Without Reservation

Gregory F. Jacob
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“T’m going to support [the tobacco treaty]—much to the surprise of many around the world. . . . We have no reservations.” With those words, Tommy Thompson, Secretary of Health and Human Services, announced that the United States was prepared to throw its support behind the Framework Convention on Tobacco Control (“FCTC” or the “Convention”). The FCTC is a World Health Organization-sponsored treaty that was negotiated by the United States in Geneva beginning in October of 2000 along with over 150 other participating countries. When the text of the treaty was finalized in February of 2003, the United States’ health attaché in Geneva issued a statement publicly decrying several of the treaty’s provisions. But by the time Secretary Thompson made his remarks in May of the same year, the United States apparently no longer had any reservations about the treaty at all. This was fortunate indeed for the United States, for one of the treaty’s most controversial provisions was a “no reservations” clause that had been inserted into the Convention’s Article 30 over the United States’ objection.

Under the standard rules of treaty-making set forth in the Vienna Convention on the Law of Treaties, a country joining a multilateral treaty is permitted to enter “reservations” against certain of the treaty’s obligations.

* Greg Jacob is an Attorney Advisor in the Department of Justice’s Office of Legal Counsel. The views expressed in this article are his own and do not reflect the positions of the United States government.

1 Tommy Thompson, Secretary of the US Department of Health and Human Services, quoted in Rob Stein and Marc Kaufman, U.S. Backs Pact Curbing Tobacco Use Worldwide, Wash Post A1 (May 19, 2003).


3 Comments of the United States, as reported by Clare Nullis, Tobacco Treaty Agreed Despite U.S., German, Some Asian Objections, AP (Mar 1, 2003). The most bizarre of the United States’ expressed reservations, perhaps, was an objection to preambular language in the treaty that used the term “peoples” instead of “people” to describe indigenous groups.

4 FCTC art 30 (cited in note 2).
Entering a reservation against an obligation prevents the obligation from entering into force for the reserving country so long as the reservation is not fundamentally inconsistent with the treaty’s object and purpose. This rule of international law was developed by the International Court of Justice amidst a boom of multilateral treaty-making in the post–World War II era of the late 1940s and early 1950s. The rule is designed to maximize the number of countries that are able to join multilateral treaties by affording countries wishing to join some measure of flexibility to accommodate their local laws and circumstances.

“No reservations” clauses, however, alter the standard rule by prohibiting joining nations from in any way altering or disclaiming the treaty’s obligations, even where such alterations would be necessary to conform the treaty to the requirements of a nation’s domestic law or constitution. Because the FCTC contains a “no reservations” clause, to join the FCTC the United States must accept it wholesale—every nip, jot, and tuck. Based on the Secretary’s remarks, it appears the United States is prepared to do so.

My personal view is that the FCTC is an imperfect document produced by a deeply flawed process. That is not to say that the United States should not join the treaty. But the FCTC is, and was from the outset destined to be, a largely symbolic document, the primary benefit of which is the raising of worldwide awareness about the public health epidemic caused by tobacco consumption. For an international treaty, the FCTC has remarkably little to do with international relations, and primarily covers matters pertaining purely to domestic law. Virtually every provision of the treaty could be enacted into law by willing countries even in the treaty’s absence. Indeed, many countries, such as Canada, Australia, and the United States, had all but a few of the treaty’s provisions in place before the negotiations began and went into the negotiations with the goal of bringing the rest of the world up to their standards. The United States, which already has just about the best tobacco control system in the world, thus stands to gain very little for itself by joining the Convention. Nevertheless, the signature of the United States on the FCTC would likely have an important and desirable symbolic effect in encouraging tobacco control efforts elsewhere in the world, and so long as the costs of joining do not appear to be too great, there is little reason why its signature should be withheld.

The process by which the treaty was created, however, is another matter. As a member of the United States delegation that negotiated the FCTC, I

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observed first-hand the process by which the treaty was created.\textsuperscript{7} That process proved to be broken, inefficient, and generally inimical to United States interests. The United States may have managed to dodge a bullet this time around insofar as the document created by that process—the FCTC—is relatively benign, and may even prove to be somewhat helpful. In considering whether to join the treaty, however, the United States ought to be leery of taking any actions that might be seen as implicitly endorsing the underlying negotiation process or as sending a signal that the United States would be willing to participate in a similar negotiation process with respect to other treaties in the future. In this piece, I will discuss several of the FCTC’s more controversial provisions while highlighting key features of the negotiations that I believe the United States should strive to avoid being repeated in the future.

I. BACKGROUND OF THE FCTC

Some have dubbed the Framework Convention on Tobacco Control the world’s first “public health treaty”; it is certainly the first treaty to be negotiated under the auspices of the World Health Organization (“WHO”). The treaty was initiated by the World Health Assembly in May of 1996,\textsuperscript{8} but it took the WHO several years to organize the negotiation process, and the first meeting of the International Negotiating Body (“INB”) did not occur until October of 2000. In all, six formal negotiation sessions were held (INB1 through INB6) involving 192 participating countries, culminating in agreement on a final text in February of 2003. The text was formally adopted by the World Health Assembly on May 21, 2003.\textsuperscript{9}

The FCTC project was spurred by a growing recognition that tobacco consumption is causing a worldwide health epidemic. When the World Health Assembly voted in 1996 to endorse the initiation of a negotiation process, it cited statistics indicating that tobacco consumption was at that time already responsible for approximately 3.5 million deaths each year, and that the annual death toll would likely rise to 10 million people each year by the decade 2020–2030.\textsuperscript{10} By the time WHO Director-General Dr. Gro Harlem Brundtland spoke at INB6 in February of 2003 urging the importance of quickly completing a final

\textsuperscript{7} As a constitutional law expert in the Department of Justice’s Office of Legal Counsel, my assigned task during the negotiations was to ensure that the treaty was ultimately consistent with the requirements of the United States Constitution. That objective was largely accomplished.


\textsuperscript{9} FCTC (cited in note 2).

Convention text, she noted that the death toll in the prior year had already risen to 4.9 million. A "death clock" akin to the national debt clocks with which we are all familiar was set up in the lobby of the building where the negotiations were conducted to serve as a constant reminder to the delegates of the severity of the problem we were facing.

The final text of the Framework Convention on Tobacco Control does not really resemble a "framework convention" at all, but rather is quite detailed and comprehensive. Among other things, the FCTC purports to establish rules governing tobacco advertising, product labeling, illicit smuggling, exposure to second-hand smoke, sales to minors, environmental pollution, tobacco product contents and emissions, legal liability rules, and even cooperative research efforts.

II. PROBLEMS ARISING FROM THE STRUCTURE OF THE WHO NEGOTIATIONS

A quick glance at the list of participants at the meetings of the INB in Geneva readily sets the stage for the course the negotiations eventually took. Many of the nations that participated in the negotiations had the resources to send only one or two delegates. Rather than fill their delegate slots with professional diplomats or lawyers trained in international law, they instead sent public health ministers to serve as their negotiating representatives. In some respects this choice of delegates makes sense, for who could be expected better to understand the impact that tobacco consumption has on public health than public health ministers, many of whom were doctors? Yet the meetings of the INB were not academic conferences involving the presentation of complicated medical papers or heated debates on the long-term effects of exposure to second-hand smoke. The object of a treaty negotiation is the making of law, and that is not something that public health ministers are necessarily particularly well equipped to do. Many of the delegates had never heard of a "no reservations" clause, did not know whether economic hardship constitutes a legitimate excuse under international law for non-performance of treaty obligations, and were


unfamiliar with how a “framework” convention with attached protocols is supposed to be structured. The inexperience of so many of the delegates with the enterprise of treaty-making, coupled with the inexperience of the WHO itself, significantly exacerbated other problems inherent in the WHO negotiation structure.

One troubling dynamic that surfaced early in the negotiations and grew significantly worse over time was a split between the developing and the developed world, a split that was strongly encouraged by the WHO’s region-based negotiating structure. The WHO generally divides itself into six regions: AFRO (Africa), EURO (Europe), EMRO (Eastern Mediterranean—generally, the Middle East), WPRO (Western Pacific—generally, China, Japan, Australia, and most Pacific islands), SEARO (South-East Asia), and AMRO/PAHO (the Pan-American Region). Before each INB, the WHO sponsored—and in many instances paid for—regional conferences at which all of the countries of each region would meet in a regional capital and work out “regional” FCTC positions. The meetings of the INB replicated this region-based structure, as the regional groups would conference on a semi-daily basis to discuss whether and to what extent their regional positions should be modified. AFRO, EMRO, and SEARO emerged almost immediately as focal points of anti-developed-country sentiment, but the gulf soon widened as the Latin American and Caribbean countries of AMRO took to meeting by themselves, to the exclusion of Canada and the United States. The Pacific Islands of WPRO then followed suit, excluding China, Australia, and Japan from most of their discussions. The developed countries, thus excluded from their home regions and effectively isolated, never banded together to form a coalition of their own except on the one issue on which they all agreed: no mandatory funding obligations.

To add injury to insult, the United States was actually left footing the bill for much of this WHO-fostered Balkanization. The regional meetings held between INBs were ostensibly paid for by the WHO, but 25 percent of the WHO’s budget comes directly from contributions assessed against the United States, while another 10–15 percent comes indirectly from US agency contributions to various WHO-sponsored programs. In effect, the United

States was paying for the rest of the world to get together and figure out how best to beat up on it—all the while being excluded from its own regional group’s meetings.

The regional emphasis proved to be highly inefficient and counterproductive. It might be expected that nations in close proximity to one another would naturally have some synergy of interests, but could it really be the case that Australia had more in common with Vietnam or Mongolia than with, say, the European Union or the United States? Free-form negotiations and an open exchange of ideas would naturally have produced alliances between similarly situated countries with common interests, but the regional emphasis of the WHO structure inhibited the formation of such natural ties. The problem was further exacerbated by the collective inexperience of the delegates, as many delegates seemed to simply assume that the region-based structure handed to them by the WHO was the correct model for how business should be conducted and consequently made little effort to break out of the regional mold.

My objection is not to the formation of voting blocks in general; they can at times be an extremely useful tool for magnifying voting power. But the artificially created voting blocks that were imposed from above by the WHO merely served to grind the negotiations to a virtual standstill. Negotiation sessions were neither meaningful nor interactive, but rather devolved into a forum for regional representatives to read aloud pre-drafted statements reflecting their region’s positions. True give-and-take negotiations were virtually impossible at these sessions because regional representatives rarely had any authority to change their region’s positions without first conducting another regional meeting. But in what proved to be a classic chicken-and-egg problem, when the regional meetings did convene it became clear that the absence of antecedent discussions and idea exchanges had done little to foster any understanding of opposing positions, and the regional meetings thus generally produced a hardening of positions rather than any movement towards reasonable compromises. The same basic negotiating dynamic could have been achieved at considerably less expense by canceling the negotiating sessions altogether and simply having each region post a written statement reflecting its positions on a bulletin board each morning.

It was readily apparent almost from the outset that the negotiating process had become dysfunctional, yet there was little impetus from within the INB to reform the negotiation structure to speed things up. A large number of the delegates were in Geneva on scholarship from the WHO, which paid virtually all
of their expenses. For these delegates, there was little pressure from their home governments to finish the treaty in a time-efficient manner. Not only did delegations from less developed countries lack incentives to speed up the process, but they actually instituted measures designed to slow things down. Because many of these countries did not have enough delegates to staff multiple simultaneous meetings, they insisted that no more than two negotiating sessions take place at the same time. This would have been more understandable if anything was actually getting done at the typically stultifying sessions. However, the very region-based structure that made the sessions so ineffective also made the attendance of all of the countries from each region completely unnecessary: acting as a collective, the regional blocks had more than enough available representatives to staff multiple meetings. Instead, as many as 150 delegates were present in the room even for “informal” negotiation sessions, which merely served to make things even more unproductive and unwieldy.

The only real pressure to stay on schedule came from the WHO Secretariat itself, which desperately wanted to have the Convention finished before Dr. Brundtland’s term as Director-General expired, as she hoped to leave office with a completed FCTC as the crown jewel of her administration. At INB4—more than half-way through the treaty-negotiation process, a time when the differences between positions are supposed to be narrowing—the INB spent over half of the time allotted for negotiations adding more than 100 brackets to an already heavily bracketed text. Watching this train wreck unfold from its perch on the dais, the Secretariat realized it was in trouble and finally moved to change the negotiation structure to speed things up. Between INB4 and INB5 the Chairman unilaterally eliminated most of the new brackets by issuing a consolidated “Chair’s text,” the primary purpose of which seemed to be to undo all of the damage that had been done at INB4.15 Furthermore, truly informal small-sized working groups were finally instituted in the later half of INB5, despite some grumbling by the developing countries, giving the FCTC at least a fighting chance at pushing through to the finish line.

Still, the slow pace of early negotiations created a significant crunch for time at the end, which prevented several key provisions of the treaty from getting full consideration. Perhaps the best example of this is the Convention’s definitions of “tobacco advertising and promotion” and “tobacco sponsorship.”16 The INB did not formally consider these definitions until its very last meeting, despite the fact that they determine the scope of the

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16 FCTC art 1 (cited in note 2).
Convention’s critically important and highly controversial tobacco advertising provisions. Article 1 of the Convention states that “tobacco advertising and promotion’ means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.”17 “Tobacco sponsorship” is defined in the same article as “any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.”18 The definition of “tobacco advertising and promotion” is so broad that it could reasonably be read to encompass the distribution of stock market circulars portraying a tobacco company in a positive light, while the definition of “tobacco sponsorship” clearly covers charitable contributions made by the tobacco industry and probably should be read to cover political contributions made by private citizens to libertarian organizations that oppose governmental regulation of smoking. The full significance of these broad definitions becomes apparent upon a close examination of the Convention’s Article 13, which obligates most countries to ban all of the activities covered by the definitions and requires those countries that cannot ban all of the covered activities because of their domestic constitutions (a group that includes the United States) to impose restrictions on them.19 Even if we could restrict charitable contributions by the tobacco industry, why would we want to? And precisely how, in light of the First Amendment, are we supposed to restrict political contributions made by private citizens to libertarian organizations?

The delegates that negotiated the text of the definitions knew full well that they were overbroad. In our informal working group, I pointed out all of the problematic applications noted above, and not a single delegate disagreed with my interpretation of the text. Indeed, several delegates agreed with me that the overbroad definitions would be problematic under their own countries’ constitutions. Unfortunately, it proved impossible to reach any kind of a compromise on a narrower definition within the time constraints provided. A large group of developing countries, apparently unhindered by domestic constitutional protections of freedom of speech, absolutely insisted on retaining the extremely broad language. It took a minor miracle just to get the word “commercial” inserted into the definition of “tobacco advertising and promotion,” as many members of the SEARO, EMRO, and AFRO regions wanted the definition to cover non-commercial speech by actors outside the tobacco industry. When I pointed out that without the insertion of the word “commercial” the definition would cover a recommendation between friends to try a particular brand of cigarette, one delegate expressed astonishment that the

17 Id.
18 Id.
19 Id art 13, ¶¶ 2–3.
United States Constitution could possibly protect speech of that nature: "Your Constitution protects that? What kind of friend would do that, anyway?"

Another delegate approached me in the hallway after the negotiating session and asked me, "If your Constitution is so horrible, why do you even bother coming to these negotiations?" With so much energy expended getting the word "commercial" inserted, there was little impetus left to secure further improvements to the definitions within the extraordinarily tight time-frame provided. Knowing full well that the definitions were problematic—but presumably betting that some creative interpretations could provide most countries the necessary "out"—the delegates held their collective noses and in the waning hours of the negotiations passed the definitions. The United States objected, expressing some bafflement that the INB would adopt definitions that it knew were wrong.

III. NGO INFLUENCE

The NGOs in Geneva were well organized and outspoken. Infact, Action on Smoking and Health ("ASH"), Campaign for Tobacco Free Kids, and an assortment of other NGOs banded together to form an umbrella organization called the "Framework Convention Alliance." The Alliance sponsored seminars for the delegates, lobbied them in the hallways, and put out an "Alliance Bulletin" every morning designed to sway delegates' positions on various proposed treaty provisions. Much of the information distributed by the NGOs was valuable and accurate, but some NGOs were not above stooping to underhanded and manipulative tactics. For example, during INB5 I had to file a complaint with the WHO Secretariat when I caught members of Infact deliberately attempting to listen in on a private cell phone conversation I was having with the White House. I received the call while I was in the main negotiation chamber and left the room so that I could talk freely without disturbing others and without being overheard. As I left the room with the phone to my ear, however, a member of Infact began to tail me, forcing me to move into a narrow corridor where it would be difficult to follow me inconspicuously. I finished my conversation from an alcove just off of the corridor, only to find as I emerged at the end of my call that another Infact member had been sent through the corridor from the opposite direction and was kneeling down around the corner, studiously taking notes. I felt like I was trapped in a "Spy vs. Spy" comic strip from Mad magazine, but apparently some members of the NGOs believed so fervently in the rightness of their cause that in their minds the employment of some highly questionable tactics was fully justified.

Nor were the various flyers and other publications distributed by the NGOs free from some occasional truth-twisting. One of the key battles during
the negotiations concerned whether the FCTC should require all parties to enact a comprehensive ban on all tobacco advertising—a provision that the United States could not agree to because such a ban is prohibited by the First Amendment.  

Despite the fact that domestic constitutional constraints would likely prevent many countries from joining the treaty if a total advertising ban was adopted, the NGOs nevertheless pushed for it hard, claiming that "[t]he only credible policy with a secure evidence base is a complete and comprehensive ban on all direct and indirect tobacco advertising, sponsorship and promotion."  

It was their prerogative, of course, to try to push the United States out of the treaty if they wanted to. But they went too far, in my view, when they distributed flyers in which they made the bogus claim that the United States was exaggerating its constitutional constraints, specifically alleging that the United States had never attempted a comprehensive ban on all tobacco advertising and that such a ban stood a good chance of being upheld by the United States Supreme Court if it was enacted. I had to spend the better part of two days after that flyer was distributed explaining to other delegations that just two years before, the Supreme Court had struck down a Massachusetts law that prohibited the advertising of tobacco products on billboards within 1,000 feet of schools.  

While the NGOs may technically have been correct that the United States has never attempted to enact a law comprehensively banning all tobacco advertising, it stretched credulity to claim that the Supreme Court would even consider upholding such a ban after so recently invalidating the rather modest advertising restrictions at issue in *Lorillard*.

These tactics would not have been so disturbing if they had not had much of an effect, but the inexperience of many of the delegates rendered them ripe for capture by sophisticated NGOs. Many of the delegations that did not have legal counsel of their own with them in Geneva ended up turning to the NGOs as their primary source of information about treaty law and about the domestic constitutional constraints facing countries like the United States. The NGOs thus exerted tremendous influence over the course of the negotiations. By the time I first became involved in the negotiations, at INB3 in November of 2001, the persuasive power of the NGOs was already well established. The negotiating rules did not permit the NGOs to be present in rooms where informal

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20 See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 770 (1976) (holding that commercial speech is protected and in this case that the First Amendment protects information regarding the price of prescription drugs).


negotiations were being conducted, but this rule proved to be about as effective at keeping the NGOs out of the negotiating process as campaign finance laws are at keeping the money out of politics. As proposals were made on the floor regarding key treaty provisions, delegates of various nations would leave the room to inform the NGOs and to consult with them regarding what positions they should take. Some of the most dramatic NGO influence would occur overnight, as NGOs would meet with select delegates over dinner to plot out their strategy for the next day. The NGOs complained vociferously about a supposed tobacco industry lobbying campaign aimed at sinking the Convention, but other than a couple of representatives of the duty-free lobby, the tobacco industry was nowhere to be found. By contrast, the NGOs worked the halls masterfully and, for all intents and purposes, filled the roles of deeply entrenched Washington insiders.

Please don't get me wrong: I am no fan of the tobacco industry, and I greatly sympathized with the cause espoused by the NGOs in Geneva. Setting my own policy preferences aside, however, it is clear to me that it is not in the interests of the United States to participate in negotiations where NGOs exert tremendous influence over large numbers of delegates not because they are right on matters of substance, but rather because they are providing the only pro bono legal services available to delegates with no legal experience of their own. In filling this role, the NGOs certainly did not act as disinterested legal advisers, and along the way more than one delegation was hoodwinked into believing the NGOs’ all-too-frequently distorted versions of the truth.

IV. ULTERIOR AGENDAS

A treaty is generally defined as an agreement between nations. One of the phenomena produced by the predominance of health ministers at the INBs in Geneva, however, was that the United States was placed in the position of negotiating not with foreign states but rather with foreign health ministries—ministries that were not necessarily pursuing policies favored by their home


24 See McConnell v Federal Election Commission, No 02-1674, slip op at 118 (Dec 10, 2003), available online at <http://www.scus.gov/opinions/03pdf/02-1674.pdf> (visited Mar 28, 2004) ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet."). See also Lisa Getter, Kerry Aided by 'Illegal' Soft Money, the GOP Claims, LA Times A22 (Apr 1, 2004) ("[T]he Bush campaign and the GOP will charge that Sen. John F. Kerry is benefiting from 'the largest illegal infusion of soft money from wealthy individuals, unions, corporations and other special interests' since Watergate.")
governments. It quickly became clear that many of the delegates had experienced frustration in the past in trying to persuade their home governments to adopt strong anti-tobacco measures. These delegates saw the FCTC as an opportunity to do an end-run around their governments by inserting strong anti-tobacco measures into the Convention and then relying on international political pressure to force their governments to join it. Some of the delegates openly admitted their ulterior agendas, making plaintive appeals from the floor of the negotiations that strong language be inserted in the treaty so that they could force the hand of their government back home. This dynamic was particularly apparent in the debate over the “no reservations” clause, as a surprisingly large number of delegates argued in favor of the provision on the grounds that if reservations were allowed, their own government would be likely to take some. I felt as though I had stepped into the Geneva edition of the Twilight Zone, as I watched the representatives of governments that apparently would have liked to take reservations to the Convention deliberately acting to deprive their governments of the opportunity to do so.

Another not-so-secret agenda pursued by several countries, mostly from the SEARO region, was a campaign to get provisions inserted into the treaty that would aid them in ongoing trade-related litigation that had been brought against them by the tobacco industry. WTO rules give countries broad discretion to adopt health-related measures so long as those measures are even-handed and non-discriminatory. For example, there would be no problem if a country banned all tobacco imports as part of a comprehensive ban of all tobacco sales within its territory, but there would be a problem if a country banned all tobacco imports as a means of protecting their domestic tobacco industry. Several countries had been successfully sued by the industry for adopting supposedly health-protective measures that were actually domestic-industry protective. Sounding the battle cry “health trumps trade,” these countries made express appeals during the negotiations for help from the rest of the world in their titanic struggle against the villainous “tobacco industry”—an appeal that almost seemed sympathetic until one realized that it was only the foreign tobacco industry that they were crusading against, while they were busily propping up their domestic companies. One of my favorite proposals in this vein was a provision that would have allowed countries to enforce their advertising bans by banning the imports of violators. The trick is that the types of violations that the provision’s proponents had in mind were, for example, Marlboro logos showing

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up on television sets in India through the auspices of ESPN because they were painted onto race cars appearing in the Indianapolis 500. In other words, the provision would have allowed India to ban Marlboro imports simply because Marlboro sponsored a race car in Indiana, thousands of miles from Indian borders. Most proposals of this nature were ultimately beaten back, but the Convention does include a handful of provisions that were designed by their sponsors to aid them in trade litigation.26

One result of the proliferation of ulterior agendas at the INBs is that the “Framework Convention on Tobacco Control” is not really a framework convention at all. A framework convention is supposed to broadly state general governing principles on which all countries can agree and then spin off related optional protocols that contain more specific substantive obligations.27 Although the United States had initially joined the negotiations on the understanding that the goal was to produce such a convention, the framework model did not really serve the needs of the NGOs, the health ministers who were looking to force the hands of their own governments, or the trade lawyers who were looking for a little extra help in the trade courts. Figuring that international political pressure would push countries into signing the main Convention but would not extend far enough to push them into optional protocols, the groups in question undertook to pack the Convention full of all the substantive provisions that were on their wish lists. They also successfully banded together to oppose the negotiation of any protocols until the main Convention was finished in its entirety, thereby creating the illusion that any details left out of the Convention might never be addressed at all. Consequently, the FCTC bears less of a resemblance to a true framework convention than it does to the Napoleonic Code.

The conversion of the “framework convention” into a code for tobacco regulation may ultimately prove to be rather unfortunate. The Convention is probably too detailed to justify the negotiation of further protocols, yet many important provisions had to be watered down to accommodate the needs and domestic circumstances of the more than 150 different countries that were negotiating the treaty. For example, countries that wanted a total ban on all tobacco advertising could easily have promulgated an optional protocol

26 See, for example, FCTC art 13(7) (cited in note 2) ("Parties which have a ban on certain forms of tobacco advertising, promotion and sponsorship have the sovereign right to ban those forms of cross-border tobacco advertising, promotion and sponsorship entering their territory and to impose equal penalties as those applicable to domestic advertising, promotion and sponsorship originating from their territory in accordance with their national law. This paragraph does not endorse or approve of any particular penalty.").

requiring such a ban, and—if the claims made by a majority of the delegates in Geneva are to be believed—most of the countries in the world would have signed on to it. Because advertising was substantively addressed in full in the main text of the Convention, however, the advertising article is riddled with caveats and exceptions that were inserted to accommodate an array of constitutional and economic feasibility concerns.\(^{28}\) It is possible that this unhappy middle ground might have been avoided if the developed countries, or even the United States acting on its own, had made a strong play to hold the INB to its mandate to produce a framework convention, perhaps by threatening to leave the negotiations when the FCTC began to be pushed in the direction of becoming something else entirely.

V. LANGUAGE MATTERS!

Part of the NGO strategy at the negotiations was to vilify the United States for its supposed attempts to “water down” the Convention. In one editorial, NGO members wrote that they and the developing countries had “saved the FCTC from being gutted by a handful of developed countries which have no intention of ever implementing most of its provisions.”\(^{29}\) The NGOs also distributed pamphlets, including one entitled “Cowboy Diplomacy,” urging the delegates to ignore the United States on the grounds that the Bush Administration does not take international law seriously and probably was not going to join the Convention anyway.

The reality is that the United States has such an excellent tobacco control system that it had already implemented all of the provisions of the Convention save one—a requirement that health warnings take up at least 30 percent of the space on all tobacco packaging\(^{30}\)—before the negotiation of the Convention even started. The United States viewed the FCTC negotiations as an opportunity to bring the rest of the world up to its standards. The problem that the United States faced at the negotiations is that it takes its international law obligations perhaps more seriously than any other country in the world. It is the policy of the State Department, for example, never to ratify a treaty until all of the domestic legislation necessary to fulfill the United States’ treaty obligations has already been enacted. Because the United States takes its obligations seriously, it is intensely interested in the language in which those obligations are couched.

For example, the United States was mercilessly pounded by the European Union at the negotiations for pushing for language regarding exposure to

\(^{28}\) See FCTC art 13 (cited in note 2).


\(^{30}\) FCTC art 11(1)(b)(iv) (cited in note 2).
second-hand smoke that would reflect the practical realities of implementing such provisions. The EU insisted that the Convention needed to contain "strong" language reflective of the seriousness of the health risk in question and pushed a provision that would have required all state parties to adopt measures protecting people from exposure to tobacco smoke in "all public places." Precisely how they planned to protect people from exposure to tobacco smoke in public places such as street corners and public parks, they could not say. Nevertheless, they generally seemed untroubled by their inability to fulfill the requirements of the text and lambasted the United States for attempting to limit the obligation to enclosed spaces where protective measures could realistically be implemented. The United States was also pilloried for attempting to limit the obligation to protecting non-smokers. Again, no one was ever able to explain to me how you protect someone who is smoking from exposure to tobacco smoke.

At any rate, there was certainly a delicious irony to being pounded on by the EU on the issue of exposure to second-hand smoke, as you can't walk into a restaurant in Geneva, or virtually any other place in Europe, without being hit by a billowing cloud of tobacco smoke. When I suggested to several EU members that if they really wanted strong language in the Convention perhaps we should consider banning all smoking in bars and restaurants, they immediately blanched and indicated that they did not think that a provision of that nature would be necessary.

The recurring problem that the United States faces in treaty negotiations is that its commitment to the complete fulfillment of its treaty obligations requires it to ensure that the text of its obligations is realistic, while many countries are not particularly concerned with the details of implementation and just want the treaties to sound good. Time and again the United States' FCTC delegation was urged to accept overbroad language and then to resolve its difficulties with it (as many others planned to do—nod, nod; wink, wink) by creatively interpreting its way out of the overbroad obligations later. Time and again, the United States refused to adopt this model because it does not believe that is the way that treaty law is supposed to work.

The NGOs argued that the United States has no intention of implementing the provisions of the Convention. In fact, it has already implemented all but one. I wonder if the NGOs can identify any of their champions of the developing world—the countries that pushed for even broader language than what was eventually included in the Convention—that can say the same.

VI. CONCLUSION

The FCTC is far from a perfect document. Nevertheless, I believe that it has done a great deal of good by raising awareness of the global health epidemic caused by tobacco consumption and by establishing model measures that can be
used by all countries to combat the problem. There may thus be good and sufficient reasons for the United States to join the Convention, and it will certainly be under a great deal of international and domestic pressure to do so. But whatever course of action the United States ultimately takes with respect to the FCTC, it should also take whatever measures are necessary to avoid the replication of the FCTC negotiation process. That process may have managed to produce a diamond-in-the-rough this time, but it is fraught with pitfalls for the future.