Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control

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I. INTRODUCTION

Based on a 2001 study commissioned to justify the repeal of restrictions on smoking in the Czech Republic, Philip Morris advocated that tobacco had saved the Czech government about $147,000,000 in reduced health care costs, pensions, and housing expenditures for the elderly due to smokers' early deaths.† The report was met with disgust that such morbid considerations

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should be used to inform tobacco policy, prompting a public apology from Philip Morris. Subsequent reviews of the analysis on which the report was based revealed that the economic costs of smoking—including health care, absenteeism and fires—were actually thirteen times higher than the so-called "benefits."

Philip Morris’s flawed economic analysis is a classic example of the lengths to which the tobacco industry has gone over the last several decades to secure new markets in the developing world. The industry’s tactics have also included promotional techniques prohibited in the United States, disinformation campaigns calculated to obscure the health consequences of smoking, and covert political lobbying aimed at thwarting the adoption of effective tobacco control legislation. The result has been an unprecedented increase in the consumption of tobacco products and a corresponding rise in tobacco-related illnesses. The World Health Organization (WHO) predicts


3. See Press Release, Altria, Philip Morris Companies, Inc. Comments Regarding Czech Study (July 26, 2001), available at http://www.altria.com/media/pressrelease/03_02_pr2001_07_26_01.asp (noting that “the funding and public release of the [Czech] study ... exhibited terrible judgment as well as a complete and unacceptable disregard of basic human values”).


5. The tobacco industry is dominated by Philip Morris International, British-American Tobacco (BAT), and Japan Tobacco, which together account for more than half of all global sales of cigarettes outside of China. See Stephen D. Sugarman, International Aspects of Tobacco Control and the Proposed WHO Treaty, in Regulating Tobacco 250 (Robert L. Rabin & Stephen D. Sugarman eds., 2001). Philip Morris, which is based in the United States, controls about sixteen percent of the global tobacco market. England-based BAT has become nearly as large as Philip Morris as a result of its merger with Rothmans International in 1999. Japan Tobacco, based in Japan, has controlled nearly ten percent of the world market since 1999, when it purchased the international rights to R.J. Reynolds’ cigarette brands. Id.


that nearly six million people in developing countries will die of tobacco-related illnesses by 2020.9

Many governments are complicit in causing their citizens to contract tobacco-related illnesses that lead to death. Empirical evidence demonstrates that certain types of tobacco control initiatives—including tobacco advertising bans, cigarette tax increases, prohibitions on smoking in public, and subsidized tobacco cessation programs—reduce the consumption of tobacco products. By failing to undertake such initiatives, governments give tobacco companies license to expand their base of prospective consumers, who incur the risks of nicotine addiction, illness, and untimely death and subject those around them to the life-threatening risks of exposure to secondhand smoke. In cases where these risks become realities, the governments’ failures violate their citizens’ internationally recognized rights to health and life.10 To the extent that individuals are not cognizant of the risks of consuming tobacco products or exposure to secondhand smoke, whether due to a lack of awareness or deceptive promotional techniques employed by the tobacco industry, their governments are also violating their internationally recognized right to freedom of information.11


11. The right to freedom of information is guaranteed by the African Charter, supra note 10, art. 9, 1520 U.N.T.S. at 247; the ACHR, supra note 10, art. 13, 1144 U.N.T.S. at 148-49; the ICCPR, supra note 10, art. 19, 999 U.N.T.S. at 178; the European Convention, supra note 10, art. 10, 213 U.N.T.S. at 230. For discussions of the tobacco control implications of the right to freedom of information, see Appleberry, supra note 10, at 78-82 (characterizing government failures to provide gender-specific information on tobacco, increase women’s access to education, inform women of the tobacco industry’s deceptive marketing tactics, ensure gender-sensitive care and health promotion,
Through effective lobbying, the tobacco industry actively encourages the governments of developing countries to violate the rights of their citizens by thwarting the passage of proposed legislation. In Ukraine, for example, Philip Morris prevented the passage of advertising restrictions in the early 1990s by clandestinely producing an information packet that was used to lobby the Ukrainian Parliament. The cover of the packet depicted crushed tobacco leaves forming the figure of $400 million and bore the message, "That's the amount that Ukraine's economy will lose in the next five years as the result of a ban on tobacco advertising." Lacking any evidence to the contrary, the Ukrainian Parliament rescinded most of the advertising restrictions that had impeded the tobacco industry's promotional efforts. In order to undermine efforts by certain Middle Eastern governments to restrict smoking in public places, Philip Morris published studies intended to "restore smoker confidence" and to refute evidence of the harmful effects of secondhand smoke. Similarly, in Latin America, Philip Morris and British-American Tobacco (BAT) co-finance the Environmental Tobacco Smoke Consultants Project, which generates data intended to challenge the scientific consensus on the harmful effects of exposure to secondhand smoke. In 1992, both companies collaborated to achieve a presidential veto of a comprehensive advertising ban in Argentina. Their joint lobbying efforts, which targeted journalists, allies in the advertising industry, and government officials, denied the existence of any connection between cigarette advertising and consumption.

12. Certain developing countries, including Thailand, Bangladesh, Brazil, South Africa, and Poland, have managed to undertake strong tobacco control initiatives despite pressure from foreign tobacco companies. These successes are attributable to a wide range of factors, including systematic and concerted efforts of non-governmental organizations in Thailand and Bangladesh, persistent action by the government in Brazil, and charismatic advocates in South Africa and Poland, all of whom took advantage of the opportunities presented by dramatic political and social changes in their countries. For detailed case-studies of these countries, see WORLD BANK, TOBACCO CONTROL POLICY: STRATEGIES, SUCCESSES AND SETBACKS (Joy de Beyer & Linda Waverley Bridgen eds., 2003).


14. Id. (internal citation omitted). The information packet was ostensibly produced by the "Association of Independent Advisors on the Question of Reviving the Ukrainian Tobacco Sector," which actually did not exist. Id.


17. See PAHO, supra note 7, at 41-44.

18. See id. at 26.

19. Id. See also U.K. DEP'T OF HEALTH, EFFECT OF TOBACCO ADVERTISING ON TOBACCO CONSUMPTION: A DISCUSSION DOCUMENT REVIEWING THE EVIDENCE, para. 69 (1992) (asserting that the balance of evidence supports the conclusion that advertising has a positive effect on the consumption of tobacco products).
Even developing country governments that resist the pressures imposed by multinational tobacco companies may not be able to succeed unilaterally in promoting tobacco control within their borders. The advent of cable and satellite television, the increasing popularity of the Internet, and the free circulation of foreign newspapers and magazines curtail the effectiveness of national advertising bans. The prevalence of cross-border tobacco smuggling further allows the tobacco industry to penetrate less accessible markets by establishing strategic footholds in developing countries with less stringent regulations.

The increasing recognition that effective tobacco control requires a coordinated international response provided the impetus for the development of a global regulatory strategy under the auspices of the WHO. Due to the uncertain political viability of obtaining consensus on a conventional treaty structure, WHO’s governing body, the World Health Assembly (WHA), opted for a framework convention, which can be supplemented by specialized protocols.

The Framework Convention on Tobacco Control (FCTC) puts the onus on States Parties to undertake appropriate initiatives to protect present and future generations from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to secondhand smoke. The success of the treaty will ultimately depend on the number of countries that agree to be bound by this regime and their willingness to fulfill the obligations it imposes. In Part II of this Article, I elaborate on the genesis of the FCTC and highlight problematic aspects of the existing mechanisms for securing compliance by States Parties.

In Part III, I propose a supplemental strategy for advancing the objectives of the FCTC within and beyond the jurisdictions of governments that have ratified it. I argue that because governments violate their citizens' basic human rights by failing to undertake effective tobacco control initiatives, tobacco control advocates could constructively utilize established international and regional human rights institutions to promote their agendas. I also consider how emerging jurisprudence on state responsibility impacts the scope of governments' obligations to regulate the activities of private tobacco companies within their jurisdictions.

In Part IV, I explore how four existing human rights institutions could be used to promote global tobacco control. These particular fora—the United

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21. See Sugarman, supra note 5, at 256-57.


Nations Committee on Economic, Social and Cultural Rights, the United Nations Human Rights Committee, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights—are significant because of the spectrum of mechanisms that they employ to secure state compliance with the treaties that they were established to enforce. These fora can be used to develop a body of jurisprudence that clarifies governments' obligations to make reasonable efforts to prevent tobacco-related human rights violations. I also recommend that the tobacco control community seek to integrate into the FCTC some or all of the implementation mechanisms that these fora employ.

In Part V, I acknowledge that the effectiveness of international human rights institutions, like the FCTC, ultimately depends on the willingness of national legislatures and courts to implement their decisions. Using examples from India, Bangladesh, and Uganda, I argue that successful litigation filed in one country can precipitate favorable jurisprudential developments in other countries and on the international level.

I conclude that the promulgation of the FCTC, the increased use of human rights institutions, and strategic human rights litigation in national courts will not only foster the evolution of favorable tobacco control jurisprudence, but also will bring new perspectives to bear on the challenge of promoting global tobacco control. It is my hope that this Article will advance both of these goals.

II. THE FCTC: ORIGINS AND OBSTACLES TO IMPLEMENTATION

Recognizing that the increasing interdependence of tobacco markets made a global regulatory structure indispensable, delegates to the Ninth World Conference on Tobacco or Health adopted a resolution in October 1994 urging the WHO to adopt an international strategy for tobacco control.25 Given the uncertain political feasibility of an international treaty, the World Health Assembly requested WHO's Director-General, Dr. Hiroshi Nakajima, to report on the viability of alternative approaches "such as guidelines, a declaration or an international convention on tobacco control to be adopted by the United Nations, taking into account existing trade and other conventions

and treaties. To this end, WHO hired Professors Allyn Taylor and Ruth Roemer as consultants. On July 27, 1995, Taylor and Roemer submitted a detailed outline of a proposed document recommending the development and implementation of a WHO Framework Convention on Tobacco Control and related protocols. The proposal initially met with substantial resistance from most WHO officials, who instead advocated a non-binding code of conduct or, alternatively, a treaty adopted under the auspices of the United Nations rather than WHO. Convinced that a non-binding code of conduct on tobacco control would be ineffective and that WHO was a more appropriate forum than the United Nations for the negotiation of a global public health treaty, Professors Taylor and Roemer did not alter their original recommendation. They submitted a final version of their manuscript to WHO’s Head of Tobacco Control on August 23, 1995. Nine months later, the WHA finally adopted a resolution calling for the development of a framework convention and related protocols that would encourage States Parties to move progressively toward the adoption of comprehensive national tobacco control policies and jointly address aspects of the tobacco epidemic that transcend national boundaries.

Three years later, after considerable political maneuvering and the election of Dr. Gro Harlem Brundtland as WHO’s Director-General, the WHA unanimously adopted a resolution that formalized the process for concluding a framework convention on tobacco control. Fifty nations, including the five permanent members of the U.N. Security Council and major tobacco growing and exporting countries, pledged their support. The resolution established a working group to prepare a text of proposed draft elements and an intergovernmental negotiating body to draft and negotiate the proposed agreement. In May 2000, the working group submitted its final report to the WHA, which passed a resolution launching formal political negotiations. The negotiations began in Geneva in October 2000 and concluded in March 2003. On May 21, 2003, the 192 Member States of the WHA adopted the FCTC by consensus. As of January 8, 2004, eighty-five countries had signed the treaty, and five countries—Fiji, Malta, Norway, Seychelles, and Sri

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27. Telephone Interview with Allyn Taylor, supra note 25.
28. Id.
29. Id.
30. Id. See also Taylor & Roemer, supra note 23.
31. See WHA Res. 49.17, supra note 23. The WHO’s authority to draft such an agreement derives from Article 19 of its Constitution. See WHO CONST., art. 19. Until the drafting of the FCTC, this authority had never been invoked.
32. See Towards a WHO Framework Convention on Tobacco Control, WHA Res. 52.18, 52nd Ass., 9th plen. mtg., Agenda Item 13, WHO Doc. WHA52/EB103/S (1999) (urging and promoting work related to the FCTC and outlining a timeline for its development).
33. See Taylor & Bettcher, supra note 22, at 923.
34. See WHA Res. 52.18, supra note 32, art. 1.
Lanka—had ratified it. The FCTC will enter into force ninety days after forty countries ratify it.

The WHA's decision to adopt a framework convention, which typically establishes broadly stated goals, resulted primarily from the formidable political obstacles that could have prevented a global consensus on the more onerous commitments normally embodied in a conventional treaty. States are generally amenable to signing onto a framework convention because they incur minimal obligations by doing so; states become bound by more specific commitments embodied in subsequently negotiated protocols only if they make a separate decision to do so. The perceived economic dependence of some 120 nations, including ninety developing countries, on tobacco production for employment and revenue made their governments especially unlikely to favor a treaty without assurances of an alternative source of income. The predictable opposition of the tobacco industry was also expected to undermine support for a treaty. Taking these and other political factors into account, Professors Taylor and Roemer recommended an incremental form of international standard-setting.

The FCTC recommends that States Parties undertake a variety of national initiatives targeted to reduce the demand for and the supply of tobacco products within their territories. In particular, States Parties are encouraged to adopt appropriate price and tax measures, protect the public from exposure to secondhand smoke, require manufacturers and exporters to disclose information about the contents of tobacco products, undertake public awareness campaigns on tobacco control, promote cessation of tobacco use and adequate treatment for tobacco dependence, enact prohibitions on sales of tobacco products to minors, provide economically viable alternatives to tobacco cultivation and sales, and effectively regulate packaging, labeling,

37. See FCTC, supra note 24, art. 36(1).
40. See Taylor & Roemer, supra note 23, para. 14. Economic analyses undertaken by the World Bank demonstrate that the long-term social and health costs of nicotine addiction far outweigh the short-term economic benefits derived from tobacco cultivation and sales. The relevant long-term costs include medical care, loss of productivity and earnings as a result of tobacco-related illnesses and death, malnutrition resulting from the diversion of scarce family income to buy tobacco products, environmental degradation caused by pesticides and firewood used to grow and cure tobacco, and fires caused by lit cigarettes and matches. WORLD BANK, TOBACCO CONTROL POLICY, supra note 12, at 10; WORLD BANK, CURBING THE EPIDEMIC, supra note 15, at 8-10; Press Release, WHO, supra note 15.
42. See id. paras. 20, 90, 91. This approach was patterned on successful strategies that international organizations had previously adopted in the areas of human rights and environmental protection. Taylor, An International Regulatory Strategy, supra note 25, at 259, 286-87. Alternatively, Taylor and Roemer had proposed that WHO should initially work toward the promulgation of a U.N. General Assembly resolution. Such a resolution, while non-binding, could have clarified the scope of agreement among governments about appropriate tobacco control policies and laid a foundation for the eventual adoption of a global regulatory regime. However, the time and effort involved in cultivating support for a General Assembly resolution might have unnecessarily postponed the start of FCTC negotiations. See Taylor & Roemer, supra note 23, paras. 90, 92-93, 96.
advertising, promotion, sponsorship, and illegal trade in tobacco products. The establishment of uniform or minimum global standards is intended to reduce the incidence of such cross-border problems as smuggling and advertising leakages through foreign television broadcasts, print media, and the Internet. In a further effort to ensure that the tobacco industry is not able to exploit markets with weak legislation or enforcement capabilities, the FCTC emphasizes the importance of the transfer of technical, scientific, and legal expertise and technology, as well as financial assistance, to developing country governments and governments with transitional economies, and the need to develop economically viable alternatives to tobacco production. The source of financial assistance which may be required by developing country governments and governments with transitional economies was a subject of much controversy during the negotiations and remains to be determined by the Conference of the Parties.

Following the adoption of the FCTC, then-WHO Director General Brundtland hailed the treaty as a "historic moment in global public health." The FCTC negotiations encouraged many governments to reevaluate their domestic tobacco control policies and provided opportunities for information sharing, coordination, and consensus-building among governments on global best practices. They also created opportunities for increased contact, with varying degrees of success and formality, between governments and non-governmental organizations (NGOs), which maintained an active presence at all the negotiating sessions. The NGOs formed the Framework Convention Alliance (FCA), a coalition of more than 180 groups from over seventy countries. The FCA members coordinated their interventions, providing daily issue briefings for FCTC delegates, publishing a daily newsletter, and lobbying informally between sessions. The negotiation process also catalyzed the formation of vibrant national coalitions of tobacco control advocates in Bangladesh, India, and the Philippines, which may improve the likelihood that their governments will ratify the FCTC expeditiously.

43. FCTC, supra note 24, arts. 6-17.
44. See id. pmbl.
45. Id. arts. 4(3), 22, 26. The need for economically viable alternatives to tobacco production will not be immediate because even the most comprehensive tobacco control policies result in gradual declines in demand for tobacco products and employment. Moreover, tobacco taxes can be increased to compensate for some losses in government revenue. See Economics of Tobacco Control, Working Group of the WHO Framework Convention on Tobacco Control, 1st mtg., at 8-9, WHO Doc. A/FCTC/WG1/2 (1999), http://www.who.int/gb/fctc/PDF/wgl/elt2.pdf; WHO, FACT SHEET No. 155, TOBACCO EPIDEMIC: MUCH MORE THAN A HEALTH ISSUE (1997).
46. Many developing countries and countries with economies in transition favored the establishment of a global trust fund, which most developed countries opposed. Telephone Interview with Allyn Taylor, supra note 25.
47. The Framework Convention on Tobacco Control: The Road Behind, the Road Ahead, DAILY NEWS: 12TH WORLD CONFERENCE ON TOBACCO OR HEALTH, Aug. 3-8, 2003, at 4.
49. Id.; Mackay, supra note 25, at 551.
50. The FCA was established by the U.S.-based Campaign for Tobacco-Free Kids in consultation with Action on Smoking and Health-London, and with co-funding from the American Lung Association.
The high level of detail embodied in the FCTC is a testament to the persistent efforts of developing country governments to prevent a handful of developed countries that opposed the treaty—including the United States, Germany, and Japan—from watering down its provisions. The opposition of these countries to numerous key provisions, including advertising restrictions and minimum size requirements for warning labels on cigarette packages, reflects a desire to safeguard the interests of the tobacco industry.

Although the FCTC provides countries with the building blocks to enact comprehensive tobacco control legislation, FCA representatives have expressed concern that many of the measures enumerated in the treaty are not mandatory. Moreover, the existing implementation machinery is weak. At present, the primary mechanism for monitoring the conduct of States Parties to the FCTC is a system of periodic national reporting. The treaty sets forth general guidelines for the content of reports from governments, which must address measures taken at the national level to implement the FCTC, constraints or barriers encountered in the course of implementation, measures taken to overcome such constraints or barriers, and information on financial and technical assistance provided or received for tobacco control activities. States Parties are also required to provide certain types of information gathered in the course of their implementation efforts.

52. See id.

53. See Clare Nullis, Tobacco Treaty Agreed Despite U.S, German, Some Asian Objections, ASSOCIATED PRESS, Mar. 1, 2003; Marc Wolfensberger, WHO Adopts Tobacco Control Text; U.S., Germany May Not Ratify, BLOOMBERG, Mar. 1, 2003. The U.S. negotiators repeatedly asserted that they could not agree to the advertising ban and warning label requirements on the grounds that the requirements would violate the free speech principles embodied in the First Amendment to the U.S. Constitution. Although it is well established that a comprehensive ban on tobacco advertising reduces tobacco consumption far more effectively than advertising restrictions do, the FCTC includes an exception for nations with such constitutional constraints. See FCTC, supra note 24, art. 13(3)-(4); Henry Saffer, Tobacco Advertising and Promotion, in TOBACCO CONTROL IN DEVELOPING COUNTRIES 215-236 (Prabhat Jha & Frank Chaloupka eds., 2000) (summarizing empirical research from 102 countries demonstrating that a comprehensive set of tobacco advertising bans can reduce tobacco consumption, while a limited set of advertising bans will have minimal effect); Press Release, Natl Council Against Smoking, Tobacco Treaty Triumph for Developing Countries & WHO (Mar. 3, 2003) (on file with The Yale Journal of International Law) (noting that both WHO and the World Bank have concluded that tobacco advertising restrictions do not work because they enable the industry to shift its advertising budget from restricted to unrestricted media).


55. See Hammond & Assunta, supra note 48, at 241. See also FCTC, supra note 24, art. 6 (specifying that States Parties’ obligations to impose price and tax measures intended to reduce tobacco demand are “without prejudice to the sovereign right of the Parties to determine and establish their taxation policies”), art. 9 (rendering States Parties’ obligations to regulate the contents of tobacco products subject to the approval of competent national authorities), art. 13 (rendering States Parties’ obligations to ban all tobacco advertising, promotion, and sponsorship subject to their constitutions or constitutional principles).

56. Telephone interview with Allyn Taylor, supra note 25.

57. See FCTC, supra note 24, art. 21(1)(a)-(c).

58. See id. art. 21(1)(d)-(e). Specifically, States Parties are required to provide publicly available scientific, technical, socioeconomic, commercial, and legal information as well as information regarding practices of the tobacco control industry and the cultivation of tobacco; taxation rates for tobacco products and corresponding trends in tobacco consumption; measures taken at the national level
The level of states’ compliance with their treaty obligations varies based on their perceived national interests. National reporting systems are intended to subject governments to public scrutiny with the goal of assisting them in implementing their international obligations and, where necessary, generating moral pressure to comply with applicable norms. The reporting requirements embodied in the FCTC may fall short of these goals because they do not ensure that states’ reports will be comprehensive or objective. Moreover, the body charged with evaluating states’ reports, the Conference of the Parties, is comprised of government officials whose susceptibility to political pressures may undermine their commitment to tobacco control. In cases where states’ reports are incomplete, the Conference is not explicitly required to solicit supplemental information from independent sources. Even where States Parties willingly disclose aspects of non-compliance with their treaty obligations, they are not assured of an opportunity to engage in dialogue with the Conference—or with each other—regarding effective, context-specific strategies to overcome existing impediments to implementation. Although the Conference is required to issue regular reports regarding the status of the FCTC’s implementation by particular countries, the treaty lacks follow-up mechanisms to monitor States Parties’ compliance with any recommendations that may be included in such reports.

Pressure on States Parties to comply with the FCTC may derive not only from the Conference but also from other States Parties that invoke the treaty’s dispute resolution procedures. If a dispute arises among States Parties concerning the interpretation or application of the FCTC, the States Parties must initially make a good faith attempt to resolve it through negotiation or another non-adversarial means. If the dispute remains unresolved, the concerned States Parties may submit it to ad hoc arbitration in accordance

to ban or restrict tobacco advertising, promotion, and sponsorship; expenditures by the tobacco industry on advertising, promotion, and sponsorship not yet prohibited; cross-border trade in tobacco products, and the storage and distribution of tobacco products held or moving under suspension of taxes or duties within their jurisdictions; health effects of consumption of tobacco products and exposure to secondhand smoke; and relevant legislation, regulations and jurisprudence. See id. arts. 6(3), 13(2), 13(3), 13(4)(d), 15(5), 19(2), 20.

59. See Louis Henkin, How Nations Behave: Law and Foreign Policy 25-26 (1979) (affirming that national interests can serve as a limitation on the enforcement of international law).

60. See Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 229-30 (1995) (asserting that a process of review and assessment of a government’s performance can prompt treaty compliance by damaging its reputation as a member of the international community and limiting its ability to participate in the international policymaking process); Bodansky, supra note 39, at 23 (noting that national reporting allows states to benefit from each other’s experiences, promotes transparency, and generates pressure on states by holding them up to domestic and international scrutiny).

61. See FCTC, supra note 24, art. 23(5)(d).

62. To facilitate access to independent information, the International Labour Organization and certain other international institutions have supplemented state reporting requirements with an “auditing” process that enables the supervisory body to verify information provided by states. See Allyn L. Taylor, Globalization and Biotechnology: UNESCO and an International Strategy To Advance Human Rights and Public Health, 25 Am. J.L. & Med. 479, 518-24 (1999). See also Taylor & Roemer, supra note 23, paras. 82-83 (proposing the incorporation of an analogous process into an international instrument for tobacco control).

63. FCTC, supra note 24, art. 23(5)(d).

64. Id. art. 27(1).
with procedures to be adopted by the Conference.\textsuperscript{65} If, however, the States Parties have not agreed, either when they ratified the treaty or subsequently, to submit disputes to arbitration, the dispute may persist indefinitely.

In their present form, neither the FCTC’s reporting requirements nor its dispute resolution procedures are likely to influence the conduct of governments. These implementation mechanisms could be strengthened and supplemented through the adoption of protocols.\textsuperscript{66} Otherwise, FCTC ratification may prove to be “a fairly cost-free enterprise” that enables States Parties to improve their public image without undertaking any concrete commitments to promote tobacco control.\textsuperscript{67}

III. THE HUMAN RIGHTS DIMENSION OF TOBACCO CONTROL

Pending the adoption of stronger implementation mechanisms, the FCTC suggests an indirect strategy for advancing the objectives of the treaty. Article 5(5), a standard provision in most framework conventions, requires States Parties to “cooperate as appropriate with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties.”\textsuperscript{68} Because governments’ failures to undertake effective tobacco control initiatives may violate certain fundamental rights of their citizens,\textsuperscript{69} international and regional human rights institutions could play a critical role in addressing these failures.

Scientific evidence has conclusively established that smoking and the inhalation of secondhand smoke decrease life expectancy.\textsuperscript{70} Even Philip

\textsuperscript{65} Id. art. 27(2).
\textsuperscript{66} The negotiation and adoption of protocols is governed by Article 33 of the FCTC. See id. art. 33. See also Framework Convention on Tobacco Control: Letter from Ambassador Luiz Felipe de Seixas Corrêa, Chair, Intergovernmental Negotiating Body, 6th Sess., Prov. Agenda Item 3, at 7, WHO Doc. A/FCTC/INB6/3 (2003) (characterizing the adoption of the FCTC as “a starting point rather than the end of a process”).
\textsuperscript{67} Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 YALE L.J. 1935, 2020 (2002) (asserting, based on empirical analyses, that treaty ratification can serve to offset pressure for real changes in state practice in the absence of effective monitoring and enforcement mechanisms); Taylor & Roemer, supra note 23, para. 66.
\textsuperscript{68} See FCTC, supra note 24, art. 5(5).
\textsuperscript{69} See Appleberry, supra note 10; Dhooge, supra note 10; Wike, supra note 10. To date, however, there has been no systematic analysis of the viability of using human rights institutions to address tobacco-related human rights violations by governments. This Article is intended to fill that gap.
\textsuperscript{70} See, e.g., Doll et al., supra note 8; FCTC, supra note 24, pmbl. (recognizing that “scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability”); NAT’L CANCER INST., U.S. DEP’T OF HEALTH & HUMAN SERVS., SMOKING AND TOBACCO CONTROL MONOGRAPH No. 11, HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE: THE REPORT OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, at ES-2 (1999) (specifying that the causal effects of environmental tobacco smoke include adverse developmental effects in infants, acute lower respiratory tract infections, asthma induction and exacerbation, ear infections and chronic respiratory symptoms in children, heart disease morbidity and mortality, as well as lung and nasal sinus cancer); SCIENTIFIC COMM. ON TOBACCO AND HEALTH, U.K. DEP’T OF HEALTH, Part Two: Environmental Tobacco Smoking, in REPORT OF THE SCIENTIFIC COMMITTEE ON TOBACCO AND HEALTH (1998) (concluding that environmental tobacco smoke increases the risks of lung cancer by twenty to thirty percent in individuals subject to long-term exposure, and causes ischaemic heart disease, sudden infant death syndrome, as well as respiratory illness, asthmatic attacks, and middle ear diseases in children); A.K. Hackshaw, The Accumulated Evidence on Lung Cancer and Environmental Tobacco Smoke, 315 BRIT. MED. J. 980 (1997) (concluding, based on
Morris has agreed with the “overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers.” Nicotine addiction has also been proven to increase malnutrition in developing countries because scarce family income is diverted to buy tobacco products. Moreover, according to WHO, the tobacco industry’s massive advertising and promotional campaigns are “direct causes of a substantial number of unnecessary deaths.” Given these realities, governments that have ratified human rights treaties obligating them to protect the rights of their citizens to life and health should be required to adopt legislative or other measures to ban tobacco advertising, discourage consumption of tobacco products, and ensure smoke-free workplaces and public spaces.

Effective tobacco control also implicates the right to freedom of information. Legal scholars and public health professionals have posited that this right may be violated when cigarettes are marketed without governmental assurances that information regarding the adverse health effects of smoking will be made available. Empirical evidence establishes that many smokers in low-and middle-income countries are unaware of the risks of smoking. The deceptiveness of the tobacco industry’s promotional activities—including the use of such non-tobacco goods and services as sports sponsorships, clothing,
and vacations to advertise tobacco products—may also interfere with individuals’ right to freedom of information. Dr. John Havard, former Secretary of the British Medical Association, has characterized these tactics as an effort by the tobacco industry “to persuade millions of people to ignore the appalling health hazards [of smoking], lulling them into a false sense of security by associating their products with healthy activities.”

Governments seeking to protect their citizens’ right to freedom of information must take steps to ensure that consumers make informed choices to assume the health risks of smoking.

The FCTC Preamble specifically references three international human rights treaties—namely, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC)—with associated implementation bodies that have already acknowledged the human rights dimension of tobacco control. The jurisprudence of these and other human rights institutions establishes that tobacco control initiatives implicate the rights to health, life, and freedom of information. Many of these institutions offer well-developed

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78. The possibility of including more direct references to the human rights implications of tobacco control in the FCTC was discussed at various points in the treaty’s evolution. See Elements of a WHO Framework Convention on Tobacco Control, Working Group on the WHO Framework Convention on Tobacco Control, 1st mtg., Prov. Agenda Item 7, paras. 14-15, WHO Doc. A/FCTC/WG1/6 (1999) (listing as possible points to be included in the FCTC’s guiding principles the right to be fully informed about the health consequences of using tobacco products and/or the addictive and lethal qualities of tobacco consumption, as well as the right to a tobacco-smoke free environment); Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts With Comments of The Working Group, Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, 1st Sess., Prov. Agenda Item 8, at 5, 15, WHO Doc. A/FCTC/INB1/2 (2000) (discussing the possibility of including a paragraph on the right to health in the FCTC preamble or elsewhere in the convention and noting that “[d]ue account should be taken of human rights issues” in the section on treatment of tobacco dependence). The absence of rights language from the FCTC may be attributable to a variety of factors, including the lack of involvement of organizations with experience in rights-based approaches in the negotiations, the public health community’s relative unfamiliarity with international human rights law, the controversial status of the right to health under international law, and the competing concerns of many governments involved in the negotiations about retaining certain sovereign rights. Telephone Interview with Allyn Taylor, supra note 25.


80. See, e.g., Wöckel v. Germany, App. No. 32165/96 (Eur. Comm’n H.R. 1998), http://hudoc.echr.coe.int/hudoc (holding that the German legislature’s failure to enact more far-reaching prohibitions on public smoking did not violate the applicant’s right to life under Article 2 of the European Convention on Human Rights in light of other tobacco control measures implemented by the German government).

81. See, e.g., Österreichische Schutzgemeinschaft Fur Nichtraucher and Rockenbauer v. Austria, App. No. 17200/91 (Eur. Comm’n H.R. 1991), http://hudoc.echr.coe.int/hudoc (holding that restrictions on advertising that misleads consumers about the health risks of tobacco products are
implementation machinery—including detailed reporting requirements, individual petition procedures, and advisory jurisdiction—that could be constructively used to encourage governments to promote global tobacco control. Because the jurisdiction of these institutions is governed by the treaties that they were established to enforce, they may have authority to address tobacco-related human rights violations by governments that have yet to ratify the FCTC. The international human rights community would be likely to support efforts by tobacco control advocates to increase the use of such institutions to address tobacco-related human rights violations because, in addition to advancing the tobacco control agenda, such innovative advocacy could help to concretize the scope of applicable rights under international law.

Tobacco-related human rights violations often stem from tobacco companies’ activities, although the companies are not directly bound by the international human rights treaty obligations undertaken by their host governments. Virtually all international human rights instruments have been construed to require States Parties to protect human rights by effectively regulating private entities within their jurisdictions. A leading decision of the Inter-American Court of Human Rights enunciated a due diligence standard for assessing a state’s compliance with its obligations regarding private actors:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

consistent with the right to freedom of expression under Article 10 of the European Convention on Human Rights); Concluding Observations of the Committee on the Rights of the Child: Armenia, 23d Sess., para. 53, U.N. Doc. CRC/C/15/Add.110 (2000) (encouraging the State Party to continue its efforts to provide children with accurate and objective information about tobacco use and to protect them from harmful misinformation by imposing comprehensive restrictions on tobacco advertising).


Other human rights institutions have similarly held that a state's failure to
avail itself of an opportunity to prevent human rights abuses by private entities
gives rise to state responsibility for violations of particular treaty
obligations.86

Under international law, states are also responsible for human rights
violations perpetrated by private companies pursuant to their instructions or
under their direction or control.87 In essence, an agency relationship must exist
between the state and the company. Because of the high threshold of
government involvement necessary to substantiate such a relationship, the
requisite facts are more easily demonstrated in the context of a state-owned
company, as compared with a private company. Although the juridical
distinctness of state-owned companies is presumed under international law,88
their involvement in internationally wrongful acts has been deemed to
generate state responsibility where such acts are the direct result of a state's
exercise of its majority ownership or control.89 The increasing privatization of
state-owned tobacco companies throughout the world, which has been
imposed in many cases by the International Monetary Fund as a condition for


88. See Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 112 (2002).

the continued receipt of financial assistance, makes this level of involvement less likely. In countries where governments exercise substantial control over the activities of private—or privatized—tobacco companies, however, human rights violations resulting from these activities may be attributable to the state.

IV. USING INTERNATIONAL HUMAN RIGHTS INSTITUTIONS TO FIGHT BIG TOBACCO

The expanding scope of state responsibility for the activities of private companies suggests that international human rights institutions could be used effectively to hold governments accountable for their failures to make adequate efforts to promote tobacco control within their borders. Recourse to these institutions would enable the tobacco control community to reclaim the language of rights from the tobacco industry, which regularly uses this tactic to promote its own objectives. The FCTC provides useful guidance regarding the types of governmental initiatives that could prevent tobacco-related human rights violations.

Some international and regional human rights treaty institutions have devoted considerable attention to the human rights dimension of tobacco control, while others have made only passing reference. Many have failed to address this subject at all. Based on the jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Human Rights Committee, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights, I explore the


91. The majority state-owned tobacco companies at the time of this writing included the China National Tobacco Corporation, Cubatabaco (Cuba), the Egyptian Tobacco Monopoly, the Iranian Tobacco Company, Tekel (Turkey), the Thailand Tobacco Monopoly, Tutunul Romanesc (Romania), and Vinataba (Vietnam). Telephone Interview with Ayda Yurekli, Economist, World Bank (Nov. 11, 2003). Japan Tobacco, Inc., which had been two-thirds government-owned, was moving aggressively toward further privatization at the time of this writing. See Mark A. Levin, Dedicating Tobacco Control to People's Lives: A Comprehensive Review of Tobacco Policy in Japan, in TOBACCO FREE JAPAN: RECOMMENDATIONS FOR TOBACCO CONTROL POLICY (forthcoming Feb. 2004) (draft chapter on file with author). For an excellent analysis of the harmful impact of privatization of state-owned tobacco companies on public health, see CAMPAIGN FOR TOBACCO-FREE KIDS, PUBLIC HEALTH AND INTERNATIONAL TRADE, VOL. 2: TARIFFS AND PRIVATIZATION (2002), http://www.tobaccofreekids.org/campaign/global/framework/docs/campaign_Tariffs.pdf.


93. See, e.g., British American Tobacco, supra note 54, at 58 (affirming adults' rights "to make informed personal choices about a product which is legal everywhere"); Letter from Paul R. Dilman, Jr., General Manager, Philip Morris Thailand Ltd., to Khin Sudarat Keyuraphan, Minister of Public Health, Thailand (Feb. 27, 2002) (on file with author) (asserting that Thailand's proposal to require graphic health warnings on cigarette packages would unnecessarily limit Philip Morris's constitutional right to communicate with its customers by displaying trademarks and logos).
different ways that these institutions might be systematically used to hold states accountable for their complicity in tobacco-related human rights violations. I conclude this Part by proposing ways in which the implementation mechanisms employed by these fora could be used to bolster those embodied in the FCTC.

A. Revitalizing Reporting Requirements: The Experience of the Committee on Economic, Social and Cultural Rights

The U.N. Committee on Economic, Social and Cultural Rights (CESCR) was established by the U.N. Economic and Social Council in 1987 to assist in monitoring States Parties’ compliance with their obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). For purposes of global tobacco control, the most significant provision of the ICESCR is Article 12, which provides the most comprehensive coverage of the right to health under international human rights law. Pursuant to Article 12(1), States Parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Article 12(2) sets forth a number of affirmative steps to be taken by States Parties to achieve the full realization of the right to health, including, in relevant part, provisions for the reduction of the stillbirth rate and of infant mortality, the healthy development of the child, the improvement of environmental and industrial hygiene, and the prevention, treatment, and control of epidemic and occupational diseases.

The CESCR construes Article 12 to require States Parties to implement certain tobacco control measures, which are referenced in General Comment No. 14. In particular, States Parties are encouraged to recognize the right to health in their national political and legal systems by undertaking “information campaigns, in particular with respect to... the use of cigarettes, drugs and other harmful substances.” The CESCR also specifies that a state’s obligation to improve environmental and industrial hygiene includes discouraging the “use of tobacco, drugs and other harmful substances.” In addition, General Comment No. 14 provides that a state’s failure to take all necessary measures to safeguard persons within its jurisdiction from infringements of the right to health by third parties, including corporations, constitutes a violation of its Article 12 obligations. The specified examples of

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95. See ICESCR, supra note 10, art. 12, 993 U.N.T.S. at 8.
96. Id. art. 12(1).
97. Id. art. 12(2). Similarly, Article 7(b) of the ICESCR guarantees the right to the enjoyment of safe and healthy working conditions. Id. art. 7(b), 993 U.N.T.S. at 6.
98. Id. art. 12(2).
99. See General Comment 14, supra note 79. The CESCR occasionally clarifies the content of particular rights enumerated in the ICESCR through the publication of authoritative interpretations known as general comments.
100. Id. para. 13.
101. Id. para. 15.
such violations include "the failure to discourage production, marketing and consumption of tobacco."  

102. Id. Paragraph 15 could be construed to imply that tobacco products should be banned. Because tobacco is not currently an illegal drug, this recommendation could undermine the CESCR's credibility.

103. States Parties to the ICESCR are currently required to report every five years on the status of their domestic implementation of the treaty provisions, including any factors and difficulties affecting their compliance. ICESCR, supra note 10, arts. 16(1), 17(2), 993 U.N.T.S. at 9; Sandra Coliver & Alice M. Miller, International Reporting Procedures, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 191 (Hurst Hannum ed., 1999).


108. See, e.g., Kamen Sachariew, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, 2 Y.B. INT'L ENVT'L L. 31, 42 (1991) (noting that the pressure of public opinion generated through open discussion of reports has the potential to promote compliance with international rules).


In addition, CESC members have used constructive dialogue sessions to question certain government representatives about the status of particular tobacco control initiatives, including anti-smoking campaigns, tobacco advertising bans, and cigarette tax increases. Following its sessions, the CESC has made general recommendations regarding the need for more effective tobacco information campaigns and the importance of tobacco advertising restrictions.

Given its openness to receiving information from non-governmental sources, the CESC would be likely to welcome substantive input from the tobacco control community regarding particular governments’ roles in tobacco-related human rights violations, as well as assistance in formulating relevant monitoring criteria and developing appropriate policy recommendations. Tobacco control advocates from different regions of the world could initiate collaboration with the CESC by drafting a statement delineating the tobacco control implications of the right to health. Such a statement should emphasize that a government’s failure to require strong health warnings on cigarette packages, organize public awareness campaigns regarding the health hazards of tobacco products, or prohibit deceptive advertising by the tobacco industry interferes with its population’s right of tobacco products as the “single most important factor of the disease burden facing Ireland,” the Irish government instituted a national tobacco control strategy including health education programs, increased cigarette taxes, and tougher advertising restrictions; Report of Armenia—Addendum to Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. ESCOR, Substantive Sess. of 1998, para. 152, U.N. Doc. E/1990/5/Add.36 (1998) (citing provisions of Armenian law that prohibit minors from working in the tobacco industry or other employment that may harm their health or physical or mental development); Report of Honduras—Addendum to Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. ESCOR, Substantive Sess. of 1998, paras. 201, 394, U.N. Doc. E/1990/5/Add.40 (1998) (asserting increased prevalence of health problems connected with the use and abuse of tobacco, and noting that the constitution calls for regulation by law of the commercial advertising of tobacco products); Report of Switzerland—Addendum to Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. ESCOR, Substantive Sess. of 1997, para. 610, U.N. Doc. E/1990/5/Add.33 (1996) (noting that the belief of both the Federal Council and the Federal Office of Public Health that smoking is harmful to its citizens’ health has led to an increase in tobacco warning labels and the implementation of a comprehensive smoking prevention program).


113. To ensure that the CESC and other international human rights institutions will seriously consider any information submitted, tobacco control advocates may wish to seek training in fact-finding methodologies employed by well-respected human rights organizations such as Human Rights Watch and Amnesty International.
access to information—the protection of which, according to General Comment 14, is a core ICESCR obligation. The statement might hold particular interest for the CESCR if it highlighted the promotional tactics employed by the tobacco industry to target women and children, whose acquisition of accurate health-related information is a priority for the CESCR. The statement could also expand on the requirements for a healthy workplace environment by defining it to be smoke-free. Depending on the CESCR’s receptiveness, the statement might serve as a draft for a future general comment.

By providing needed technical expertise, the tobacco control community could also help the CESCR to supplement its existing reporting guidelines with detailed questions regarding a government’s tobacco control policies. Likewise, the tobacco control community could encourage the CESCR to discuss tobacco-related violations of the right to health during constructive dialogue sessions. Based on these exchanges, the CESCR—with additional input from tobacco control advocates, where needed—could formulate country-specific recommendations to address instances of non-compliance. In the process, the tobacco control community could expand its advocacy

114. See General Comment 14, supra note 79, paras. 11, 12, 34, 35, 44(d), 47, 50. Ideally, governments should be urged to adopt comprehensive bans on tobacco advertising rather than partial restrictions, which have proven to have minimal impact on tobacco use. PAHO, DEVELOPING LEGISLATION FOR TOBACCO CONTROL 23 (2002).


116. See General Comment 14, supra note 79, paras. 21, 23. This concern is also consistent with Article 10 of the ICESCR, which calls for special measures of protection for mothers during a reasonable period before and after childbirth, as well as for children and young persons. See ICESCR, supra note 10, art. 10(2)-3), 993 U.N.T.S. at 7.

117. See General Comment 14, supra note 79, para. 15. According to PAHO, smoke-free environments promote smoking cessation and prevent smoking initiation “by striking at the heart of the social acceptability of tobacco.” PAHO, supra note 114, at 31-32.

118. For an example of NGO interventions that have contributed to the elaboration and implementation of ICESCR rights, see Scott Leckie, The Legal Struggle for Housing Rights: One NGO’s Search for the Elusive, 2 BEYOND LAW 75-88 (1992) (noting that the Habitat International Coalition and the Centre for Housing Rights and Evictions provided significant input to the CESCR on General Comment 4, which defines the right to adequate housing in very specific terms and provides concrete benchmarks for assessing implementation efforts by States Parties). General Comment 4 can be found at http://www1.umn.edu/humanrts/gencomm/epcomm4.htm.

119. Notably, the guidelines for reports by States Parties to the U.N. Convention on the Rights of the Child explicitly request the submission of:
information on legislative and other measures taken to prevent the use by children of alcohol, tobacco and other substances which may be prejudicial to their health . . . and on any evaluation made of the effectiveness of such measures, together with relevant disaggregated data on the use by children of such substances.


120. Although NGO representatives cannot participate in formal constructive dialogue sessions, they are permitted to attend. They often submit proposed questions prior to these sessions and take advantage of the opportunity to suggest appropriate follow-up questions to CESCR members during breaks. See ALLAN MCCHESEY, PROMOTING AND DEFENDING ECONOMIC, SOCIAL & CULTURAL RIGHTS: A HANDBOOK 107-08 (2000).

121. By publicizing any written materials they submit to the CESCR, tobacco control NGOs could generate public debate that might impose additional pressure on governments to improve their records of compliance. Id. at 103.
efforts to a potentially useful forum where government representatives would be compelled to confront its concerns.

B. People’s Justice: The Right of Individuals To Petition the U.N. Human Rights Committee and the European Court of Human Rights

Certain human rights institutions are competent to consider communications from individuals who claim to be victims of human rights violations or entities acting on behalf of such individuals, and to grant appropriate remedies. The jurisdiction of at least two of these bodies, the U.N. Human Rights Committee (HRC) and the European Court of Human Rights (ECHR), encompasses the enforcement of certain core civil and political rights, including the rights to life, protection from cruel, inhuman, or degrading treatment, and freedom of information, all of which are implicated in tobacco control. Although the HRC has yet to consider the human rights dimension of tobacco control, its jurisprudence suggests multiple possibilities for bringing this subject to its attention. By contrast, the ECHR has issued numerous decisions addressing the human rights consequences of tobacco control initiatives undertaken by Member States of the European Union. The populations of victims eligible to submit petitions to each of these fora are largely distinct, as are the types of relief available to them.

1. U.N. Human Rights Committee

The HRC was established pursuant to Article 28 of the International Covenant on Civil and Political Rights (ICCPR) to monitor States Parties’ compliance with their obligations under that treaty. The HRC has made significant contributions to human rights jurisprudence through its decisions, known as “views,” in response to individual communications against States Parties pursuant to the First Optional Protocol to the ICCPR. Although the HRC’s views are neither legally binding nor enforceable, they have prompted some governments to compensate victims, amend legislation, or establish

122. See ICCPR, supra note 10, art. 28, 999 U.N.T.S. at 179. The HRC is composed of eighteen nationals of different States Parties to the ICCPR who have recognized competence in human rights. They are chosen to ensure equitable geographical distribution of membership, and representation of different forms of civilization and the world’s principal legal systems. Although they are nominated and elected by States Parties to the ICCPR, the members of the HRC serve in their personal capacities. Id. arts. 28, 31.

123. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 648 (1993) (referring to the adjudication of individual communications under the Optional Protocol as “one of the most important procedures for the international protection of human rights”) (emphasis omitted). But cf. ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM 25 (2001) (noting that the average time between submission of an individual communication to the HRC and the determination of final views is four years); Murat Metin Hakki, The Silver Anniversary of the UN Human Rights Committee: Anything To Celebrate?, 6 INT’L J. HUM. RTS. 85, 96-97 (2002) (characterizing the HRC’s views as “inept instruments to achieve greater protection of rights by all states,” but conceding that many States Parties to the Optional Protocol have nonetheless given effect to them).
local remedies. They have also been reflected with increasing frequency in the judgments of national courts.

A victim, group of victims, or their representatives may file an individual communication with the HRC against States Parties to the First Optional Protocol. In some cases, the mere possibility that an individual will become the victim of human rights violations has been sufficient to render a communication admissible. The state has six months to respond in writing once a communication is filed with the HRC; the individual has an additional six weeks to submit a surreply. Based on the written submissions received on behalf of the individual and the state, the HRC issues its views setting forth both its findings of fact and conclusions of law. The HRC’s views are transmitted to the individual and the targeted state, and published in the HRC’s annual report to the U.N. General Assembly.

Individual communications addressing tobacco-related human rights violations could be filed against the government of a country where a tobacco

124. See Elizabeth Evatt, The Right to Individual Petition: Assessing Its Operation Before the Human Rights Committee and Its Future Application to the Women’s Convention on Discrimination, 89 AM. SOC’Y INT’L L. PROC. 225, 229 (1995). Since 1990, the HRC’s guidelines for the preparation of reports by States Parties have required a section regarding actions taken in response to individual communications. In an effort to ensure more consistent implementation of the HRC’s views, the HRC also appointed a Special Rapporteur for the Follow-Up of Views. NOWAK, supra note 123, at 711-12. Despite these steps, the HRC has not been consistently able to follow up on its recommendations. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 740-41 (2d ed. 2000). Cf. Alfred de Zayas, The Examination of Individual Complaints by the United Nations Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 73 (Gudmundur Alfdsson et al. eds., 2001) (referring to the HRC’s examination of States Parties’ reports as “unwieldy, routine, repetitious and overlapping”).

125. See, e.g., Tachiona v. Mugabe, 234 F. Supp. 2d 401, 430-31 (S.D.N.Y. 2002) (noting that rulings of the HRC on individual communications establish certain essential principles regarding the content of the rights of freedom of thought, belief, opinion, and expression); In re Minister for Immigration and Multicultural Affairs, 2001 Austl. High Ct. LEXIS 4, 54-57 (2001) (noting that Australia’s common law will be influenced by the HRC’s jurisprudence by virtue of Australia’s having signed the ICCPR). See also Markus G. Schmidt, Follow-up Procedures to Individual Complaints and Periodic State Reporting Mechanisms, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS, supra note 124, at 201 (noting that national courts are increasingly cognizant of HRC decisions).


128. See ICCPR Optional Protocol, supra note 126, art. 4(2), 999 U.N.T.S. at 302; Siân Lewis-Anthony, Treaty-Based Procedures for Making Human Rights Complaints Within the UN System, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, supra note 103, at 47.

129. See Lewis-Anthony, supra note 128, at 48.

130. See ICCPR Optional Protocol, supra note 126, arts. 5(4), 6, 999 U.N.T.S. at 303.
company is operating or against the government of the country where the company’s headquarters are based. Such a communication could be based on alleged violations of the “inherent right to life” under Article 6(1) of the ICCPR. The HRC has emphasized that this right should be broadly construed and that states are required to adopt positive measures to protect it. In particular, the HRC has recommended that “it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate . . . epidemics.” The travaux préparatoires to the ICCPR affirm that such measures should include regulation of the behavior of “private persons,” a term which has been construed to include corporations.

Given the overwhelming evidence that smoking and the inhalation of secondhand smoke cause various types of cancer and other life-threatening illnesses, States Parties to the ICCPR should be required to adopt legislative or other measures to decrease consumption of tobacco products and ensure smoke-free workplaces and public spaces. This could be achieved through the filing of individual communications, on behalf of smokers and non-smokers, against States Parties to the Optional Protocol with weak

132. Article 6(1) of the ICCPR provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” ICCPR, supra note 10, art. 6(1), 999 U.N.T.S. at 174. Pursuant to Article 4(2), no derogations from Article 6 are permitted. Id. art. 4(2), 999 U.N.T.S. at 174.
134. See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 120 (1987). See also CLAPHAM, supra note 84; FARRIOR, supra note 84.
135. See supra notes 84-86.
136. See supra note 70.
137. See ICCPR, supra note 10, art. 2(2), 999 U.N.T.S. at 173-74 (requiring States Parties “to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant”).
138. These measures should include the imposition of tobacco taxes at levels that decrease consumption and the progressive elimination of tobacco advertising and promotion. PAHO, supra note 114, at 3. However, a total ban on smoking would be unenforceable. See Economics of Tobacco Control, supra note 45, at 7. Many tobacco control advocates oppose such a ban. See, e.g., Kenneth E. Warner et al., The Emerging Market for Long-Term Nicotine Maintenance, 278 J. AM. MED. ASS’N 1087, 1090 (1997) (advocating that a new nicotine policy should acknowledge the “individual dignity [of victims of nicotine addiction], the difficulty many would have in being forced to forgo nicotine, and the opportunity to continue consuming nicotine should they so desire”).
tobacco regulatory regimes.\(^{139}\) Claims on behalf of non-smokers based on the absence of legislation requiring smoke-free workplaces and public spaces may be easier to prove than claims on behalf of smokers, whose injuries are commonly perceived to stem from their own conduct. However, because smokers in the developing world are generally unaware of the risks associated with tobacco use,\(^{140}\) their conduct should not give rise to an assumption of risk defense or diminish the level of state responsibility for resultant violations of the right to life.

Individual communications on behalf of non-smokers seeking to minimize their exposure to secondhand smoke could also be based on their right to protection from “cruel, inhuman or degrading treatment or punishment” under Article 7 of the ICCPR.\(^{141}\) The HRC has characterized “treatment,” which was defined by the drafters to be broader in scope than “punishment,”\(^{142}\) as “cruel, inhuman or degrading” in only a few cases, nearly all of which involved mistreatment of prisoners in detention.\(^{143}\) For example, the HRC has construed “degrading treatment” to include a broad spectrum of arbitrary practices intended to humiliate prisoners and make them feel insecure.\(^{144}\) Involuntary exposure to secondhand smoke arguably falls into this category.\(^{145}\) Outside the detention context, a government should be held accountable for its failure to implement a ban on smoking in workplaces and public spaces, where non-smokers are compelled to inhale secondhand smoke involuntarily.

Effective tobacco control also implicates the obligations of governments under Article 19(2) of the ICCPR, which protects the right to freedom of information.\(^{146}\) The U.N. Special Rapporteur on Freedom of Opinion and Expression has independently recognized this right and has affirmed the obligation of private bodies to disclose information relating to crucial public

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139. The hallmarks of a strong tobacco regulatory regime include broad restrictions on tobacco advertising and promotion, high tobacco taxes, strong warnings on tobacco packages, strict limits on smoking in public spaces and workplaces, tight controls on tobacco sales to minors, organized antismoking efforts, and effective monitoring and enforcement mechanisms. See Sugarman, supra note 5, at 261; Taylor & Roemer, International Strategy for Tobacco Control, supra note 23, at 41.

140. See WORLD BANK, supra note 15, at 30 (“People’s knowledge of the health risks of smoking appears to be partial at best, especially in low and middle-income countries where information about these hazards is limited.”); Prabhat Jha et al., The Economic Rationale for Intervention in the Tobacco Market, in TOBACCO CONTROL IN DEVELOPING COUNTRIES, supra note 53, at 153, 156-57 (attributing lack of awareness of the health hazards of smoking in the developing world to low education levels and governments’ failures to regulate tobacco advertising and promotion).

141. See ICCPR, supra note 10, art. 7, 999 U.N.T.S. at 175.

142. See BOSSUYT, supra note 134, at 150.

143. See NOWAK, supra note 123, at 134-135.

144. See id. at 133 (citing Conteris v. Uruguay, U.N. GAOR Hum. Rts. Comm., 25th Sess., para. 9.2, U.N. Doc. CCPR/C/25/D/139/1983 (1985), which found that repeated solitary confinement, subjection to cold, and persistent relocation to a different cell constituted “degrading treatment”). Such a finding may be based on an objective standard or an individual’s perception of the treatment to which he is subjected. Id.

145. The U.S. Supreme Court has held that a state prisoner’s involuntary exposure to secondhand smoke that poses an unreasonable risk of serious damage to his future health could constitute cruel and unusual punishment in violation of the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 35 (1993) (remanding case for further hearings on these allegations).

146. Article 19(2) of the ICCPR provides for the “freedom to seek, receive, and impart information, and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or any other media.” ICCPR, supra note 10, art. 19(2), 999 U.N.T.S. at 178.
interests, including health.147 On the theory that Article 19(2) of the ICCPR obligates governments to ensure that their citizens make informed choices to assume the health risks of smoking, individual communications could be filed against those States Parties to the Optional Protocol that have failed to undertake adequate tobacco control education measures. At a minimum, these measures should include the implementation of regulations requiring detailed or graphic health warnings on cigarette packages and the organization of public awareness campaigns. Although the effectiveness of particular initiatives may vary depending on relevant geographical and cultural considerations, the HRC could establish a useful precedent by affirming that governments have a positive obligation to disclose the risks inherent in using tobacco products. The burden of disclosure should be higher in cases where tobacco advertising targets particularly vulnerable groups such as women and children.

The tobacco industry regularly seeks to defeat advertising restrictions on the grounds that they would infringe its right to freedom of expression.148 However, Article 19(2) is subject to the exceptions set forth in Article 19(3). Article 19(3) provides that the exercise of the rights covered by Article 19(2) carries "special duties and responsibilities," including compliance with certain restrictions provided by law that are necessary for the protection of public health.149 Legal scholars have construed Article 19(3) to embody the "general duty to present information truthfully, accurately, and impartially."150 Insofar as the tobacco industry’s advertisements or promotional activities are misleading or deceptive,151 restrictions on these activities would be consistent with Article 19(3).152


149. See ICCPR, supra note 10, art. 19(3), 999 U.N.T.S. at 178.


151. For example, the use of deceptive descriptors such as “light” and “mild” falsely implies a reduced health risk attributable to low-tar or nicotine requirements. See generally MINISTERIAL ADVISORY COUNCIL ON TOBACCO CONTROL, PUTTING AN END TO DECEPTION: PROCEEDINGS OF THE INTERNATIONAL EXPERT PANEL ON CIGARETTE DESCRIPTORS (2002), available at www.ntch.ca/CCTCweb.nsf (finding no convincing evidence of health benefits resulting from cigarettes marked as “light” or “mild”); NAT’L CANCER INST., U.S. DEP’T OF HEALTH & HUMAN SERVS., SMOKING AND TOBACCO CONTROL MONOGRAPH No. 13, RISKS ASSOCIATED WITH SMOKING CIGARETTES WITH LOW MACHINE-MEASURED YIELDS OF TAR AND NICOTINE (2001), http://cancercontrol.cancer.gov/ctcrb/monographs/13/m13.preface.pdf (finding that switching to low-tar/low-nicotine cigarettes may provide smokers with a false sense of reduced risk because the actual amount of tar and nicotine consumed may be equal to or greater than a higher yield brand).

152. See NOWAK, supra note 123, at 357-58 (noting that the restriction of tobacco advertising by States Parties to the ICCPR may be justified based on the public health exception to the right to
HRC members, like CESCR members, may lack the technical competence required to assess the tobacco industry's truthfulness in advertising or the effectiveness of measures taken by states to counter deceptive advertising practices. Thus, individual communications should be comprehensively documented with relevant scientific and other evidence. By ensuring that such information is presented to the HRC, tobacco control advocates could facilitate the development of international standards that bolster their advocacy efforts before national courts and legislatures.

2. European Court of Human Rights

The ECHR is authorized to render decisions on petitions from any person, NGO, or group claiming to be or to represent the victim of a violation by a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms of any of the rights protected by that instrument. The ECHR has issued instructive jurisprudence in response to individual petitions alleging violations of the rights to life, respect for private and family life, and freedom to receive information based on various aspects of States Parties' tobacco control legislation. While affirming the human rights dimension of tobacco production, marketing, and consumption, the ECHR's decisions accord a "margin of appreciation" to national governments regarding the precise parameters of an effective tobacco regulatory regime. Its judgments, with which States Parties to the European Convention are legally bound to comply, are significant not only for their effect on the conduct of European governments, but also for their potential

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153. Article 5(1) of the Optional Protocol appears to limit the evidence available to the HRC to written information supplied by the individual who files the communication and the concerned State Party. In practice, however, informal NGO communications are welcomed by particular HRC members. Moreover, HRC members cannot be expected to disregard any independent knowledge they may have of the factual or legal situation in a particular state. See Nowak, supra note 123, at 691-93.

154. European Convention, supra note 10, art. 34, 155 E.T.S. at 5. Although the ECHR is also authorized to render decisions on disputes between States Parties regarding alleged breaches of the European Convention, states have generally been reluctant to initiate such proceedings. See European Convention, supra note 10, art. 33, 155 E.T.S. at 5; Soren C. Prebensen, Inter-State Complaints Under Treaty Provisions, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS, supra note 124, at 554-55.

155. These rights are protected by Articles 2, 8, and 10, respectively, of the European Convention. European Convention, supra note 10, arts. 2, 8, 10, 213 U.N.T.S. at 224, 230. To date, the tobacco-related jurisprudence of the ECHR has not addressed Article 3, which prohibits inhuman or degrading treatment or punishment. See European Convention, supra note 10, art. 3, 213 U.N.T.S. at 224.


157. See European Convention, supra note 10, art. 46(1), 155 E.T.S. at 8. Regarding mechanisms for enforcing ECHR judgments, see Elizabeth Lambert-Abdelgaward, Council of Europe, The Execution of Judgments of the European Court of Human Rights (2002). By contrast, the decisions of the CESCR and the HRC are not legally binding.

impact on the reasoning of other international human rights institutions and national courts throughout the world.\footnote{159}{See Coliver, \textit{supra} note 75, at 44 (noting that decisions of the European Court are often granted significance in other regions of the world); Anne-Marie Slaughter, \textit{Judicial Globalization}, 40 \textit{Va. J. Int'l L.} 1103, 1109-10 (2000) (noting that the South African Supreme Court, the Supreme Court of Zimbabwe, and the British Privy Council sitting as the Constitutional Court of Jamaica have relied on ECHR decisions). For examples of decisions of non-European fora that have looked to ECHR jurisprudence, see Cooley v. Granholm, 291 F.3d 880, 883 (6th Cir. 2002) (citing an ECHR case about euthanasia); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Adv. Op. OC-5/83, Inter-Am. Ct. H.R. (ser. A), No. 5, para. 46 (1985) (discussing ECHR decisions regarding permissible restrictions on freedom of expression) [hereinafter \textit{Compulsory Membership}].}

The decision of the European Commission on Human Rights\footnote{160}{Prior to the entry into force on November 1, 1998 of Protocol No. 11 of the European Convention, cases submitted to the ECHR were handled initially by the European Commission on Human Rights, which ruled on admissibility, established the facts, and promoted friendly settlement. \textit{See} A.H. Robertson \& J.G. Merrills, \textit{Human Rights in the World} 127-30, 149-51 (1996).} in \textit{Wöckel v. Germany} provides guidance regarding the scope of States Parties' affirmative obligations to protect non-smokers from the risks of exposure to secondhand smoke.\footnote{161}{\textit{Id.} In \textit{Wöckel}, the applicant's claim under Article 8 derived from an alleged violation of his right to private life. \textit{Id.} However, Article 8 could also provide the basis for claims of violations of the right to family life by individuals whose family members have died from tobacco-related illnesses.} In that case, the European Commission declared inadmissible a German citizen's request for an order requiring the German legislature to enact more far-reaching prohibitions on smoking in public pursuant to Articles 2\footnote{162}{\textit{Id.} The applicant's claim under Article 8 derived from an alleged violation of his right to private life. \textit{Id.} However, Article 8 could also provide the basis for claims of violations of the right to family life by individuals whose family members have died from tobacco-related illnesses.} and 8\footnote{163}{\textit{Id.} The applicant's claim under Article 8 derived from an alleged violation of his right to private life. \textit{Id.} However, Article 8 could also provide the basis for claims of violations of the right to family life by individuals whose family members have died from tobacco-related illnesses.} of the European Convention.\footnote{164}{See \textit{Wöckel v. Germany}.} Noting that the German government had already undertaken a public information campaign on the health risks of smoking, imposed restrictions on tobacco advertising, and prohibited smoking in certain public areas, the European Commission held that the applicant's rights to life and to respect for private and family life had not been violated.\footnote{165}{\textit{Id.} In \textit{Wöckel}, the applicant's claim under Article 8 derived from an alleged violation of his right to private life. \textit{Id.} However, Article 8 could also provide the basis for claims of violations of the right to family life by individuals whose family members have died from tobacco-related illnesses.} This decision establishes that Articles 2 and 8 impose certain affirmative obligations on States Parties to protect non-smokers' rights through public education and legislation. However, the Commission ultimately deferred to Germany, which has been a staunch and consistent ally of the tobacco industry,\footnote{166}{\textit{See}, e.g., Eryn Brown, \textit{The World Health Organization Takes On Big Tobacco}, \textit{Fortune}, Sept. 17, 2001, at 117; Frances Williams, \textit{Progress Made on Tobacco Control Treaty}, \textit{Financial Times}, Mar. 26, 2002, at 12; Hannah Cleaver, \textit{Germany Under Pressure To Back Tobacco Treaty}, \textit{Reuters}, Jan. 27, 2003; Richard Waddington, \textit{Activists Say US, Japan, Germany Block Tobacco Pact}, \textit{ABC News/Reuters}, Oct. 24, 2002, http://www.fctc.org/ news314.shtml.} emphasizing that the implementation
of these obligations falls within national governments' margin of appreciation.\footnote{167}

\textit{Keenan v. United Kingdom}, which addressed the affirmative obligations of prison officials to prevent a mentally ill prisoner from committing suicide,\footnote{168} may also provide a useful precedent for future tobacco control litigation in the ECHR. In \textit{Keenan}, the ECHR affirmed that Article 2 of the European Convention requires government authorities to take reasonable steps to protect individuals from an immediate risk to life if they know or should know of the existence of such a risk.\footnote{169} Noting that the prison officials' obligations in \textit{Keenan} were not affected by the prisoner's role in taking his own life, the ECHR held that they had fulfilled their obligations by placing the petitioner in the hospital and under watch when he displayed suicidal tendencies.\footnote{170} While the risk of contracting life-threatening diseases from smoking or exposure to secondhand smoke may be less immediate than the risk of suicide in \textit{Keenan}, it should be no less evident to government authorities. Nicotine addiction renders smokers, like persons in custody, particularly vulnerable to tobacco-related diseases and death. As in \textit{Keenan}, this heightened vulnerability should be construed to impose a corresponding duty on government authorities to take reasonable precautions to protect their citizens.\footnote{171} At a minimum, such precautions should include the public dissemination of information regarding the health risks of tobacco use,\footnote{172} the imposition of cigarette warning label requirements, and prohibitions on misleading and deceptive tobacco advertisements.

ECHR jurisprudence suggests that such tobacco advertising restrictions would be consistent with the right to freedom of expression under Article 10 of the European Convention.\footnote{173} The European Commission responded to an application from a private Austrian association promoting the interests of non-smokers by implicitly denouncing advertising that misleads consumers about the health risks of tobacco products.\footnote{174} The applicants alleged that a 1990 decision of the Austrian Supreme Court, which prohibited them from using

\footnotetext[167]{See \textit{Wöckel v. Germany}. The Commission also noted the competing interests of the applicant as a non-smoker and other individuals who smoked. \textit{Id.}}


\footnotetext[169]{\textit{Id.} paras. 89-91, 101.}

\footnotetext[170]{\textit{Id.} para. 98.}

\footnotetext[171]{\textit{See id.} paras. 89-91.}

\footnotetext[172]{This obligation is bolstered by Judge Jambrek's concurring opinion in \textit{Guerra & Others v. Italy}, App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998), \textit{available at} http://hudoc.echr.coe.int/hudoc, which held that Article 2 of the European Convention prohibits a government from withholding information about "circumstances which foreseeably, and on substantial grounds, present a real risk of danger to health and physical integrity." \textit{Id.} at 387.}

\footnotetext[173]{The Convention provides that:

\begin{quote}
Everyone has the right to freedom of expression. This right shall include freedom to . . . receive . . . information and ideas without interference by public authority and regardless of frontiers . . . . The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of health or morals [and] for the protection of the reputation or rights of others . . . .
\end{quote}

European Convention, \textit{supra} note 10, art. 10, 213 U.N.T.S. at 230.}

Philip Morris’s “Camel” trademark175 in the context of anti-smoking publicity, unjustifiably interfered with their right to freedom of expression. After acknowledging that the prohibition on the petitioners’ use of the trademark was consistent with Article 10(2) of the European Convention because it was prescribed by Austrian law and was intended to protect the reputations and the rights of others, the Commission focused on whether this prohibition was necessary in a democratic society.176 The Commission ultimately concluded that the Austrian Supreme Court’s decision did not exceed the margin of appreciation granted to national authorities in assessing the proportionality of an interference with freedom of expression, because “without special reason such as misleading advertising for tobacco using health symbols, a particular brand must not be disparaged as a substitute for a whole category of products.”177 The Commission’s reasoning suggests that the applicants might have been accorded greater latitude if they had demonstrated that Philip Morris’s advertisements were likely to mislead prospective consumers about the health consequences of smoking. In fact, the ECHR has explicitly affirmed in non-tobacco-related cases that advertising restrictions imposed to protect consumers from misleading or deceptive practices are consistent with Article 10.178

The impact of tobacco advertising restrictions on the right to freedom of expression was also analyzed by the Advocate General of the European Court of Justice (ECJ)179 in the related cases of Germany v. Parliament and Council80 and R. v. Secretary of State for Health, ex parte Imperial Tobacco Ltd.181 Both cases addressed the validity of the prohibitions imposed by European Parliament and Council Directive 98/43 (Advertising Directive) on all direct and indirect advertising of tobacco products and the tobacco industry’s sponsorship of events.182

175. Both the applicants and the European Commission improperly attributed the Camel trademark to Philip Morris rather than the R.J. Reynolds Tobacco Company.
176. Österreichische Schutzgemeinschaft v. Austria.
177. Id.
179. The ECJ was established to ensure that European Community (EC) law is uniformly interpreted and effectively applied. It has jurisdiction over disputes involving EC Member States and European Union institutions, businesses, and individuals. Since all EC Member States are parties to the European Convention, the ECJ derives guidance from the rights enumerated in the Convention when interpreting and applying EC law. Anthony Lester, Freedom of Expression, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 465, 468 (J. Macdonald et al. eds., 1993).
182. Council Directive 98/43, 1998 O.J. (L 213/9). In the first case, Germany sought the annulment of the Advertising Directive pursuant to Article 173 of the European Community Treaty (Article 230, as amended), which authorizes the ECJ to review the legality of acts adopted by the European Parliament and Council. In the second case, several tobacco manufacturing companies had applied to the U.K. High Court of Justice, Queen’s Bench Division (Crown Office), for judicial review of the intention and obligation of the U.K. government to give effect to the requirements of the
Although the ECJ ultimately annulled the Advertising Directive on trade-related grounds, Advocate General Fennelly’s Opinion elaborated on the human rights dimension of tobacco advertising bans. Noting that ECHR jurisprudence permits reasonable limits on commercial speech, the Advocate General reasoned that the Advertising Directive could be justified only if it would reduce tobacco consumption and if less restrictive measures would not be equally effective. Based on the evidence presented, he concluded that these standards had been met, except with respect to a prohibition on the advertisement of non-tobacco goods and services bearing brands or other distinguishing features associated with tobacco products. The ECJ adopted the same distinction in its Judgment in the case brought by Germany, which annulled the Advertising Directive and thereby rendered moot the case brought by the United Kingdom. In December 2002, the European Union passed a new law banning tobacco advertising from radio, television, the Internet and print, and prohibiting tobacco companies from sponsoring events such as Formula One motor racing, but excluding the types

Advertising Directive. The U.K. court then referred certain questions regarding the validity of the Advertising Directive to the ECJ. Previously secret tobacco industry documents revealed that the tobacco industry had tried to defeat the Advertising Directive by actively lobbying government officials and industrial groups in Germany, the United Kingdom, and other EC Member States to protect its right to freedom of expression. See BITTON ET AL., supra note 148, at 18-40.


186. The evidence presented included reports prepared by the U.S. National Bureau of Economic Research (NBER) and the Institut für Therapie- und Gesundheitsforschung, Kiel, which established a direct correlation between tobacco advertising and youth smoking, as well as between comprehensive advertising bans and reductions in average per capita tobacco consumption. The NBER had concluded that the Advertising Directive would have reduced tobacco consumption by approximately 6.9 percent during the sample period, and that more limited bans had been minimally effective in reducing tobacco consumption. Id. at I-8491-92, [2000] 3 C.M.L.R. at 1247.


188. See Parliament & Council, 2000 E.C.R. at I-8527-28, I-8532, [2000] 3 C.M.L.R. at 1268, 1271; R. v. Sec’y of State for Health, ex parte Imperial Tobacco Ltd., 2000 E.C.R. I-8599, I-8606, [2000] 3 C.M.L.R. 1175, 1272. Although the freedom to receive information, guaranteed by Article 10(2) of the European Convention, was not relevant in these cases, the Advocate General noted in his Opinion that it might come into play if a customer sought information from a tobacco producer or distributor about its products. See Parliament & Council, 2000 E.C.R. at I-8494 & n.207, [2000] 3 C.M.L.R. at 1250 & n.216 (Opinion of Advocate General). If the producer or distributor failed to respond, the State Party concerned would arguably have an obligation under Article 10 of the European Convention to require disclosure of the requested information. See European Convention, supra note 10, art. 10, 213 U.N.T.S. at 230. However, the ECHR would be unlikely to require a state to facilitate the disclosure of such information on its own initiative. See Guerra & Others v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357, 381-82 (1998), available at http://hudoc.echr.coe.int/hudoc (holding that the Italian government did not have a positive obligation under Article 10(2) to inform the public about dangers arising out of the operation of a chemical factory and how to proceed in the event of a major accident).
of restrictions that the ECJ had found problematic in the Advertising Directive.\(^\text{189}\)

Many tobacco-related human rights claims remain to be litigated before the ECHR.\(^\text{190}\) Given the ECHR’s past unwillingness to take a proactive stance on tobacco control, progress is likely to be gradual at best. Cases must be chosen strategically with a view toward emphasizing the human toll that will result from maintaining the status quo in particular countries. The outcome of these cases will be important because human rights institutions in other regions of the world are likely to grant them considerable deference.

C. Expanding the Scope of Applicable Norms Through Advisory Opinions: The Untapped Potential of the Inter-American System

The jurisdiction of the Inter-American System is governed primarily by the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.\(^\text{191}\) To date, no tobacco-related human rights petitions appear to have been filed in this system, which is comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.\(^\text{192}\) However, the diverse mechanisms available to raise new issues before these institutions offer great potential for progress in this arena. Like the HRC and ECHR, the Inter-American Commission permits the filing of individual petitions concerning alleged violations by states of rights protected by the American Convention and the American Declaration.\(^\text{193}\)

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190. See, e.g., Edward Lestrade, Slovak Republic: The Right to Life and the Protection of Non-Smokers in Slovakia, GLOBALINK NEWS & INFO. BULL., July 23, 2003 (arguing that the Slovak government risks challenge in the ECHR for its failure to protect non-smokers from the deadly effects of environmental tobacco smoke) (on file with author).


192. The Inter-American Commission is composed of seven persons “of high moral character and recognized competence in the field of human rights.” ACHR, supra note 10, art. 34, 1144 U.N.T.S. at 153-54. They are elected by the General Assembly of the Organization of American States (OAS) from a list of candidates proposed by the governments of OAS Member States, but serve in their personal capacities. Id. art. 36(1), 1144 U.N.T.S. at 154. The Inter-American Court consists of seven judges, who are nationals of OAS Member States. Id. art. 52(1), 1144 U.N.T.S. at 157-58. They are elected by the States Parties to the ACHR “from among jurists of the highest moral authority and of recognized competence in the field of human rights,” but also serve in their personal capacities. Id.

193. See Statute of the Inter-American Commission on Human Rights, OAS Res. 447, 9th Reg. Sess., art. 20 (1979) (granting the Inter-American Commission jurisdiction to examine communications regarding governments that are not parties to the ACHR and to make appropriate recommendations); ACHR, supra note 10, art. 44, 1144 U.N.T.S. at 155 (permitting any person, group, or non-governmental entity legally recognized in at least one OAS Member State to file petitions with the Inter-American Commission “containing denunciations or complaints of violations” by States Parties). See also Case 12.285 (Domingues v. United States), Inter-Am. C.H.R. Rep. No. 62/02, para. 30 (2002); Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Adv. Op. OC-10/89, Inter-Am
Unlike other human rights fora, the Inter-American Court exercises advisory jurisdiction.\(^{194}\)

Following the submission of a petition, the Inter-American Commission may receive testimony, documents, or other information regarding particular human rights issues.\(^{195}\) Based on this evidence and other available information, the Commission issues a report delineating the facts, the terms of any settlement reached by the parties, or, in the absence of a settlement, its conclusions.\(^{196}\) If individual petition proceedings before the Inter-American Commission do not result in a friendly settlement or if a targeted state fails to comply with the Commission’s recommendations within a prescribed period, the Commission or the petitioning state may refer the matter to the contentious jurisdiction of the Inter-American Court.\(^{197}\) Like the ECHR, the Inter-American Court is empowered to issue legally binding judgments.\(^{198}\)

The Inter-American Commission and Court have accorded far-reaching protection to the rights of vulnerable groups, including persons with mental disabilities,\(^{199}\) women,\(^{200}\) and children.\(^{201}\) Empirical evidence demonstrates the particular susceptibility of children and adolescents to the tobacco industry’s promotional tactics,\(^{202}\) as well as the heightened health risks of smoking and exposure to secondhand smoke during childhood.\(^{203}\) If such evidence has been

\(^{194}\) See ACHR, supra note 10, art. 64, 1144 U.N.T.S. at 159-60.
\(^{195}\) See id. art. 48, 1144 U.N.T.S. at 156-57.
\(^{196}\) See id. arts. 49-50, 1144 U.N.T.S. at 157.
\(^{197}\) See id. arts. 51, 63, 1144 U.N.T.S. at 157, 159. In order for the Inter-American Court to hear such a case, the relevant State Party must have filed a declaration or special agreement recognizing the Court’s jurisdiction. Id. art. 62, 1144 U.N.T.S. at 159.
\(^{198}\) Id. art. 68, 1144 U.N.T.S. at 160.
\(^{199}\) See Case 11.427 (Victor Rosario Congo v. Ecuador), Inter-Am. C.H.R. 475, OEA/ser. L.V./II.95, doc. 7 rev., paras. 53-54, 106-08 (1999) (noting that persons with mental disabilities comprise a “particularly vulnerable group” entitled to special protection and holding that the Government of Ecuador had violated the petitioner’s rights to life, physical, mental, and moral integrity, and protection from cruel, inhuman, and degrading treatment based on the injuries he suffered in detention; in an effort to remedy these violations, the Government of Ecuador undertook to pay $30,000 in compensation, to seek the prosecution of the responsible individuals, and to establish a trust fund for the benefit of the victim’s family).
\(^{200}\) See Case 12.051 (Maria Da Penha v. Brazil), Inter-Am. C.H.R. 704, OEA/ser. L.V./II.III, doc. 20 rev., paras. 45-49, 56 (2001) (noting the disproportionate number of female victims of domestic violence and finding that the Government of Brazil had displayed a pattern of negligence and failed to take effective action to prosecute and convict perpetrators). Cf. American Declaration of the Rights and Duties of Man, supra note 191, art. 7 (affirming the right of pregnant and nursing women and of all children to “special protection, care and aid”).
\(^{202}\) See, e.g., John P. Pierce et al., Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association with Target Advertising, 271 J. AMER. MED. ASS’N 608, 611 (1994) (concluding that tobacco advertising campaigns targeting women were associated with an increase in smoking among minor girls).
\(^{203}\) See NAT’L CANCER INST., supra note 70; SCIENTIFIC COMM. ON TOBACCO AND HEALTH, supra note 70.
compiled in countries that have ratified the American Convention, recourse to the individual petition procedure might be productive.  

Alternatively, advocacy efforts could be targeted toward the expansion of international human rights norms to encompass states' obligations to undertake particular tobacco control initiatives. A proactive Member State of the Organization of American States (OAS) or a qualified OAS organ such as the Pan-American Health Organization could request an advisory opinion from the Inter-American Court regarding the tobacco control implications of relevant norms in the American Convention or other treaties concerning the protection of human rights in the Americas. An OAS Member State could also request an advisory opinion on the compatibility of its tobacco control laws with the applicable provisions of these treaties. Similar results could be achieved through a hearing before the Inter-American Commission, which may be held on the Commission's own initiative or at the request of any interested party.

The existing jurisprudence of the Inter-American Commission and Court can be construed strategically to address tobacco-related human rights violations in OAS Member States. Article 4(1) of the American Convention protects the right to life. In Villagrán Morales ("Street Children Case"), the Inter-American Court interpreted this right broadly to require a state to guarantee the creation of "conditions that guarantee a dignified existence." A compelling argument could be made that such conditions should preclude

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204. For maximum impact, individual petitions alleging tobacco-related human rights violations should be filed initially against States Parties to the American Convention. Only petitions filed pursuant to the American Convention may be referred to the Inter-American Court, which can issue legally binding judgments.

205. These strategies are not mutually exclusive in the Inter-American System. By contrast, the ECHR is prohibited from exercising advisory jurisdiction over any issue that might arise in the course of proceedings before the European Commission or Court. See Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 11, 1950, art. 1, Europ. T.S. No. 44.


207. See ACHR, supra note 10, art. 64(2), 1144 U.N.T.S. at 160.


209. See ACHR, supra note 10, art. 4(1), 1144 U.N.T.S. at 145 ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

210. See Street Children Case, supra note 201, paras. 144, 146, 191 (finding that the Guatemalan government had violated the petitioners' right to life by applying or tolerating a systematic practice of violence against at-risk children in its territory).
the type of harrowing death that many victims of tobacco-related disease in the developing world are forced to suffer.211

Article 5 of the American Convention, which is more expansive than comparable provisions of the ICCPR and the European Convention, protects the rights to physical integrity and freedom from cruel, inhuman, or degrading punishment or treatment.212 Like the jurisprudence of the HRC, most of the relevant decisions of the Inter-American Commission and Court have involved prison conditions. Several of these decisions have highlighted evidence of inadequate ventilation and lack of fresh air.213 In countries where prisoners are forced to inhale secondhand smoke, similar evidence could be presented to substantiate alleged violations of Article 5. These violations could be remedied through legislation mandating that all prisoners have the right to a smoke-free environment. The attribution of state responsibility for rights violations in the prison context is clear because the government is the guarantor of the rights of detainees.214 By analogy, Article 5 should be construed to require that all government facilities be smoke-free.

Claims alleging violations of the right to freedom of information based on the tobacco industry's deceptive promotional tactics may be more difficult to substantiate in the Inter-American System than in other human rights fora. The Inter-American Commission and Court have construed the scope of permissible restrictions on freedom of expression under Article 13 of the American Convention215 more narrowly than the HRC or the ECHR have construed comparable provisions of the ICCPR and the European Convention. Although the Inter-American Court has affirmed that such restrictions may be "justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees,"216 Article 13(2) of the American Convention

211. See, e.g., Rachel C. Koshy et al., Cancer Pain Management in Developing Countries: A Mosaic of Complex Issues Resulting in Inadequate Analgesia, 6 SUPPORT CARE CANCER 430, 431 (1998) (noting that cancer pain medications are not available to the vast majority of patients in Latin and South America, Eastern Europe, Asia, and Africa).

212. See ACHR, supra note 10, art. 5, 1144 U.N.T.S. at 146. Article 5 provides:

(1) Every person has the right to have his physical, mental, and moral integrity respected;
(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Id.


214. See Neira Alegria Case, Inter-Am Ct. H.R. (ser. C), No. 21, para. 60 (1995) (finding that Article 5(2) of the ACHR requires the state to ensure a detainee's rights to life and humane treatment).

215. See ACHR, supra note 10, art. 13(1), 1144 U.N.T.S. at 148 (providing that "Everyone has the right to freedom of thought and expression. This right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice.").

216. See Compulsory Membership, supra note 159, para. 46.
explicitly prohibits any form of prior censorship.\textsuperscript{217} The sole exception to this prohibition is contained in Article 13(4), which permits censorship of "public entertainments" for the moral protection of children and adolescents.\textsuperscript{218} This provision would arguably justify bans on tobacco advertisements in contexts where children are most likely to view them. Because tobacco advertising increases consumption of tobacco products by individuals of all ages and nicotine addiction compromises smokers' ability to make informed decisions to assume the inherent risks of their conduct,\textsuperscript{219} the Inter-American Commission and Court should be encouraged to treat tobacco advertising as a special case that warrants a careful balancing of the rights involved. Moreover, legislation imposing sanctions for advertisements that misrepresent or distort the health risks of tobacco products could be justified under Article 13(2), which permits the imposition of liability for abusive exercises of freedom of expression.\textsuperscript{220}

In countries where tobacco companies must obtain governmental authorization before commencing operations, the state may have an obligation under Article 13 to ensure that prospective consumers have access to information regarding the human rights implications of these companies' activities. The Inter-American Commission elaborated on this aspect of Article 13 in its Report on the Situation of Human Rights in Ecuador.\textsuperscript{221} The Commission concluded that the rights of indigenous populations in areas targeted for oil exploitation by companies licensed by the government could best be protected by requiring the government of Ecuador to improve the dissemination of information about the expected environmental impact of these companies' activities on particular populations.\textsuperscript{222} The Commission reasoned that access to information is a prerequisite for effective public participation in relevant decision-making processes.\textsuperscript{223} In the tobacco control context, this precedent suggests that governments may be required to counter

\textsuperscript{217} See ACHR, supra note 10, art. 13(2), 1144 U.N.T.S. at 149 ("The exercise of the right [to freedom of expression] . . . shall not be subject to prior censorship . . . ."). See also Compulsory Membership, supra note 159, para. 77 ("A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has."); Declaration of Principles on Freedom of Expression, Inter-Am. C.H.R., Principles 5, 7 (2000), http://www.cidh.oas.org/Basicos/principles.htm.

\textsuperscript{218} See ACHR, supra note 10, art. 13(4), 1144 U.N.T.S. at 149. The Inter-American Court has defined "child" as a person who has not yet reached his or her eighteenth birthday. See Legal Status and Human Rights of the Child, Adv. Op. OC-17, Inter-Am. Ct. H.R. (ser. A), No. 17, para. 42 (2002).

\textsuperscript{219} See generally supra notes 72, 73, and 76 and accompanying text.

\textsuperscript{220} See ACHR, supra note 10, art. 13(2), 1144 U.N.T.S. at 149. The scope of such liability must be expressly and precisely defined by law and no greater than necessary to achieve the ends specified in the Convention. Compulsory Membership, supra note 159, paras. 38-40, 46-48. A prerequisite to the subsequent imposition of liability is proof of actual malice, which may be demonstrated through a showing of intention or negligence. See Claudio Grossman, Freedom of Expression in the Inter-American System for the Protection of Human Rights, 7 ILSA J. INT'L & COMP. L. 619, 640 (2002).

\textsuperscript{221} Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OAS Doc. OEA/ser. L/V/II.96, doc. 10 rev. 1, ch. IX (1997). The impetus for this report was the filing of a petition on behalf of the indigenous Huorani people in 1990. After concluding that numerous claims raised by the petitioners were prospective, the Commission opted to undertake a general evaluation of the human rights situation in Ecuador pursuant to Article 22 of the American Convention. Id.

\textsuperscript{222} See id. ch. VII.

\textsuperscript{223} Id.
misrepresentations by tobacco companies about the health consequences of smoking and exposure to secondhand smoke, and the effectiveness of particular tobacco control strategies. Available remedies include comprehensive information campaigns and the adoption of legislation requiring detailed, culturally-specific health warnings on cigarette packages.

The tobacco-related human rights obligations of OAS Member States could be made explicit in a detailed advisory opinion from the Inter-American Court or advisory recommendations promulgated by the Inter-American Commission. These pronouncements, which apply throughout the Americas, may have more far-reaching impact than a judgment in an individual case.225

D. The FCTC Reconsidered

Existing international human rights institutions hold great promise for promoting government accountability for tobacco-related human rights violations. Even before the FCTC enters into force, advocates and decision-makers could use its provisions, along with applicable principles and recommendations promulgated by WHO and other intergovernmental organizations, as benchmarks for delineating the tobacco control obligations of governments that are encompassed by prevailing human rights norms.226 Meanwhile, the strategies employed by existing institutions could be used to strengthen the implementation mechanisms embodied in the FCTC.

As discussed in Part II, the reporting process in the draft FCTC is not well-defined. If subsequently negotiated protocols include more detailed reporting guidelines, those developed by the CESCR could provide a useful model. To ensure that state reports are objectively evaluated, an independent expert body akin to the CESCR or the HRC could be established227 Moreover, a process of constructive dialogue along the lines of the CESCR process could be adopted to engage government representatives in developing effective country-specific strategies for surmounting obstacles to FCTC implementation. Like the CESCR, the FCTC expert body should be explicitly permitted to solicit information from tobacco control NGOs in evaluating state reports and monitoring the implementation of its recommendations.228

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224. See PAHO, supra note 7, at 21-32 (regarding the prevalence of such misrepresentations by Philip Morris and British American Tobacco in Latin America).
226. The use of non-binding principles and recommendations to delineate the scope of existing human rights norms proved effective in Case 11.427, supra note 199. Interview with Javier Vasquez, supra note 208.
227. Independent expert bodies have also been established to evaluate state reports under many other international human rights treaties. See, e.g., CRC, supra note 10, art. 43, 28 I.L.M. at 1461; CEDAW, supra note 10, art. 17, 1249 U.N.T.S. at 21; ICERD, supra note 10, art. 8, 660 U.N.T.S. at 224.
228. The FCTC could also assign monitoring responsibilities directly to NGOs. Notably, under the International Code of Marketing of Breast-milk Substitutes, which was adopted by the World Health Assembly in 1981, NGOs were tasked with reporting violations to manufacturers and distributors of breast-milk substitutes, as well as government authorities. This structure has reportedly encouraged the development of an international network of NGOs that monitor and report on compliance with the
In addition to evaluating state reports, the FCTC expert body could exercise advisory jurisdiction modeled on that of the Inter-American Court or the more informal procedures utilized by the Inter-American Commission. States Parties to the FCTC and the WHO could then file requests for advisory opinions to clarify the obligations imposed by specific treaty provisions and to determine whether a particular country's domestic legislation is consistent with these obligations. In addition, advisory proceedings would provide a non-adversarial forum for dialogue among States Parties and permit input from tobacco control NGOs during public hearings and in less formal settings.

Existing human rights mechanisms also provide various models for highlighting and addressing governments' violations of their treaty obligations. The individual petition procedures under the First Optional Protocol to the ICCPR, the European Convention, and the American Convention permit the filing of petitions by victims or their representatives. Whether or not the decisions by these fora are legally enforceable, they often generate international condemnation sufficient to shame governments into compliance with their treaty obligations. The creation of comparable decision-making fora within the FCTC regime could yield similar results.

The explicit incorporation of such implementation mechanisms into the FCTC may be less important than fostering an awareness of their utility among the Members of the Conference of the Parties or any subsequently established FCTC implementation body. In fact, a number of the mechanisms referenced in the foregoing sections, including those employed by the CESCR and the HRC's Special Rapporteur for the Follow-Up of Views, were not envisioned at the time the relevant treaties were drafted, but instead evolved over time as the need arose. The Conference could heighten its ability to promote compliance by States Parties by interpreting its mandate to permit the adoption of some or all of these implementation mechanisms.

V. FROM STATE RESPONSIBILITY TO NATIONAL IMPLEMENTATION

Both the Conference of the Parties and the human rights institutions discussed in Part IV are authorized to affirm the responsibility of states for treaty violations and to make recommendations intended to address these violations. Private tobacco companies, however, whose activities often precipitate such violations either directly or by virtue of the political and


229. For the specific provisions that may be used to file these petitions, see supra note 126 (for the First Optional Protocol to the ICCPR), supra note 154 (for the European Convention), and supra note 193 (for the American Convention).

economic influence they exercise over national governments, are not subject to the jurisdiction of the Conference or any existing human rights institution. Some intergovernmental organizations have sought to address this deficiency by promulgating human rights guidelines for corporations. While these instruments may indicate the current expectations of many governments regarding corporate responsibility for human rights violations, private corporations, including tobacco companies, are not legally obligated to comply with them.

The effectiveness of international human rights bodies in promoting global tobacco control will ultimately depend on the willingness of national legislatures and courts to implement and enforce their decisions. Some national courts have independently construed domestic human rights norms, which replicate norms contained in the ICCPR and the ICESCR, to require governments to undertake far-reaching tobacco control measures. These decisions may, in turn, influence courts in other regions of the world and prompt international human rights institutions to devote greater attention to tobacco-related human rights violations.

The decision of the Supreme Court of India in Deora v. India demonstrates the potential for promoting tobacco control through domestic human rights litigation. The petition, filed by the President of the Mumbai Regional Congress Committee, Shri Murli Deora, argued that the Union of India had violated the constitutional rights of its citizens to life, health, and a clean environment by failing to undertake adequate tobacco control initiatives. On November 2, 2001, the Indian Supreme Court ruled in favor of the petitioner and ordered the states of India to ban smoking in hospitals, educational institutions, railways and other public transportation facilities.

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231. See supra notes 12-22 and accompanying text.

232. As Andrew Clapham has pointed out, the absence of applicable enforcement procedures does not negate the existence of corporate obligations pursuant to international human rights treaties. See Andrew Clapham, The Question of Jurisdiction Under International Criminal Law over Legal Persons, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 193 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).


234. However, as Michael Akehurst has noted, such "soft law" documents may affect judicial or quasi-judicial decision-making and the evolution of new international norms. See MICHAEL B. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 54-55 (6th ed. 1996). For an innovative alternative approach for deriving international norms of corporate responsibility, see Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE L.J. 443, 496-524 (2001).


237. Id.
courts, public offices, libraries, and auditoriums throughout the country. In response to the petitioner's arguments that foreign tobacco companies were circumventing prevailing advertising restrictions, the Indian Supreme Court further directed police commissioners of major cities to report ongoing efforts to enforce the Indian advertising code.

Using a similar strategy, a group of tobacco control lawyers in Bangladesh challenged BAT's advertising practices on the grounds that such practices violated certain fundamental rights guaranteed under the constitution. The impetus for the lawsuit was the November 1999 arrival in Bangladesh's Chittagong port of the Voyage of Discovery, a touring luxury yacht, as part of a larger BAT campaign to cultivate a market for its Gold Leaf cigarettes among youth in Africa and Asia. The petitioners, officials of the Bangladesh National Drug Federation, alleged that BAT's exhibition of the vessel, which was covered with promotional messages without statutorily required health warnings, violated Bangladeshi citizens' constitutionally protected rights to life and liberty. Noting that the high rate of illiteracy in Bangladesh undermined the efficacy of statutorily required health warnings, the petitioners called for a total ban on the advertisement and promotion of tobacco products.

The decision issued by the Bangladesh Supreme Court on February 7, 2000, cites numerous decisions of neighboring South Asian countries which emphasize the human rights dimension of tobacco control. Invoking the rights to dignity and health guaranteed, respectively, by Articles 11 and 18 of the Constitution of Bangladesh, the court banned advertisements of tobacco products in newspapers, magazines, billboards, and electronic media beyond the period of any existing contracts with tobacco manufacturers or their agents. The court further prohibited the Government of Bangladesh from undertaking or encouraging any promotional ventures that resembled "Voyage..."
of Discovery." In addition, the court banned smoking in public places pursuant to Article 31 of the constitution, which protects the right to life of Bangladeshi citizens, and called upon the government to take more far-reaching steps to halt the manufacturing, production, and marketing of tobacco products. At the time of this writing, this decision was on appeal.

Although BAT obtained a stay of the judgment pending the hearing of the appeal, the Bangladeshi Supreme Court’s decision offers a useful model for advocates and courts seeking to prevent tobacco-related human rights violations in other countries. Drawing on the Bangladeshi experience, the Environmental Action Network (TEAN), a public interest litigation group in Kampala, Uganda, filed a similar case in the Uganda High Court. The Ugandan decision, issued in December 2002, held that smoking in public places violates the rights of non-smokers to life and to a clean and healthy environment. In both Bangladesh and Uganda, these cases have served as the impetus for the promulgation of new tobacco control laws, which are currently under consideration by the legislatures of both countries.

VI. CONCLUSION

WHO’s decision to invoke its treaty-making authority for the first time in its institutional history signifies an acknowledgement by its Member States of the gravity of the tobacco epidemic and their commitment to exploring innovative solutions. The international and domestic human rights strategies discussed in this Article should be among those solutions. Moreover, the integration into the FCTC of implementation mechanisms employed by existing human rights institutions—including reporting requirements, individual petition procedures, and advisory opinions—would enhance the likelihood of promoting compliance by States Parties. Confronted with heightened scrutiny of their conduct, governments would have greater incentives to take their FCTC commitments seriously.

247. Id.
248. This case also implicates the right to freedom of expression, which has been construed under the Bangladeshi Constitution to incorporate the right to receive information. In response to BAT’s allegation that the relief requested would violate its right to freedom of expression, the petitioners asserted that BAT’s aggressive marketing campaign exploited prospective consumers’ low level of awareness of the health consequences of tobacco consumption and thereby violated their right to freedom of information. Interview with Tania Amer, Barrister, The Law Associates, Washington, D.C. (June 6, 2002). The Bangladeshi Supreme Court’s decision did not address this issue explicitly.
249. See Islam & Mohammed v. Bangladesh, at 32. Recommended strategies included providing crop-switching subsidies to farmers, assisting tobacco workers in finding alternative jobs, restricting the issuance of licenses for tobacco factories, directing existing tobacco companies to engage in other business pursuits, and eventually prohibiting imports of tobacco products. Id. at 39.
250. E-mail from Debra Efroymson, Regional Director, PATH Canada, to author (Nov. 11, 2003) (on file with author).
252. See BLANKE, supra note 238, at 36; E-mail from Philip Karugaba, Director, The Environmental Action Network, to author (Nov. 9, 2003) (on file with author).
253. As Steven Ratner has noted, NGOs may have an important role to play in eliciting treaty compliance by states. See Ratner, supra note 234, at 543 (noting that “[t]he changing of expectations . . . must often begin with civil society before governments can be expected to respond”).
The increased use of international human rights institutions to address tobacco-related human rights violations can be expected to highlight the role of the tobacco industry in derailing effective tobacco control initiatives by national governments. By codifying minimum requirements for global tobacco control, the FCTC, together with the jurisprudence of international human rights institutions, will provide a common frame of reference for states. These standards should inspire more comprehensive national tobacco control legislation and more vigorous enforcement efforts by national courts. Conversely, proactive efforts by national courts to expand the scope of domestic human rights norms to encompass tobacco control guarantees may raise the profile of tobacco-related human rights violations at the international level.

Even if states do not comply immediately with their international obligations to promote tobacco control, progress may still be achieved. The FCTC negotiations have initiated a valuable process of dialogue among governments, NGOs, intergovernmental organizations, and scholars from diverse disciplines. The use of international human rights institutions and national courts to address tobacco-related human rights violations will involve an even broader range of participants in the debate about effective tobacco control strategies. The momentum created by these developments may ultimately embolden governments to defy the will of the tobacco industry more effectively than any treaty.