to the Bush administration, which does not oppose public health per se; but it merely gave primary concern to the trading freedom of one of its largest exporters instead. Thus, the loss did not undermine important Administration objectives.⁶⁸

One could also posit that timing played a major role in the force with which the opposing countries held firm. INB-6, when the final coming together of resolve and frustration produced a strong treaty, was during the weeks leading up to the second Iraq war. It is fair to suggest that many countries took out their anger and feelings of impotence at being unable to avert U.S. plans to invade Iraq with an anti-U.S. vote during this negotiation.

Finally, although U.S. desires were thwarted in much of the final language of the treaty, in those areas that were most central to U.S. needs because they implicated areas

over and above tobacco, for example the language on trade, the U.S. either prevailed or was able to practice significant damage control. The final negotiated outcome on trade-- basically silence with pro health preambulatory language-- did not achieve U.S. goals of trade primacy language but it did thwart the desired language favored by the vast majority of delegates for health primacy language.

Nonetheless, the final treaty represents a significant step forward for global public health, both in the provisions contained in the document and the catalyst it provided to energize and unite a new civil society force for change. Whether it represents a significant defeat for U.S. policy is yet to be determined but for the countries involved in this negotiation, and the civil society that supported them, the defeat was real and justly deserved.

¹ Thanks must be given to Mike Pertschuk cofounder of the Advocacy Institute and guru to all tobacco NGOs around the world. He helped our coalition with strategy, organization and wisdom and helped us realize our dream. Many of the thoughts and words in this article are his.

² Starkey B, Boyer M, Wilkenfeld J; Negotiating a Complex World, An Introduction to International Negotiation, (New York: Rowman and Littlefield Publishers, Inc. 1999), p 61.

³ Starkey, et.al. p. 62.

⁴ This unlikely alliance also benefited enormously from WHO and World Bank assistance, from information and materials to moral support and statements on the floor of the negotiations.

⁵ "Tobacco Free Initiative," World Health Organization, 2004.
<http://www.who.int/tobacco/about/en/>.

⁶ See generally, USDHHS, PHS, Office of the Surgeon General, The Health Consequences of Smoking, A Report of the Surgeon General, 2004; Campaign for Tobacco Free Kids, "Health Harms from Smoking and Other Tobacco Use" www.tobaccofreekids.org.

⁷ Katharine Esson, "The Millennium Development Goals and the WHO FCTC – An Opportunity for Global Partnerships,: Presentation at FCTC IGWG, 21 June 2004. http://www.who.int/tobacco/areas/communications/events/en/mdgs_tobaccocontrol.pdf, 21 August 2004.

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- ⁸ Esson, slide 17.
http://www.who.int/tobacco/areas/communications/events/en/mdgs_tobaccocontrol.pdf
- ⁹ Kiernan VG, *Tobacco a History*, (London: Hutchinson Radius, 1991).
- ¹⁰ Yach D, Wipfli H, Hammond R, Glantz S. "Globalization and Tobacco" in *Globalization and Health*. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.
- ¹¹ World Bank, *Curbing the Epidemic: governments and the economics of tobacco control*,. Development in Practice, Washington DC, 1999; Peto, R., Lopez, AD, Boreham, J, et al, "Mortality from Smoking Worldwide," *British Medical Bulletin* 52(1996) 12-21.
- ¹² Yach D, Wipfli H, Hammond R, Glantz S. "Globalization and Tobacco" in *Globalization and Health*. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.
- ¹³ Eryn Brown, "The World Health Organization Takes on Big Tobacco (But Don't hold Your Breath) Anti smoking advocates are mounting a global campaign. It's going to be a long, hard fight." *Fortune*, September 17, 2001.
- ¹⁴ Patricia Lambert, legal advisor to the South African Minister of Health and head of the South African delegation to FCTC. The quotes are from an interview that she gave to INFACT in preparation of their movie "Overcoming the Odds: A Story of the First Global Health and Corporate Accountability Treaty." 2004.
- ¹⁵ "Tobacco Free Initiative" World Health Organization, 2004.
<http://www.who.int/tobacco/about/en/>; Scarce family resources are spent on tobacco products instead of on food, or essential needs. "If poor people did not smoke... potentially 10.5 million fewer people would be malnourished in Bangladesh: quoting Debra Efroymsen, et al., *Hungry for Tobacco: An Analysis of the Economic Impact of Tobacco Consumption on the Poor in Bangladesh*. Joy de Beyer, Chris Lovelace, Ayda Yurekli, "Poverty and Tobacco" *Tobacco Control* 2001: 10:210-211; Joy de Beyer & Linda Waverley Bridgen eds., *Tobacco Control Policy: Strategies, Successes and Setbacks* (2003) p. 10.
- ¹⁶ Economic & Social Council, <http://www.un.org/esa/coordination/ecosoc/>; Item ... of the provisional agenda, Tobacco or Health, Ad hoc Inter-Agency Task Force on Tobacco Control, Report of the Secretary-General, June 8, 2004. Substantive session for 2004, New York, 28 June-23 July 2004.
- ¹⁷ Thalif Deen, "Smoking Chokes Progress on U.N. Millennium Goals," *United Nations*, Jun 8, 2004 (IPS).
- ¹⁸ Thalif Deen, "Smoking Chokes Progress on U.N. Millennium Goals," *United Nations*, Jun 8, 2004 (IPS).
- ¹⁹ Taylor, A, Chaloupka, F, Guindon, E, Corbett, M, "The Impact of Trade Liberalization on Tobacco Consumption," in. *Tobacco Control in Developing Countries*, Jha P. and Chalupka F. eds, (Oxford, Oxford University Press 2000). p 356-8.
- ²⁰ Glen Frankel, National Bureau of Economic Research, "US Aided Cigarette Firms in Conquests Across Asia," *Washington Post*, 17 November 1996.
- ²¹ Roemer R, *Legislative Action to Combat the World Tobacco Epidemic*, Geneva, WHO 1993 in Yach D, Wipfli H, Hammond R, Glantz S. "Globalization and

Tobacco” in Globalization and Health. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.

²² Ira Shapiro, “Treating Cigarettes as an Exception to the Trade Rules,” SAIS Review, A Journal of International Affairs, 22, 1 (2002), pp. 87-96.

²³ EXECUTIVE ORDER FEDERAL LEADERSHIP ON GLOBAL TOBACCO CONTROL AND PREVENTION January 18, 2001; Thursday; However, regardless of the posture of the incumbent administration, the most visible U.S. presence internationally has remained that of Philip Morris. Philip Morris, the U.S. based tobacco transnational, manufactures the world’s most smoked brand, Marlboro. Between 1994 and 1997, Philip Morris increased its sales by more than 1/3rd with 3/4^{ths} of those being outside the U.S. Alliance Bulletin, INB-2, 1 May 2001, page 2 (source Physicians for a Smoke Free Canada/ Commonwealth Medical Assn). More specifically, in the first half of 2004, Philip Morris International lost volume in Western Europe by 9%, but more than made up for that loss with gains of 9% in Eastern Europe, the Middle East and Africa and 4% in Asia. It is this face of America that most people around the world, especially in developing countries, see. Remarks by Andre Calantzopoulos, President and Chief Executive Officer, Philip Morris International, Inc. at the Pan European Strategic Decisions Conference, September 29, 2004, London, UK.

²⁴ Chitra Subramaniam, Tobacco Free Initiative- World Health Organization, 2003 personal communication.

²⁵ We the People: Civil Society, the UN and Global Governance: Report of the Panel of Eminent Persons on UN-Civil Society Relationship- June 7 2004 A/58/817 pp. 7-8.

²⁶ “We the peoples: civil society, the United Nations and global governance”, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, June 2004, p. 28.

²⁷ Elaine L. Chao speech, The Federalist Society, 21st Anniversary, National Lawyers Convention Session Nov. 14, 2003 <http://www.ngowatch.org/ChaoAddress.pdf>. See also, Gary Johns “The NGO Challenge: Whose Democracy is it Anyway?”, Institute of Public Affairs, Australia; American Enterprise Institute; Jarol Manheim, Biz-War: Origins, Structure and Strategy of Foundation- NGO Network Warfare on Corporations in the United States, June 11, 2003.

²⁸ Lambert 2004.

²⁹ Civil society was not alone in wanting to be a part of this negotiation. Many in the tobacco industry also wished to be represented. Although many rejected the FCTC, most tobacco industry representatives tried to portray themselves as wanting to ‘engage’ WHO and to work together with the health community. In their oral submission to the FCTC, BAT said, “...we are not some insensitive monolith” and Philip Morris stated that they, “support national governments efforts to provide for sensible and effective regulation of cigarettes.” However Derek Yach, Project Manager of the World Health Organization’s Tobacco Free Initiative, in a press conference after the public hearings queried the tobacco industry’s sincerity and called on the industry to stop lobbying finance ministries and running intense briefings. Others have described the tobacco industry’s desire to participate as no different than asking the mosquito or other disease vector to attend a discussion of the disease.

³⁰ The history of the Framework Convention Alliance is based on personal recollections of members of FCA, notes taken at meetings, FCA Alliance Bulletins, email traffic etc.

³¹ Yach D, Wipfli H, Ha Yach D, Wipfli H, Hammond R, Glantz S. “Globalization and Tobacco” in Globalization and Health. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.

³² Yach D, Wipfli H, Ha Yach D, Wipfli H, Hammond R, Glantz S. “Globalization and Tobacco” in Globalization and Health. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.

³³ The Advocacy Institute developed Globalink for the American Cancer Society in the early 1990's as an international counterpart to the Advocacy Institute's domestic advocacy network, SCARCet (Smoking Control Advocacy Resource Center.) The International Union Against Cancer (UICC headquartered in Geneva Switzerland) volunteered, in about 1995, to take over the funding and management for Globalink.

³⁴ The discussion on structured network is based in large part on a draft of a discussion paper prepared by Jeremy Brecher, Tim Costello, Suren Moodliar, and Kim Folz entitled “Making Social Networks Work” (The North American Alliance for Fair Employment), www.fairjobs.org , 23 April 2004.

³⁵ Keck M and Sikkink K, *Activists Beyond Borders* (Ithaca, Cornell University Press, 1998) p. 8.

³⁶ Keck p. 3

³⁷ See Roundup- UN Non-governmental Liaison Service We the People: Civil Society, the UN and Global Governance: Report of the Panel of Eminent Persons on UN-Civil Society Relationship NGLS Roundup 113, June 2004.

³⁸ Following the adoption of the treaty by the World Health Assembly in May, 2003, the Framework Convention Alliance voted to become an incorporated non-profit in Geneva, Switzerland and to apply for accreditation to WHO. The Alliance is actively involved in ratification and implementation efforts around the world, running workshops for advocates and government officials, providing the infrastructure for monitoring and watchdogging the treaty's compliance in the countries that have ratified, and continuing advocacy and lobbying work on the subsequent protocols to the treaty.

³⁹ Allyn Taylor, “Global governance, international health law and WHO: looking towards the future,” *Bulletin of the WHO*, 80 (12), 975-980.

⁴⁰ “The FCTC is a “framework convention” that establishes the framework for an ongoing diplomatic process to reduce the global public health threat posed by tobacco consumption. The intention is for the states parties to the FCTC to negotiate [subsequent] protocols on specific issues connected to global tobacco control, such as tobacco advertising, promotion, and sponsorship; tobacco-product regulation; illicit trade in tobacco; and liability. [citation omitted] As with the “framework-protocol” approach taken in certain international environmental treaties, the strategy in the FCTC contemplates progressive development of the international law on tobacco control.” David P. Fidler, “World Health Organization's Framework Convention for Tobacco Control,” *ASIL Insights*, March 28, 2003, <http://www.asil.org/insights/insigh100.htm>

⁴¹ Yach D, Wipfli H, Hammond R, Glantz S. “Globalization and Tobacco” in

Globalization and Health. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.

⁴² Questions were raised throughout the negotiation about the propriety of including non transboundary issues in the treaty (e.g. warning labels, smoke free environments, advertising bans). The successful conclusion of the treaty negotiations undoubtedly answered that question. As noted in the text, many low and middle income countries felt that they needed the protection of an international treaty in order to proceed with a domestic tobacco control agenda. Many, if not most, of these countries have smaller GDPs than the annual operating budgets of the transnational tobacco companies, and are often intimidated by the economic might of the industry or fall prey to corporate corruption. In addition, however, many of the treaty's provisions implicate purely transboundary issues, e.g. smuggling, economic and scientific cooperation, or have transboundary implications, e.g. although advertising may be purely intrastate there is an emerging problem of transboundary advertising provided by the Internet, satellite TV and radio etc.

⁴³ When the U.S. NGOs organized this workshop (Sept. 5, 2000), they had no preconceived notions. In fact, because the Clinton administration had taken such a strong stand on domestic tobacco issues they expected the U.S. government to be an ally during negotiations. Representatives from NGOs who had been involved in various treaty negotiations were asked to participate. They came from work on Persistent Organic Pollutants (Framework Convention on Climate Change), Rights of the Child, Landmines Treaty and International Criminal Court and they were asked to tell the NGOs all that they knew.

⁴⁴ The technical seminars and the distribution of information over the years evolved into what former WHO executive director for Non-communicable Disease and Mental Health, Dr. Derek Yach called "the best university of global tobacco control." Simpson B, "Smoke Out!" Johns Hopkins Pubic Health, Spring 2003. From Yach D, Wipfli H, Hammond R, Glantz S. "Globalization and Tobacco" in Globalization and Health. Ichiro Kawachi, Editor. (London: Oxford University Press, 2005) forthcoming.

⁴⁵ The quotes are from an interview that Dr. Otto gave to INFACT in preparation of its movie "Overcoming the Odds: A Story of the First Global Health and Corporate Accountability Treaty." 2004

⁴⁶ Szasz, P. "International Norm-Making," in Edith Brown Weiss, Environmental Change and International Law: New Challenges and Dimensions (UN University Press 1992) p. 49.

⁴⁷ Prior to the beginning of formal negotiations, WHO organized two pre-negotiation "Working Group" meeting in Geneva to review a WHO-produced treaty document. The first working group was held from 25-29 October 1999 and the second from 27 to 29 March 2000. Due to lack of funding support, the first meeting was poorly attended (only 89 countries) and low and middle-income countries were significantly underrepresented. The U.S. played a constructive role (under the Clinton administration) and suggested (along with other countries) that a second working group would be necessary to ensure that low and middle-income countries had input. WHO organized a second WG meeting and funding was provided to ensure more participation. 115 countries attended the second meeting. The working group outcomes were reported back

to the World Health Assembly, which passed Resolution 53.16 calling for negotiations to begin.

⁴⁸ For the sake of brevity, this paper includes a discussion of only two of the many important issues negotiated. However, many of those not included were as important or more important to comprehensive and effective tobacco control. For example, two of the most effective tobacco control measures that a country can enact (from a preventative and cessation perspective) are high tobacco taxes and smoke free environments. Both of these issues are covered in the treaty but in provisions with enough leeway to be adaptable to each country's needs. Smuggling, duty free products, and cross border advertising were debated extensively and although included in the treaty, specificity is being left for future protocol discussions. Other issues, such as litigation (class action lawsuits, punitive damages, contingency fees) were determined to be too specific to the varying legal systems of each country to be included in any detail.

⁴⁹ The United States consistently and persistently argued that its First Amendment protection of freedom of speech applied to the commercial speech of tobacco companies. Basically, its argument was that the government may regulate speech that is deceptive, untruthful etc., but may not ban truthful commercial speech except under certain constrained circumstances. Thus, it argued it would be unable to be a party to a treaty that called for a total ban. Early on these concerns were taken into account and a "carve out" (variously worded) for countries with constitutional limitations was created. The U.S. never accepted this as a satisfactory articulation, even though it meant that the ad ban provisions would not apply to the United States if it were to become a party.

⁵⁰ See generally, "Global Initiatives," Campaign for Tobacco-Free Kids, <http://www.tobaccofreekids.org/global>: How do you Sell Death? (<http://www.tobaccofreekids.org/campaign/global/FCTCreport2.pdf>); Trust Us We Are the Tobacco Industry (<http://www.tobaccofreekids.org/campaign/global/framework/docs/TrustUs.pdf>); Golden Leaf, Barren Harvest (<http://www.tobaccofreekids.org/campaign/global/FCTCreport1.pdf>); Public Health, International Trade and the Framework Convention on Tobacco Control (<http://www.tobaccofreekids.org/campaign/global/framework/docs/Policy.pdf>) (12 August 2004).

⁵¹ The World Health Organization conducts much of its business through its regional offices, these are:

AFRO- the African Region

PAHO- the Pan American Health Organization- North and South America and the Caribbean

SEARO- South-East Asia

WPRO- Western Pacific

EURO- Europe and

EMRO- Eastern Mediterranean

⁵² Patricia Lambert. The quotes are from an interview that she gave to INFAC in preparation of their movie "Overcoming the Odds: A Story of the First Global Health and Corporate Accountability Treaty." 2004.

⁵³ “According to the Center for Responsive Politics (CRP), in the previous election cycle, the tobacco companies gave more than \$6 million in soft money, mainly to the Republican party. Between 1995 and the end of 2002, Philip Morris alone donated more than \$10.7 million (about \$9 million to Republicans), making it number four on the all-time soft-money donor list.” Chris Berdik “Tobacco Industry Saves on Soft Money, Spends On Advertising and Lobbyists,” CorpWatch, 28 July 2004.

⁵⁴ “Waxman Critical of President’s Tobacco Stance” Los Angeles Times 19 November 2001.

⁵⁵ For undoubtedly much the same reason, the European Union was constrained by German tobacco interests and Japan followed the interests of Japan International which opposed all regulatory rules in the body of the treaty, relegating them to a protocol.

⁵⁶ Cesar Chelala, “US should not ease its stand against tobacco” 20 August 2001, see also, Chris Adams, “Politics and Policy tobacco-control Negotiator’s Departure Puts Focus on Bush’s Stance on Industry” Wall Street Journal 3 August 2001; Albert R. Hunt, “Going Into the Tank for Tobacco”, New York Times, 2 August 2001.

⁵⁷ The U.S. posited, on numerous occasions, that the federal government lacked the authority to take action in certain areas (those areas reserved to the states), e.g. smoke free environments, labeling, etc. The short hand term for this position was “federalism.”

⁵⁸ Jonathan Fowler, “Tobacco Control Talks Make Progress” Associated Press 29 November 2001.

“The draft of the international anti-tobacco treaty... was packed with options for alternative wording setting out differing and often competing policy options on taxation, marketing, labeling and anti-smuggling measures, Derek Yach, head of WHO anti smoking campaign “The language we have creates options for a strong treaty. There’s also language that could make it a weak treaty- but all the language is clear.” Quoting Wilkenfeld “It is heartening that nations from Africa, Asia, the Middle East ... that are the latest targets of the tobacco industry’s marketing barrage have taken strong positions and have succeeded in keeping them under consideration as the negotiating process moves forward.

⁵⁹ This language is similar to that incorporated into the General Agreement on Tariff and Trade, XXb. “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.”

⁶⁰ Patricia Lambert, legal advisor to the South African Minister of Health and head of the South African delegation to FCTC. The quotes are from an interview that she gave to INFACCT in preparation of their movie “Overcoming the Odds: A Story of the First Global Health and Corporate Accountability Treaty.” 2004.

⁶¹ See footnote 59.

⁶² Several other schisms deepened, threatening the future of the treaty. Japan asserted that it did not support the reduction of tobacco consumption as the objective of the treaty, holding that cigarettes were “articles of taste.”

⁶³ Prior to INB4, eight U.S. senators wrote to President Bush, stating that “While there are U.S. constitutional issues involving advertising bans, the U.S. should not prevent other nations from adopting advertising bans in keeping with their own legal systems when the U.S. Surgeon General has concluded that such limits have been shown to reduce tobacco consumption, especially among youth.”

(<http://www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=558>)

Despite these concerns from the Senate, the U.S. continued to take an obstructionist role in the negotiations.

⁶⁴ India and most of SEARO supported strong pro tobacco control measures. In the final phase of the negotiations in Feb. 2003, India was selected by the combined groups of several developing nations (representing SEARO, AFRO, EMRO, Caribbean and Pacific Nations) to be the main negotiator on the contentious issues related to advertising, promotion and sponsorship. It steadfastly insisted on a comprehensive ban on tobacco advertising, sponsorship, and promotion and that this should be the universal norm and successfully introduced the concept of cross border advertising provisions including penalties.

⁶⁵ The quotes are from an interview that Dr. Otto gave to INFACIT in preparation of its movie.

⁶⁶ Marc Kaufman, “US Seeks to Alter Anti-Tobacco Treaty: ‘Reservations’ Clause Sought as Way Out of Some Provisions,” Washington Post, A01, 30 April 2003.

⁶⁷ Ellen Goodman, Torching the Tobacco Treaty; 5.02.03 “But couldn’t we make common cause with the rest of the world in pursuit of an international killer, a globally certified bad guy? Like say the Marlboro Man?”.

⁶⁸ It could also be argued equally well that the US interest in the promotion of international health, as in AIDS as well as the tobacco pandemic, will always be trumped by its overriding determination to preserve the freedom of its exporting multinationals, even if that export is the source of mass death and disease. In addition, the Bush administration continues to put its own perceived interests ahead of international concerns. Its failure to attend an important review conference on the 1997 international treaty on land mines because it could not justify the expense suggests that it has withdrawn further from positive international relations. See “U.S. won’t attend international conference on land mines,” Gedda, G, AP newswire, November 26, 2004.