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Smoke Across the Waters: Tobacco Production and Exportation as International Human Rights Violations

by

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SMOKE ACROSS THE WATERS: TOBACCO PRODUCTION AND EXPORTATION AS INTERNATIONAL HUMAN RIGHTS VIOLATIONS

*Lucien J. Dhooge**

[T]is a plague, a mischief, a violent purger of goods, lands, health; hellish, devilish and damned tobacco, the ruin and overthrow of body and soul.[1]

The smoking epidemic is a fire in the global village.[2]

INTRODUCTION

Tobacco has been an agricultural staple almost from the instant of its discovery in the New World at the dawn of the Age of Exploration.[3] The pervasive nature of its cultivation and consumption have made tobacco one of the most profitable crops in world agricultural history. This legacy has continued to the present day. World production of tobacco is estimated at fifteen billion pounds annually.[4] Although ninety percent of world to-

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1. RICHARD BURTON, THE ANATOMY OF MELANCHOLY (1621) *quoted in* PHILIP J. HILTS, SMOKESCREEN 185 (1996).

2. World Health Organization, *Press Release WHO/61, The Smoking Epidemic - "A Fire in the Global Village"* (visited Mar. 23, 1998) <http://who.org/inf/pr/1997/pr97-61.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Press Release WHO/61*] (quoting Dr. Hiroshi Nakajima). Dr. Nakajima is the former Director-General of the World Health Organization ("WHO").

3. *See* DANIEL J. BOORSTIN, THE DISCOVERERS 237-38 (1983). The first recorded European encounter with tobacco occurred in Cuba, in October 1492, during Christopher Columbus' first voyage to the New World. *Id.* While seeking the Great Khan of China, Columbus' ambassadors encountered a group of Taino Indians who "with a firebrand in the hand and herbs . . . drink the smoke thereof." *Id.* at 237. Columbus' ambassadors dismissed the practice as a primitive custom. *Id.* at 238. It was only after Spaniards colonized the New World and began consuming tobacco themselves that it was introduced on a wide-scale basis in Europe, Asia, and Africa. *Id.*

4. JASPER WOMACH, U.S. DEP'T OF AGRIC., TOBACCO PRICE SUPPORT: AN OVERVIEW OF THE PROGRAM, 95-129 ENR 1 (1997). This estimate is based upon production figures for 1996. *Id.*

bacco production occurs in twenty-five countries,[5] tobacco is cultivated in over 100 countries.[6] The top six tobacco producing countries in the world, specifically, the Peoples' Republic of China, the United States, India, Brazil, Turkey, and Zimbabwe, produced over 4.6 million metric tons of tobacco in 1997.[7] The Peoples' Republic of China alone was responsible for producing more than 2.6 million metric tons.[8]

Tobacco production has flourished, in part, as a result of the insatiable demand for cigarettes. Cigarettes are the leading manufactured form of tobacco consumed in the global marketplace.[9] The World Health Organization estimates that 1.1 billion people over the age of fifteen years—one-third of the world's population—are regular cigarette smokers.[10] Additionally, approximately 60,000 people become new smokers every day.[11] In developed countries, forty-two percent of men and twenty-four percent of women smoke cigarettes on a regular basis.[12] In developing countries, forty-eight percent of men and seven percent of women smoke cigarettes on a regular basis.[13] These statistics translate into annual consumption estimates of 2400 cigarettes per adult in developed countries, and 1400 cigarettes per adult in developing countries.[14] Globally, smokers

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5. World Health Organization, *Fact Sheet N118, The Tobacco Epidemic: A Global Public Health Emergency* (visited Mar. 23, 1998) <http://who.org/inf/fs/fact118.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Fact Sheet N118*].

6. *Id.*

7. FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., TOBACCO: WORLD MARKETS AND TRADE tbl.1 (1997) [hereinafter TOBACCO: WORLD MARKETS AND TRADE].

8. *Id.* The Peoples' Republic of China produced an estimated 2.61 million metric tons of tobacco in 1997. *Id.* The United States was the second leading producer of tobacco (667,680 metric tons) followed by India (544,050 metric tons), Brazil (447,000 metric tons), Turkey (195,631 metric tons), and Zimbabwe (180,978 metric tons). *Id.*

9. *See WHO, Fact Sheet N118, supra* note 5. The WHO estimates that 65% to 85% of global tobacco consumption is in the form of cigarettes. *Id.*

10. *See id.*; *see also* World Health Organization, *Press Release WHO/41, World No-Tobacco Day 1995: Tobacco Costs More Than You Think!* (visited Mar. 23, 1998) <http://www.who.org/press/1995/pr95-41.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Press Release WHO/41*]. Globally, approximately 47% of all men and 12% of all women smoke. *See* World Health Organization, *Fact Sheet N176, Smoking and Women: The Next Wave of the Tobacco Epidemic* (visited Mar. 23, 1998) <http://www.who.org/inf/fs/fact176.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Fact Sheet N176*]; *see also WHO, Press Release WHO/61, supra* note 2.

11. *See* Bruce van Voorst, *Exporting Death*, TIME, Apr. 13, 1998, at 63.

12. *See WHO, Fact Sheet N118, supra* note 5.

13. *Id.*

14. *See WHO, Press Release WHO/41, supra* note 10. In the last 10 years, the annual

consume six trillion cigarettes every year—a quantity so vast that, if laid tip-to-tip, the cigarettes would reach the sun and back.[15]

As a result of increasing global demand, revenues derived from the production, processing, and sale of tobacco products have grown by staggering proportions. World exports of unmanufactured tobacco totaled over 1.9 million metric tons in 1996.[16] The six leading exporters of unmanufactured tobacco, specifically, Brazil, the United States, Zimbabwe, Turkey, India, and Malawi, accounted for over one million metric tons of exports in 1997.[17] Tobacco exports generated US$262 billion in revenues in 1997.[18] U.S. tobacco companies have earned a generous share of these revenues. In 1996, the United States exported 539 million pounds of leaf tobacco valued at US$1.39 billion.[19] Although the United States finished behind Brazil in the export of unmanufactured tobacco, is the world's leading exporter of cigarettes.[20] Cigarette exports by U.S. manufacturers grew 260% between 1986 and 1996.[21] In 1996, thirty-four percent of the estimated 760 billion cigarettes produced by U.S. manufacturers were exported.[22] One-third of the US$72 billion in revenues earned in 1997 by Philip Morris Corporation, the largest U.S. cigarette manufacturer, originated from overseas sales.[23]

Soaring tobacco production and the growing demand for

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consumption rate in developed countries has declined from 2800 cigarettes per adult, while the rate increased from 1150 cigarettes per person in the developing world during this same period of time. *Id.* The consumption rate in developing countries continues to grow by 1.7% annually. *Id.*

15. *See* World Health Organization, *Press Release WHA/4, The Tobacco Epidemic: A Global Public Health Emergency* (visited Mar. 23, 1998) <http://www.who.org/press/1996/wha96-04.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Press Release WHA/4*]; *see also WHO, Press Release WHO/41*, *supra* note 10.

16. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 1. In 1997, world exports of unmanufactured tobacco totaled 1,929,161 metric tons. *Id.*

17. *Id.* In 1997, the combined total of exports of unmanufactured tobacco from these countries was 1,062,720 million metric tons. *Id.* Brazil was the leading exporter of unmanufactured tobacco (294,000 metric tons), followed by the United States (230,000 metric tons), Zimbabwe (189,000 metric tons), Turkey (121,000 metric tons), India (115,000 metric tons), and Malawi (113,720 metric tons). *Id.*

18. *See* van Voorst, *supra* note 11, at 63.

19. *See* WOMACH, *supra* note 4, at 2.

20. *See WHO, Fact Sheet N118*, *supra* note 5.

21. *See* William Carlsen, *Tobacco Firms Find New Markets Abroad*, S.F. CHRON., June 4, 1997, at A2.

22. *See* WOMACH, *supra* note 4, at 2.

23. *See* van Voorst, *supra* note 11, at 63.

cigarettes has had a devastating effect upon the lives and health of the global citizenry. According to the World Health Organization, tobacco causes six percent of all deaths in the world.[24] It is estimated that tobacco causes 3.5 million deaths annually, primarily as a result of lung cancer and circulatory diseases.[25] Fifty percent of these deaths occur between the ages of thirty-five and sixty-nine, resulting in a loss of twenty-two years of life expectancy for each victim.[26] Unless current trends are reversed, the World Health Organization estimates that tobacco usage will kill ten million people annually by the year 2025.[27] Seven million of these deaths will occur in the developing world with two million occurring in the Peoples' Republic of China alone.[28] The costs associated with treatment, mortality, and disability as a result of tobacco usage exceed the global economic benefits associated with tobacco production by an estimated US$200 billion annually.[29]

Although annual cigarette consumption has declined in the United States, from 640 billion in 1981 to an estimated 487 billion in 1996,[30] U.S. mortality rates and costs associated with smoking follow patterns similar to those in the global marketplace. Four hundred eighty thousand U.S. citizens die annually of tobacco-related illnesses, including 50,000 non-users who die from exposure to environmental tobacco smoke.[31] Additionally,

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24. *See* World Health Organization, *Tobacco or Health: A Global Status Report* (visited Mar. 23, 1998) <http://who.org/programmes/psa/toh.htm> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Global Status Report*].

25. *See* WORLD HEALTH ORGANIZATION, FIFTY FACTS FROM THE WORLD HEALTH REPORT 1997, at 2 (1997) [hereinafter WHO, FIFTY FACTS FROM THE WORLD HEALTH REPORT 1997]. The WHO estimated that 85% of lung cancers in men and 46% of lung cancers in women are tobacco-related. *Id.* at 3. Additionally, the WHO estimated that smoking accounts for one in seven cancer deaths worldwide. *See id.*; *see also* World Health Organization, *Fact Sheet N175, Tobacco Epidemic in the Western Pacific* (visited Mar. 23, 1998) <http://who.org/inf/fs/fact175.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Fact Sheet N175*].

26. *See WHO, Press Release WHO/61*, *supra* note 2.

27. *See WHO, Fact Sheet N175*, *supra* note 25; *see also WHO, Fact Sheet N118*, *supra* note 5.

28. *See WHO, Fact Sheet N175*, *supra* note 25.

29. *See id.*; *see also WHO, Press Release WHO/41*, *supra* note 10.

30. *See* WOMACH, *supra* note 4, at 2.

31. *See* FOOD AND DRUG ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., REGULATION OF CIGARETTES AND SMOKELESS TOBACCO UNDER THE FEDERAL FOOD, DRUG AND COSMETICS ACT, vol. 1, at i (1996) [hereinafter FOOD, DRUG AND COSMETICS ACT REGULATION]. This death toll exceeds the combined death toll from alcohol, illegal drug use, Acquired Immune Deficiency Syndrome ("AIDS"), car accidents, homicides, and sui-

over one million minors become regular smokers annually, one-third of whom, it is estimated, will die prematurely as a result of their tobacco usage.[32] Tobacco-related disease costs the U.S. economy US$50 billion in avoidable medical expenses and US$73 billion in lost productivity on an annual basis.[33]

Despite these health concerns, the U.S. government continues to provide significant financial support to domestic tobacco producers. The Farm Service Agency, a branch of the U.S. Department of Agriculture, stabilizes tobacco prices at higher levels than would occur in the free market through a combination of marketing quotas and non-recourse loans available through the Commodity Credit Corporation.[34] Additionally, the Risk Management Agency of the U.S. Department of Agriculture administers a federal crop insurance program that provides farmers, including those engaged in the cultivation of tobacco, with subsidized multiple peril insurance for unavoidable production losses due to adverse weather, insect infestations, plant diseases, and other natural calamities.[35] The U.S. Department of Agriculture also provides tobacco inspection and grading services as well as a tobacco market news service.[36] In addition, the U.S. Department of Agriculture collects and analyzes domestic and international data on planting intentions, crop conditions, harvesting, yield, and production, which it utilizes to prepare economic forecasts for tobacco farmers.[37] Finally, until its termination in fiscal year 1995, the U.S. Department of Agriculture funded research related to tobacco production, processing, and marketing.[38] Nevertheless, the U.S. Department of Agriculture continues to fund educational and technical assistance programs designed to serve as links between agricultural research institutions and tobacco farmers.[39]

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cides. *See* Joel M. Moskowitz, *Snuff Out Tobacco Altogether*, S.F. CHRON., Mar. 20, 1998, at A25.

32. FOOD, DRUG AND COSMETIC ACT REGULATION, *supra* note 31, at i.

33. *See* Moskowitz, *supra* note 31, at A25.

34. *See generally* JASPER WOMACH, U.S. DEP'T OF AGRIC., TOBACCO-RELATED PROGRAMS AND ACTIVITIES OF THE U.S. DEPARTMENT OF AGRICULTURE: OPERATION AND COST, 97-417 ENR 4 (1997).

35. *Id.* at 4.

36. *Id.* at 4-5.

37. *Id.* at 6.

38. *Id.* at 5.

39. *Id.*

This Article examines the operation of the tobacco industry in the United States. Part I examines the organization of the industry, the health consequences resulting from the industry's domestic operations and receipt of governmental financial support, and the restraints upon these operations. Part II examines the role of the U.S. tobacco industry in the international marketplace, with emphasis on its operations in its largest points of sale in Europe, the Pacific Rim, the Middle East, and Latin America. Finally, Part III analyzes the activities of the U.S. tobacco industry and the U.S. government in light of the obligations of the United States pursuant to numerous international human rights treaties. This Article concludes that U.S. governmental subsidization of the domestic tobacco industry constitutes a violation of numerous international human rights obligations of the United States. This Article calls for the United States to undertake numerous actions to bring itself into compliance with its human rights obligations and to alleviate the negative consequences associated with the global consumption of tobacco products.

I. *THE TOBACCO INDUSTRY IN THE UNITED STATES*

A. *The Organization and Operation of the Domestic Tobacco Industry*

The United States is the second largest tobacco producing country in the world. From 1993 through 1997, the United States produced an annual average of 619,815 metric tons of tobacco with production totaling 667,680 metric tons in 1997.[40] Tobacco is the sixth largest cash crop in the United States, generating an estimated farm value of US$2.85 billion annually.[41] Ninety-three percent of the tobacco produced in the United States is of the flue-cured or burley varieties.[42] In 1996, U.S. farmers produced 897 million pounds of flue-cured tobacco worth an estimated US$1.64 billion[43] and 516.3 million pounds

40. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 1.

41. *See* WOMACH, *supra* note 4, at 2; *see also* Ceci Connolly, *'At War' with Tobacco, Clinton Woos Farmers*, WASH. POST, Apr. 10, 1998, at A3. The estimated farm value cited in the text was for the 1996 crop.

42. *See* WOMACH, *supra* note 4, at 2. Both flue-cured and burley tobacco are utilized in cigarette production and are often combined with oriental tobacco in blend cigarettes. *Id.* Other types of tobacco include sun-cured, cigar-filler and binder, fire-cured, and dark air-cured, utilized in the production of cigars, chewing tobacco, and snuff. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., COMMODITY FACT SHEET, OTHER TOBACCOS 1 (1997) [hereinafter COMMODITY FACT SHEET, OTHER TOBACCOS].

43. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., COMMODITY FACT SHEET, FLUE-

of burley tobacco worth an estimated US$992.3 million.[44] This tobacco was transformed into an estimated 760 billion cigarettes by U.S. manufacturers.[45] Additionally, the United States produced 44.2 million pounds of fire-cured tobacco, 8.6 million pounds of dark air-cured tobacco, 100,000 pounds of sun-cured tobacco, and 5.1 million pounds of cigar binder tobacco, with a farm value of US$116.9 million in 1996.[46]

Tobacco is produced on approximately 124,000 farms occupying 732,700 acres of cultivable land located in sixteen U.S. states.[47] North Carolina and Kentucky produce sixty-five percent of the U.S. tobacco crop.[48] Tennessee, Virginia, South Carolina, and Georgia are responsible for an additional twenty-six percent of U.S. tobacco production.[49] Tobacco farming is the most profitable usage of arable lands in these states, with gross receipts averaging US$4000 per acre.[50] As a result, several of these states

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CURED TOBACCO 2 (1997) [hereinafter COMMODITY FACT SHEET, FLUE-CURED TOBACCO]. The United States produced an average of 879.1 million pounds of flue-cured tobacco worth an estimated US$1.52 billion annually from 1990 through 1996. *Id.*

44. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRICULTURE, COMMODITY FACT SHEET, BURLEY TOBACCO 2 (1997) [hereinafter COMMODITY FACT SHEET, BURLEY TOBACCO]. The United States produced an average of 591.7 million pounds of burley tobacco worth an estimated US$1.07 billion annually from 1990 through 1996. *Id.*

45. *See* WOMACH, *supra* note 4, at 2. From 1990 through 1992, the United States' annual production averaged 707.6 billion cigarettes. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, The United States of America* (visited Mar. 27, 1998) <http://www.cdc.gov/nccdphp/osh/who/usa.htm> (on file with the *Fordham International Law Journal*) [hereinafter *U.S. Profile*]. In 1993, production decreased to 661 billion cigarettes. *Id.* In 1994, cigarette production resumed its steady increase, however, with the production of 725.6 billion units. *Id.*

46. *See* COMMODITY FACT SHEET, OTHER TOBACCOS, *supra* note 42, at 1. The production and farm value of these tobaccos for 1996 are summarized as follows: Virginia Fire-Cured, 1.7 million pounds, US$3 million; Kentucky-Tennessee Fire-Cured, 42.5 million pounds, US$89.7 million; Kentucky-Tennessee Dark-Air-Cured, 8.6 million pounds, US$16.4 million; Virginia Sun-Cured, 100,000 pounds, US$200,000; and Cigar Binder, 5.1 million pounds, US$7.6 million. *Id.*

47. *See* WOMACH, *supra* note 4, at 2. The number of farms and cultivable acres devoted to tobacco are 1996 estimates. *Id.*

48. North Carolina is the leading tobacco producing state in the country, followed by Kentucky. *See* Curt Anderson, *Tobacco Bill Includes Farmer Buyout*, ASSOCIATED PRESS, Mar. 31, 1998. The tobacco grown in North Carolina is primarily of the flue-cured variety. *See* WOMACH, *supra* note 4, at 1. Tobacco grown in Kentucky is primarily of the burley variety. *Id.*

49. *See* WOMACH, *supra* note 4, at 2.

50. *See Next Retiree After Joe Camel: Tobacco Crop Insurance*, THE WASTE BASKET, vol. II, no. 25 (July 21, 1997). By comparison, the gross receipts from an acre of wheat or soybeans average US$400 or less. *See id.; see also* Susan Dentzer, *Can Farmers Kick the Habit, Too?*, U.S. NEWS AND WORLD REP., Oct. 7, 1996, at 56. "A farmer would have to

are highly dependent upon tobacco revenues. For example, tobacco constituted thirteen percent of the value of all farm commodities in North Carolina in 1995.[51] In Kentucky, tobacco cultivation accounts for twenty-three percent of the value of all farm commodities and supports half of all family farms in the state.[52] In South Carolina, tobacco cultivation generates US$200 million annually and employs 50,000 people.[53]

The marketing of tobacco products in the United States is dominated by three multinational tobacco companies. These three companies, Philip Morris International, RJR Nabisco Holdings Corporation, and British-American Tobacco Industries, PLC, account for approximately eighty-five percent of domestic cigarette sales.[54] Philip Morris International, through its subsidiary Philip Morris USA, is the leading cigarette manufacturer in the United States.[55] In 1993, Philip Morris sold 194.7 billion cigarettes in the United States constituting a domestic market share in excess of forty-two percent.[56] Philip Morris' best-known brands of cigarettes are Marlboro, Benson & Hedges, Merit, Virginia Slims, Cambridge, and Basic.[57] Philip Morris' Marlboro brand is the largest selling cigarette in the world and accounted for 23.5% of U.S. cigarette sales in 1993.[58]

RJR Nabisco Holdings Corporation, operating through its subsidiary R.J. Reynolds Tobacco, and British-American Tobacco Industries, maintain twenty-nine percent and eighteen percent

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plant 372 acres of cotton, 747 acres of corn or 1442 acres of wheat to replace the income generated by 50 acres of tobacco." Elizabeth Jarnagin, *Why Should We Subsidize Tobacco?*, AMARILLO GLOBE-NEWS (visited Mar. 31, 1998) <http://www.amarillonet.com/stories/080197/subsid.html> (on file with the *Fordham International Law Journal*) (quoting U.S. Congressman Larry Combest).

51. *See* WOMACH, *supra* note 4, at 2. The term "farm commodities" includes all crops and livestock raised in the state. *Id.*

52. *See id.*; *see also* Sandra Sobieraj, *Clinton Seeks Tobacco Support in Kentucky*, ASSOCIATED PRESS, Apr. 9, 1998.

53. *See Senate Panel OKs Tobacco Bill*, S.F. CHRON., Apr. 2, 1998, at A5.

54. FOOD AND DRUG ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NICOTINE IN CIGARETTES AND SMOKELESS TOBACCO PRODUCTS IS A DRUG AND THESE PRODUCTS ARE NICOTINE DELIVERY DEVICES UNDER THE FEDERAL FOOD, DRUG AND COSMETICS ACT, JURISDICTIONAL ANALYSIS app.5, vol. 60, No. 55, at A-161 (Aug. 11, 1995).

55. *Id.*

56. *Id.* Philip Morris USA's share of the U.S. cigarette market was 42.2% in 1993. *Id.*

57. *Id.*

58. *Id.* at 3.

shares of the U.S. cigarette market, respectively.[59] R.J. Reynolds Tobacco is the second largest cigarette manufacturer in the United States and is responsible for the production and marketing of such cigarette brands as Winston, Doral, Salem, Camel, Monarch, and Best Value.[60] British-American Tobacco Industries operates in the United States through Brown and Williamson Tobacco Corporation ("Brown and Williamson") and the American Tobacco Company.[61] Brown and Williamson markets Kool, Barclay, Viceroy, and Richland cigarette brands in the United States and accounted for 11.5% of domestic cigarette sales in 1993.[62] The American Tobacco Company markets Lucky Strike, Pall Mall, Tareyton, Carlton, American, Montclair, Misty, Riviera, Private Stock, Prime, and Summit brand cigarettes in the United States and accounts for 6.75% of all domestic cigarette sales.[63]

There are two smaller cigarette manufacturers of note operating in the United States. The Lorillard Corporation maintains a seven percent market share through its production and sale of Newport, Kent, and True brand cigarettes. The Liggett Group is the smallest major cigarette company operating in the United States. Liggett maintains a 2.4% share of the domestic market through its production and sale of L&M, Chesterfield, Lark, and Eve brand cigarettes. Additionally, a small number of companies have captured a fraction of the U.S. market through the importation and sale of cigarettes produced abroad.[64]

B. *U.S. Cigarette Consumption and Related Health Consequences*

The U.S. Centers for Disease Control and Prevention estimates that approximately twenty-six percent of all U.S. citizens, some 46 million people, smoke cigarettes on a regular basis.[65] The number of smokers, however, has dropped precipitously in the past thirty years. The World Health Organization estimates

59. *Id.* R.J. Reynolds Tobacco's share of the U.S. cigarette market was 29.8% in 1993. *Id.* British-American Tobacco Industries' share of the domestic cigarette market was 18.25% in 1993. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 3-4.

64. *Id.*

65. *See* U.S. Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults, United States-1993*, 43 MORBIDITY AND MORTALITY WKLY. REP. 925, 925-30 (1994).

that, from 1970 to 1993 daily and occasional smoking by persons over the age of eighteen years in the United States declined from 44.1% to 27.7% for men and from 31.5% to 22.5% for women, with an overall smoking prevalence rate of 25.7% in 1991.[66] The largest decline occurred among U.S. men whose smoking prevalence fell from fifty-two percent in 1965 to twenty-eight percent in 1994.[67]

The decrease in the number of smokers has been accompanied by a decrease in the number of cigarettes consumed on an annual basis. In 1970, the annual average cigarette consumption rate for persons over the age of fifteen years in the United States was 3700.[68] This rate dropped to 3560 by 1980 and to 2670 by 1990.[69] Overall annual consumption of cigarettes in the United States has declined twenty-four percent since 1981 from 640 billion units to an estimated 487 billion units in 1996.[70]

It is important to note, however, that these reductions have not been uniform across all strata of society. For example, the prevalence of smoking increases among those members of the population with lower educational levels. In 1993, smoking prevalence among persons with sixteen or more years of education was 13.5% compared to 36.8% among persons with nine to eleven years of education.[71] Additionally, smoking rates are not uniform across all age groups. According to the World Health Organization, smoking prevalence is highest in the thirty-five to forty-four year age group for men and in the twenty-five to thirty-four year age group for women.[72] The smoking prevalence rate is lowest in the sixty-five year and older age group where 15.1% of men and twelve percent of women regularly consume cigarettes.[73] At the other end of the spectrum, smoking prevalence declined from twenty-five percent in 1974 to 10.8% in 1991 for

66. *See U.S. Profile*, *supra* note 45.

67. *See* U.S. Centers for Disease Control and Prevention, *History of the 1964 Surgeon General's Report on Smoking and Health* (visited Mar. 30, 1998) <http://www.cdc.gov/nccdphp/osh> (on file with the *Fordham International Law Journal*) [hereinafter *History of the 1964 Surgeon General's Report*].

68. *See U.S. Profile*, *supra* note 45.

69. *Id.*

70. *See* WOMACH, *supra* note 4, at 2.

71. *See U.S. Profile*, *supra* note 45.

72. *Id.* The smoking prevalence rate for men in the 35 to 44 year age group is 33.1%, and the prevalence rate for women in the 25 to 34 year age group is 28.4%. *Id.*

73. *Id.*

those in the twelve to seventeen year age group, but subsequent declines have been negligible.[74] More ominously, the number of high school seniors who regularly smoked cigarettes rose to nineteen percent in 1993.[75] These patterns among minors are extremely important, as approximately eighty percent of all adult smokers began smoking regularly at sixteen years or younger.[76]

Despite the decline in the number of smokers and annual cigarette consumption in the United States, U.S. mortality rates and costs associated with smoking remain at staggering proportions. As previously noted, the U.S. Food and Drug Administration estimates that 480,000 U.S. citizens die annually of tobacco-related illnesses, including 50,000 non-users who die from exposure to environmental tobacco smoke.[77] The World Health Organization placed this death rate even higher, estimating that 529,000 U.S. citizens died of tobacco-related illnesses in 1995.[78] If the World Health Organization's estimate is accurate, twenty-four percent of total mortality in the United States was attributable to tobacco usage in 1995.[79] Additionally, more than one million minors become regular smokers annually, and it is estimated that one-third will die prematurely as a result of their tobacco usage.[80] Tobacco-related disease has been estimated to cost the U.S. economy US$50 billion in avoidable medical expenses and US$73 billion in lost productivity on an annual basis.[81] Estimates place these costs at US$3 trillion over the course of the next twenty-five years.[82]

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74. *Id.*

75. *Id.* This statistic represents a 1.8% increase in the smoking prevalence rate for high school seniors from 1992. *Id.*

76. *Id.*

77. *See* FOOD, DRUG AND COSMETICS ACT REGULATION, *supra* note 31, at vol. 1, at i.

78. *See U.S. Profile*, *supra* note 45.

79. *Id.* According to the WHO, tobacco-attributable mortality in middle-aged U.S. women (35 through 69 years) increased from five percent of all deaths in 1965 to 31% in 1995. *Id.* In 1990, an estimated 52% of all cancer deaths among middle-aged men were due to tobacco usage. *Id.*

80. FOOD, DRUG AND COSMETICS ACT REGULATION, *supra* note 31, at vol. 1, at i.

81. *See* Moskowitz, *supra* note 31, at A25.

82. *Id.*

C. *Government Regulation of the Domestic Tobacco Industry*

1. Governmental Financial Support of the Domestic Tobacco Industry

The U.S. government has regulated domestic tobacco production since the early 1930s.[83] The primary purposes of this regulatory scheme have been to support and to stabilize tobacco prices and to protect farmers from catastrophic losses associated with extreme weather conditions.[84] The first U.S. government program supporting tobacco production, the Agricultural Adjustment Act of 1933, designated tobacco as a basic commodity and authorized cash payments to growers who limited their production.[85] Subsequent statutes authorized marketing quotas and the establishment and maintenance of support prices for tobacco.[86] Additionally, pursuant to the Disaster Assistance Act of 1988, the U.S. government provided financial assistance to tobacco farmers if their crop yield was lowered more than thirty-five percent by drought, hail, excessive moisture, or other extraordinary occurrences.[87] The Disaster Assistance Act of 1989 increased the crop loss necessary to receive financial assistance to forty percent.[88]

The primary means that the U.S. government utilizes to bolster the domestic tobacco industry are price support and crop insurance programs. The tobacco price support program is administered by the U.S. Department of Agriculture Farm Service Agency.[89] The price support program exists solely for the benefit of tobacco producers and has as its primary purposes the stabilization of farm tobacco prices at levels higher than those

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83. *See generally* THOMAS CAPEHART, U.S. DEP'T OF AGRIC., THE TOBACCO PROGRAM - A SUMMARY AND UPDATE 1 (1996).

84. *Id.* at 1, 3.

85. *See* Agricultural Adjustment Act of 1933, Pub. L. No. 10, 48 Stat. 31 (1933) (repealed).

86. *See, e.g.*, Agricultural Adjustment Act of 1938, Pub. L. No. 430, 52 Stat. 31 (1938) (codified as amended in scattered sections of 7 and 16 U.S.C.); *see also* Agricultural Act of 1949, Pub. L. No. 439, 63 Stat. 1051 (1949) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1985) (codified as amended in scattered sections of 7, 10, 12, 15, 16, 19, 23, 26, 29, 33, 38, 42, 43, 44, 45, 46, 47, and 49 U.S.C.).

87. *See* Disaster Assistance Act of 1988, Pub. L. No. 100-387, 102 Stat. 924 (1988) (codified as amended in scattered sections of 7, 12, 16, 29, and 43 U.S.C.).

88. *See* Disaster Assistance Act of 1989, Pub. L. No. 101-82, 103 Stat. 564 (1989) (codified as amended in scattered sections of 7, 16, and 25 U.S.C.).

89. *See* WOMACH, *supra* note 34, at 2.

achievable in the free market and the maintenance of farm income.[90] Additionally, the program is designed to increase the competitive position of U.S. producers in the world tobacco market.[91] These purposes are accomplished by the price support program through marketing quotas and non-recourse commodity loans.

Unlike most other crops, tobacco cannot be freely produced and marketed.[92] Rather, a producer must hold a government allotment or quota in order to produce and to market tobacco legally. The national marketing quota is established annually at a level sufficient to meet domestic and export demand at a price at least equal to the legally mandated support price.[93] The production restrictions created by the allotment of quotas result in market prices above those that would result from free production and trade. These increased market prices, in turn, serve to maintain the income of tobacco producers at the expense of purchasers and consumers.[94] Marketing quotas have been in effect for flue-cured and burley tobacco since 1938.[95] Quotas for flue-cured and burley tobacco are established annually based upon average annual exports for the preceding three years, the amount of tobacco needed to maintain a specified reserve stock level, and the number of intended purchases by tobacco companies.[96] Tobacco manufacturers are required to submit estimates of their tobacco purchases to the U.S. Department of Agriculture fifteen days prior to the public announcement of quotas for

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90. *See* WOMACH, *supra* note 4, at 3.

91. *See* CAPEHART, *supra* note 83, at 5.

92. The right to produce and to market a specified quantity of tobacco is assigned to the owner of cultivable land by the U.S. Department of Agriculture. As a result, a farmer can only produce and market tobacco by purchasing or leasing land that has a quota assigned to it by the U.S. government. *See* WOMACH, *supra* note 4, at 4.

93. *See* WOMACH, *supra* note 34, at 2; *see also* WOMACH, *supra* note 4, at 3.

94. *See* WOMACH, *supra* note 34, at 2.

95. *See* CAPEHART, *supra* note 83, at 1. Production of flue-cured tobacco has been subject to acreage and poundage quotas since 1965. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 1. Under acreage and poundage marketing quotas, if the marketings from a farm are less than its poundage quota, the difference is added to the farm's acreage and poundage quotas for the next year. *Id.* Marketings in excess of the allotted poundage quota are deducted from the next year's quota. *Id.* Production of burley tobacco has been subject to poundage quotas since 1971. *See* COMMODITY FACT SHEET, BURLEY TOBACCO, *supra* note 44, at 1.

96. *See* CAPEHART, *supra* note 83, at 3. Required reserve stock levels are 15% of the effective quota or a minimum of 100 million pounds of flue-cured tobacco and 50 million of burley tobacco. *Id.*

the upcoming year.[97] The U.S. Department of Agriculture is prohibited from setting flue-cured and burley tobacco quotas at more than 103% or less than ninety-seven percent of the amount determined by manufacturers' needs, anticipated exports, and the reserve stock.[98]

Although the national marketing quota and resultant acreage available for tobacco production have been subject to considerable fluctuation, the national average support price, average price to farmers, and farm value of tobacco have grown steadily in the past thirty years. In the case of flue-cured tobacco, the national marketing quota declined from an annual average of 1.17 billion pounds in the 1970s to 869 million pounds in the 1980s, before rebounding to 890.75 million pounds in the 1990s.[99] Actual average annual production for these decades was 1.16 billion pounds, 870.5 million pounds, and 890.5 million pounds, respectively.[100] The national average support price for flue-cured tobacco rose from US$.9319 per pound in the 1970s to US$1.5581 per pound in the 1980s and US$1.5693 per pound in the 1990s.[101] The average price to farmers for flue-cured tobacco increased from an average of US$1.0304 per pound in the 1970s to US$1.6605 per pound in the 1980s and US$1.7331 per pound in the 1990s.[102] The aggregate farm value of flue-cured tobacco also grew from an annual average of US$1.2 billion in the 1970s to US$1.44 billion in the 1980s and US$1.52 billion in the 1990s.[103]

These patterns are similar in the case of burley tobacco. The national marketing quota declined from an annual average of 602.44 million pounds in the 1970s to 572.5 million pounds in the 1980s, before rebounding to 627.88 million pounds in the

97. *Id.* A tobacco manufacturer failing to purchase at least 90% of the amount of tobacco contained within its estimate is subject to the imposition of penalties by the U.S. Department of Agriculture. *Id.*

98. *Id.*

99. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 2. In 1997, the national marketing quota for flue-cured tobacco was 974 million pounds, which represented an increase of 100 million pounds from 1996. *Id.*

100. *Id.* Actual production of flue-cured tobacco increased from 897 million pounds in 1996 to 970 million pounds in 1997. *Id.*

101. *Id.* The national support price for flue-cured tobacco increased from US$1.601 per pound in 1996 to US$1.621 per pound in 1997. *Id.*

102. *Id.*

103. *Id.*

1990s.[104] Actual average annual production for these decades was 567.37 million pounds, 561.58 million pounds, and 591.77 million pounds, respectively.[105] The national average support price for burley tobacco rose from US$.9604 per pound in the 1970s to US$1.5844 per pound in the 1980s and US$1.6763 per pound in the 1990s.[106] The average price to farmers for burley tobacco increased from an average of US$1.055 per pound in the 1970s to US$1.693 per pound in the 1980s and US$1.8271 per pound in the 1990s.[107] The aggregate farm value of burley tobacco also grew from an annual average of US$600.3 million in the 1970s to US$961.59 million in the 1980s and US$1.07 billion in the 1990s.[108]

Tobacco prices are further supported by the non-recourse loan program financed by the U.S. Department of Agriculture's Commodity Credit Corporation. This program utilizes funds borrowed from the U.S. Treasury.[109] The non-recourse loan program is designed to provide farmers with interim financing, to maintain balanced and adequate supplies of farm commodities and their orderly distribution, and to remedy any shortcomings of the marketing quota program.[110] The loan program operates by annually establishing a loan rate for every grade of eligible tobacco.[111] In the event that tobacco buyers are unwilling

104. *See* COMMODITY FACT SHEET, BURLEY TOBACCO, *supra* note 44, at 2. The national marketing quota for 1997 was 699 million pounds, which represented a 68 million pound increase from 1996. *Id.*

105. *Id.*

106. *Id.* This trend continued in 1997, when the U.S. Department of Agriculture increased the national average support price for burley tobacco from US$1.737 per pound to US$1.76 per pound. *Id.*

107. *Id.*

108. *Id.*

109. *See* WOMACH, *supra* note 4, at 4. The U.S. Department of Agriculture's Farm Service Agency provides the operating personnel for the Commodity Credit Corporation. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRICULTURE, COMMODITY LOAN PROGRAMS 1 (1998) [hereinafter COMMODITY LOAN PROGRAMS]. The Farm Service Agency also administers commodity loan programs for wheat, rice, corn, grain sorghum, barley, oats, oilseeds, peanuts, cotton, raw cane sugar, and refined beet sugar. *Id.*

110. *See* COMMODITY LOAN PROGRAMS, *supra* note 109, at 1; *see also* WOMACH, *supra* note 4, at 4.

111. *See* CAPEHART, *supra* note 83, at 1. Loan rates are established utilizing recent market prices, loan holdings, and shares of particular grades received under loan. *Id.* In any event, the average of the various loan rates must equal the support level for each variety of eligible tobacco. *Id.* Both flue-cured and burley tobacco producers are presently eligible to participate in the loan program. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 1; *see also* COMMODITY FACT SHEET, BURLEY TOBACCO,

to match the government loan price at auction, an eligible grower may receive the loan price less overhead for administrative costs from the cooperative association responsible for the particular variety of tobacco in question. The cooperative association utilizes monies borrowed from the Commodity Credit Corporation.[112] The tobacco is subsequently consigned to the cooperative association that is responsible for its packaging and storage as collateral for the Commodity Credit Corporation loan.[113] The cooperative association is also responsible for the ultimate sale of the tobacco, the proceeds of which are remitted to the Commodity Credit Corporation with interest.[114]

The budgetary impact of the quota and commodity loan program is determined by comparing the difference between outlays for new loans by the Commodity Credit Corporation and repayment of existing loans.[115] Revenue derived from the repayment of existing loans has exceeded the amount of new loans extended by the Commodity Credit Corporation in recent fiscal years.[116] Nevertheless, in order to eliminate losses associated with the quota and commodity loan program when tobacco is

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supra note 44, at 1. Additionally, for crop year 1997, producers of dark air-cured, fire-cured, sun-cured, and cigar filler and binder tobaccos were eligible to participate in the loan program. *See* COMMODITY FACT SHEET, OTHER TOBACCOS, *supra* note 42, at 2.

112. *See* CAPEHART, *supra* note 83, at 1; *see also* WOMACH, *supra* note 34, at 2; WOMACH, *supra* note 4, at 4. The Flue-Cured Tobacco Cooperative Stabilization Corporation is responsible for the purchase of all flue-cured tobacco eligible for participation in the loan program. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 1. The Burley Tobacco Growers Cooperative Association and the Burley Stabilization Corporation are responsible for the purchase of all burley tobacco eligible for participation in the loan program. *See* COMMODITY FACT SHEET, BURLEY TOBACCO, *supra* note 44, at 1.

113. *See* WOMACH, *supra* note 34, at 2; *see also* WOMACH, *supra* note 4, at 4.

114. WOMACH, *supra* note 34, at 2. As of July 1, 1997, the Flue-Cured Tobacco Cooperative Stabilization Corporation held 91 million pounds of flue-cured tobacco valued at US$175 million. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 1. This amount represented a 66 million pound decrease in inventory from July 1, 1996. *Id.* Additionally, all pre-1994 flue-cured tobacco was committed to purchase by tobacco manufacturers over a seven-year period ending in 2001. *Id.* As of July 1, 1997, the Burley Tobacco Growers Cooperative Association and the Burley Stabilization Corporation held 141 million pounds of burley tobacco valued at US$285 million. *See* COMMODITY FACT SHEET, BURLEY TOBACCO, *supra* note 44, at 1. This amount represented a 72 million pound decrease in inventory from July 1, 1996. *Id.* Burley tobacco from 1991 through 1993 is under contract to be sold over a seven-year period ending in 2001. *Id.*

115. *See* WOMACH, *supra* note 34, at 2.

116. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 25. For example, in fiscal year 1996, the Commodity Credit Corporation extended new loans totaling

sold at a later date for a price insufficient to repay the loan and accrued interest, the U.S. Congress ("Congress") enacted the No-Net-Cost Tobacco Program Act in 1982.[117] Mandated by the Agriculture and Food Act of 1981, the no-net-cost tobacco program requires that producers contribute to an escrow fund or pay assessments to accounts established by the cooperative associations in order to be eligible for federal price supports commencing with the 1982 crop.[118] The creation and funding of this program ensures that the tobacco price support program operates at no-net-cost to taxpayers other than administrative expenses and covers any potential losses due to insufficient prices upon resale.[119] Average combined assessments for producers of flue-cured tobacco were US$.0609 per pound in the 1980s and US$.0122 per pound in the 1990s.[120] Average combined assessments for producers of burley tobacco were US$.0319 per pound in the 1980s and US$.015 per pound in the 1990s.[121] Cooperative associations collected US$27.9 million in assessments in fiscal year 1996 that resulted, in part, in the Commodity Credit Corporation operating at a US$27.9 million profit.[122]

US$27.3 million dollars while receiving repayment of previously-extended loans in the amount of US$495.4 million. *Id.*

117. No-Net-Cost Tobacco Program Act of 1982, Pub. L. No. 97-218, 96 Stat. 197 (codified as amended in scattered sections of 7 and 16 U.S.C.).

118. *Id.* Purchasers of U.S. tobacco have been required to contribute to these escrow funds since 1986. *See* CAPEHART, *supra* note 83, at 4. Beginning in 1994, assessments were levied on importers of flue-cured and burley tobacco. *Id.*

119. *See* CAPEHART, *supra* note 83, at 2; *see also* WOMACH, *supra* note 34, at 2. It is important to note, however, that administrative costs of the price support program exceed US$14 million annually. *See* CAPEHART, supra note 83, at 3. These costs are primarily the result of salaries and staff time associated with the operation of the program's 600 county offices located throughout the country. *Id.* As a result, critics of the price support program have noted that the program does not truly operate at no-net-cost to taxpayers. *Id.*

120. *See* COMMODITY FACT SHEET, FLUE-CURED TOBACCO, *supra* note 43, at 3. The no-net-cost assessment for purchasers of flue-cured tobacco averaged US$.0143 per pound in the 1980s and US$.0195 per pound in the 1990s. *Id.* The combined assessments for producers and purchasers of flue-cured tobacco were US$.01 per pound in fiscal year 1997. *Id.* at 1.

121. *See* COMMODITY FACT SHEET, BURLEY TOBACCO, *supra* note 44, at 2. The no-net-cost assessment for purchasers of burley tobacco averaged US$.0126 per pound in the 1980s and US$.0187 per pound in the 1990s. *Id.* The combined assessments for producers and purchasers of burley tobacco were US$.01 per pound in fiscal year 1997. *Id.* at 1.

122. TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 25. In fiscal year 1995, the cooperative associations collected US$33.7 million in assessments resulting in a net operating gain of US$33.4 million for the program. *Id.*

In addition to marketing assessments, tobacco, like most other commodities receiving governmental price support, is subject to deficit reduction requirements imposed by the Omnibus Budget Reconciliation Act of 1990[123] and the Omnibus Budget Reconciliation Act of 1993.[124] A special assessment, equal to one percent of the average support price for the fiscal year in question, is collected in equal amounts for producers and purchasers on every pound of marketed tobacco.[125] Failure to remit this assessment may result in the imposition of a penalty, equal to 3.75% of the sum of the average price of flue-cured and burley tobacco for the immediately preceding year, on the quantity of tobacco for which payment was not remitted.[126] Deficit reduction assessments generated approximately US $28 million in revenue in fiscal year 1997.[127]

Although it has been required to operate at no-net-cost to U.S. taxpayers since 1982, the price support and non-recourse loan programs have not operated without controversy. Criticism of the programs has focused on the exemption of administrative expenses from the no-net-cost requirement and their inconsistency with free market principles.[128] As a result, in the most recent session of Congress, attempts were made to modify the quota and non-recourse loan programs. Under a proposal drafted by U.S. Sen. Richard Lugar and Sen. Mitch McConnell, the production quota program would have been terminated in 1999, and price supports would have been phased out over a three-year period ending in the 2001 crop year.[129] Quota owners

123. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 16, 19, 20, 21, 22, 26, 29, 30, 31, 35, 38, 39, 42, 46, 48, and 49 U.S.C.).

124. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified as amended in scattered sections of 2, 5, 7, 10, 12, 16, 19, 20, 21, 26, 29, 30, 31, 35, 38, 42, 43, 46, and 47 U.S.C.).

125. *See* 104 Stat. at 1388; *see also* 107 Stat. at 312. Importers became subject to the payment of deficit reduction assessments in 1994.

126. *See* 104 Stat. at 1388; *see also* 107 Stat. at 312.

127. *See* WOMACH, *supra* note 34, at 3; *see also* WOMACH, *supra* note 4, at 5. The deficit reduction marketing assessment totaled US$28 million in fiscal year 1996 and US$34 million in fiscal year 1995. *Id.* at 6.

128. *See* WOMACH, *supra* note 34, at 3; *see also* Saundra Torry, *Tobacco Subsidies Stay Alive in Senate*, WASH. POST, June 13, 1998, at A4.

129. *See* Curt Anderson, *Bill Would End Tobacco Supports*, ASSOCIATED PRESS, May 21, 1998; *see also Tobacco Bill's Grower Proposals*, ASSOCIATED PRESS, May 21, 1998. Sen. Richard Lugar is a Republican from the state of Indiana. Sen. Mitch McConnell is a Republican from the state of Kentucky. Anderson, *supra*.

would have been bought out by the U.S. government at US$8 per pound payable in three installments, and quota lessees would have been paid US$4 per pound based upon average production, also payable in three installments.[130] Additionally, tobacco-dependent states would have received US$1 billion over five years for economic aid, promotion of alternative crops, and education.[131] The total cost of the Lugar-McConnell proposal was estimated at US$18 billion over five years.[132]

A competing proposal by Sen. Wendell Ford provided for the continuation of the price support and quota programs for burley tobacco, and the creation of a permit program for flue-cured tobacco in which only active producers would have been eligible.[133] Senator Ford's proposal also contained a mandatory quota buyout for flue-cured producers and voluntary buyout for burley producers at US$8 per pound, payable over a ten-year period or in a lump sum if the national quota declined by fifty percent.[134] Additionally, tobacco-dependent states would have received US$12.5 billion in grants for economic assistance, worker transition, and higher education.[135] The cost of Senator Ford's proposal was estimated at US$28.5 billion payable over twenty-five years.[136] Neither of these proposals survived the most recent session of Congress, however, and the price support and non-recourse loan programs presently remain intact.

The U.S. government also subsidizes the production and marketing of tobacco through the provision of crop insurance. The federal crop insurance program, which is administered by the U.S. Department of Agriculture's Risk Management Agency, provides farmers with subsidized multiple peril insurance for sixty-four different crops.[137] The federal crop insurance program is designed to protect "cash-flow . . . collateral [and] crop

130. *See Tobacco Bill's Grower Proposals*, *supra* note 129.

131. *Id.*

132. *Id.*

133. *Id.* Sen. Wendell Ford is a Republican from the state of Kentucky.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., CROP INSURANCE 1 (1998) [hereinafter CROP INSURANCE]. Crops covered by the Federal Multiple Peril Crop Insurance program include: almonds, apples, beans, canola, citrus trees, corn, grain, sorghum, soybeans, cotton, cranberries, figs, millet, peaches, peanuts, pears, peas, peppers, plums, potatoes, prunes, raisins, rice, safflower, wheat, barley, oats, rye, flax, sugar beets, sugarcane, sunflower seeds, and tomatoes. *See* U.S. DEP'T OF AGRIC., RISK MAN-

marketing plans . . . [and to provide] stability for long-term business plans and family security."[138] As such, the insurance program provides comprehensive protection against weather-related loss and other unavoidable perils including drought, excessive moisture, hail, wind, flooding, hurricanes, tornadoes, lightning, and insect infestations.[139] Federal crop insurance not only shields farmers from the complete destruction of their crops, but also provides protection from losses associated with low yields, poor quality, late planting, replanting, and prevented planting.[140] Losses resulting from neglect, poor farming practices, theft, or market conditions resulting in low prices are not covered by the insurance program.[141] All forms of federal multiple peril crop insurance are available for purchase from and are serviced by private insurance agents listed with the U.S. Department of Agriculture Farm Service Agency.[142]

Insurance coverage is available for losses associated with the cultivation of crops by participating farmers at fifty to seventy-five percent of the actual production history for the farm.[143] An indemnity price election from sixty to 100% of the Federal Crop Insurance Corporation expected market price is selected by the producer at the time the insurance policy is purchased.[144] Crop insurance policies are continuous after their purchase and remain in effect for each crop year following the acceptance of the producer's original application.[145] Producers may cancel an entire policy, a crop, a specific county, or a specific crop in a specific county after the first effective crop year by providing written notice to insurance providers on or before the cancellation date

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AGEMENT EDUCATION FACT SHEET, MULTIPLE PERIL CROP INSURANCE 2 (1997) [hereinafter RISK MANAGEMENT EDUCATION FACT SHEET].

138. RISK MANAGEMENT EDUCATION FACT SHEET, *supra* note 137, at 2.

139. *See* CROP INSURANCE, *supra* note 137, at 1; *see also* WOMACH, *supra* note 34, at 4.

140. *See* RISK MANAGEMENT EDUCATION FACT SHEET, *supra* note 137, at 1.

141. *See* CROP INSURANCE, *supra* note 137, at 1; *see also* WOMACH, *supra* note 34, at 4.

142. *See* RISK MANAGEMENT EDUCATION FACT SHEET, *supra* note 137, at 2.

143. *See id.* at 1. The actual production history of a farm is determined by production records for a minimum of four consecutive years and a maximum of 10 consecutive years. *Id.* For producers who are unable to provide records for four consecutive years of production, variable transitional "T" yields are used to complete the four-year database. *Id.* The actual production history for producers who elect not to supply production records is limited to 65% of the applicable "T" yield for the first year during which the producer was insured. *Id.*

144. *Id.*

145. *Id.* at 2.

established by the applicable crop provisions.[146] Producers may also request amendments to their price election or coverage levels from their insurance providers as long as such requests are filed on or before the sales closing date for the insured crop.[147] Additionally, all insured producers are required to submit an acreage report by unit for each insured crop on or before the acreage reporting date for the county in which the insured crop is located.[148] Producers are also required to notify their insurance providers immediately of the occurrence and extent of any crop loss or damage subject to insurance coverage.[149]

Unlike the federal price support and quota programs, the crop insurance program operates at taxpayer expense. Although sales and servicing of policies are undertaken primarily by private insurance companies, operating costs and net indemnity losses associated with the program are the responsibility of the federal government.[150] Additionally, the U.S. Department of Agriculture has subsidized premiums charged to producers for insurance since 1980 in order to encourage participation and to lessen the need for enactment of disaster assistance programs in the event of catastrophic loss.[151] As a result of these practices, the U.S. Department of Agriculture expended US$79.8 million in tobacco-related costs associated with the crop insurance program in fiscal year 1996.[152] Net federal outlays associated with tobacco-related costs of the crop insurance program for fiscal

146. *Id.*

147. *Id.*

148. *Id.* A unit is defined as "that acreage of the insured crop in the county which is taken into consideration when determining the guarantee, premium and the amount of any indemnity (loss payment) for that acreage." *Id.* at 1. The basis insurance unit is defined as "all insurable acreage of the insured crop in the county on the date coverage begins for the crop year in which the producer has a one hundred percent share or which is owned by one entity and operated by another specific entity on a share basis." *Id.*

149. *Id.* at 2.

150. *See* WOMACH, *supra* note 34, at 4.

151. *See id.*; *see also* CROP INSURANCE, *supra* note 137, at 1; RISK MANAGEMENT EDUCATION FACT SHEET, *supra* note 137, at 2.

152. *See* TOBACCO WORLD MARKETS AND TRADE, *supra* note 7, tbl. 25. Federal expenditures for the crop insurance program are calculated by deducting all premiums paid directly by producers to insurance providers, and associated administrative expenses from indemnity expenditures incurred by the U.S. Department of Agriculture. *Id.* Net federal outlays associated with tobacco-related costs of the crop insurance program were US$31.3 million in fiscal year 1994 and US$29.4 million in fiscal year 1995. *Id.*

year 1997 were estimated at US$48 million.[153]

As a result of these expenditures, Congress attempted to prohibit the expenditure of federal funds for crop insurance programs associated with the cultivation and marketing of tobacco in agricultural appropriations legislation for fiscal year 1998.[154] Proponents of this attempt to prevent further federal expenditures on tobacco-related aspects of the crop insurance program contended that there was a compelling governmental interest in eliminating the expenditures of federal monies that assist in the production of a product that has a deleterious effect upon public health.[155] Conversely, supporters of the continuation of tobacco coverage under the federal crop insurance program contended that there was no nexus between the tobacco insurance program and the decisions of individuals to consume tobacco products.[156] Proponents of this argument contended that it would be unfair to deprive tobacco producers of protection in the absence of such a direct nexus.[157] The proposed prohibition of the expenditure of federal monies for tobacco-related portions of the crop insurance program was ultimately defeated in the U.S. Senate on July 23, 1997 and in the U.S. House of Representatives on July 24, 1997.[158] As a result, the U.S. Department of Agriculture continues to expend federal monies to support the multiple peril crop insurance program as it relates to the cultivation and marketing of tobacco.

The U.S. Department of Agriculture operates numerous additional programs that benefit tobacco producers. The U.S. Department of Agriculture's Agricultural Marketing Service provides inspection and grading services at tobacco auction markets in order to assess the quality of tobacco held as collateral for loans extended by the Commodity Credit Corporation.[159] The

153. *See* WOMACH, *supra* note 34, at 4.

154. *See generally* H.R. 2160, 105th Cong. (1997); *see also* S. 1033, 105th Cong. (1997); WOMACH, *supra* note 34, at 4.

155. *See* WOMACH, *supra* note 34, at 4.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* Inspection and grading services have operated at no-net-cost to taxpayers since 1981, as a result of the assessment of user fees set at US$.83 per 100 pounds. *Id.* The US$17 million generated in user fees in fiscal year 1996 was sufficient to finance all costs associated with the performance of inspections, as well as the cost of developing and maintaining applicable quality standards. *Id.*

Agricultural Marketing Service also operates a market news service that consists of daily reports of grades, prices, and sales volumes at auction markets.[160] Additionally, the U.S. Department of Agriculture funded research related to tobacco production and marketing through the Agriculture Research Service and Cooperative State Research Service, at an average annual cost to U.S. taxpayers of US$6.6 million, until fiscal year 1995 when future funding was terminated.[161] Nevertheless, the U.S. Department of Agriculture, through the Cooperative State Research, Education and Extension Service, funds education and technical assistance programs for tobacco producers in conjunction with state and county governments[162] and distributes information to farmers through publications, seminars, and consultations.[163] The Cooperative State Research, Education and Extension Service operates entirely at taxpayer expense and spent approximately US$680,000 on tobacco-related activities in fiscal year 1997.[164] Finally, the U.S. Department of Agriculture engages in extensive data collection and economic analysis through the Economic Research Service, the Foreign Agriculture Service, and the National Agricultural Statistics Service.[165]

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160. *See* WOMACH, *supra* note 34, at 5. The market news service operates at taxpayer cost that totaled US$965,000 in fiscal year 1997, and US$899,000 in fiscal year 1996. *Id.* at 7. Supporters of continued subsidization of the Agricultural Marketing Service's operations contend that the service allows tobacco markets to operate more efficiently by distributing relevant information, which would otherwise be assessed by costly private market research firms, to all participants at no cost. *Id.* at 5.

161. *See id.* at 5. The U.S. Department of Agriculture continues to fund research utilizing tobacco as a test plant, but such research is not considered relevant to the tobacco industry. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* An attempt to end taxpayer funding for the Cooperative State Research, Education, and Extension Service, through amendment of agricultural appropriations legislation for fiscal year 1997, was defeated in the U.S. House of Representatives on June 12, 1996, by a vote of 212 to 210. *See* Action on Smoking and Health, *Bill to End Tobacco Subsidies Very Narrowly Defeated* (visited Mar. 30, 1998) <http://ash.org/government/defeat.html> (on file with the *Fordham International Law Journal*). The amendment would also have ended the appropriation of federal funds for the multiple peril crop insurance program. *Id.* No attempt was made to eliminate such funding in agricultural appropriations legislation for fiscal year 1998.

165. The Economic Research Service collects and analyzes information relating to tobacco supply and demand, the role of tobacco in local economies, and the impact of changes in the U.S. Department of Agriculture's tobacco programs. Its findings are published quarterly in the *Tobacco Situation and Outlook Report*. *See* WOMACH, *supra* note 34, at 6. The Foreign Agriculture Service collects economic data relating to numerous commodities, including tobacco, in the international marketplace for utilization by

Each of these services is fully funded by the U.S. Government and operates at taxpayer expense.[166]

2. Governmental Restraints upon the Domestic Tobacco Industry

Despite the U.S. government's enormous financial support of tobacco cultivation and production, it has imposed some restraints upon the industry. The majority of these restraints relate to domestic marketing, content, and consumption of tobacco products. Although a comprehensive history of federal regulation of tobacco products is beyond the scope of this Article, a brief review of the highlights of such regulation is necessary in order to place U.S. governmental support of the tobacco industry in its proper context.

Significant U.S. governmental restraints upon the marketing, content, and consumption of tobacco products originated in a report, released on January 11, 1964 by the U.S. Surgeon General's Advisory Committee on Smoking and Health, entitled *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service.* This landmark report, now known as the First Surgeon General's Report on Smoking and Health, documented the first major study on smoking and public health conducted in the United States.[167] On the basis of more than 7000 articles relating to causal links between smoking and disease, the Surgeon General's 387 page report concluded that cigarette smoking is a cause of lung and laryngeal cancer in men, a probable cause of lung cancer in women, and the most important contributing cause of chronic bronchitis.[168] This conclusion has been strengthened and elaborated upon in twenty-

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economists, policy-makers, and the private business community. *Id.* The National Agricultural Statistics Service collects and disseminates information on planting intentions, crop conditions, harvesting, yield, and production, and assists farmers in developing marketing plans relating to a wide range of commodities. *Id.*

166. The Economic Research Service operated at a cost of US$130,000 in fiscal year 1997. *See* WOMACH, *supra* note 34, at 6. Tobacco-related costs of the Foreign Agriculture Service and the National Agricultural Statistics Service totaled US$133,000 and US$250,000, respectively, in fiscal year 1997. *Id.*

167. For a history of *Smoking and Health: Report of the Advisory Committee to the Surgeon General*, see *History of the 1964 Surgeon General's Report*, *supra* note 67.

168. *See id.*; *see also* U.S. Centers for Disease Control and Prevention, *Chronology, Significant Developments Related to Smoking and Health, 1964-96* (visited Mar. 27, 1998) <http://www.cdc.gov/nccdphp/osh/issue> (on file with the *Fordham International Law Journal*) [hereinafter *Chronology of Significant Developments Related to Smoking and Health*].

four reports published by the Surgeon General in the intervening thirty-four year period. For example, in a 1967 report entitled *The Health Consequences of Smoking: A Public Health Service Review*, the Surgeon General concluded that cigarette smoking is the principal cause of lung cancer in the United States.[169] In his report entitled *The Health Consequences of Smoking: A Report of the Surgeon General*, published in 1972, the Surgeon General identified involuntary exposure to cigarette smoke as a significant health risk.[170] Nine years later, in a report entitled *The Health Consequences of Smoking-The Changing Cigarette: A Report of the Surgeon General*, the Surgeon General concluded that no cigarette or level of cigarette consumption is safe.[171]

In response to the Surgeon General's reports and growing public concern regarding the health consequences associated with cigarette consumption, Congress imposed restrictions upon domestic marketing of tobacco products commencing in the mid-1960s. In 1965, Congress adopted the Federal Cigarette Labeling and Advertising Act that required, in part, the placement of a health warning on all cigarette packages sold in the United States.[172] The health warning requirement was strengthened in 1970 with the adoption of the Public Health Cigarette Smoking Act.[173] Additionally, this legislation banned cigarette advertising on television and radio.[174] Congress recognized the particularly harmful health effects of cigarette smoking upon children by re-

169. *See Chronology of Significant Developments Relating to Smoking and Health*, *supra* note 168.

170. *Id.*

171. *Id.*

172. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965). The Federal Cigarette Labeling and Advertising Act required health warnings placed on cigarette packages to state: "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Id.* at 283.

173. *See* Public Health Cigarette Smoking Act, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended in scattered sections of 15 U.S.C.). The warning to be placed upon cigarette packages was required to read "Warning: The Surgeon General has Determined that Cigarette Smoking is Dangerous to Your Health." *Id.* at 88. The requirement providing for health disclosures on cigarette packages was subsequently subject to rotating warnings as a result of the adoption of the Comprehensive Smoking Education Act in 1984. Pub. L. No. 98-474, 98 Stat. 2200, 2210-12 (1984) (codified as amended in scattered sections of 15 U.S.C.).

174. § 6, 84 Stat. at 89. Cigarette advertising ended on radio and television in 1971. Radio and television advertisement of so-called "little cigars" ended in 1973 with the adoption of the Little Cigar Act of 1973. Pub. L. No. 93-109, 87 Stat. 352 (1973) (codified as amended in scattered sections of 15 U.S.C.).

quiring states to adopt and to enforce restrictions on tobacco sales to minors.[175] Additionally, Congress adopted a smoke-free policy for all federally-funded children's services in 1994.[176]

The vast majority of federal tobacco regulation has, however, occurred at the administrative level. The Federal Trade Commission has conducted studies on tar, nicotine, and carbon monoxide yields associated with cigarette smoking.[177] The Environmental Protection Agency issued its first draft risk assessment on environmental tobacco smoke in 1990[178] and classified such smoke as a "Group A Carcinogen" in 1993.[179] As a result, in 1994 the Occupational Safety and Health Administration announced regulations to prohibit smoking in the workplace except in separately-ventilated smoking rooms.[180] Finally, in 1994, then U.S. Food and Drug Administration Commissioner David Kessler announced that cigarettes may qualify as drug delivery systems, thereby bringing them within the jurisdiction of the U.S. Food and Drug Administration.[181] The U.S. Food and Drug Administration subsequently developed a comprehensive set of measures to reduce child and adolescent smoking rates in 1995.[182] These measures were published as a final rule on August 23, 1996 and granted the U.S. Food and Drug Administration broad jurisdiction with regard to the sale and distribution of cigarettes to children and adolescents.[183]

Numerous state governments also became involved in efforts to regulate the marketing and consumption of tobacco products. In 1973, Arizona became the first state to restrict

175. *See* 42 U.S.C. § 300x-26 (1992). States failing to adopt and to enforce restrictions upon cigarette sales to minors were subject to imposition of limitations on federal funds for state substance abuse programs. *Id.*

176. *See* Pro-Children Act of 1994, 20 U.S.C. §§ 6081-84 (1994).

177. *See Chronology of Significant Developments Related to Smoking and Health, supra* note 168. The Federal Trade Commission released its first report on tar and nicotine yields in cigarette brands in 1967. *Id.* The Federal Trade Commission first began testing cigarettes for carbon monoxide yields in 1980. *Id.*

178. *Id.*

179. *Id.* The Environmental Protection Agency's classification was overturned in federal court on July 17, 1998. *See Smoking Bans Are Here to Stay, U.S. Says*, S.F. CHRON., July 20, 1998, at A3.

180. *See Chronology of Significant Developments Related to Smoking and Health, supra* note 168.

181. *Id.*

182. *Id.*

183. *Id.*

smoking in public areas due to the health consequences associated with exposure to environmental tobacco smoke.[184] Minnesota adopted the first comprehensive clean indoor air act in 1976, which, in part, restricted smoking in most public buildings.[185] In 1978, Utah became the first state to ban tobacco advertisements on billboards, streetcars, and buses.[186] Nine years later, Minnesota became the first state to ban tobacco advertising in public sports venues.[187] Furthermore, in 1985, Minnesota enacted the first state legislation earmarking a portion of the state cigarette excise tax to support tobacco control measures and smoking prevention programs.[188] California followed this example in 1988, when it raised the excise tax on cigarettes by US$.25 per pack, the single largest cigarette tax increase in U.S. history.[189] Finally, in 1994, Mississippi became the first state to initiate litigation against retail tobacco companies to recover Medicaid costs arising from the treatment of smoking-related illnesses.[190] Forty-one states ultimately followed Mississippi's initiative and commenced litigation to recover smoking-related costs from the tobacco industry.[191]

As a result of growing financial and public pressures, as well as the likelihood of adoption of comprehensive control measures by states, on June 20, 1997, the retail tobacco companies entered into an agreement with the state attorneys general ("Proposed Resolution") settling the claims brought against them.[192] Although a detailed examination of the provisions of

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *See* State Tobacco Information Center, *Attorney General Bringing the Tobacco Industry to Justice* (visited Nov. 4, 1998) <http://stic.neu.edu/> (on file with the *Fordham International Law Journal*). Only Alabama, Delaware, Kentucky, North Carolina, North Dakota, Tennessee, Virginia, and Wyoming have not initiated litigation against the tobacco industry to recover Medicaid costs associated with smoking-related illnesses. *Id.*
192. *See generally Proposed Resolution* (visited Mar. 23, 1998) <http://www.tobaccoresolution.com> (on file with the *Fordham International Law Journal*) (agreement between retail tobacco companies and state attorneys general, entered into on June 20, 1997, settling claims brought against tobacco companies); *see also $368 Billion Deal on Tobacco*, S.F. CHRON., June 21, 1998, at A1; Jill Smolowe, *Sorry Pardner*, TIME, June 30, 1997, at 24; Deborah Riechmann, *Questions and Answers About the Tobacco Legislation*, ASSOCIATED PRESS, Apr. 8, 1998.

the Proposed Resolution is beyond the scope of this Article, a summary of its primary provisions is appropriate in order to place it in its proper historical context.

The Proposed Resolution consisted of nine separate titles. Title I consisted of comprehensive marketing provisions. Title I(A) placed restrictions upon the marketing and advertising of tobacco products in the United States.[193] Title I(B) addressed issues relating to warnings, labeling, and packaging of U.S. tobacco products.[194] Title I(C) placed restrictions upon access to tobacco products,[195] and Title I(D) created a licensing scheme for retail vendors of tobacco products.[196] Tobacco product development and manufacturing were subject to regulation pursu-

193. *See Proposed Resolution*, *supra* note 192, tit. I(A). Title I(A) the agreement between retail tobacco companies and state attorneys general ("Proposed Resolution") prohibited the use of non-tobacco brand names as brand names of tobacco products, except for tobacco products in existence as of January 1, 1995. *Id.* Title I(A) also prohibited the use of non-tobacco merchandise bearing the name, logo, or selling message of a tobacco brand, the offering of non-tobacco items based on proof of purchase of tobacco products, and the sponsorship of concerts and sporting events by tobacco companies. *Id.* Moreover, Title I(A) prohibited the use of human images and cartoon characters in all tobacco advertising and on tobacco product packages, all outdoor tobacco product advertising and advertising on the internet and payments for tobacco product placement or glamorization in the media. *Id.* Tobacco advertising was further limited to black text on white background, with the exception of advertising in adult-only facilities or adult publications. *Id.* Additionally, Title I(A) provided for the creation of nationwide restrictions on point-of-sale advertising in non-adult facilities, with a view toward minimizing the impact of such advertising upon minors. *Id.*

194. *Id.* tit. I(B). Title I(B) called for the amendment of the Federal Cigarette Labeling and Advertising Act to require nine new rotating warnings regarding the health consequences of smoking to be displayed on all cigarette cartons and packages. *Id.* These health warnings would be rotated quarterly in all tobacco advertisements. *Id.* Additionally, cigarette packages would carry a statement, formulated by the U.S. Food and Drug Administration, identifying the intended use of cigarettes as "nicotine delivery devices." *Id.*

195. *Id.* tit. I(C). Title I(C) established 18 years as the minimum age for the purchase of tobacco products and required tobacco retailers to examine photographic identification of all persons under 27 years of age. *Id.* Title I(C) also required face-to-face transactions for all sales of tobacco products and prohibited all sales of tobacco products through vending machines. *Id.* Additionally, Title I(C) required that tobacco products be placed out of sight and reach of consumers, except in adult-only facilities. *Id.*

196. *Id.* tit. I(D). Title I(D) called upon the U.S. Congress to develop minimum federal standards for a retail licensing program, subject to enforcement by federal, state, and local governmental authorities through funding by the tobacco industry. *Id.* All entities in the distributive chain, including manufacturers, wholesalers, importers, distributors, and retailers, would be required to obtain an appropriate license prior to dealing in tobacco products. *Id.*

ant to Title I(E),[197] and disclosure of non-tobacco ingredients was required by the provisions of Title I(F).[198] Finally, Title I(G) mandated compliance procedures and changes in corporate culture for U.S. tobacco manufacturers.[199]

The remaining titles of the Proposed Resolution are also worthy of mention. Title II contained controversial "look back provisions" relating to mandated reductions in cigarette consumption rates for underage smokers.[200] Title III created penal-

197. *Id.* tit. I(E). Title I(E) provided, in part, for the creation of a regulatory regime to govern the manufacturing of tobacco products, including approval of ingredients by the U.S. Food and Drug Administration and the imposition of standards for reducing the level of certain harmful additives such as nicotine. *Id.* A key element of this proposed regulatory scheme was the classification of nicotine as a drug pursuant to the Food, Drug and Cosmetics Act, and recognition of the Food and Drug Administration's authority to regulate tobacco products as "restricted medical devices." *Id.* Title I(E) also granted authority to the U.S. Food and Drug Administration to promulgate performance standards for the tobacco industry that would require the modification of tobacco products to reduce the potential injury caused by such products. *Id.* Finally, Title I(E) would have subjected manufacturers to standards comparable to those imposed upon medical device manufacturers, food companies, and other industries subject to regulation by the U.S. Food and Drug Administration. *Id.*

198. *Id.* tit. I(F). Title I(F) called for federal legislation prohibiting tobacco manufacturers from utilizing non-tobacco ingredients in their products unless the manufacturer could demonstrate that the ingredient was not harmful to the public health under the intended conditions of use. *Id.* Additionally, this proposed legislation would have required the disclosure of all non-tobacco ingredients and their amounts to the U.S. Food and Drug Administration and consumers in a manner similar to current federal disclosure requirements for food products. *Id.* Finally, tobacco manufacturers would have been required to maintain records relating to tobacco product ingredients that would have been subject to review by the U.S. Food and Drug Administration. *Id.*

199. *Id.* tit. I(G). Title I(G) required manufacturers to create plans to ensure compliance with all applicable laws and regulations relating to tobacco, to identify methods to reduce access and consumption of tobacco products by minors, and to provide incentives to develop products posing reduced risks to consumers. *Id.* Additionally, Title I(G) required manufacturers to implement programs to ensure internal compliance with the requirements of the Proposed Resolution. *Id.* Title I(G) also imposed strict controls upon the activities of tobacco lobbyists, including the requirement of express authorization from tobacco manufacturers prior to initiating activities in opposition to proposed federal or state governmental action with regard to the regulation of tobacco products. *Id.* In addition, the tobacco industry agreed to dissolve the Tobacco Institute and the Council for Tobacco Research, U.S.A., within 90 days of the enactment of federal legislation adopting the provisions of the Proposed Resolution. *Id.* Finally, Title I(G) subjected tobacco companies to fines and penalties for failure to develop, implement, and enforce such internal compliance measures, including the failure to report known or alleged violations by retailers or distributors to the U.S. Food and Drug Administration. *Id.*

200. *Id.* tit. II. The "look back" provisions required the reduction of underage cigarette smoking rates by 30% five years after enactment of the legislation implementing the Proposed Resolution, by 50% in the seventh year, and by 60% in the 10th year.

ties and enforcement procedures with regard to violations of the Proposed Resolution.[201] Title IV attempted to create and to implement nationwide standards to minimize involuntary exposure to environmental tobacco smoke.[202] Title V purported to grant jurisdiction to the U.S. Food and Drug Administration and state governments with regard to tobacco production and marketing issues,[203] while the financial aspects of the settlement were addressed in Title VI.[204] Recommendations by the state attorneys general for the expenditure of public health funds generated by the Proposed Resolution were contained in Title VII.[205] Title VIII addressed issues of ongoing civil liability of the tobacco companies in future litigation.[206] Finally, Title IX provided for

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Id. In the event that a target was not met, Title II imposed a mandatory surcharge upon the tobacco industry equal to the present value of the profit the industry would earn over the lives of all underage users in excess of the target subject, to an annual cap of US$2 billion. *Id.*

201. *Id.* tit. III. Title III provided for the enforcement of the terms of the Proposed Resolution, and implementing legislation by the federal and state governments. *Id.* Additionally, Title III established civil penalties of up to US$10 million per violation for any violation of the tobacco companies' obligation to disclose to the U.S. Food and Drug Administration research regarding the health effects of tobacco usage and the toxicity of non-tobacco ingredients utilized in their products. *Id.* Title III also provided for the adoption of consent decrees between the tobacco industry and the states implementing the Proposed Resolution, as well as a regulatory scheme governing any tobacco company that elected not to become a party to the Proposed Resolution. *Id.*

202. *Id.* tit. IV. Title IV required that federal legislation implementing the Proposed Resolution provide for restrictions upon indoor smoking in public facilities and directed the U.S. Occupational Safety and Health Administration to issue regulations implementing and enforcing any restrictions upon indoor smoking adopted pursuant to such legislation. *Id.*

203. *Id.* tit. V. Title V purported to grant the U.S. Food and Drug Administration authority over all tobacco products sold in U.S. commerce, including new entrants and importers. *Id.* In addition, Title V purported to maintain the jurisdiction of state and local governmental authorities over tobacco companies. *Id.*

204. *Id.* tit. VI. Title VI provided for a lump sum cash payment of US$10 billion dollars by the tobacco companies, payable on the date of the adoption of federal legislation implementing the Proposed Resolution. *Id.* Additionally, the tobacco companies were required to remit payments having a 25 year total face value of US$358.5 billion. *Id.*

205. *Id.* tit. VII. The state attorneys general recommended that public health funds generated by the Proposed Resolution be allocated for a wide range of uses including federal, state, and local efforts to reduce tobacco usage and to administer their responsibilities properly. *Id.*

206. *Id.* tit. VIII. Title VIII provided for the legislative resolution of all present and future attorneys general, *parens patriae*, and class actions. *Id.* All addiction and dependence claims were also settled, and all other personal injury claims were reserved. *Id.* Third-party payor actions, pending as of June 9, 1997, were not settled, however. *Id.* With regard to civil suits for relief arising from past conduct, the Proposed Resolution

the approval of the terms of the Proposed Resolution by the boards of directors of the participating tobacco companies prior to its implementation.[207]

For the purposes of this Article, most important was the complete absence of provisions relating to the international marketing and sale of tobacco products in the Proposed Resolution. The state attorneys general and the tobacco companies provided two separate explanations for the absence of such provisions. Initially, the state attorneys general and the tobacco companies concluded that the extraterritorial imposition of restrictions contained within the Proposed Resolution would constitute a violation of the sovereignty of other countries with different tobacco regulatory schemes.[208] Additionally, the state attorneys general and the tobacco companies alleged that the international imposition of such restrictions would place U.S. tobacco companies at a disadvantage in competing with non-U.S. manufacturers, many of which are government-owned monopolies, and all of which would not be subject to the same limitations constraining U.S. tobacco manufacturers.[209] As a result, despite its billing as comprehensive, the Proposed Resolution failed to address the larger issues surrounding tobacco in the burgeoning global marketplace.

In any event, Congress refused to adopt the provisions of the Proposed Resolution. Rather, federal lawmakers were determined to draft legislation containing new and substantially stiffer terms and penalties. These efforts culminated in the introduction of Senate Bill 1415 (or "Bill") by Sen. John McCain on November 7, 1997.[210] Senate Bill 1415 provided for a lump sum payment of US$10 billion and additional annual payments totaling US$496 billion over a twenty-five year term, financed primarily through the assessment of licensing fees commencing in 1999 and rising to US$1.10 per pack by the year 2003.[211] The Bill also

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resolved all punitive damage claims, prohibited class actions, and established an annual aggregate cap for future judgments and settlements. *Id.*

207. *Id.* tit. IX. The terms of the Proposed Resolution were subject to the approval of the participating tobacco companies' boards of directors. *Id.*

208. *See Questions About the Proposed Resolution* (Oct. 7, 1997) <http://www.tobacco resolution.com/K1/QA.html> (on file with the *Fordam International Law Journal*).

209. *Id.*

210. *See* S. 1415, 105th Cong. (1997). Senator McCain is a Republican from Arizona.

211. *See* S. 1415 §§ 402, 404. Annual payments would have commenced at US$14.4

required reduction in teenage smoking rates by fifteen percent in the first three years following its enactment, thirty percent in the first five years, fifty percent in the first seven years, and sixty percent over the first decade.[212] Failure to achieve these reductions would have resulted in the imposition of penalties of up to US$240 million for each percentage point by which the target was missed, with total penalties capped at US$3.5 billion annually.[213] Section 1404 of the Bill prohibited outdoor tobacco advertising and the use of human images, animal images, and cartoon characters in such advertising and further limited such advertising to black and white text.[214] Furthermore, vending machine sales of tobacco products were prohibited.[215] Additionally, nicotine would have been subject to extensive regulation by the U.S. Food and Drug Administration, which could have banned its use in tobacco products upon giving two years notice.[216] In return for these concessions, the tobacco companies were to have received a US$6.5 billion annual cap on damages in liability actions brought by private parties.[217] Finally, the Bill provided for the buyout of flue-cured and burley tobacco quotas and federal financial aid for individuals and communities suffering negative economic effects as a result of its adoption.[218] It was estimated that Senate Bill 1415 would have impacted U.S. national health by preventing 991,000 premature deaths and by reducing the number of teenage smokers, in the four year period

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billion in 1999 and risen to US$23.6 billion in 2003, the amount at which they would have stayed for the remaining term. *Id.*; *see* Darlene Superville, *Tobacco Bill Still Has Support*, ASSOCIATED PRESS, Apr. 9, 1998; *What the Sides Want in Tobacco Deal*, ASSOCIATED PRESS, Apr. 8, 1998; *Senate Bill Raises Stakes on Tobacco*, S.F. CHRON., Mar. 30, 1998, at A1; James Carney, *McCain's Big Deal*, TIME, Apr. 13, 1998, at 62.

212. *See* S. 1415 §§ 203-04; *see also Highlights of Proposed Tobacco Bill*, ASSOCIATED PRESS, Mar. 31, 1998.

213. *See* S. 1415 § 205; *see also Highlights of Proposed Tobacco Bill*, *supra* note 212.

214. *See* S. 1415 § 1404; *see also Highlights of Proposed Tobacco Bill*, *supra* note 212; Carney, *supra* note 211, at 62.

215. *See* S. 1415 § 1162; *see also* Carney, *supra* note 211, at 62.

216. *See generally* S. 1415 tit. IX. An order of the U.S. Food and Drug Administration banning the use of nicotine in tobacco products would, however, have been subject to congressional override. *Id.*; *see Senate Bill Raises Stakes on Tobacco*, *supra* note 211, at A1; Carney, *supra* note 211, at 62.

217. *See generally* S. 1415 tits. VII, XIV. Additionally, it is important to note, that unlike the Proposed Resolution, the tobacco companies did not receive immunity from class action lawsuits or the imposition of punitive damages under this bill. *Id.*; *see Highlights of Proposed Tobacco Bill*, *supra* note 212; Carney, *supra* note 211, at 62.

218. *See* S. 1415 tits. X, XV; *see also* Anderson, *supra* note 48.

from 1999 through 2003, by 2.9 million.[219]

Unlike the Proposed Resolution, Senate Bill 1415 also contained numerous provisions relating to the exportation of U.S. tobacco products to overseas markets. Section 1105(a) prohibited the use of federal funds to promote the export of U.S. tobacco products.[220] Furthermore, Sections 1101(1) and 1101(4) prohibited U.S. tobacco companies from intentionally marketing their products to children.[221] In any event, Section 1106 would have required all cigarette packages exported from the United States to contain health warnings in compliance with either the law of the product's ultimate destination or U.S. law in the absence of such non-U.S. laws.[222] International marketing practices of U.S. tobacco companies would have been subject to oversight by a nonprofit corporation, created by Title 11, which would have been empowered to foster and to facilitate international tobacco control programs.[223]

Despite its unwieldy nature, Senate Bill 1415 secured the approval of the Senate Commerce Committee by a vote of nineteen to one on April 1, 1998.[224] The Bill immediately encountered opposition, however, from two sources. Initially, on April 8, 1998, RJR Nabisco announced its opposition to the Bill.[225] RJR Nabisco's rejection of the Bill was quickly followed by similar rejections by Brown and Williamson, Philip Morris,

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219. *See List of Effects of Tobacco Laws*, ASSOCIATED PRESS, Mar. 22, 1998.

220. *See* S. 1415 § 1105(a); *see also Highlights of Senate Tobacco Bill*, *supra* note 212; Laurie Kellman, *Tobacco Bill Would Cap Liability*, ASSOCIATED PRESS, Mar. 30, 1998; Laurie Kellman, *Negotiators Hammer Out Tobacco Bill*, ASSOCIATED PRESS, Mar. 29, 1998.

221. *See* S. 1415 §§ 1101(1), (4); *see also Highlights of Senate Tobacco Bill*, *supra* note 212; Kellman, Negotiators Hammer Out Tobacco Bill, *supra* note 220.

222. *See* S. 1415 § 1106.

223. *See id.* §§ 1102, 1103, 1107; *see also Highlights of Senate Tobacco Bill*, *supra* note 212; Kellman, *supra* note 220.

224. *See* Ceci Connolly & Saundra Torry, *Tobacco Bill Clears Senate Panel*, WASH. POST, Apr. 2, 1998, at A1; *see also Senate Panel OKs Tobacco Bill*, *supra* note 53, at A5. The sole dissenting vote on the Senate Commerce Committee was cast by Sen. John Ashcroft (Republican, Missouri), who objected to the granting of liability protection to the tobacco industry, because such protection was not accorded to other industries. *See Senate Panel OKs Tobacco Bill*, *supra*.

225. *See* John Schwartz, *Tobacco Firms Say They'd Rather Fight*, WASH. POST, Apr. 9, 1998, at A1; *see also* Darlene Superville, *RJ Reynolds Won't Back Tobacco Bill*, ASSOCIATED PRESS, Apr. 8, 1998. Steven Goldstone, the chief executive officer of RJR Nabisco, rejected Senate Bill 1415 as a dismantling of the Proposed Resolution in favor of "a taxing frenzy on a disfavored industry and the forty-five million customers it serves." *Comments on Tobacco Dispute*, ASSOCIATED PRESS, Apr. 8, 1998.

U.S.A., and Lorillard Tobacco Company.[226] Although several members of Congress warned of "less-than-pleasant" alternatives if the tobacco companies failed to cooperate in the formulation of a comprehensive national tobacco policy,[227] Senator McCain acknowledged that the Bill was not viable without industry support.[228]

The second source of opposition to the development of a comprehensive national tobacco policy was Congress. In April 1998, the House Speaker Newt Gingrich condemned the proposed taxes and regulatory powers set forth in the Bill as symptomatic of "a very liberal, big government, big bureaucracy bill" that would not survive scrutiny in the U.S. House of Representatives.[229] Gingrich's sentiments were echoed by the Republican leadership in the U.S. Senate.[230] House and Senate Republicans asserted their preference for a narrowly focused federal tobacco policy targeting teenage smoking and drug abuse.[231] In any event, this combined opposition served to defeat Senate Bill 1415 and the adoption of a comprehensive national tobacco policy.[232]

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226. *See* Schwartz, *supra* note 225, at A1; *see also* Laura Meckler, *Four Companies Won't Back Tobacco Bill*, ASSOCIATED PRESS, Apr. 8, 1998; Superville, *supra* note 225; *Big Tobacco Abandons Settlement*, S.F. CHRON., Apr. 9, 1998, at A1. Nicholas G. Brookes, the chairman and chief executive officer of Brown and Williamson Tobacco Corporation, rejected Senate Bill 1415 as constituting "a suicide note . . . [for] a legal enterprise engaged in marketing a legal product . . . targeted for extinction by politicians, who in the name of our nation's youths and political correctness, have nothing more in mind than filling the coffers of the federal government." *Comments on Tobacco Dispute*, *supra* note 225; *see also* Superville, *supra* note 225. Lorillard Tobacco Company rejected the adoption of a comprehensive national tobacco policy, as set forth in Senate Bill 1415, as "unworkable and unconstitutional," and a disservice to its customers and shareholders that the company could not responsibly endorse. *Comments on Tobacco Dispute*, *supra* note 225; *see also* Meckler, *supra* note 226; Superville, *supra* note 225.

227. *See* Laurie Kellman, *Tobacco Companies Pushed to Support Deal*, ASSOCIATED PRESS, Apr. 3, 1998; *see also* Lauran Neergaard, *Tough Tobacco Legislation Urged*, ASSOCIATED PRESS, Apr. 2, 1998.

228. *See* Laurie Kellman, *Senator: Tobacco Bill Could Be Tougher*, ASSOCIATED PRESS, Apr. 3, 1998; *see also* Kellman, *supra* note 227.

229. *See* Laurie Kellman, *Gingrich Opposes Tobacco Bill*, ASSOCIATED PRESS, Apr. 18, 1998; Laurie Kellman, *GOP Likes Narrow Tobacco Bill*, ASSOCIATED PRESS, Apr. 22, 1998.

230. *See* Saundra Torry, *House GOP Leaders Reject Tobacco Proposal*, WASH. POST, Apr. 30, 1998, at A6; *see also House Tobacco Bill Goes Up in Smoke*, S.F. CHRON., Apr. 30, 1998, at A6.

231. *See* Kellman, *supra* note 229; *see also House GOP Leaders May Draft Their Own Tobacco Bill*, S.F. EXAM., Apr. 19, 1998, at A-21.

232. *See Senate Stamps Out Tobacco Bill*, S.F. CHRON., June 18, 1998, at A1; *see also* Saundra Torry, *Tobacco Bill Lacks Votes Needed for Any Senate Action, Lott Says*, WASH. POST,

II. *THE INTERNATIONAL TOBACCO MARKETPLACE*

A. *The Global Marketplace and the U.S. Tobacco Industry*

As previously noted, tobacco has been an agricultural staple for almost 500 years.[233] Global tobacco production is estimated at fifteen billion pounds annually.[234] The six leading tobacco producing countries in the world, specifically, the Peoples' Republic of China, the United States, India, Brazil, Turkey, and Zimbabwe, produced over 4.6 million metric tons of tobacco in 1997.[235] The leading producer of unmanufactured tobacco in the world, the Peoples' Republic of China, produced more than 2.6 million metric tons of tobacco in 1997.[236] U.S. tobacco production for this same period of time totaled 667,680 metric tons, which constituted 10.1% of global production.[237]

These same countries, with the exception of the Peoples' Republic of China, dominate the unmanufactured tobacco export market. Global tobacco exports totaled in excess of 1.9 million metric tons in 1997.[238] The six leading tobacco exporting countries in the world sold more than 1.06 million metric tons of unmanufactured tobacco in 1997, constituting fifty-five percent of all global exports.[239] Brazil was the leading exporter of un-

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June 15, 1998, at A5; *Senate Likely to Snuff Tobacco Reform Bill*, S.F. CHRON., June 9, 1998, at A8; *Lott Declares Tobacco Measure Dead*, S.F. CHRON., June 8, 1998, at A3; *Lott Says Tobacco Deal Is Crumbling*, S.F. CHRON., June 2, 1998, at A7.

233. *See supra* note 3 and accompanying text.

234. *See* WOMACH, *supra* note 4, at 1. This estimate is based upon production figures for 1996. *Id.* The U.S. Department of Agriculture has estimated global tobacco production for 1997 at 6.55 million metric tons. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 1.

235. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 1. According to the U.S. Department of Agriculture, global production of tobacco increased by 4.3% in 1997 from 1996, when global production reached 6.28 million metric tons. *Id.* The leading cultivators of tobacco and their production in metric tons for 1996 and 1997, respectively, were the Peoples' Republic of China (2.61 million/2.61 million), the United States (625,454/667,680), India (506,475/544,050), Brazil (367,000/447,000), Turkey (190,391/195,631), and Zimbabwe (178,595/180,978). *Id.*

236. *Id.* This figure represented 39.7% of global tobacco production for 1997. *Id.*

237. *Id.* The U.S. unmanufactured tobacco production figure of 625,454 metric tons in 1996 totaled 9.9% of global production. *Id.*

238. *Id.* Global tobacco exports totaled 1,929,161 million metric tons in 1997. *Id.* This figure represented a two percent decrease from global exports of unmanufactured tobacco in 1996. *Id.*

239. *Id.* The leading exporters of unmanufactured tobacco and their export totals for 1996 and 1997, respectively, in metric tons, were Brazil (282,500/294,000), the United States (222,316/230,000), Zimbabwe (176,619/189,000), Turkey (169,703/121,000), India (118,000/115,000), and Malawi (101,720/113,720). *Id.*

manufactured tobacco in 1997, at 294,000 metric tons.[240] The United States was the world's leading exporter of unmanufactured tobacco until 1993.[241] U.S. exports of unmanufactured tobacco totaled 230,000 metric tons constituting 11.9% of global exports in 1997.[242] These exports earned U.S. tobacco producers US$1.39 billion in 1996.[243]

Between sixty-five and eighty-five percent of global tobacco consumption is in the form of cigarettes.[244] Worldwide, approximately 5.566 trillion cigarettes are manufactured every year.[245] Over fifty percent of global production occurs in the Peoples' Republic of China, the United States, Japan, and Germany.[246] The United States contributes 760 billion cigarettes to global cigarette production on an annual basis.[247] Approximately thirty-four percent of this annual production is sold overseas, which has served to make the United States the world's largest exporter of cigarettes.[248] U.S. cigarette exports grew dramatically in the 1990s primarily due to the opening of new markets in Eastern

240. *Id.* This figure represented 15% of global exports of unmanufactured tobacco in 1997. *Id.*

241. *See WHO, Fact Sheet N118, supra* note 5.

242. *See* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 1. U.S. unmanufactured tobacco exports for 1996 totaled 222,316 metric tons, constituting 11.2% of global exports. *Id.*

243. *See* WOMACH, *supra* note 4, at 2; *see also* FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., U.S. EXPORTS OF TOBACCO 1-2 (1998) [hereinafter U.S. EXPORTS OF TOBACCO]. The 10 leading destinations for U.S. unmanufactured tobacco exports in 1996 were Japan, Germany, the Netherlands, Belgium/Luxembourg, the United Kingdom, Turkey, the Dominican Republic, the Republic of Korea, Spain, and Thailand. *See* U.S. EXPORTS OF TOBACCO, *supra*, at 1-2. Sales in these markets earned U.S. tobacco companies US$1.01 billion in 1996, constituting 72.8% of all U.S. unmanufactured tobacco export earnings. *Id.* The 10 leading destinations for U.S. unmanufactured tobacco exports in 1997 were Germany, Japan, Turkey, the Dominican Republic, Belgium/Luxembourg, the Netherlands, Thailand, Malaysia, the Republic of Korea, and the United Kingdom. *Id.* In 1997, U.S. unmanufactured tobacco exports reached record levels in five of these countries, specifically, the Dominican Republic, Belgium/Luxembourg, Thailand, Malaysia, and the Republic of Korea. *Id.* In 1997, sales in these markets earned U.S. tobacco companies US$1.16 billion, which constituted 75% of all U.S. unmanufactured tobacco export earnings. *Id.*

244. *See WHO, Fact Sheet N118, supra* note 5.

245. *Id.*

246. *Id.*

247. *See* WOMACH, *supra* note 4, at 2. U.S. cigarettes are of the blend variety, constituting a combination of flue-cured, burley, and oriental tobaccos. *Id.* All oriental tobacco utilized in U.S. blend cigarettes is imported, with the vast majority originating from Turkey. *Id.*

248. *Id.*; *see U.S. Profile, supra* note 45; *WHO, Fact Sheet N118, supra* note 5.

Europe, Asia, and the former Soviet Union.[249] From 1986 to 1996, cigarette exports by U.S. tobacco companies grew by 260%.[250] By 1994, U.S. cigarette exports accounted for 23.5% of world exports.[251] In 1997, the United States exported in excess of 217 billion cigarettes.[252]

U.S. tobacco companies exported cigarettes to 121 different countries on six continents in 1997.[253] Thirty percent of all U.S. cigarette exports were to Asia, with most sales occurring in countries located in the Pacific Rim, specifically Japan, the Republic of Korea, Singapore, Hong Kong, Taiwan, and Malaysia.[254] Export figures were also impressive in the former Soviet Union, with particular emphasis in the Russian and Ukrainian markets.[255] U.S. cigarette exports to the Middle East were also substantial, with primary markets located in Lebanon, Saudi Arabia, Turkey, Israel, and Kuwait.[256] In Europe, Belgium and Cyprus were the leading importers of U.S. cigarettes.[257] Finally, Panama and Paraguay were the leading importers of U.S. cigarettes in

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249. *See U.S. Profile*, *supra* note 45.

250. *See* Carlsen, *supra* note 21, at A2.

251. *Id.*

252. *See* FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., U.S. DOMESTIC EXPORTS, CIGARETTES CONTAINING TOBACCO 1 (1998) [hereinafter U.S. CIGARETTE EXPORTS].

253. *Id.* at 1-3; *see* TOBACCO: WORLD MARKETS AND TRADE, *supra* note 7, tbl. 5.

254. In 1997, U.S. tobacco companies exported 67.6 billion cigarettes, valued at US$1.54 billion, to Japan. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2. In the same year, 7.23 billion cigarettes, valued at US$153.5 million, were exported to the Republic of Korea. *Id.* Also in 1997, U.S. cigarette exports to Singapore totaled 5.91 billion, valued at US$79.6 million. *Id.* Hong Kong imported 4.34 billion U.S. cigarettes valued at US$88 million in 1997. *Id.* The Republic of China imported 2.75 billion cigarettes from U.S. tobacco companies, valued at US$63.7 million, during this same period of time. *Id.* at 1. Finally, in 1997, U.S. tobacco companies exported 2.44 billion cigarettes to Malaysia valued at US$25.3 million. *Id.* at 2.

255. *Id.* In 1997, U.S. cigarette exports to Russia totaled 10.2 billion cigarettes valued at US$232.6 million. *Id.* U.S. tobacco companies exported 3.41 billion cigarettes, valued at US$80.13 million, to the Ukraine during this same period of time. *Id.* at 3.

256. *Id.* In 1997, U.S. cigarette exports to Lebanon totaled 10.33 billion units valued at US$178.4 million. *Id.* at 2. Cigarette exports to Saudi Arabia totaled 9.34 billion units, valued at US$205.6 million, for this same period of time. *Id.* Turkey imported 5.85 billion U.S. cigarettes valued at US$58.2 million in 1997. *Id.* at 3. During this same period of time, Israel imported 3.22 billion cigarettes valued at US$64 million. *Id.* at 2. Finally, in 1997, Kuwait imported 1.89 billion cigarettes valued at US$42.43 million. *Id.* at 2.

257. *Id.* In 1997, U.S. cigarette exports to Belgium totaled 48.52 billion units valued at US$1.02 billion. *Id.* at 1. During this same period of time, Cyprus imported 9.94 billion cigarettes from U.S. tobacco companies valued at US$116.4 million. *Id.*

South America.[258]

World tobacco sales generated US$262 billion in revenues in 1997.[259] The United States' share of these revenues is considerable. U.S. unmanufactured and manufactured tobacco export earnings totaled US$6.6 billion in 1996.[260] The vast majority of these earnings were derived from sales of manufactured tobacco products, which totaled US$5.1 billion in 1996.[261] This change constitutes a 2.8% increase from revenues derived from manufactured tobacco exports in 1994, when such earnings totaled US$4.96 billion.[262] This growth has accelerated three to five percent annually in the latter half of the 1990s.[263] This phenomenal growth rate has been fueled, in considerable part, by increasingly aggressive international marketing tactics by U.S. tobacco companies, including advertising campaigns that equate consumption of U.S. tobacco products with affluence, health, sophistication, and other desirable characteristics associated with a "Western lifestyle."[264] Such advertising has enabled U.S. tobacco companies to derive one-third to one-half of their total revenues from manufactured tobacco exports.[265]

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258. *Id.* In 1997, Panama imported 2.41 billion cigarettes valued at US$44.53 million from U.S. tobacco companies. *Id.* at 2. U.S. cigarette exports to Paraguay totaled 2.23 billion units valued at US$43.32 million in 1997. *Id.*

259. *See* van Voorst, *supra* note 11, at 63.

260. *See* Annie Nakao, *Asians Fuming over Tobacco Ads in Neighborhoods*, S.F. EXAM., May 18, 1997, at C-1. Earnings from the export of unmanufactured tobacco declined from US$1.44 billion in 1990 to US$1.32 billion in 1993, before rebounding to US$1.39 billion in 1996. *See U.S. Profile*, *supra* note 45; *see also* WOMACH, *supra* note 4, at 2.

261. *See* WOMACH, *supra* note 4, at 2.

262. *See U.S. Profile*, *supra* note 45.

263. *See* Daniel Kadlec, *How Tobacco Firms Will Manage*, TIME, June 30, 1997, at 29.

264. *See Selling Death Overseas*, WASH. POST, Apr. 7, 1998, at A22; *see also* Sabin Russell, *Pelosi Wants Laws on Sale of U.S. Tobacco Abroad*, S.F. CHRON., Apr. 18, 1998, at A1. The advertising campaigns of U.S. tobacco companies abroad have been subject to considerable criticism for selling "lethal products as symbols of Western glamour and free-market prosperity." *Selling Death Overseas*, *supra*, at A22. U.S. Representative Nancy Pelosi (Democrat, California) has characterized the Marlboro Man as the most visible representative of the United States overseas. *See* STATEMENT OF CONGRESSWOMAN NANCY PELOSI AT THE CAMPAIGN FOR TOBACCO-FREE KIDS BRIEFING ON THE INTERNATIONAL ASPECTS OF U.S. TOBACCO POLICY 1 (Mar. 31, 1998) [hereinafter PELOSI STATEMENT]. Many members of the U.S. Congress have expressed concern about the manner in which U.S. tobacco companies are representing U.S. culture overseas. *See* Russell, *supra*, at A1. Mark Palmer, a former U.S. ambassador to Hungary, characterized U.S. tobacco marketing practices abroad as "an affront conducted on a massive scale . . . [by appropriation of] our own value system and the love of [non-U.S. citizens] for America and corrupting it for their own immoral and unethical purposes." *Id.*

265. *See* van Voorst, *supra* note 11, at 63; *see also* Kadlec, *supra* note 263, at 29.

U.S. exports have served to feed burgeoning global demand for cigarettes, which reached 6000 billion units annually by the mid-1990s.[266] The World Health Organization estimates that one-third of the world's population over the age of fifteen years—1.1 billion people—are regular cigarette smokers.[267] Approximately forty-seven percent of all men and twelve percent of all women regularly smoke cigarettes on a global basis.[268] In addition, 60,000 people become new smokers every day.[269] Forty-two percent of men and twenty-four percent of women smoke cigarettes on a regular basis in developed countries, while forty-eight percent of men and seven percent of women consume cigarettes in developing countries.[270] These statistics translate into annual consumption estimates of 2400 cigarettes per adult in developed countries and 1400 cigarettes per adult in developing countries.[271]

These consumption patterns have had a catastrophic impact upon world health. The World Health Organization has estimated that tobacco causes six percent of all deaths worldwide.[272] Tobacco has been estimated to cause 3.5 million deaths per year, over 8200 deaths per day, primarily as a result of lung cancer and circulatory diseases.[273] Seven hundred fifty thousand of

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266. *See WHO, Press Release WHA/4*, *supra* note 15; *see also WHO, Press Release WHO/41*, *supra* note 10.

267. *See WHO, Fact Sheet N118*, *supra* note 5; *see also WHO, Press Release WHO/41*, *supra* note 10.

268. *See WHO, Fact Sheet N176*, *supra* note 10; *see also WHO, Press Release WHO/61*, *supra* note 2.

269. *See* van Voorst, *supra* note 11, at 63.

270. *See WHO, Fact Sheet N118*, *supra* note 5.

271. *See WHO, Press Release WHO/41*, *supra* note 10. In the last 10 years, the annual consumption rate per adult in developed countries has dropped 14.2% from 2800 cigarettes. *Id.* Conversely, in the last 10 years, the annual consumption rate per adult in developing countries has increased by 21.7% from 1150 cigarettes. *Id.* The consumption rate per adult continues to grow in developing countries by 1.7% annually. *Id.*

272. *See WHO, Global Status Report*, *supra* note 24.

273. *See* WHO, FIFTY FACTS FROM THE WORLD HEALTH REPORT 1997, *supra* note 25, at 2; *see also* World Health Organization, *Fact Sheet N154, Tobacco Epidemic: Health Dimensions* (visited Mar. 23, 1998) <http://www.who.org/inf/fs/fact154.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Fact Sheet N154*]; PELOSI STATEMENT, *supra* note 264, at 1. According to the WHO, 85% of lung cancers in men and 46% of lung cancers in women are related to the consumption of tobacco products. WHO, FIFTY FACTS FROM THE WORLD HEALTH REPORT 1997, *supra*, at 3. Smoking accounts for one in seven cancer deaths worldwide. *Id.*; *see WHO, Fact Sheet N175*, *supra* note 25.

these deaths occur in the Peoples' Republic of China.[274] Five hundred thousand people presently alive today, including 200,000 children and teenagers, will die as a direct result of tobacco usage.[275] More than half of these deaths occur between the ages of thirty-five and sixty-nine years, resulting in a considerable loss of life expectancy for each victim.[276] These negative health consequences have a particularly harsh effect upon developing countries, where twenty-five percent of all male deaths and thirteen percent of all female deaths in 1995 were attributable to smoking.[277] If tobacco consumption rates remain unchanged, the World Health Organization has estimated that by the year 2020 tobacco usage will be the leading cause of death in developed countries, responsible for 17.7% of all deaths, and in developing countries, responsible for 10.9% of all deaths.[278] By the year 2025, it has been estimated that tobacco usage will result in the death of ten million people annually.[279] Seventy percent of these deaths will occur in the developing world with two million deaths occurring in the Peoples' Republic of China alone.[280] The estimated costs associated with treatment, mortality, and disability as a result of tobacco usage exceed the global economic benefits associated with tobacco production by US$200 billion annually.[281]

B. *Consumption and Regulatory Patterns of the Leading Importers of U.S. Tobacco Products*

1. Europe

a. Belgium

Belgium was the leading European purchaser of U.S. ciga-

274. *See WHO, Press Release WHO/61, supra* note 2.

275. *See* Carlsen, *supra* note 21, at A2; *see also* van Voorst, *supra* note 11, at 63; CONGRESSWOMAN NANCY PELOSI TAKES AIM AT INTERNATIONAL TOBACCO 1 (Apr. 17, 1998).

276. *See WHO, Press Release WHO/61, supra* note 2.

277. *See WHO, Fact Sheet N118, supra* note 5.

278. *See WHO, Fact Sheet N154, supra* note 273; *see also* Carlsen, *supra* note 21, at A2.

279. *See WHO, Fact Sheet N175, supra* note 25; *see also WHO, Fact Sheet N118, supra* note 5.

280. *See WHO, Fact Sheet N175, supra* note 25. The WHO has estimated that, if consumption rates remain stable, 50 million Chinese, presently under the age of 20, will die from tobacco-related causes. *See WHO, Fact Sheet N154, supra* note 273.

281. *See WHO, Fact Sheet N175, supra* note 25; *see also WHO, Press Release WHO/41, supra* note 10.

rettes and the second largest purchaser in the world in 1997.[282] Belgium's importation of U.S. cigarettes totaled 48.52 billion units valued at US$1.02 billion in 1997.[283] A substantial majority of these imports, however, were destined for re-export to other markets throughout Europe.[284] Cigarette consumption in Belgium itself has steadily declined over the course of the last thirty years.[285] The smoking prevalence rate fell from forty percent to twenty-six percent between 1982 and 1994, representing approximately thirty-one percent of men and nineteen percent of women in Belgium.[286] As a result, the average annual cigarette consumption rate per adult declined from a peak of 3090 in the 1970s to 2310 in the early 1990s.[287] Studies conducted in 1990 and 1994, however, found an increase in smoking prevalence for Belgian teenage boys from twelve percent to twenty-two percent and for Belgian teenage girls from eight percent to thirteen percent.[288] Additionally, the mortality rate among Belgian men attributable to smoking increased 137% from 1955 to 1985, before declining to 14,000 per year in 1995.[289] This statistic represents approximately thirty percent of all male deaths in the country.[290] Smoking has not been deemed a major cause of death among Belgian women.[291]

Belgium maintains a policy of stringent control over tobacco products. Advertising on radio, television, and in print media serving minors has been prohibited since 1982.[292] Remaining outlets for advertising, such as billboards, will be prohibited commencing in 1999.[293] Additionally, sponsorship of

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282. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 1.

283. *Id.*

284. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Belgium* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/belgium.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Belgium Profile*].

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* Deaths attributable to smoking constitute two percent of the mortality rate for Belgian women. *Id.*

292. *Id.*; *see* ADVERTISING AND CONSTITUTIONAL RIGHTS IN EUROPE 76 (Wassilios Skouris ed., 1994).

293. *See* Robert Wielaard, *EU Bans Tobacco Ads, Sets Sponsorship Deadline*, S.F. CHRON., Dec. 5, 1997, at B2.

cultural and sporting events by tobacco companies remains permissible until 2006, when a European Union ("EU") directive prohibiting future sponsorship is scheduled to become effective.[294] Cigarette packages must disclose tar and nicotine levels and are required to contain one of the rotating health warnings mandated by Belgian law and EU directives.[295] Smoking was prohibited on public transportation in 1976 and is strictly regulated in other public places.[296] This regulation includes an absolute prohibition upon smoking in enclosed premises offering services to the public, health care facilities, facilities serving minors or providing educational services, and premises where shows, exhibits, or athletic activities take place.[297]

b. Russia

Russia proved to a be lucrative market for U.S. companies in 1997, with exports totaling 10.2 billion cigarettes valued at US$232.6 million.[298] According to the Russian government, the prevalence of smoking increased from fifty-three percent in 1985 to sixty-seven percent in 1993 for the adult male population, and from ten percent in 1985 to thirty percent in 1995 for the adult female population.[299] As a result, tobacco is one of the leading causes of mortality in Russia.[300] An estimated 280,000 Russians died from tobacco usage in 1995, representing eighteen percent of all deaths.[301] Two hundred forty-one thousand male deaths, one-third of all male deaths in Russia in 1995, were attributable to tobacco usage, making it the leading cause of male mortality.[302] Furthermore, smoking prevalence rates among minors continues to grow with estimates as high as forty to sixty percent for teenage boys and twenty-four to forty-four percent for teenage girls.[303]

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294. *Id.*

295. *See Belgium Profile*, *supra* note 284.

296. *Id.*

297. *Id.*

298. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

299. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Russian Federation* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/russianf.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Russia Profile*].

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

Anti-tobacco measures are the responsibility of the Ministry of Health and Medicine, the Coordinating Council on Disease Prevention and Healthy Lifestyles, and the National Cancer Research Center.[304] Tobacco advertising in the mass media is limited, and all printed tobacco advertisements are required to carry appropriate health warnings.[305] Cigarettes produced in Russia must also carry health warnings on their packages, but imported cigarettes are exempt from this requirement.[306] Tobacco sales to persons under the age of sixteen years have been prohibited since 1981, but the World Health Organization concluded that enforcement of this law has been lax.[307] Finally, the Russian government has attempted to discourage tobacco usage through increases in prices, excise taxes, and import duties.[308]

c. The Ukraine

The Ukraine imported 3.41 billion cigarettes from U.S. tobacco companies in 1997, valued at US$80.1 million.[309] Tobacco consumption patterns in the Ukraine are poorly documented. In 1990, the World Health Organization estimated that the smoking prevalence rate was ten percent among twelve and thirteen year olds, increased to forty percent among sixteen and seventeen year olds, and peaked at sixty-one percent among twenty through twenty-nine year olds.[310] Based upon these patterns, the World Health Organization estimated that annual adult per capita cigarette consumption in the Ukraine was 1800 cigarettes in 1992.[311] The World Health Organization further estimated that 107,000 deaths were attributable to tobacco usage in 1995.[312] Of this number, thirty-one percent of male deaths and six percent of female deaths were tobacco-related.[313] Smoking is estimated to cause forty-three percent of all male deaths between the ages

304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 3.
310. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Ukraine* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/ukraine.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Ukraine Profile*].
311. *Id.*
312. *Id.*
313. *Id.*

of thirty-five and sixty-nine years, and fifty-three percent of all cancer deaths in the Ukraine.[314]

Tobacco control and smoking prevention measures are nonexistent in the Ukraine, due in substantial part to media indifference and lack of funds for control and prevention measures.[315] Tobacco advertising is widespread in all forms of media, including television and radio, despite appeals for voluntary restraints by the Ministry of Health.[316] Nevertheless, all cigarette packages are required to contain a mandatory health warning.[317] Additionally, tobacco products are subject to substantial taxation including fifty percent of the retail price for luxury brands.[318] Finally, the smoking prevention efforts of the Ministry of Health have received substantial assistance from the National Center for Health Education and other non-governmental organizations.[319]

d. Cyprus

U.S. cigarette exports to Cyprus totaled 9.94 billion units valued at US$116.4 million in 1997.[320] Overall smoking prevalence rates have declined in Cyprus from 34.5% in 1970 to 24.2% in 1990, with 42.5% of men and 7.2% of women classified as smokers.[321] According to the World Health Organization, however, intensity of usage was high among adult smokers.[322] Seventy-three percent of male smokers and fifty percent of female smokers smoke more than ten cigarettes per day.[323] As a result, the annual average cigarette consumption rate per adult over the age of fifteen years increased from 2190 in 1970 to 3080 in 1990.[324] Smoking prevalence rates remained lowest for mi-

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314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 1.
321. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Cyprus* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/cyprus.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Cyprus Profile*]. It bears to note, however, that tobacco consumption rates for native Cypriots are difficult to assess due to the annual influx of 1.5 million tourists to Cyprus and the presence of United Nations personnel. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*

nors between the ages of fifteen and eighteen years, but fifty-one percent of male smokers and twenty-nine percent of female smokers initiated smoking between the ages of fifteen and nineteen years.[325] Statistics concerning smoking-related illnesses in Cyprus are incomplete, but the World Health Organization has estimated that sixteen percent of all cancers among men and eight percent among women are attributable to smoking.[326]

The Cypriot Ministry of Health and non-governmental organizations, such as the Anti-Cancer Society and Non-Smokers League, jointly coordinate tobacco control and smoking prevention measures in Cyprus.[327] The sale of tobacco products to minors is prohibited as are vending machine sales and television and radio advertising.[328] Printed media and billboard advertisements are, however, permitted.[329] Furthermore, health warnings on cigarette packages are obligatory, and "normal" European levels of tar and nicotine must be maintained.[330] Smoking is prohibited on public transportation, in health care establishments, and in public places, with the exception of restaurants and coffee shops.[331]

2. The Pacific Rim

a. Japan

Japan was the world's leading importer of U.S. cigarettes in 1997.[332] U.S. tobacco companies exported 67.6 billion cigarettes valued at US$1.54 billion to Japan in 1997.[333] These exports served a market with one of the strongest demands for tobacco products in the world. Smoking prevalence among men was fifty-nine percent in 1994, the highest rate in the developed world.[334] Smoking prevalence amongst Japanese women has re-

325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.
333. *Id.*
334. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Japan* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/japan.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Japan Profile*].

mained relatively steady at 14.8% from 1960 to 1994.[335] Japanese men and women between the ages of twenty and forty years have the highest smoking prevalence rates, at 65.8% and 19.5%, respectively.[336] Japan's average annual cigarette consumption rate peaked in the 1980s at 3430, before declining slightly to 3240 in the early 1990s.[337] Nevertheless, mortality rates associated with tobacco usage continued to increase in the 1990s. In 1995, twenty percent of all male deaths and eight percent of all female deaths were caused by tobacco, with an overall mortality rate associated with tobacco usage of fourteen percent.[338] Furthermore, twenty-one percent of all cancer deaths in Japan in 1995 were caused by tobacco consumption.[339]

The Japanese government has been slow to endorse tobacco control or smoking prevention measures. These measures have been hampered in large part by the 1984 Tobacco Business Law, which had the promotion of the Japanese tobacco industry as its primary purpose.[340] Although the Japanese tobacco monopoly was dismantled in 1985, the Japanese government remains the majority owner and chief regulator of its successor, Japan Tobacco.[341] Japan Tobacco controls eighty percent of the domestic cigarette market despite the loss of its monopoly position.[342]

The Japanese Ministry of Health and Welfare did not recognize the health hazards associated with smoking until 1987.[343] Nevertheless, tobacco advertising is permitted on television and radio and in newspapers and magazines.[344] There are no tar or

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The smoking prevalence rate for Japanese men peaked in 1966 at an astonishing 84%. *Id.*

335. *Id.*

336. *Id.* The smoking prevalence rate for men in the 20 to 40 year age bracket declined from 79.9% to 66.1% between 1970 and 1990. *Id.* The prevalence rate for women in this age category increased, however, from 9.8% to 15.2% during this same period of time. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* Lung cancer became the leading cause of cancer deaths among Japanese men in 1993. *Id.*

340. *Id.*

341. *See* Sonni Efron, *Japan Slow to Tell Consumers Tobacco Is a Health Hazard*, S.F. EXAM., May 18, 1997, at A-14.

342. *See* Joseph Coleman, *U.S. Tobacco Company Under Fire in Japan*, ASSOCIATED PRESS, Apr. 28, 1998.

343. *See Japan Profile*, *supra* note 334.

344. *Id.* It bears to note, however, that Japanese tobacco companies imposed a voluntary ban upon television advertising, which took effect on April 1, 1998. *See* Cole-

nicotine limits on cigarettes, and the health warnings required to be carried on all cigarette packages are tepid in their advisement that excessive smoking might be injurious to the consumer's health.[345] Although smoking by persons under the age of twenty years is prohibited, cigarettes are readily available through widespread vending machines.[346] Non-smoking areas have gradually increased in number over the last decade, and smoking is prohibited in medical facilities and on public transportation.[347] There are no prohibitions, however, upon smoking in the workplace.[348]

b. The Republic of Korea

The Republic of Korea imported 7.23 billion cigarettes from the United States valued at US$153.5 million in 1997.[349] Overall smoking prevalence rates in the Republic of Korea declined from 69.6% to 68.2% for men, and eleven percent to 6.7% for women from 1980 to 1989.[350] Nevertheless, the average annual cigarette consumption rate per adult over the age of fifteen years has continued to grow from 2370 in the 1970s to 2750 in the 1980s and 3010 in the 1990s.[351] This growth has been accompanied by increases in lung cancer mortality rates that have grown from 30.5 to 40.1 deaths per 100,000 men and from 7.5 to 9.4 deaths per 100,000 women in the period between 1985 and 1991.[352] Additionally, the World Health Organization has estimated that smoking prevalence rates for minors aged ten to

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man, *supra* note 342. Prior to the voluntary ban, Japanese tobacco companies limited their advertising on television to commercials airing between 10:54 P.M. and 5:00 A.M. *See* Efron, *supra* note 341, at A-14.

345. *See Japan Profile*, *supra* note 334; *see also* Efron, *supra* note 341, at A-14. Health warnings on cigarette packages have, in the past, merely advised consumers to "[b]e careful not to smoke too much as it might injure your health" and that "[i]t is feared that smoking could damage your health." *Id.*

346. *See Japan Profile*, *supra* note 334.

347. *Id.*

348. *Id.*

349. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

350. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Republic of Korea* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/repkorea.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Korea Profile*].

351. *Id.*

352. *Id.*

fourteen years is sixteen percent for girls and twelve percent for boys.[353]

Tobacco control and smoking prevention programs are the responsibility of the Health Education Section, Bureau of Public Health, and Ministry of Health and Social Affairs, with strong support from numerous non-governmental organizations including the Consumers Union of Korea and the Korean Association on Smoking and Health.[354] Tobacco control measures in the Republic of Korea are of mixed strength. Tobacco advertising is prohibited on television, radio, and in newspapers, but is permitted in magazines 120 times per year per brand, except in those publications that target women and minors.[355] Sports and art sponsorship by tobacco companies is permitted, except when the majority of the audience are women or minors.[356] Vending machine sales are banned in Seoul, but are permitted throughout the rest of the country.[357] Health warnings have been required on cigarette packages since 1976.[358] Additionally, smoking is prohibited in health facilities and on public transportation, but is only subject to partial restrictions in the workplace and in government offices.[359]

c. Singapore

U.S. cigarette exports to Singapore totaled 5.91 billion units valued at US$79.6 million in 1997.[360] Nevertheless, Singapore has one of the lowest smoking prevalence levels in the world.[361] Smoking rates peaked in the 1970s when forty-two percent of men and 4.5% of women were regular smokers.[362] These rates declined to 31.9% for men and 2.7% for women by 1995.[363] As a

353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.
361. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Singapore* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/singapor.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Singapore Profile*].
362. *Id.*
363. *Id.* Smoking prevalence rates are considerably higher among the Malay population sub-group than among the Indian and Chinese populations. *Id.*

result, the average annual cigarette consumption rate per adult declined 36.8% from the 1980s to the 1990s, to 1610.[364] The mortality rate associated with tobacco usage also declined and was estimated at 2500 deaths annually by the World Health Organization in 1991.[365] Tobacco consumption also declined among youth populations in Singapore. A national survey conducted in 1992 concluded that a mere three percent of boys and .2% of girls aged nine to twenty years smoked at least one cigarette per week.[366]

Singapore has some of the most stringent tobacco control measures and public education programs in the world.[367] Tobacco control and smoking prevention measures in Singapore are coordinated by the Ministry of Health, in conjunction with forty-nine other governmental agencies and numerous non-governmental organizations.[368] Singapore was the first country to implement a ban upon tobacco advertising in 1970.[369] Tobacco advertising is limited to point of sale displays and sponsorship at the discretion of the Ministry of Health.[370] Distribution of free cigarettes, sales to minors, vending machine sales, and smoking by minors in public are also prohibited.[371] Health warnings upon cigarette packages were introduced in 1980 and, in addition, all packages must disclose tar and nicotine levels.[372] Smoking in public facilities was banned in 1970, and presently includes theaters, restaurants, and indoor stadiums.[373] Smoking is also prohibited in private and public buses and taxis.[374] Finally, the Training and Health Education Department of the Ministry of Health has organized public information programs throughout the country since 1979, and smoking prevention education is included in the public school curriculum from primary through junior college levels.[375]

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364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*

d. Malaysia

Finally, U.S. tobacco companies exported 2.44 million cigarettes valued at US$25.3 million to Malaysia in 1997.[376] According to the World Health Organization, forty-one percent of Malaysian men and four percent of Malaysian women are regular consumers of cigarettes.[377] Most of these smokers reported that they began smoking by the age of twenty years.[378] Average annual cigarette consumption rates for adults grew 46.4% to 2050 in the 1980s, before decreasing to 1630 in the 1990s.[379] Although only thirty-five percent of all deaths are certified by physicians, the Malaysian government estimated that twenty percent of all deaths nationally were caused by tobacco usage in 1987.[380] Information relating to youth smoking rates also remains fragmentary. A 1991 study of smoking habits of secondary school students, however, concluded that sixty-nine percent of children aged twelve to eighteen years had tried cigarettes at least once.[381]

Tobacco control and smoking prevention measures in Malaysia are under the control of the Division of Disease Control of the Ministry of Health.[382] Smoking education programs within the country are coordinated by the Ministry of Health in conjunction with schools, consumer protection associations, and non-governmental organizations such as the Malaysian Medical Association.[383] All direct advertising of tobacco products is prohibited, but such advertisements are permitted if they are contained within imported print media.[384] Additionally, tar and nicotine levels are restricted to twenty milligrams and 1.5 milligrams, respectively, and all cigarette packages must bear a

376. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

377. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Malaysia* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/malaysia.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Malaysia Profile*]. It bears to note, however, that smoking prevalence rates vary widely among different ethnic groups within the country, with higher prevalence rates among the Malay population sub-group as compared to the Indian and Chinese populations. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

warning concerning the health effects associated with smoking.[385] The sale of tobacco products to persons under the age of eighteen years is prohibited, as are vending machine sales.[386] Finally, in order to discourage smoking, the Malaysian government increased taxation of cigarettes by 100% in 1992, and doubled import and excise duties in 1993.[387]

3. The Middle East

a. Lebanon

Lebanon was the leading purchaser of U.S. cigarettes in the Middle East in 1997, with imports totaling 10.33 billion units valued at US$178.4 million.[388] Information regarding tobacco consumption rates in Lebanon is fragmented. According to the World Health Organization, per capita cigarette consumption rose 80.4% to 3230 from the 1970s to the 1980s.[389] This consumption rate had declined 9.3% to 2930 by the 1990s.[390] Additionally, unlike some of its neighbors in the Middle East, Lebanon's tobacco control regime is somewhat more relaxed. Tobacco control and smoking prevention measures are under the control of the Ministry of Public Health.[391] Tobacco advertising is permitted in newspapers and magazines and on television, radio, and billboards.[392] All tobacco advertising, however, must contain health warnings mandated by the Ministry of Health.[393] These health warnings must also appear on all domestic and imported packages of cigarettes manufactured or offered for sale in the country.[394]

b. Saudi Arabia

Saudi Arabia imported 9.34 billion cigarettes from U.S. to-

385. *Id.*
386. *Id.*
387. *Id.*
388. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.
389. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Lebanon* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/lebanon.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Lebanon Profile*].
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *Id.*

bacco companies valued at US$205.6 million in 1997.[395] A 1990 governmental study of 1200 adults in the Al Baha region of Saudi Arabia found an overall smoking prevalence rate of 29.2% with a prevalence among men of 52.7%.[396] This study also found that 58.9% of adult smokers began using tobacco products before reaching the age of eighteen years.[397] Furthermore, a 1987 governmental survey of students enrolled at King Saud University found that thirty-seven percent of the student body were regular smokers, consuming in excess of fifteen cigarettes per day.[398] The average annual cigarette consumption rate per adult over the age of fifteen years was 2130 in the 1990s, representing a 74.5% increase from the 1970s.[399]

Tobacco products are subject to strict control in Saudi Arabia. Tar and nicotine levels are limited to twelve and .8 milligrams, respectively, and health warnings in Arabic and English must appear on all cigarette packages.[400] The Saudi government has also attempted to restrict tobacco advertising and to discourage smoking by increasing duties on imported cigarettes to fifty percent of value.[401] Products that could promote smoking to children, such as candies designed to appear as cigarettes, are prohibited.[402] Additionally, smoking is prohibited or restricted in government offices, and medical and educational professionals are encouraged to refrain from smoking in the presence of children.[403]

c. Turkey

Turkey imported 5.85 billion cigarettes from the United States in 1997, valued at US$58.2 million.[404] These imports serve

395. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

396. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Saudi Arabia* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/saudiara.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Saudi Arabia Profile*]. According to a study completed in 1987, however, 60% of Saudi smokers prefer shisha smoking to cigarette smoking. *Id.* The Al Baha region is located in Southeastern Saudi Arabia. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 3.

a market in which the overall prevalence of smoking among adults over the age of fifteen years is forty-three percent.[405] According to the World Health Organization, sixty-three percent of Turkish men and twenty-four percent of Turkish women regularly consume cigarettes.[406] Furthermore, a 1986 survey of smoking habits of Turkish youth found substantial increases in smoking prevalence with age.[407] The smoking prevalence rate among minors ages ten to fourteen years increased from seven percent for boys and two percent for girls to thirty-one percent for boys and five percent for girls by ages fifteen to nineteen years.[408] These percentages increased to forty-seven percent for boys and thirty-one percent for girls in the twenty to twenty-four year age category.[409] After increasing from 1950 to 2250 from the 1970s to the 1980s, the average annual cigarette consumption rate per adult decreased slightly in the 1990s to 2100.[410]

Smoking prevention and control activities in Turkey are coordinated by the Ministry of Health and numerous non-governmental organizations, including the Turkish Medical Association and Turkish universities.[411] Advertising tobacco products on television and radio is prohibited, and health warnings are required to appear on all domestic and imported cigarette packages.[412] The Turkish Government has also attempted to discourage smoking through substantial price increases on tobacco products.[413] Smoking is prohibited in schools and hospitals and on domestic airline flights.[414] Smoking is also prohibited in public places and office buildings and on public transportation.[415] The World Health Organization concluded, however, that the

405. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Turkey* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/turkey.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Turkey Profile*]. The WHO's estimate of the smoking prevalence rate in Turkey is based upon a national survey conducted in 1988. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* For example, after the breakup of the Turkish state tobacco monopoly in 1991, the Turkish government increased prices on all tobacco products by 20% to 33%. *Id.*

414. *Id.*

415. *Id.*

implementation of these laws has been inadequate.[416]

d. Israel

Israel is also a leading destination for U.S. cigarette exports in the Middle East. In 1997, U.S. tobacco companies exported 3.23 billion cigarettes to Israel valued at US$64 million.[417] According to the World Health Organization, overall smoking prevalence in Israel is thirty-four percent for adults eighteen to forty years of age.[418] Smoking prevalence is highest among men ages twenty-five to thirty years and women ages thirty-five to forty-four years.[419] A 1993 study by the Israeli government of smoking prevalence among fifteen year olds found a 9.3% rate for boys and an 8.8% rate for girls.[420] Overall consumption of cigarettes has declined in Israel from 2400 cigarettes per adult in the 1980s to 2290 cigarettes per adult in the early 1990s.[421] Nevertheless, in 1990 the World Health Organization concluded that smoking caused about 1800 male deaths, which was twelve percent of all male deaths in Israel.[422]

Like many of its Arab neighbors, there are substantial tobacco control measures in place in Israel. Anti-tobacco efforts in Israel are spearheaded by an alliance between the Ministry of Health and numerous medical and educational associations, such as the Israeli Cancer Society and the Israeli Medical Association.[423] These efforts culminated in 1993 with the formation of the "Forum on Smoking Prevention," which coordinates all edu-

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416. *Id.*

417. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

418. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Israel* (visited Mar, 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/israel.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Israel Profile*]. The smoking prevalence rate cited by the WHO is based upon a 1992 national survey. There are, however, considerable differences between the smoking rates for Jews and Arabs residing in Israel. According to a 1990 survey of adults aged 18 to 40 years, smoking prevalence was 28% among Jews and 48% among Arabs. *Id.* A 1994 survey confirmed a 29% smoking prevalence rate for adult members of the Jewish population. *Id.*

419. *Id.* The 1992 survey identified 47.7% of males aged 20 to 24 years, and 48.6% of males aged 25 to 34 years, as smokers. *Id.* The survey identified 27.4% of women aged 35 to 44 years as smokers. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* The WHO further concluded that smoking was not yet a significant cause of death for Israeli women. *Id.*

423. *Id.*

cational and legislative activities for the prevention of smoking.[424] Cigarette advertising is prohibited on television and radio and in youth publications.[425] All cigarette packages must carry a health warning, and substantial tax increases have been imposed in an attempt to discourage consumption.[426] Smoking is prohibited in all public places and on all forms of public transport.[427] Smoking in the workplace, other than in designated areas, has been prohibited since 1994.[428]

e. Kuwait

Finally, Kuwait is a substantial importer of U.S. tobacco products. Kuwait imported 1.89 billion cigarettes from the United States valued at US$42.43 million in 1997.[429] These imports serve a Kuwaiti market in which fifty-two percent of men and twelve percent of women smoke cigarettes.[430] A governmental survey, completed in 1979, concluded that among Kuwaitis who smoked cigarettes, consumption rates were very high, with thirty-nine percent of male Kuwaiti smokers consuming more than thirty cigarettes per day and 39.7% of female Kuwaiti smokers consuming ten to twenty cigarettes per day.[431] Cigarette consumption is also prevalent among minors aged fourteen to eighteen years, whose smoking rate was reported at fifty percent in 1991.[432] Despite the prevalence of smoking in Kuwait, the average annual cigarette consumption rate per adult over the age of fifteen years declined from 3520 to 2280 between the 1980s and the 1990s.[433]

Kuwait became one of the leaders in comprehensive to-

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424. *Id.*

425. *Id.*

426. *Id.* In 1989, prices for domestic brands were increased by 21% and imported brands by 17%. *Id.*

427. *Id.*

428. *Id.*

429. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

430. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Kuwait* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/kuwait.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Kuwait Profile*]. The smoking prevalence rates cited by the WHO are based upon a survey conducted by the Kuwaiti government in 1991. *Id.* In 1997, the WHO concluded that smoking prevalence rates have remained relatively unchanged since 1979. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

bacco control efforts in 1995, through the adoption of a number of anti-tobacco laws.[434] Tobacco control measures are implemented jointly by governmental and non-governmental organizations, including the Ministry of Public Health and the Kuwaiti Society for Cancer Prevention.[435] The importation of tobacco products is prohibited unless they satisfy conditions prescribed by the Ministry of Public Health, including maximum tar and nicotine levels and the inclusion of health warnings.[436] Tobacco advertising, sponsorship of sporting events and other social activities, and sales to persons under the age of twenty-one years are prohibited.[437] Additionally, smoking is prohibited in designated public facilities and on public transportation.[438]

4. Latin America

a. Panama

Panama was the leading importer of U.S. cigarettes in Latin America in 1997.[439] U.S. tobacco companies exported 2.42 billion cigarettes valued at US$44.54 million to Panama in 1997.[440] These imports serve a Panamanian market in which fifty-six percent of men and twenty percent of women smoke, with an overall smoking prevalence rate of thirty-eight percent.[441] Additionally, 10.1% of boys and 3.9% of girls between the ages of eleven and eighteen years smoke cigarettes at least once per week.[442] As a result, the average annual cigarette consumption rate per adult over the age of fifteen years, which had declined from

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434. *Id.*

435. *Id.*

436. *Id.* The Ministry of Public Health has set maximum tar and nicotine levels at 12 milligrams and .8 milligrams respectively. *Id.* Non-conforming cigarettes imported into Kuwait must be re-exported within two months or be destroyed, but cannot be re-exported to any Arab country in the Persian Gulf region. *Id.*

437. *Id.*

438. *Id.*

439. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.

440. *Id.*

441. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Panama* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/panama.htm> (on file with *the Fordham International Law Journal*) [hereinafter *Panama Profile*]. The smoking prevalence rates cited by the WHO are based upon the sole national survey conducted by the Panamanian government in 1983. *Id.* Subsequent governmental surveys of Ministry of Health employees have resulted in substantially lower smoking prevalence rates. *Id.*

442. *Id.*

1150 in the early 1970s to 950 in the early 1980s, increased to 960 in the early 1990s.[443]

The Adult Health Department of the Ministry of Health and a national interdisciplinary commission established in 1989 are responsible for smoking prevention and tobacco control activities in Panama.[444] The efforts of these agencies have, however, been relatively ineffective. As a result, Panamanian tobacco control measures remain underdeveloped. Although cigarettes sold in Panama must bear a health warning, there are no restrictions upon tar and nicotine yields.[445] Tobacco advertising is relatively unrestricted, with the sole substantive limitation being upon the portrayal of actual smoking.[446] Governmental authorities have been more successful in protecting nonsmokers by prohibiting smoking on public transportation and requiring separate smoking areas in restaurants and other public facilities.[447]

b. Paraguay

Paraguay was the second leading importer of U.S. cigarettes in Latin America in 1997. U.S. tobacco companies exported 2.23 billion cigarettes valued at US$43.3 million to Paraguay in 1997.[448] These imports serve a market in which 24.1% of men and 5.5% of women smoke, with an overall smoking prevalence rate of 14.8%.[449] In 1997, the World Health Organization reported that the average annual cigarette consumption rate per adult, which had declined from 1190 in the early 1970s to 1030 in the early 1980s, had increased to 1100 in the early 1990s.[450] Although there have been no comprehensive surveys of tobacco usage among minors, a 1990 survey reported that eighty-seven percent of all adult smokers in Paraguay began smoking by the

443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. *Id.*
448. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 2.
449. *See* World Health Organization, *Tobacco or Health: A Global Status Report, Country Profile, Paraguay* (visited Mar. 23, 1998) <http://www.cdc.gov/nccdphp/osh/who/paraguay.htm> (on file with the *Fordham International Law Journal*) [hereinafter *Paraguay Profile*]. The smoking prevalence rates cited by the WHO are based upon a national survey conducted by the Paraguayan government in 1990. *Id.* A governmental survey of physicians, in 1989, reported smoking prevalence rates of 35.2% for men and 23.9% for women, with an overall prevalence rate of 31.7%. *Id.*
450. *Id.*

age of twenty years.[451]

As in Panama, governmental regulation of tobacco products in Paraguay is relatively underdeveloped. The Ministry of Health is responsible for smoking prevention and control activities, but receives considerable assistance from non-governmental organizations such as the Paraguayan Tuberculosis and Pneumonology Society and the Paraguayan Anti-Smoking Association.[452] Although advertising depicting children or associating tobacco with sporting events is prohibited, tobacco advertising remains prevalent in magazines and newspapers, as well as on billboards and television.[453] Health advisories have been required on cigarette packages since 1990 and in advertisements, including those on television, since 1991.[454] Nonsmokers receive limited protection through prohibitions upon smoking on public transportation and by employees in health institutions, theaters, and buildings of the Ministry of Health.[455]

III. *INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS AND THE MANUFACTURE AND EXPORTATION OF TOBACCO PRODUCTS*

A. *Introduction*

The subsidization of the tobacco industry by the U.S. government and the practices of U.S. tobacco companies constitute violations of numerous international human rights instruments. The relevant components of these instruments are organized in three separate categories for purposes of the underlying discussion. Although there are numerous methods by which human rights obligations may be categorized, this Article will discuss such obligations under the headings of personal rights, societal rights, and governmental duties.

Personal rights are defined as freedoms and guarantees contained within international human rights instruments that are primarily intended to serve the needs of the individual or pro-

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* Television commercials are required to show a three second health warning. *Id.* Additionally, television advertising of tobacco products may not be shown before 7:00 P.M. *Id.* The WHO recently concluded, however, that this restriction was ineffective and subject to circumvention. *Id.*

455. *Id.*

tect the individual from governmental abuse or inaction. Included within the definition of personal rights are the rights to life, health, dignified treatment, and receipt of information, and the granting of special protections to children. Societal rights are defined as freedoms and guarantees contained within international human rights instruments that primarily serve the interests of people as a whole, or of members of a smaller group contained within the whole. Included within the definition of societal rights are the rights to receive and benefit from advances in science, technology, and economic development. Finally, governmental duties are defined as affirmative obligations of all branches of government to promote, to implement, and to protect the freedoms and guarantees contained within human rights instruments. Governmental duties also include the obligation to refrain from engaging in actions that derogate from or are inconsistent with fundamental freedoms, under circumstances not specifically provided for by applicable human rights instruments.

The categorizations utilized in the following discussion focus upon the primary attributes of each right. Nevertheless, there is considerable overlap between the rights contained within each category. For example, the right to attainment of the highest degree of health may also be considered a right that serves the interests of society as a whole. The special protections to be granted by states to children may also be deemed to be in the best interests of society.[456] The same may also be said of the right to receive information. Furthermore, all human rights instruments create affirmative duties for states and place restrictions upon circumstances in which states may derogate from these duties. As a result, the categorizations of human rights contained within the following discussion are not universally agreed upon and may undoubtedly be subject to discussion and revision. Subject to disagreements as the underlying categorizations may be, however, at the very least they represent an effective means by which to analyze the compatibility of governmental and private industry practices with international human rights obligations.

456. With regard to children, the author acknowledges the interest of society in the healthy development and protection of children, but has chosen to treat children as possessing societal autonomy and resultant entitlement to individual rights and freedoms to the same extent as adults.

B. *Tobacco and Personal Rights*

The subsidization and exportation of tobacco products are inconsistent with several personal rights guaranteed to the global citizenry by numerous international and regional human rights instruments. First, the subsidization and exportation of tobacco products are inconsistent with the most fundamental of all personal rights—the right to life itself. The right to life was recognized as fundamental at the very inception of modern human rights law by the Universal Declaration of Human Rights ("Universal Declaration"), which was adopted by the United Nations General Assembly on December 10, 1948.[457] Specifically, Article 3 of the Universal Declaration recognizes that "[e]veryone has the right to life."[458] Although the Universal Declaration was not intended by the member states of the United Nations to create binding international obligations, it nevertheless serves to establish a common set of values that member states are to recognize, to observe, and to implement progressively in their policies.[459] As a result, one may view the rights set forth in the Universal Declaration as a global benchmark for judging the actions and policies of states that purport to subscribe to its standards.

Regardless of its non-binding nature, the Universal Declaration was implemented in a binding fashion in the International Covenant on Civil and Political Rights ("ICCPR").[460] The ICCPR was adopted as a resolution of the United Nations General As-

457. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 135, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

458. *Id.* art. 3, at 136. The persons to whom the protections set forth in the Universal Declaration of Human Rights ("Universal Declaration") are owed are defined as "all members of the human family." *Id.* pmbl, at 135-36.

459. *See* Stephen Raube-Wilson, *The New World Information and Communication Order and International Human Rights Law*, 9 B.C. INT'L & COMP. L. REV. 107, 116 (1986) (citing SIR HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 397 (1968)). Some commentators contend, however, that the Universal Declaration is a binding instrument on the basis of its alleged universal acceptance as customary international law, or due to its perceived role in implementing the human rights obligations set forth in Articles 55 and 56 of the U.N. Charter. *See* THOMAS BUERGENTHAL, THE RIGHT TO RECEIVE INFORMATION ACROSS NATIONAL BOUNDARIES, IN CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT 73 (1974).

460. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR]. The International Covenant on Civil and Political Rights ("ICCPR"), in conjunction with the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), constitute the so-called International Bill of Rights.

sembly on December 16, 1966 and entered into force and effect on March 23, 1976. The United States signed the ICCPR on October 5, 1977 and ratified its provisions on June 8, 1992.[461] ICCPR recognizes the right to life established in the Universal Declaration in Article 6(1), which provides in part that "[e]very human being has the inherent right to life . . . [that] shall be protected by law."[462] The primacy of life is also recognized in regional human rights instruments to which the United States is a party. The American Declaration of the Rights and Duties of Man ("American Declaration"), the regional equivalent of the Universal Declaration for the Western Hemisphere, recognizes that "[e]very human being has the inherent right to life."[463] The American Declaration was implemented in a binding fashion by the American Convention on Human Rights ("American Convention"), which provides in Article 4 that "[e]very person has the right to have his life respected . . . [and] protected by the law."[464] The United States recognized the principles set forth in the American Convention on June 1, 1977.[465]

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461. *See International Covenant on Civil and Political Rights, Ratification Information* (visited Nov. 3, 1998) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html> (on file with the *Fordham International Law Journal*). Several countries that are leading importers of U.S. tobacco products have also ratified the ICCPR. Belgium, Cyprus, Israel, Japan, Panama, Russia, and the Ukraine have ratified the ICCPR, and Kuwait, Lebanon, Paraguay, and the Republic of Korea adopted its provisions through accession. *Id.*

462. ICCPR, *supra* note 460, art. 6(1), 999 U.N.T.S. at 174, 6 I.L.M. at 370.

463. American Declaration of the Rights and Duties of Man, OEA/Ser.L/V/II.23, doc. 21 rev. 6, (1948) [hereinafter American Declaration], *reprinted in* ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17 (1985).

464. American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, 9 I.L.M. 673, 676 (entered into force July 18, 1978) [hereinafter American Convention].

465. *See Organization of American States, American Convention, Signatures and Current Status of Ratification* (visited Nov. 4, 1998) <http://www.oas.org/en/prog/ichr/sitemap.htm> (on file with the *Fordham International Law Journal*) [hereinafter *American Convention, Status of Ratification*]. Although the United States has not ratified the American Convention on Human Rights ("American Convention"), as a signatory to the American Convention it is prohibited from defeating the American Convention's object and purpose until it has clearly expressed its intention not to ratify the treaty. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331, 336 (1969). Article 18(a) provides, in part, that "[a] State is obliged to refrain from acts which defeat the object and purpose of a treaty when . . . [i]t has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty." *Id.* Although it has not ratified the Vienna Convention, the United States has recognized its principles as customary international law. *See* S. DOC. NO. 385-13, 92d Cong., 1st

The incompatibility of tobacco usage and the right to life is readily apparent.[466] The responsibility of U.S. tobacco companies for increasing global consumption of manufactured tobacco products and, consequently, increasing mortality rates, is also readily apparent. Tobacco advertisements, sponsorships, promotions, product placements, and targeting of specific groups have been cited by the World Health Organization as factors contributing to the expansion of tobacco markets.[467] These practices led Dr. Hiroshi Nakajima, the former Director-General of the World Health Organization, to conclude that "'tobacco products have and are being aggressively marketed by a powerful industry promoting . . . the images of independence, emancipation and sex appeal for products which in reality only kill and disable.'"[468]

The incompatibility of tobacco usage and the right to life is apparent in the mortality statistics of the leading destinations for U.S. cigarette exports. For example, an estimated 280,000 Russians died as a result of tobacco usage in 1995.[469] The death toll was 107,000 in the Ukraine for this same period of time.[470] In Malaysia, twenty percent of all deaths in 1987 were attributable to tobacco,[471] while lung cancer mortality rates increased significantly in the Republic of Korea.[472] Tobacco usage is a significant factor with respect to male mortality in these countries. Eighty-six percent of all deaths attributable to tobacco usage in Russia in 1995 were male.[473] Thirty-one percent of all male deaths in the Ukraine were attributable to tobacco usage during this same period of time.[474] This pattern of high male mortality associated with tobacco usage also occurred in the developed world. To-

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Sess., at 1 (1971); *see also* LOUIS HENKIN ET AL., INTERNATIONAL LAW 417 (3d ed. 1993). The two leading destinations of U.S. cigarette exports in Latin America are parties to the American Convention. Panama executed the American Convention on June 22, 1978, and Paraguay became a party to the American Convention on August 24, 1989. *See American Convention, Status of Ratification, supra.*

466. *See supra* notes 24-29, 272-81 and accompanying text.

467. *See WHO, Fact Sheet N175, supra* note 25; *see also infra* note 597 and accompanying text.

468. *WHO, Press Release WHO/61, supra* note 2.

469. *See Russia Profile, supra* note 299.

470. *See Ukraine Profile, supra* note 310.

471. *See Malaysia Profile, supra* note 377.

472. *See Korea Profile, supra* note 350.

473. *See Russia Profile, supra* note 299.

474. *See Ukraine Profile, supra* note 310.

bacco usage was the cause of twenty percent of all male deaths in Japan,[475] and thirty percent of such deaths in Belgium in 1995.[476]

It is more difficult to assess the actual impact of consumption of U.S. cigarettes upon mortality rates. Some statistical correlation between global and national mortality rates and the consumption of U.S. tobacco products can, however, be drawn. For example, utilizing population, annual cigarette consumption, mortality, and U.S. cigarette import statistics for Russia in 1995 and 1997, U.S. tobacco companies had an estimated 8.6% share of the cigarette market.[477] This market share translates into approximately 24,080 deaths annually attributable to the consumption of U.S. tobacco products in Russia if one assumes the interrelationship of market share and mortality rates.[478] Utilizing similar statistics from 1992, 1995, and 1997, 23,005 deaths can be attributed to the consumption of U.S. cigarettes in the Ukraine.[479] Utilizing similar statistics from the 1990s, it can be estimated that 2.786% of all tobacco-related deaths in Japan are attributable to U.S. cigarettes.[480] A similar equation translates

475. *See Japan Profile*, *supra* note 334.

476. *See Belgium Profile*, *supra* note 284.

477. *See Russia Profile*, *supra* note 299. The formula utilized for estimating the market share for U.S. cigarettes in Russia in 1995 is as follows: number of persons 15 years or older in Russia in 1995 (116,050,000) × estimated annual cigarette consumption rate for persons 15 years or older (2040) = number of cigarettes annually consumed in Russia (236,742,000,000) - annual number of cigarettes produced in Russia (118,371,000,000) = annual number of cigarettes imported by Russia (118,371,000,000) + into annual number of cigarettes exported by the United States to Russia (10,200,000,000) = approximate share of U.S. cigarettes in Russian market (8.6%).

478. *Id.* The formula utilized for estimating the annual mortality rate in Russia attributable to U.S. cigarette consumption is as follows: annual number of deaths in Russia attributable to tobacco usage (280,000) × estimated U.S. share of Russian cigarette market (8.6%) = 24,080 estimated annual deaths.

479. *See Ukraine Profile*, *supra* note 310. The formula utilized for estimating the annual mortality rate in the Ukraine attributable to U.S. cigarette consumption is as follows: number of persons 15 years or older in the Ukraine in 1995 (41,051,000) × estimated annual cigarette consumption rate for persons 15 years or older (1800) = number of cigarettes annually consumed in the Ukraine (73,891,800,000) - number of cigarettes annually produced in the Ukraine (58,091,800,000) = number of cigarettes annually imported by the Ukraine (15,800,000,000) + into number of cigarettes annually exported by the United States to the Ukraine (3,410,000,000) = estimated U.S. share of Ukrainian cigarette market (21.5%) × number of annual deaths attributable to tobacco usage in the Ukraine (107,000) = 23,005 estimated annual deaths.

480. *See Japan Profile*, *supra* 334. The formula utilized for estimating the annual mortality rate in Japan attributable to U.S. cigarette consumption is as follows: number of persons 15 years or older in Japan in 1995 (104,780,000) × estimated annual ciga-

into 2.38% of all tobacco-related deaths in Malaysia being attributable to U.S. cigarettes.[481] Finally, utilizing global consumption and U.S. production statistics, it can be estimated that U.S. tobacco products cause approximately 278,850 to 364,650 deaths annually on a worldwide basis.[482] If consumption rates continue to rise, as predicted by the World Health Organization, the estimated global mortality rate associated with the use of U.S. tobacco products will rise to between 929,500 and 1,215,000 persons annually.[483] Although these calculations by no means provide a statistical correlation between global and national mortality rates and U.S. tobacco products with an absolute degree of exactitude, they do provide possible methodologies for assessing this relationship.

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rette consumption rate for persons 15 years or older (3240) = estimated number of cigarettes annually consumed in Japan (339,487,200,000) ÷ into number of cigarettes annually exported by the United States to Japan (67,600,000,000) = estimated U.S. share of Japanese cigarette market (19.9%) × annual percentage of deaths in Japan attributable to tobacco consumption (14%) = estimated percentage of annual deaths in Japan attributable to consumption of U.S. tobacco products (2.786%).

481. *See Malaysia Profile*, *supra* note 377. The formula utilized for estimating the annual mortality rate in Malaysia attributable to U.S. cigarette consumption is as follows: number of persons 15 years and older in Malaysia in 1995 (12,496,000) × estimated annual cigarette consumption rate for persons 15 years and older (1630) = estimated number of cigarettes annually consumed in Malaysia (20,368,480,000) ÷ into number of cigarettes annually exported by the United States to Malaysia (2,440,000,000) = estimated U.S. share of Malaysian cigarette market (11.9%) × annual percentage of deaths in Malaysia attributable to tobacco consumption (20%) = estimated percentage of annual deaths in Malaysia attributable to consumption of U.S. tobacco products (2.38%).

482. *See WHO, Fact Sheet N154*, *supra* 273; *see also WHO, Fact Sheet N118*, *supra* note 5. The formula utilized for estimating the annual global mortality rate attributable to U.S. cigarette consumption is as follows: world population 15 years or older in 1997 (3,300,000,000) × estimated annual cigarette consumption rate for persons 15 years or older in 1997 (1600) = estimated number of cigarettes annually consumed in world (5,280,000,000,000) ÷ into estimated number of cigarettes annually produced by United States (760,000,000,000) = estimated U.S. share of global cigarette market (14.3%). The estimated U.S. share of the global cigarette market is multiplied by the extremes of the estimated range of annual deaths attributable to cigarette consumption (1,950,000-2,550,000), which results in an estimated range of annual deaths attributable to the consumption of U.S. cigarettes of 278,850 to 364,650. The estimated range of annual deaths attributable to cigarette consumption is determined by multiplying the annual mortality rate attributable to tobacco usage (3,000,000) by the estimated percentage of global tobacco consumption in the form of cigarettes (65-85%), which equals a range of 1,950,000 to 2,550,000 deaths attributable to cigarette consumption annually.

483. *Id.* This estimate is achieved by substituting 10 million deaths for three million deaths utilized in the formula set forth *supra* note 482.

In any event, as the leading exporter of manufactured tobacco products, the United States bears partial responsibility for surging global mortality rates associated with tobacco usage. Despite the staggering nature of these rates, the United States has failed to place limitations upon the activities of U.S. tobacco companies in the international marketplace. Rather, U.S. tobacco companies continue to run roughshod over non-U.S. populations, in search for new markets to replace deceased smokers and to counter the effects of their increasingly negative reputation in the United States. This inaction represents a callous indifference to the ultimate result of foreign consumption of U.S. tobacco products. Perhaps more troubling are the continued expenditures of public funds on programs for the express benefit of the U.S. tobacco industry.[484] These expenditures exceeded US$64 million in 1997, with no reductions or limitations in the foreseeable future.[485] These expenditures constitute active participation in the campaign against global health championed by U.S. tobacco companies. Such expenditures, and the tacit endorsement of the consequences associated therewith, are inconsistent with the obligation of the United States to respect life as established by the previously-noted human rights treaties.[486] Furthermore, no circumstances justify this behavior, as the right to life as set forth in these instruments is not subject to derogation.[487] Regardless of the inapplicability of the derogation clauses contained within these instruments, a policy promoting a product that, if consumed properly, will ultimately result in death is inexcusable.

Closely related to the right to life is the right to health. Article 25 of the Universal Declaration provides, in part, that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family."[488] This right to health was further elaborated upon in Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") in which states parties recognized "the right of everyone to the enjoyment of the highest attainable standard of

484. *See supra* notes 91, 94, 110, 138, 140, 160, 162-63, 165 and accompanying text.

485. *Id.*

486. *See supra* notes 457-65 and accompanying text.

487. *See* ICCPR, *supra* note 460, art. 4, 999 U.N.T.S. at 174, 6 I.L.M. at 369-70; *see also* American Convention, *supra* note 464, art. 27(2), at 683.

488. Universal Declaration, *supra* note 457, art. 25(1), at 140.

physical . . . health [including] . . . [t]he prevention, treatment and control of . . . diseases."[489] Additional international recognition of the right to physical health is contained in the Declaration on Social Progress and Development ("Declaration on Social Progress") adopted by the United Nations General Assembly on December 11, 1969.[490] Article 10(d) of the Declaration on Social Progress establishes "the achievement of the highest standards of health" throughout the world as one of the primary objectives of the community of nations.[491] At the regional level, Article XI of the American Declaration recognizes that "[e]very person has the right to the preservation of his health,"[492] and the American Convention guarantees that all persons have "the right to have [their] physical . . . integrity respected."[493]

Tobacco is the known or probable cause of at least twenty-five diseases.[494] Although lung cancer is the disease most commonly associated with smoking, more persons are affected by other smoking-related conditions such as cancers of the esophagus, stomach, and liver, as well as heart disease, stroke, emphysema, and other chronic lung diseases.[495] The United States has been aware of the health dangers associated with tobacco usage since at least the issuance of the initial Surgeon General's Report in 1964, which concluded that cigarette smoking is a cause of

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489. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 165, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]. As previously noted, the ICESCR, along with the ICCPR, serves to implement the Universal Declaration and constitutes part of the International Bill of Rights. *See supra* note 460. The United States signed the ICESCR on October 5, 1977, but has failed to ratify it. *See International Covenant on Economic, Social and Cultural Rights, Ratification Information* (visited Nov. 8, 1998) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html> (on file with the *Fordham International Law Journal*). Several of the leading importers of U.S. tobacco products have, however, ratified the ICESCR. Belgium, Cyprus, Israel, Japan, Panama, Russia, and the Ukraine have ratified the ICESCR, and Kuwait, Lebanon, and the Republic of Korea became parties through accession. *Id.*

490. Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 257, U.N. Doc. A/7630 (1969) [hereinafter Declaration on Social Progress].

491. *Id.* art. 10(d), at 258.

492. American Declaration, *supra* note 463, art. XI, at 21.

493. American Convention, *supra* note 464, art. 5, at 676-77.

494. *See WHO, Fact Sheet N175*, *supra* note 25.

495. *See WHO, Press Release WHO/61*, *supra* note 2; *see also WHO, Fact Sheet N154*, *supra* note 273.

lung cancer in men and a suspected cause in women.[496] The American Medical Association officially declared cigarette smoking a serious health hazard in that same year.[497] Subsequent reports by the Surgeon General concluded that smoking is the principal cause of lung cancer and a factor in the development of cardiovascular and chronic obstructive lung diseases.[498] As a result, the Surgeon General concluded that no cigarette or level of consumption is safe.[499] Finally, the Surgeon General has, on numerous occasions, identified the dangers associated with environmental tobacco smoke, causing the Environmental Protection Agency to classify it as a Class A carcinogen in 1993.[500] Tobacco-related disease costs the U.S. economy US$50 billion in avoidable medical expenses annually.[501] As a result, the United States spends tens of millions of dollars annually to reduce tobacco consumption.[502]

Globally, 2.6% of all disease was caused by tobacco in 1990.[503] The World Health Organization has estimated that this rate will grow to nine percent by 2020—greater than any other single disease.[504] On a worldwide basis, eighty-five percent of lung cancers in men and forty-six percent in women are tobacco-related.[505] The negative consequences associated with tobacco usage are evident in health statistics from the leading importers of U.S. tobacco products. For example, in the early 1990s, lung cancer mortality rates for men in Russia and the Ukraine were extraordinarily high. The lung cancer mortality rate for men in

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496. *See generally Smoking and Health: Report of the Advisory Committee to the Surgeon-General of the Public Health Service*, *supra* note 167.

497. *See Chronology of Significant Developments Related to Smoking and Health*, *supra* note 168.

498. *See id.* (summarizing *The Health Consequences of Smoking - Cardiovascular Disease: A Report of the Surgeon General* (1983)); *see also id.* (summarizing *The Health Consequences of Smoking - Chronic Obstructive Lung Disease: A Report of the Surgeon General* (1984)).

499. *See id.* (summarizing *The Health Consequences of Smoking - The Changing Cigarette: A Report of the Surgeon General* (1981)).

500. *See id.* (summarizing *The Health Consequences of Smoking: A Report of the Surgeon General* (1972)); *see also id.* (summarizing *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General*)

501. *See* Moskowitz, *supra* note 31, at A25.

502. *See Next Retiree After Joe Camel: Tobacco Crop Insurance*, *supra* note 50. In 1996, the United States spent US$177 million on efforts to reduce the usage of tobacco products. *Id.*

503. *See Selling Death Overseas*, *supra* note 264, at A22.

504. *Id.*

505. *See* WHO, FIFTY FACTS FROM THE WORLD HEALTH REPORT, *supra* note 25, at 3.

the Ukraine was eighty-nine deaths per 100,000 from 1990 through 1992,[506] while the rate was 103 deaths per 100,000 for the years 1991 through 1993 in Russia.[507] Lung cancer became the leading cause of cancer deaths among Japanese men in 1993.[508] Significant increases in the incidence of lung cancer were also noted in the Republic of Korea and Cyprus.[509] European countries were not immune from the negative health consequences associated with tobacco consumption, as evidenced by the tripling of lung cancer rates among Belgian men from 1955 to 1985.[510]

Comprehensive tobacco education should include health promotion, education, and cessation programs, as well as warnings on tobacco products and extensive campaigns in all forms of media. Several countries, however, lack adequate measures to protect their citizens from the depredations of tobacco companies. For example, smoking control measures have not yet been adopted in the Ukraine due to a lack of funds.[511] As a result, advertising of tobacco products in all forms of the media is rampant.[512] Educational efforts have had mixed success in Malaysia due to the failure of the government to communicate health information to rural populations within the country adequately.[513] In Paraguay, non-governmental organizations have supplanted the government and assumed a leading role in tobacco education efforts.[514]

Inadequate education efforts are not, however, restricted to developing countries. As previously noted, the Japanese govern-

506. *See Ukraine Profile, supra* note 310, at 2.

507. *See Russia Profile, supra* note 299.

508. *See Japan Profile, supra* note 334. The mortality rate from lung cancer among Japanese men was 47.9 per 100,000 in the early 1990s. *Id.*

509. *See Korea Profile, supra* 350. Between 1985 and 1991, lung cancer mortality rates in Korea increased from 30.5 to 40.1 deaths per 100,000 males, and from 7.5 to 9.4 deaths per 100,000 females. *Id.* In Cyprus, the total number of smoking-related cancers, as a percentage of all neoplasms, averaged 16% for men and eight percent for women from 1985 through 1987. *See Cyprus Profile, supra* note 321.

510. *See Belgium Profile, supra* note 284. The incidence of lung cancer in Belgian men grew from 40 per 100,000 in 1955 to 120 per 100,000 in 1985. *Id.*

511. *See Ukraine Profile, supra* note 310.

512. *Id.*

513. *See Malaysia Profile, supra* note 377. The WHO has estimated that 36% of the rural population in Malaysia are unaware of the adverse consequences associated with smoking. *Id.*

514. *See Paraguay Profile, supra* note 449.

ment did not recognize the health hazards associated with smoking until 1987.[515] Nevertheless, Japanese laws regulating tobacco still have the promotion and development of the tobacco industry as their primary purpose.[516] As a result, tobacco advertising in all forms of media remains pervasive.[517] Furthermore, the health warnings required to be carried upon cigarette packets merely advise smokers to refrain from excessive consumption that might damage their health.[518] Conversely, comprehensive health education programs in Singapore have succeeded in reducing the incidence of lung cancer, as well as tobacco-attributable deaths, to 2500 persons annually.[519]

The United States has failed to take action to curb the practices of U.S. tobacco companies in the international marketplace or to share resources necessary to combat the negative health consequences associated with smoking. The United States has chosen to ignore the negative connection between smoking and global health and the efforts of U.S. tobacco companies to counteract control measures, adopted by overwhelmed governments of other countries, to address the tobacco epidemics raging within their borders. Instead, as previously noted with regard to the right to life, the United States has continued to expend funds to ensure the success of the domestic tobacco industry.[520] The dual policies of blithe ignorance and active financial support of the domestic tobacco industry must be discontinued in order for the United States to satisfy its duty to foster the attainment of the highest possible standards of health for all persons, as established by international and regional human rights instruments.

Furthermore, despite the expenditure of millions of dollars upon education and cessation programs within its own boundaries, the United States has denied the benefit of such programs to the citizens of its trading partners. At the very least, the United States has a duty to export the public health tools that it utilizes to combat domestic smoking—education and cessation programs, extensive media campaigns, and prominent health

515. *See Japan Profile, supra* note 334.
516. *Id.*
517. *Id.*
518. *Id.*
519. *See Singapore Profile, supra* note 361.
520. *See supra* notes 484-85 and accompanying text.

warnings upon cigarette packets. The failure of the United States to adopt standards to foster greater international awareness of the perils of smoking and to promote tobacco education on a global basis adequately, also violates its duty to contribute to the achievement of optimal levels of health for all persons. Rather, the United States has apparently chosen to sacrifice its duty at the altars of U.S. tobacco interests, free trade, and export revenues.

In addition, international human rights law recognizes the fragile status of children and the need for special protections to ensure the continued existence of all possible opportunities for their proper development. The special status of children was first recognized in the Universal Declaration, which provided that children are entitled to "special care and assistance."[521] This need was also recognized in both the ICCPR and the ICESCR. Article 24 of the ICCPR provides, in part, that "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor on the part of his family, society and the State."[522] Article 10 of the ICESCR further addressed the need for the protection of children by calling upon the states parties to adopt "[s]pecial measures of protection and assistance [to shield] children and young persons . . . from economic and social exploitation."[523] The purposes of such special protective measures were best enumerated in the Declaration on Social Progress, specifically, protecting the upbringing, health, rights, and welfare of children and ensuring that they have the opportunity to assume fully their responsibilities within the community upon reaching adulthood.[524]

The special protective status of children is further recognized in two relevant regional human rights instruments. Article VII of the American Declaration establishes that "all children have the right to special protection, care and aid."[525] Furthermore, Article 19 of the American Convention restates the obligations of states parties set forth in Article 24 of the ICCPR with respect to children; specifically, that "[e]very minor child has

521. Universal Declaration, *supra* note 457, art. 25(2), at 140. The states parties also recognized the need of mothers for such special care and assistance. *Id.*

522. ICCPR, *supra* note 460, art. 24(1), 999 U.N.T.S. at 179, 6 I.L.M. at 375.

523. ICESCR, *supra* note 489, art. 10(2), at 166.

524. Declaration on Social Progress, *supra* note 490, arts. 4, 11(b), (c), at 258.

525. American Declaration, *supra* note 463, art. VII, at 21.

the right to the measures of protection required by his condition as a minor on the part of his family, society and the state."[526]

Furthermore, the special status of children is specifically recognized in two human rights instruments devoted exclusively to their rights. The initial international instrument exclusively addressing the rights of children is the Declaration of the Rights of the Child ("Declaration"), which was adopted by the United Nations General Assembly on November 20, 1959.[527] The Preamble of the Declaration restates the need for special safeguards and legal protections with respect to children by reason of their physical and mental immaturity.[528] Among these special protections are those designed to enable the healthy physical development of children.[529] Furthermore, Principle 9 states that children are to be protected from all forms of exploitation.[530] The Declaration provides that the best interests of children shall be of "paramount consideration" in adopting these protections.[531] The Declaration concludes that "mankind owes to the child the best it has to give."[532]

The Declaration is implemented in binding fashion by the Convention on the Rights of the Child (or "Convention").[533] Adopted by the United Nations General Assembly on November 20, 1989, the Convention has been adopted either through ratification or accession by all of the leading importers of U.S. tobacco products.[534] The United States signed the Convention on February 16, 1995, but has yet to ratify its obligations.[535]

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526. American Convention, *supra* note 464, art. 19, at 681.

527. Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 195, U.N. Doc. A/4354 (1959).

528. *Id.* pmbl., at 195.

529. *Id.* at princs. 2, 4, at 196.

530. *Id.* at princ. 9, at 196.

531. *Id.* at princ. 2, at 196.

532. *Id.* pmbl., at 195.

533. Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1448, 1456-57.

534. *See Convention on the Rights of the Child, Ratification Information* (visited Nov. 8, 1998) <http://www.unorg/Depts/Treaty/final/ts2/newfiles/part_boo/iv_11.html> (on file with the *Fordham International Law Journal*). Belgium, Cyprus, Israel, Japan, Kuwait, Lebanon, Panama, Paraguay, the Republic of Korea, Russia, Turkey, and the Ukraine have ratified the Convention on the Rights of the Child. *Id.* Malaysia, Saudi Arabia, and Singapore adopted the Convention on the rights of the child through accession. *Id.*

535. *Id.*

As in other international human rights instruments, the Convention recognizes that children are entitled to special care and protection.[536] The Convention also establishes several universal rights to which children are entitled. Most fundamentally, all states parties to the Convention recognize that children have an inherent right to life that is subject to protection to the "maximum extent possible."[537] On a related note, children have the right to enjoy the highest attainable standard of health.[538] In order to preserve their physical well-being, Article 17(1) grants children the right to access information from national and international sources.[539] This right to receive information freely regardless of form and frontiers is also guaranteed in a more general manner by Article 13(1).[540] Finally, children have the right to be free from all forms of exploitation, which states parties must prevent through adoption of appropriate legislative and administrative measures.[541]

The Convention also places specific duties upon the states parties to foster the development of children. Article 3 of the Convention requires states parties to protect and to care for children in a manner that serves to protect their well-being through appropriate legislative and administrative measures.[542] These legislative and administrative measures must serve to implement the rights of children set forth in the Convention.[543] For example, states parties are required to take all appropriate measures to secure the highest attainable standard of health for children, including measures designed to diminish mortality, to combat disease, to foster childhood health education, to develop preventative health care practices, and to foster cooperation with other states parties to secure such standards on a universal ba-

536. Convention on the Rights of the Child, *supra* note 533, pmbl., at 1457. The Convention on the Rights of the Child defines children as those persons under 18 years of age, unless majority is attained at an earlier age pursuant to the laws applicable to the child. *Id.* art. 1, at 1459.

537. *Id.* art. 6(1), (2), at 1460.

538. *Id.* art. 24(1), at 1465.

539. *Id.* art. 17, at 1462-63.

540. *Id.* art. 13(1), at 1462. Article 13(1) provides in part that "[t]he child shall have 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 through any other media of the child's choice." *Id.*

541. *Id.* art. 19(1), at 1463.

542. *Id.* art. 3(2), at 1459.

543. *Id.* art. 4, at 1459.

sis.[544] States parties are also under an affirmative duty to disseminate health information, to encourage international cooperation in the exchange and dissemination of such information, and to develop guidelines for the protection of children from information injurious to their well-being.[545] In any event, the primary consideration that is to govern all decisions made by state parties in this regard is the best interests of children.[546]

The entrapment of children by the tobacco industry and the failure of U.S. policies to address this abusive practice violate the special protections mandated by international human rights instruments for children. The tobacco industry has clearly targeted children throughout the world as replacement markets for lost sales in the United States.[547] Tobacco advertising and sponsorship of sporting events and art are widespread throughout the world and serve to contribute to the expansion of international tobacco markets.[548] This expansion is furthered by product placement in films and the use of cigarette brand names on clothing and sports equipment.[549] Children are particularly vulnerable to practices that portray smoking as glamorous, modern, sophisticated, and Western.[550] As a result, the United States runs the risk of Joe Camel and the Marlboro Man serving as its most visible ambassadors to children throughout the world.[551]

In this regard, the tobacco industry has correctly concluded that children are the base of its future fortunes.[552] There is considerable evidence to support this conclusion in the developing world. For example, in Cyprus, the World Health Organization has concluded that fifty-one percent of adult male smokers and twenty-nine percent of adult female smokers initiated smoking

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544. *Id.* art. 24(2)(a), (c), (e), (f), 24(4), at 1466. Article 24(4) also requires that "particular account . . . be taken of the needs of developing countries in this regard." *Id.* art. 24(4), at 1466.

545. *Id.* art. 17(a), (b), (e), at 1462-63.

546. *Id.* art. 3(1), at 1459.

547. *See* James Hoagland, *Joe Camel Goes to Europe*, WASH. POST, Apr. 2, 1998, at A25.

548. *See WHO, Fact Sheet N175*, *supra* note 25.

549. *Id.*

550. *Id.*

551. *See* CONGRESSWOMAN NANCY PELOSI TAKES AIM AT INTERNATIONAL TOBACCO, *supra* note 275, at 1; *see also* PELOSI STATEMENT, *supra* note 264, at 1.

552. *See Memos Discussed Nicotine, Youth*, ASSOCIATED PRESS, June 29, 1998 (quoting internal memorandum of Lorillard Tobacco Company containing proposal that company manufacture cigarette to appeal to young smokers presently consuming Philip Morris' Marlboro brand, because "the base of our business is the high school student").

between the ages of fifteen and nineteen years.[553] This scenario also holds true in Saudi Arabia, where a study conducted by the government in 1990 concluded that 58.9% of adult smokers began using tobacco products before reaching the age of eighteen years.[554] This percentage reaches shocking proportions in Paraguay where a 1990 survey determined that eighty-seven percent of all adult smokers began consuming tobacco products by the age of twenty years.[555] The World Health Organization recently concluded that the median age of smoking initiation was under the age of fifteen years.[556] This statistic is of particular concern because commencement of smoking at an early age substantially increases the risk of death from smoking-related causes.[557] In this regard, the World Health Organization has estimated that, among those who continue to smoke throughout their lives, fifty percent can be expected to die from smoking-related causes.[558]

The inability of non-U.S. governments to address the onslaught of the tobacco industry upon their children adequately is readily apparent in those countries that are the leading importers of U.S. cigarettes. Several of the countries within this group have failed to counteract the negative effects of tobacco advertising upon the youngest members of their populations. The efforts of some U.S. trading partners to restrict access to tobacco products by minors suffer from a lack of available financial resources and conflicting priorities. Such a situation exists in the Ukraine, where governmental efforts to decrease skyrocketing consumption rates by minors are practically nonexistent due to a lack of financial resources and the lucrative nature of tobacco advertising revenues to local media outlets.[559] Even in those countries where access to tobacco products is controlled, such restrictions suffer from a lack of consistent enforcement. For example, the World Health Organization recently concluded that efforts to restrict access by minors to tobacco products in Russia and Turkey have failed due to inadequate enforcement.[560] Pan-

553. *See supra* note 321 and accompanying text.
554. *See supra* note 396 and accompanying text.
555. *See supra* note 449 and accompanying text.
556. *See WHO, Fact Sheet N118, supra* note 5.
557. *Id.*
558. *Id.*
559. *See supra* note 310 and accompanying text.
560. *See supra* notes 299, 405 and accompanying text.

amanian attempts to control access to tobacco products by children have been plagued by similar enforcement problems.[561] Enforcement difficulties are not, however, limited to developing countries. For example, unrestricted advertising, inadequate health warnings, the absence of tar and nicotine limits, and the widespread presence of vending machines have complicated efforts to deter smoking among Japanese children.[562]

As a result, it is no surprise that smoking rates among minors in countries with few or no controls is shockingly high. For example, smoking rates for minors in Russia may be as high as sixty percent for teenage boys and forty-four percent for teenage girls.[563] Teenage smoking rates are similarly high in the Ukraine, where the World Health Organization estimated that in 1990 forty percent of Ukrainian sixteen and seventeen year olds were regular smokers.[564] In Asia, Korean efforts to shield minors from the harmful effects of tobacco advertising have failed to reduce underage smoking rates, which remain at sixteen percent for girls and twelve percent for boys ages ten to fourteen years.[565] An absolute prohibition upon the sale of tobacco products to persons under the age of eighteen years has failed to discourage tobacco experimentation among Malaysian youth substantially.[566] In the Middle East, the smoking rate for teenagers in Kuwait is fifty percent despite the existence of comprehensive tobacco controls.[567] Stringent control measures adopted by the Belgian government have not reduced smoking prevalence among Belgian youth, which increased from twelve percent to twenty-two percent for teenage boys and eight percent to thirteen percent for teenage girls in the period from 1990 to 1994.[568]

The U.S. government bears some of the responsibility for the burgeoning smoking epidemic among the world's children. The United States has recognized the need to shield its children from tobacco products since at least the adoption of the Public

561. *See supra* note 441 and accompanying text.
562. *See supra* notes 344-46 and accompanying text.
563. *See supra* note 299 and accompanying text.
564. *See supra* note 310 and accompanying text.
565. *See supra* note 350 and accompanying text.
566. *See supra* note 377 and accompanying text.
567. *See supra* note 430 and accompanying text.
568. *See supra* notes 284, 293 and accompanying text.

Health Cigarette Smoking Act of 1969, which banned cigarette advertising on television and radio.[569] The United States also recognized the need to protect children from tobacco products in the Surgeon-General's 1994 report on tobacco use among U.S. youth[570] and through the declaration of tobacco use as a pediatric disease by the U.S. Food and Drug Administration in 1995.[571] The United States has recognized the need to address the physical dangers associated with smoking and the enticing promotional practices of the tobacco industry on a global basis. In August 1997, President Clinton stated that with sales declining in the United States, "it's natural to expect that the [tobacco] companies will try to accelerate the growing [international] markets . . . [but] if they're dangerous to children here, they're dangerous to children there."[572] Nevertheless, the United States has failed to take action to protect children residing in other countries. Rather, the United States has acquiesced to the physical and economic exploitation of children throughout the world by companies operating within its jurisdiction. The protection of U.S. children from tobacco addiction at the expense of many more children in other countries places international trade before global health concerns and is clearly contrary to the provisions of the above-cited human rights instruments that require paramount consideration to be accorded to the best interests of all children.[573]

In any event, all persons, regardless of their age, are entitled to treatment that recognizes their dignity and worth. The right to dignified treatment is inherent in all international human rights treaties. An exercise in treaty interpretation is, however, not necessary to discover this right. The Universal Declaration expressly recognized this right fifty years ago in its Preamble, which states that "the peoples of the United Nations . . . reaffirmed their faith . . . in the dignity and worth of the human

569. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970).

570. *See* U.S. Centers for Disease Control and Prevention, *A Report of the Surgeon-General, Smoking-Related Surgeon General's Reports, 1964-1994* (visited Mar. 30, 1998) <http://www.cdc.gov/nccdphp/osh> (on file with the *Fordham International Law Journal*).

571. *See Chronology of Significant Developments Related to Smoking and Health*, *supra* note 168.

572. *Excerpts from President Clinton's News Conference*, WASH. POST, Aug. 7, 1997, at A16.

573. *See Selling Death Overseas*, *supra* note 264, at A22.

person . . . ."[574] This right has been reaffirmed repeatedly in the many and varied international human rights treaties that have sprung from the principles established by the Universal Declaration. Perhaps the most fundamental reaffirmation of this right is contained in the Declaration on Social Progress.[575] Article 2 of the Declaration on Social Progress recognizes that the foundation for social progress and development of all peoples is "founded on respect for the dignity and value of the human person . . . ."[576] Article 2 further recognizes that only progress and development founded upon such respect will adequately ensure the promotion of human rights and social justice.[577]

The practices of U.S. tobacco companies are inconsistent with the recognition of the dignity and worth of citizens of other countries. U.S. tobacco companies treat non-U.S. citizens in the same fashion as they treat U.S. consumers, as expendable commodities rather than individuals entitled to respect for their physical integrity. Children are viewed as especially valuable commodities, necessary to replace the legions of deceased smokers who have succumbed to their deadly products. The practices of U.S. tobacco companies are nothing short of economic exploitation of non-U.S. populations for the purposes of replacing deceased customers and increasing market share and product visibility. Ultimately, the U.S. government must bear some responsibility for the exploitation of non-U.S. citizens by companies within its jurisdiction. Although it is unduly optimistic to conclude that U.S. tobacco companies will ever completely refrain from their predatory practices, such behavior would undoubtedly become infinitely more difficult in the presence of a strong regulatory scheme and in the absence of federal expenditures to support the cultivation, sale, and exportation of tobacco products.

The final relevant personal right is the right to receive information freely. The fundamental nature of this right was recognized in Article 19 of the Universal Declaration, which guaranteed the right of all persons to "receive and impart information and ideas through any media and regardless of frontiers."[578]

574. Universal Declaration, *supra* note 457, pmbl., at 135-36.
575. Declaration on Social Progress, *supra* note 490, at 257.
576. *Id.* art. 2, at 257.
577. *Id.*
578. Universal Declaration, *supra* note 457, art. 19, at 138.

This right was established in a binding nature by Article 19 of the ICCPR, which guaranteed the freedom of all persons to receive information regardless of the form of media and frontiers.[579] The right was, however, recognized most prominently in the Declaration on Social Progress. Article 5 of the Declaration on Social Progress recognizes that social progress and global development require "enlightened public opinion," which results from the dissemination of information across national and international borders.[580] This dissemination of information is required "to make people aware of changing circumstances in society as a whole, and to educate the consumer."[581] As a result, the Declaration on Social Progress calls for an "[i]ntensification of international cooperation with a view to ensuring the international exchange of information, knowledge and experience."[582]

The right to impart and to receive information is also recognized in two relevant regional human rights instruments. Article IV of the American Declaration recognizes the right of every person to freedom of investigation, opinion, expression, and dissemination of information.[583] This right was further elaborated upon in Article 13(1) of the American Convention, which provides in part that "[e]veryone has the right 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 one's choice."[584]

The international exchange of information, knowledge, and experience for the purpose of educating the consumer is not served by the practices of the U.S. government or the tobacco industry. Nevertheless, the need for complete and accurate information with regard to tobacco products is great. In many countries, the serious consequences associated with tobacco usage are unknown.[585] Developing countries in particular have historically low levels of public awareness regarding the health

579. ICCPR, *supra* note 460, art. 19(2), 999 U.N.T.S. at 178, 6 I.L.M. at 374.

580. Declaration on Social Progress, *supra* note 490, art. 5(a), (b), at 258.

581. *Id.* art. 15(d), at 259.

582. *Id.* art. 24(a), at 260.

583. American Declaration, *supra* note 463, art. IV, at 20.

584. American Convention, *supra* note 464, art. 13(1), at 679.

585. *See* World Health Organization, *Why Are Comprehensive Tobacco Control Measures Necessary* (visited Apr. 16, 1998) <http://www.who.ch/psa/toh/Alert/4-96/E/ta4.html> (on file with the *Fordham International Law Journal*).

consequences of smoking.[586] As a result, developing countries have failed to adopt adequate domestic control mechanisms for tobacco products that are sufficient to educate their citizens or to counteract the marketing practices of tobacco companies.[587]

This failure is endemic in several of the leading importers of U.S. tobacco products. As previously noted, a lack of financial resources has prevented the adoption of effective tobacco control measures in the Ukraine, Panama, and Turkey.[588] Russian efforts to discourage its citizens from smoking are plagued by inconsistencies such as the exemption from mandatory health warnings granted to imported cigarettes.[589] These problems also exist in developed countries, as evidenced by the failure of the Japanese Ministry of Health and Welfare to recognize the health hazards associated with smoking until 1987 and the relatively weak health warnings required to be carried on all cigarette packages.[590]

U.S. tobacco companies, operating free of international controls and flush with financial support from the U.S. government, have filled the informational and regulatory void existing in many countries. U.S. tobacco companies market smoking and their products as a national characteristic of the United States, in a blatant attempt to appeal to the strong attraction of non-U.S. consumers to the perceived glamour of the Western, and primarily American, lifestyle.[591] For example, in the Ukraine, U.S. cigarettes are advertised utilizing the slogan "Be American, Smoke American," while in Poland, L&M Cigarettes are advertised as "Really American."[592] Other examples include the marketing of West Brand Cigarettes in Russia and the worldwide utilization of the Marlboro Man by the Philip Morris Corporation.[593] U.S. tobacco companies have also attempted to entice women by using

586. *See WHO, Press Release WHO/61, supra* note 2.

587. *Id.*; *see* World Health Organization, *Fact Sheet No. 157, Tobacco Epidemic in the Russian Federation Kills 750 People Every Single Day* (visited Mar. 23, 1998) <http://www.who.org/inf/fs/fact157.html> [hereinafter *WHO, Fact Sheet N157*] (on file with the *Fordham International Law Journal*).

588. *See supra* notes 315, 416, 445-46 and accompanying text.

589. *See supra* note 306 and accompanying text.

590. *See supra* notes 343, 345 and accompanying text.

591. *See WHO, Fact Sheet N157, supra* note 587; *see also* Hoagland, *supra* note 547, at A25.

592. *See* Hoagland, *supra* note 547, at A25.

593. *Id.*

aggressive advertising associating smoking with Western ideals of female independence and sexuality.[594] Such advertising has eroded traditional socio-cultural restraints that discouraged smoking among women.[595] For those consumers not enamored with the Western lifestyle, U.S. tobacco companies have attempted to appeal to historical traditions. For example, RJR Reynolds markets Peter the Great cigarettes in Russia, which are designed to appeal to those who "believe in the revival of the traditions and grandeur of the Russian lands."[596] Despite the best efforts of national and international health organizations, in August 1997 the World Health Organization concluded that advertising and targeting of specific groups have contributed to the expansion of global tobacco markets and have discouraged the media from reporting the risks of smoking.[597] This potential for abuse also exists in other leading markets for U.S. tobacco products that have few or no restraints upon advertising, such as Japan, Malaysia, Lebanon, Panama, and Paraguay.[598]

Implicit in the free flow of information across international boundaries is the underlying accuracy of this information. The U.S. tobacco companies have, however, engaged in an industry-wide misinformation campaign regarding the health consequences associated with the consumption of their products. Industry executives denied the health risks associated with cigarette smoking and the addictive properties of nicotine until January 1998.[599] Despite its recent admissions to the U.S. public, however, U.S. tobacco companies continue to attack proposed restrictions abroad as scientifically unsound or the product of lawsuit-driven societies such as the United States.[600] These ef-

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594. *See WHO, Fact Sheet N176, supra* note 10.

595. *Id.*; *see Big Tobacco Abroad*, WASH. POST, July 13, 1998, at A20.

596. *See Selling Death Overseas, supra* note 264, at A22.

597. *See WHO, Fact Sheet N175, supra* note 25; *see also WHO, Fact Sheet N176, supra* note 10.

598. *See supra* notes 344, 384, 392, 446, 453 and accompanying text.

599. *See Industry Admits Cigarettes Are Addictive*, S.F. CHRON., Jan. 30, 1998, at A2. As late as April 1994, industry executives testified before the U.S. Congress that cigarette smoking was not addictive. *See* William Carlsen, *Criminal Charges Still Possible*, S.F. CHRON., June 21, 1997, at A9.

600. *See Big Tobacco Aims to Keep the World Lighting Up*, S.F. EXAMINER, Jan. 18, 1998, at A-15; *see also* Action on Smoking and Health, *Tobacco Campaigns in Third World Are Smoking* (visited Mar. 30, 1998) <http://ash.org/jan98/01-19-4.html> (excerpts from Barry Meier, *Tobacco Firms Fire Up Smoking Campaigns in Third World*, N.Y. TIMES SERV., Jan. 19, 1998) (on file with the *Fordham International Law Journal*).

forts are directed primarily at the media and public policy-makers and have the defeat of public smoking and advertising restrictions and the diminishment of health awareness and prevention campaigns as their primary objectives.[601] Additionally, there is widespread evidence that U.S. tobacco companies concealed the health consequences and addictive power of their products from the U.S. public through the alteration, concealment, and destruction of relevant documentation.[602] There is no reason to believe that U.S. tobacco companies will unilaterally refrain from such practices in the international marketplace in the absence of regulation.

Although U.S. tobacco companies bear the brunt of responsibility for their overseas marketing campaigns and concealment of relevant information relating to the health effects of smoking, a degree of responsibility is also attributable to the U.S. government. As the world's leading exporter of manufactured tobacco products, the United States has a moral duty to address the adverse impact of the advertising and misinformation campaigns conducted by U.S. tobacco companies overseas.[603] The failure of the U.S. government to take any action to rein in the barrage of advertising and misinformation by U.S. tobacco companies serves to make the United States complicit in industry efforts to addict billions of people worldwide. The U.S. government's indifference to U.S. tobacco companies preying upon societies that have no public health and educational programs and are vulnerable to sophisticated marketing practices will only serve to reap ill will and financial claims for the United States in the years to come.[604]

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601. *Id.*; *see Why Are Comprehensive Tobacco Control Measures Necessary*, *supra* note 585.

602. *See* John Schwartz, *New Tobacco Files Suggest Efforts to Conceal Data*, WASH. POST, Apr. 23, 1998, at A2; *see also* Saundra Terry, *1980 Philip Morris Memo Spoke of Need to Hide Nicotine Studies*, WASH. POST, Apr. 16, 1998, at A4. Documents recently released by U.S. tobacco companies, in response to discovery requests in litigation pending in U.S. courts, have even caused Newt Gingrich, the former Speaker of the U.S. House of Representatives and a leading critic of efforts to regulate domestic tobacco companies, to conclude that the tobacco companies have been stripped of "any pretense of any claim of respectability . . . [t]hey were clearly lying to the U.S. Congress and the American people about their behavior." Kellman, *supra* note 229.

603. *See* Action on Smoking and Health, *Senators Propose International Restrictions* (visited Mar. 30, 1998) <http://ahs.org/feb98/02-26-98-5.html> (on file with the *Fordham International Law Journal*).

604. *See* Hoagland, *supra* note 547, at A25.

C. *Tobacco and Societal Rights*

Current U.S. policies are inconsistent with two societal rights guaranteed by numerous global and regional human rights instruments. The first societal right is the right to receive and to benefit from advances in science and technology. Closely related to the individual's right to receive information, the right to receive and to benefit from scientific and technological advances was initially guaranteed by Article 27 of the Universal Declaration, which granted all global citizens "the right . . . to share in scientific advancement and its benefits."[605] Article 27 is implemented by Article 15 of the ICESCR in which states parties recognized the right of all persons to "enjoy the benefits of scientific progress and its applications."[606] Article 15 places responsibility for the diffusion of scientific advancements upon the states parties, who are encouraged to develop and to maintain international contacts and cooperation in the scientific fields.[607]

The right to receive and to benefit from scientific and technological advances is also guaranteed in a general fashion by two other relevant human rights instruments. First, the Declaration on Social Progress recognizes "the contribution that science and technology can render towards meeting the needs common to all humanity."[608] In order to maximize this contribution, the Declaration on Social Progress encourages the development of enlightened public opinion and awareness of societal changes among all peoples.[609] Developed countries are urged to maximize this contribution through the equitable sharing of scientific and technological advances with developing countries.[610] Specifically, Article 24(a) calls for the achievement of social progress and development through the "broadest possible international . . . scientific . . . cooperation and reciprocal utilization of the experience of countries with different economic and social systems and different levels of development on the basis of mutual advantage."[611] Secondly, at the regional level, the American Declaration specifically recognizes the right of all persons "to

605. Universal Declaration, *supra* note 457, art. 27(1), at 140.
606. ICESCR, *supra* note 489, art. 15(1)(b), at 167.
607. *Id.* art. 15(2), (4), at 167.
608. Declaration on Social Progress, *supra* note 490, pmbl., at 257.
609. *Id.* art. 5(a), (b), at 258.
610. *Id.* arts. 13(a), 24(a), at 259, 260.
611. *Id.* art. 24(b), at 260.

participate in the benefits that result from intellectual progress, especially scientific discoveries."[612]

Finally, access to scientific and technological advances was specifically guaranteed by the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind ("Declaration on Scientific Progress").[613] Adopted as a resolution by the United Nations General Assembly in 1975, the Declaration on Scientific Progress noted "the urgent need to make full use of scientific and technological developments for the welfare of man."[614] In order to meet this need, the Declaration on Scientific Progress called upon all states to adopt measures to ensure that the results of scientific and technological developments were utilized for the purpose of economic and social development of all peoples.[615] Furthermore, states were instructed to adopt measures to extend the benefits of science and technology to all strata of the world's population through cooperation in "the establishment, strengthening and development of the scientific and technological capacity of developing countries."[616] The Declaration on Scientific Progress also warned of the dangers of progress and instructed states to adopt specific measures to protect the world's population from the harmful effects associated with misuse of science and technology.[617]

As in the case of the right of individuals to receive information, present U.S. policies and the practices of the tobacco industry are inconsistent with the right of the world's population to receive and to benefit from advancements in science and technology. Innumerable studies of the effect and costs of tobacco usage have been completed throughout the developed world, including twenty-five separate studies by the U.S. Surgeon General.[618] These studies have been, in part, the impetus behind

612. American Declaration, *supra* note 463, art. XIII, at 21-22.

613. Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, G.A. Res. 3384, U.N. GAOR, 30th Sess., Supp. No. 34, at 86, U.N. Doc. A/10034 (1975) [hereinafter Declaration on Scientific Progress].

614. *Id.* pmbl., at 86.

615. *Id.* art. 1, at 86.

616. *Id.* arts. 5, 6, at 86.

617. *Id.* art. 6, at 86.

618. *See supra* notes 167-71 and accompanying text.

tobacco control measures throughout the world.[619] The need for access to and dissemination of this scientific information is urgent. As previously noted in the discussion relating to the international exchange of information, the serious consequences associated with tobacco usage are unknown in many countries due to a lack of adequate financial resources and governmental willpower, competing health problems, and administrative difficulties.[620] These circumstances have prevented the development of enlightened public opinion on the topic of tobacco usage as called for by the Declaration on Social Progress.[621]

U.S. tobacco companies have most certainly retarded the development of enlightened public opinion on the dangers of tobacco usage by waging a campaign of omission and misinformation. As previously noted, industry executives denied the health risks and addictive properties associated with their products until January 1998.[622] U.S. tobacco companies also altered, concealed, and destroyed documentation concerning the health consequences of smoking and the addictive power of cigarettes.[623] Most importantly, U.S. tobacco companies have labeled studies that have reached negative conclusions regarding tobacco usage as scientifically unsound.[624] For example, British-American Tobacco Industries has hosted conferences at luxury resorts for journalists from developing countries at which anti-tobacco studies have been condemned as "bad science used by personal injury lawyers to shake down deep-pocket businesses," and the product of "Chicken Littles to fuel wacky social agendas."[625] Speakers at these seminars have characterized the dangers posed by environmental tobacco smoke as "infinitesimal" and "hypothetical."[626] In 1994, Philip Morris International seriously considered adopting a public relations campaign in the Republic of the Philippines designed to remove cancer awareness

619. *See supra* notes 172-91 and accompanying text.

620. *See supra* notes 511-18 and accompanying text; *see also WHO, Press Release WHO/61*, *supra* note 2; *WHO, Fact Sheet N176*, *supra* note 10; *Why Are Comprehensive Tobacco Control Measures Necessary*, *supra* note 585.

621. *See* Declaration on Social Progress, *supra* note 490, art. 5(a), (b) at 258.

622. *See supra* note 599 and accompanying text.

623. *See supra* note 602 and accompanying text.

624. *See supra* note 600 and accompanying text.

625. *Big Tobacco Aims to Keep the World Lighting Up*, *supra* note 600, at A-15; *see Tobacco Campaigns in Third World Are Smoking*, *supra* note 600, at 1.

626. *Big Tobacco Aims to Keep the World Lighting Up*, *supra* note 600, at A-15.

and prevention as a key concern of local health officials and to neutralize a government plan to reduce smoking by children.[627] Although Philip Morris did not ultimately adopt this strategy, funding for Philippine efforts to discourage smoking by children through a massive media campaign were virtually eliminated.[628] The effects of these campaigns are difficult to gauge, but may include the slowing of the international flow of accurate scientific information and the retardation of tobacco control programs. At the very least, these omissions, misstatements, and unfounded attacks upon science do not strengthen the scientific and technological capabilities of developing states as required by the previously-cited human rights instruments.

Responsibility for the failure to disseminate accurate scientific information on tobacco usage also resides with the U.S. government. The ICESCR places responsibility for the diffusion of scientific advancements directly upon states.[629] Included in this responsibility is the duty to cooperate with developing states, to share scientific advancements, and to strengthen their scientific capabilities.[630] Despite this responsibility, the United States has made little effort to become involved in global tobacco control efforts or to export U.S. public health tools in an attempt to counteract the effects of attacks upon science by the tobacco companies. Rather, through a multiplicity of programs, the United States has continued to promote the sale and export of tobacco products. This promotion is also implicit in the failure of the United States to restrain the international activities of U.S. tobacco companies, including the irresponsible attacks upon scientific studies and efforts to derail the adoption of tobacco control measures overseas. The active promotion of tobacco products and benign neglect of the excesses of U.S. tobacco companies falls far short of satisfying the duty to promote and to strengthen scientific advancements and capabilities in the developing world.

The second relevant societal right is the right to economic

627. *Id.*

628. *Id.*

629. ICESCR, *supra* note 489, art. 15(2), (4), at 167.

630. *See* Universal Declaration, *supra* note 457, art. 27(1), at 140; *see also* ICESCR, *supra* note 489, art. 15(1)(b), at 167; Declaration on Social Progress, *supra* note 490, arts. 13(a), 24(a), (b), at 259-60; Declaration on Scientific Progress, *supra* note 613, pmbl., arts. 1, 5, at 86.

development. The right to economic development is guaranteed by two international instruments. First, the Declaration on Social Progress addresses the issue of economic development.[631] It calls upon developed countries to assist developing countries in accelerating their economic growth.[632] In order to achieve appropriate levels of development, the Declaration on Social Progress calls upon developed states to grant favorable and equitable terms of trade to developing states.[633] Developed states are further instructed to refrain from economic exploitation of developing states.[634] Additionally, international efforts are to be undertaken to achieve development through the raising of living standards for all peoples.[635] Economic development is also to be achieved through the maintenance of the highest attainable standards of health and the protection of the rights and welfare of children.[636] States are instructed to achieve these goals primarily through the adoption of appropriate legislative and administrative measures that ensure the full realization of economic rights without discrimination.[637] States are also encouraged to meet these goals through the free exchange of information and equitable sharing of scientific and technological advances.[638]

The right to economic development was restated by the United Nations General Assembly seventeen years later in the Declaration on the Right to Development.[639] Development is defined as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom."[640] The Declaration on the Right to Development declares economic development to be an inalienable human right

631. *See* Declaration on Social Progress, *supra* note 490, at 257.

632. *Id.* pmbl., at 257.

633. *Id.* arts. 7, 23(e), at 258-60.

634. *Id.* art. 12(c), at 259.

635. *Id.* art. 9, at 258.

636. *Id.* arts. 10(d), 11(b), (c), at 258.

637. *Id.* art. 18(a), at 259.

638. *Id.* arts. 5(b), 13(a), 15(d), 24(a), (b), at 258-60.

639. Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

640. *Id.* pmbl., at 186.

"by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic . . . development, in which all human rights and fundamental freedoms can be fully realized."[641] The primary responsibility for the creation of conditions favorable to the realization of the right to development resides with states.[642] In this regard, states have the duty to cooperate with one another in ensuring development and eliminating obstacles thereto.[643]

The net costs associated with tobacco usage are profoundly negative and include direct medical costs and lost productivity from increased illness and early death. Tobacco causes 3.5 million deaths annually throughout the world, with fifty percent of these deaths occurring between the ages of thirty-five and sixty-nine years—the most economically productive years of life.[644] In addition, rising smoking rates among minors endanger the lives of the generations upon whose labor the world depends for future economic development. These premature deaths and tobacco-related diseases are and will remain the cause of thousands of years of lost economic productivity. Although it is difficult to attribute mortality and disease rates to U.S. tobacco companies with a high degree of specificity, it is certain that, as the world's leading exporter of manufactured tobacco products, the United States bears significant responsibility for the resultant lost economic productivity.

The loss to the world economy arising from tobacco products exceeds the combined health expenditures of all of developing countries.[645] The World Bank and the World Health Organization have estimated that the costs of treatment, mortality, and disability associated with tobacco use exceeds the economic benefits arising from tobacco production and sale by US$200 billion annually.[646] Tobacco also creates a net loss to the balance of trade in most countries.[647] For example, the fifteen leading pur-

641. *Id.* art. 1, at 186.

642. *Id.* art. 3(1), at 186.

643. *Id.* art. 3(2), at 186.

644. *See WHO, Press Release WHO/61*, *supra* note 2.

645. *See* World Health Organization, *Fact Sheet N155, Tobacco Epidemic: Much More Than a Health Issue* (visited Mar. 23, 1998) <http://www.who.org/inf/fs/fact155.html> [hereinafter *WHO, Fact Sheet N155*] (on file with the *Fordham International Law Journal*).

646. *See WHO, Fact Sheet N175*, *supra* note 25; *see also WHO, Fact Sheet N155*, *supra* note 645; *WHO, Press Release WHO/41*, *supra* note 10.

647. *See WHO, Fact Sheet N155*, *supra* note 645.

chasers of U.S. manufactured tobacco products imported 190.7 billion pieces at a cost of US$3.8 billion dollars in 1997.[648] The expenditures upon tobacco imports exceeded the income earned from tobacco exports for nine of these purchasers.[649] Only Belgium, Japan, Turkey, and Cyprus earned more from tobacco exports than were expended on tobacco imports.[650] In any event, the vast majority of the profits associated with the international tobacco trade flow primarily to multinational companies with meager amounts trickling down to national treasuries and individuals.[651]

Tobacco products are also a significant drain upon the economic resources of individuals and families, especially in the developing world. For example, in Malaysia, the average worker is required to spend five to ten percent of his or her daily income for a single pack of cigarettes.[652] In the Republic of Korea, three percent of the median household income is needed to purchase

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648. *See* U.S. CIGARETTE EXPORTS, *supra* note 252, at 1-3.

649. In 1993, import expenditures in Russia were US$348 million, while export earnings totaled US$6 million. *See Russia Profile, supra* note 299. In 1990, import costs of tobacco and cigarettes totaled US$140.9 million in the Republic of Korea, while export earnings totaled US$80.9 million. *See Korea Profile, supra* note 350. In Singapore, import costs of tobacco and cigarettes exceeded export earnings in 1990—US$490 million to US$458.9 million. *See Singapore Profile, supra* note 361. Import costs of tobacco and cigarettes totaled US$47.2 million in Malaysia in 1990, while export earnings totaled a mere US$651,000. *See Malaysia Profile, supra* note 377. Lebanese tobacco and cigarette imports totaled US$45 million in 1990, while exports earned US$6 million. *See Lebanon Profile, supra* note 389. Export earnings for tobacco products amounted to US$4.8 million in Saudi Arabia in 1993, while import costs totaled US$351.8 million. *See Saudi Arabia Profile, supra* note 396. In Israel, tobacco and cigarette export earnings totaled US$2.9 million, while import expenditures totaled US$76 million in 1993. *See Israel Profile, supra* note 418. Kuwaiti import expenditures and export earnings were US$53 million and US$1 million, respectively, during this same period of time. *See Kuwait Profile, supra* note 430. Finally, in Paraguay, export earnings were US$7 million in 1993, while import expenditures were US$51.5 million for the same period of time. *See Paraguay Profile, supra* note 449. Import expenditure and export earning statistics for the Ukraine and Panama are incomplete and, thus, cannot be the basis for any reliable conclusions.

650. Export earnings exceeded import costs in Belgium by US$78.7 million in 1993. *See Belgium Profile, supra* note 284. In Japan, export earnings exceeded import costs by US$96.3 million in 1990. *See Japan Profile, supra* note 334. In 1993, Turkey's export earnings exceeded import costs of tobacco leaves and products by US$130 million. *See Turkey Profile, supra* note 405. In Cyprus, export earnings exceeded import costs by US$14.9 million in 1993. *See Cyprus Profile, supra* note 321.

651. *See WHO, Fact Sheet N155, supra* note 645.

652. *See Malaysia Profile, supra* note 377. This estimate was based upon wage and price information for 1990. *Id.*

a single pack of cigarettes,[653] while in Paraguay, 4.6% of monthly income would have to be devoted to the purchase of cigarettes in order to support a pack a day smoking habit.[654] This drain upon individual economic resources also exists in developed countries. A pack of cigarettes costs six minutes of labor for the average Japanese worker[655] and thirteen minutes of labor for the average worker in Belgium.[656] By contrast, the average U.S. worker must work ten minutes in order to purchase a single pack of cigarettes.[657]

The United States once again bears partial responsibility for the retardation of economic development caused by tobacco. The Declarations on Social Progress and the Right to Development place responsibility for fostering economic development upon the developed world.[658] Furthermore, developed states have the duties of raising the living standards existing in lesser-developed states and of granting such states favorable and equitable terms of trade.[659] States are specifically instructed to refrain from economic exploitation of their lesser-developed counterparts.[660] Nevertheless, the U.S. government has continued to permit U.S. tobacco companies to vend their deadly and addictive products overseas without restriction, despite the enormous toll in lost lives, health care costs, and decreased economic productivity. These sales remain unchecked despite the negative balance of trade and the drain upon personal income caused by their unregulated presence in overseas markets. The present policies of the United States are a tacit approval of, if not active participation in, the exploitation of non-U.S. citizens through the marketing of a highly profitable, addictive, and deadly product.

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653. *See Korea Profile, supra* note 350. This estimate was based upon wage and price information for 1990. *Id.*

654. *See Paraguay Profile, supra* note 449. This estimate was based upon wage and price information for 1989. *Id.*

655. *See Japan Profile, supra* note 334. This estimate was based upon wage and price information for 1993. *Id.*

656. *See Belgium Profile, supra* note 284. This estimate was based upon wage and price information for 1992. *Id.*

657. *See U.S. Profile, supra* note 45. This estimate was based upon wage and price information for 1991. *Id.*

658. *See* Declaration on the Right to Development, *supra* note 639, art. 3(1), at 186; *see also* Declaration on Social Progress, *supra* note 490, art. 18(a), at 259.

659. *See* Declaration on Social Progress, *supra* note 490, arts. 7, 9, 23(e), at 258-60.

660. *Id.* art. 12(c), at 259.

D. *Tobacco and Governmental Duties*

Finally, the present federal regulatory scheme with regard to the export activities of the U.S. tobacco industry violates two duties imposed upon the United States by numerous global and regional human rights instruments. First, the current regulatory scheme is inconsistent with the duty of the United States to promote and to encourage respect for human rights throughout the world. This duty is undoubtedly implicit in every human rights instrument, including each and every instrument previously cited in this Article. Nevertheless, a brief examination of this duty, as established by the leading global and regional human rights instruments, is in order.

The duty of states to promote and to encourage respect for human rights is set forth in the three instruments that comprise the International Bill of Rights. First, states pledged to achieve, to promote, and to observe human rights in the preamble of the Universal Declaration.[661] This pledge is implemented in binding fashion in the ICCPR, wherein states parties agreed to respect and to protect the rights recognized within the ICCPR as they apply to all persons within their jurisdictions.[662] Furthermore, the states parties agreed to undertake all constitutional and legislative processes necessary to give domestic effect to the rights recognized in the ICCPR.[663] This respect for human rights and pledge to implement such rights is restated in Articles 2(1) and 2(2) of the ICESCR.[664]

The duty to promote and to encourage respect for human rights is also guaranteed in several other instruments relevant to this discussion. States parties to the Convention on the Rights of the Child pledged to respect the rights set forth in the Convention and to ensure children the protections and care necessary

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661. Universal Declaration, *supra* note 457, pmbl., at 135-36.

662. ICCPR, *supra* note 460, art. 2(1), 999 U.N.T.S. at 173, 6 I.L.M. at 369.

663. *Id.* art. 2(2), 999 U.N.T.S. at 173-74, 6 I.L.M. at 369.

664. ICESCR, *supra* note 489, art. 2(1), (2), at 165-66. Article 2(1) of the ICESCR provides, in part, that "[e]ach State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." *Id.* art. 2(1), at 165. Article 2(2) of the ICESCR provides that states parties undertake to guarantee the implementation of the rights set forth in the Covenant without discrimination. *Id.* art. 2(2), at 165-66.

for their well-being.[665] These protections are to be implemented by the states parties through appropriate legislative and administrative measures.[666] The Declaration on Social Progress places a duty upon developed countries to assist developing countries in accelerating their economic growth through the adoption of appropriate legislative and administrative measures.[667] These obligations were subject to further elaboration in the Declaration on the Right to Development, which places the primary responsibility for ensuring development upon states.[668] According to the Declaration on the Right to Development, states have a duty to cooperate with one another to ensure development,[669] as well as a duty to formulate, to adopt, and to implement policies that facilitate international development.[670] Additionally, the Declaration on Scientific Progress requires all states to promote the use of scientific and technological developments for the purpose of global economic and social development and to take all appropriate measures to prevent the misuse of such developments.[671] Finally, this duty is guaranteed by the relevant regional human rights instrument, specifically the American Convention, in which all states parties agreed to "undertake to respect the rights and freedoms recognized herein and . . . ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."[672]

The practices of the U.S. government with regard to the export activities of the U.S. tobacco industry violate the duty of the United States to promote and to encourage respect for international human rights. For the reasons previously noted, the policies, or absence of policies, with respect to the international activities of the tobacco industry hardly serve to promote human rights as required by the Universal Declaration.[673] The duties of the United States to respect the lives, health, and dignity of individuals, and to grant special protective status to children are in-

665. Convention on the Rights of the Child, *supra* note 533, arts. 2(1), 3(2), at 1459.

666. *Id.* art. 4, at 1459.

667. Declaration on Social Progress, *supra* note 490, pmbl., art. 18(a), at 257-59.

668. Declaration on the Right to Development, *supra* note 639, art. 3(1), at 186.

669. *Id.* art. 3(3), at 186.

670. *Id.* arts. 4(1), 10, at 186-87.

671. Declaration on Scientific Progress, *supra* note 613, arts. 1, 2, at 86.

672. American Convention, *supra* note 464, art. 1(1), at 675.

673. Universal Declaration, *supra* note 457, pmbl., at 135-36.

consistent with present policies supporting the international activities of the U.S. tobacco industry.[674] The present policies also fly directly in the face of the duties of the United States to promote and to assist in economic, scientific, and technological development.[675] Furthermore, the failure of the United States to adopt measures recognizing the primacy of these rights and curbing their abuse by the tobacco industry constitutes a violation of those instruments that place an affirmative obligation upon states to promote international standards through appropriate legislative and administrative measures.[676]

The second duty imposed upon the United States that is violated by its practices with respect to tobacco products is the duty to refrain from engaging in actions in derogation of guarantees and rights under circumstances not specifically provided in applicable human rights instruments. Every binding human rights instrument provides for circumstances in which states may deviate from their obligations. A brief examination of such circumstances, as set forth in the leading global and regional instruments relevant to the subject matter of this Article, is pertinent.

The duty to refrain from engaging in actions in derogation of guarantees and rights, under circumstances not specifically provided in applicable human instruments, is set forth in considerable detail in the instruments comprising the International Bill of Rights. Article 29(2) of the Universal Declaration identifies the sole limitations upon the rights established by the Universal Declaration as respect for the rights and freedoms of others, and those necessary for "meeting the just requirements of morality, public order and the general welfare in a democratic society."[677] Furthermore, Article 30 provides that nothing in the Universal Declaration "may be interpreted as implying for any State, group or person any right to engage in any activity or to

674. *See supra* notes 457-604 and accompanying text.

675. *See supra* notes 605-60 and accompanying text; *see also* Declaration on Social Progress, *supra* note 490, pmbl., art. 18(a), at 256-59; Declaration on the Right to Development, *supra* note 639, art. 3(1), (3), at 186; Declaration on Scientific Progress, *supra* note 613, arts. 1, 2, at 86.

676. *See* Universal Declaration, *supra* note 457, pmbl., at 135-36; *see also* ICCPR, *supra* note 460, art. 2(2), at 999 U.N.T.S. at 173-74, 6 I.L.M. at 369; ICESCR, *supra* note 489, art. 2(1), at 165; Convention on the Rights of the Child, *supra* note 533, art. 4, at 1459; Declaration on the Right to Development, *supra* note 639, arts. 4(1), 10, at 186-87.

677. Universal Declaration, *supra* note 457, art. 29(2), at 141.

perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[678] Articles 4 and 5 of the ICCPR and ICESCR elaborate upon the circumstances in which a state may derogate from the protections set forth in the International Bill of Rights. Article 4 of the ICCPR permits derogation in the event of a publicly-proclaimed emergency that threatens the life of the nation, provided that such measures are strictly required by the exigency of the situation and are applied in an equitable fashion in a manner consistent with the state's other international obligations.[679] In any event, no derogation is permitted from the right to life set forth in Article 6(1).[680] Article 4 of the ICESCR permits states to limit the exercise of such rights "only in so far as . . . may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[681] Article 5 of the ICCPR and Article 5 of the ICESCR both restate Article 30 of the Universal Declaration, which prohibits any state from interpreting a covenant in a manner that serves to destroy any guaranteed rights or freedoms.[682]

Derogation is also restricted in other global and regional human rights instruments. Articles 3(2) and 5 of the Convention on the Rights of the Child permit states to derogate from the rights guaranteed therein to the extent necessary to ensure the rights of parents and guardians.[683] Article XXVIII of the American Declaration subjects the rights guaranteed therein to limitations based upon "the rights of others, the security of all, and by the just demands of the general welfare and the advancement of democracy."[684] This clause is implemented in Articles 27 and 30 of the American Convention. Article 27 of the American Convention permits derogation in time of war or other public emergency that threatens the independence or security of a state.[685] All measures adopted in derogation of the rights guaranteed by the American Convention must, however, not be in-

678. *Id.* art. 30, at 141.

679. ICCPR, *supra* note 460, art. 4(1), 999 U.N.T.S. at 174, 6 I.L.M. at 369-70.

680. *Id.* art. 4(2), 999 U.N.T.S. at 174, 6 I.L.M. 370.

681. ICESCR, *supra* note 489, art. 4, at 166.

682. *Id.* art. 5, at 166; *see* ICCPR, *supra* note 460, art. 5, 999 U.N.T.S. at 174, 6 I.L.M. at 370.

683. Convention on the Rights of the Child, *supra* note 533, arts. 3(2), 5, at 1459-60.

684. American Declaration, *supra* note 463, art. XXVIII, at 24.

685. American Convention, *supra* note 464, art. 27(1), at 683.

consistent with the state's other international obligations and may not be applied in a discriminatory manner.[686] Additionally, all such measures are required to be implemented in accordance with the laws of the jurisdiction for the specific purpose of remediation of the circumstances requiring derogation.[687] In any event, no derogation is permitted from the right to life and the rights of children as guaranteed by the American Convention.[688]

Regardless of the aforementioned derogation provisions, the practices of the United States with respect to the tobacco industry are not justified under any applicable derogation clause. There are no explanations or interpretations of current governmental programs that are consistent with U.S. obligations under any of the above-referenced human rights instruments. The most common defenses of these programs are the promotion of U.S. business interests abroad and the protection of the economic competitiveness of the U.S. tobacco industry that is necessitated by similar practices engaged in by other states.[689] Such defenses, however, ignore the prohibitions contained within human rights instruments regarding interpretations that impinge upon or otherwise nullify the rights of others.[690] These defenses nullify the rights of all persons to life and attainment of the highest standards of health.[691] These defenses also impinge upon the rights of all persons to seek and to receive accurate information and to be treated with respect as individuals rather than replaceable product-consuming units.[692] Finally, any defense of present governmental practices interferes with the rights of all societies to receive the benefits of science and to attain the highest levels of economic development.[693]

A responsible national policy that imposes limitations upon the activities of U.S. tobacco companies in overseas markets

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686. *Id.*

687. *Id.* art. 30, at 684.

688. *Id.* art. 27(2), at 683.

689. *See WHO, Fact Sheet N155*, *supra* note 645; *see also* van Voorst, *supra* note 11, at 63; *Big Tobacco Aims to Keep the World Lighting Up*, *supra* note 600, at A-15.

690. *See* Universal Declaration, *supra* note 457, arts. 29(2), 30, at 141; *see also* ICCPR, *supra* note 460, art. 30, 999 U.N.T.S. at 180, 6 I.L.M. at 376; ICESCR, *supra* note 489, art. 30, at 168.

691. *See supra* notes 457-573 and accompanying text.

692. *See supra* notes 574-604 and accompanying text.

693. *See supra* notes 605-60 and accompanying text.

would be consistent with the derogation provisions of applicable human rights instruments. A responsible policy would most certainly respect the rights and freedoms of others, especially the right to life from which no derogation is permitted.[694] In fact, such a policy would serve the general welfare of all persons by discouraging the production of tobacco and regulating the distribution of its deadly products.[695] With respect to children, a responsible national tobacco policy would not only preserve the lives and health of children and recognize their special protective status, but also might serve to protect the rights of parents who are now engaged in a losing battle to shield their children from the glamorous images of smoking portrayed by tobacco companies in their advertising.[696] As required by those provisions affirmatively establishing the rights of individuals and societies, the derogation provisions of applicable human rights instruments also demand the adoption of a responsible national policy by all states with regard to the activities of tobacco companies in the international marketplace.

IV. *CONCLUSION*

Tobacco has been the scourge of humankind for almost 500 years. The cause or a contributing factor in more than twenty-five diseases, tobacco causes 3.5 million deaths annually, which is six percent of all deaths worldwide.[697] If current trends are not reversed, this rate will climb to ten million persons annually.[698] The vast majority of these persons reside in countries unable to combat the burgeoning epidemic within their borders or to treat adequately those already sick and in need of assistance.[699] Millions of these potential victims are the truly voiceless, the world's children, who are mankind's future, but are its weakest and most easily exploited group.[700] Even those unaffected by the physical ravishes of tobacco addiction suffer as a result of the stupendous

694. *See* ICCPR, *supra* note 460, art. 4, 999 U.N.T.S. at 174, 6 I.L.M. at 369-70; *see also* American Convention, *supra* note 464, art. 27, at 683.

695. *See* Universal Declaration, *supra* note 457, art. 29(2), at 141; *see also* ICESCR, *supra* note 489, art. 4, at 166; American Declaration, *supra* note 463, art. XXVIII, at 24.

696. *See* Convention on the Rights of the Child, *supra* note 533, arts. 3(2), 5, at 1459-60.

697. *See supra* notes 272-73, 494 and accompanying text.

698. *See supra* note 279 and accompanying text.

699. *See supra* note 280 and accompanying text.

700. *See supra* notes 521-73 and accompanying text.

costs associated with treatment, mortality, and disability that serve as a substantial barrier to present and future economic development.[701]

Nevertheless, the U.S. tobacco industry has continued to expand its role as the leading exporter of manufactured tobacco products, selling approximately 217 billion cigarettes in the global marketplace on an annual basis.[702] Operating free of domestic and international controls and with the financial support of the federal government, the U.S. tobacco industry markets its products throughout the world as a symbol of the perceived glamour and freedom of the Western lifestyle.[703] The largely untapped female market has also been cultivated through the association of smoking with images of emancipation and sexuality.[704] Perhaps most troubling of all, however, has been the cultivation of future customers through the enticement of children to smoke utilizing advertising, clothing, cultural and sporting events sponsorships, and product placement.[705] The efficacy of these marketing campaigns is readily apparent in the 260% growth in U.S. cigarette exports between 1986 and 1996 with no indication of decline in the near future.[706]

Despite these concerns, the United States continues to pursue policies that promote the exportation of tobacco products and their consumption in other countries. The United States shields tobacco farmers from the pressures of the free market through a combination of marketing quotas and non-recourse commodity loans.[707] Tobacco farmers are also shielded from the vagaries of nature through subsidized multiple peril crop insurance.[708] Additionally, the federal government performs domestic and international market research, prepares economic forecasts for tobacco farmers, and funds educational and technical assistance programs that serve as links between farmers and agricultural research institutions.[709] Tens of millions of U.S. dollars are expended upon these programs annually despite recent ef-

701. *See supra* notes 631-60 and accompanying text.
702. *See supra* note 252 and accompanying text.
703. *See supra* notes 591-99 and accompanying text.
704. *See supra* notes 594-95 and accompanying text.
705. *See supra* notes 547-51 and accompanying text.
706. *See supra* note 21 and accompanying text.
707. *See supra* notes 89-136 and accompanying text.
708. *See supra* notes 137-58 and accompanying text.
709. *See supra* notes 159-66 and accompanying text.

forts to eliminate or to reduce their cost to taxpayers.[710] Conversely, in those areas truly in need of federal regulation, such as overseas marketing practices, packaging, and labeling, the United States has remained silent. The United States has also remained impassive in seeking international cooperation to devise strategies to combat the spread of tobacco consumption in the global community. Rather, the United States has ceded the international marketplace to its tobacco companies who have been given unfettered rein to addict, to maim, and to kill millions throughout the world through the peddling of their noxious wares.

The time has come for the United States to reorient its policies with regard to the promotion of U.S. tobacco products in the international marketplace. This reorientation should consist of both domestic and international initiatives. The domestic component of this reorientation should consist of several separate initiatives. First, the United States must adopt a responsible domestic tobacco control policy. This policy should consist of health education and smoking cessation programs as well as adequate safeguards to protect children from tobacco addiction and nonsmokers from the effects of environmental tobacco smoke.[711] Additionally, this policy should discourage tobacco usage through fiscal measures such as steep taxes upon tobacco sales, the proceeds of which could be utilized to finance other tobacco control and health promotion measures.[712] All forms of tobacco advertising, promotion, and sponsorship should be eliminated.[713] Furthermore, the authority of the U.S. Food and Drug Administration to regulate nicotine as a drug, and cigarettes as drug delivery devices, should be recognized. In this regard, the U.S. Food and Drug Administration should place limitations upon and should require mandatory reporting of all constituents contained within tobacco products.[714] Finally, this policy should promote alternatives to tobacco cultivation.[715] The tobacco production quota, price support, and crop insur-

710. *See supra* notes 128-36, 154-58 and accompanying text.

711. *See* WHO, *Why Are Comprehensive Tobacco Control Measures Necessary?*, *supra* note 585.

712. *Id.*

713. *Id.*

714. *Id.*

715. *Id.*

ance programs should be terminated or gradually eliminated, and assistance should be offered to those who suffer resultant economic dislocation.

The international component of this reorientation should consist of five separate initiatives. Initially, the United States must end governmental support for the activities of domestic tobacco companies in the global marketplace. All federal programs, or portions thereof, designed to support or to promote the exportation of tobacco or manufactured tobacco products should be immediately terminated or eliminated over time.[716] The United States should also refrain from attempting to weaken non-U.S. tobacco regulation in the absence of arbitrary discrimination and legitimate public health concerns.[717] In this regard, tobacco products should be removed from Section 301 of the Trade Act of 1974, thereby prohibiting the threatened use of unilateral trade sanctions to interfere with national tobacco control activities of other countries.[718]

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716. *See* Action on Smoking and Health, *Senators Propose International Restrictions*, *supra* note 603.

717. *Id.*

718. *See Report of the Kessler-Koop Advisory Committee on Tobacco Policy and Public Health* (visited July 9, 1997) <http://www.tobacco.neu.edu/Extra/hotdocs> [hereinafter *Kessler-Koop Report*] (on file with the *Fordham International Law Journal*). Section 301 of the Trade Act of 1974 provides, in part, that:

> (a) Whenever the President determines that a foreign country or instrumentality -
>
> (1) maintains unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States or which burden, restrict or discriminate against United States commerce,
>
> (2) engages in discriminatory or other acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce,
>
> (3) provides subsidies . . . on its exports of one or more products to the United States or to other foreign markets which have the effect of substantially reducing sales of the competitive United States product or products in the United States or in those other foreign markets, or
>
> (4) imposes unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products which burden or restrict United States commerce,
>
> the President shall take all appropriate and feasible steps within his power to obtain the elimination of such restrictions or subsidies, and he -
>
> (A) may suspend, withdraw, or prevent the application of, or may refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality; and
>
> (B) may impose duties or other import restrictions on the products of

The third component of this international reorientation should be the establishment of a code of conduct governing the labeling and advertising of U.S. tobacco products sold overseas.[719] For example, U.S. tobacco companies should be required to include health warning labels upon their products sold overseas that are as stringent as those required upon products offered for sale in the United States.[720] Additionally, U.S. tobacco companies should be subject to the same restraints upon advertising, marketing, and selling tobacco products abroad as are applicable to their domestic activities, including absolute prohibitions upon marketing and sales to children.[721] Furthermore, a fee should be assessed upon every package of cigarettes sold by U.S. tobacco companies abroad in order to fund tobacco control efforts by non-governmental and multilateral international organizations, as well as related research efforts.[722]

The fourth international component of this reorientation should consist of U.S. support for the World Health Assembly's May 1996 resolution calling upon the Director-General to initiate the development of an international framework convention for tobacco control in accordance with Article 19 of the Constitution of the World Health Organization.[723] Although the ultimate content of the convention would be dependent upon the whims of the signatories, several potential topics would be appropriate for inclusion. For example, the convention could attempt to formulate restrictions upon tobacco advertising and marketing practices, including prohibitions upon sales to children.[724]

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such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate . . . .

19 U.S.C. § 2411 (1994).

719. *See* Action on Smoking and Health, *Senators Propose International Restrictions*, *supra* note 603.

720. *Id.*

721. *Id.*

722. *Id.*; *see Kessler-Koop Report*, *supra* note 718.

723. *See* World Health Organization, *International Collaboration: An International Framework Convention for Tobacco Control* (visited Apr. 16, 1998) <http://www.who.ch/psa/toh/Alert/4-96/E/tal0.html> (on file with the *Fordham International Law Journal*) (citing to World Health Assembly Resolution WHA A49.17 (May 1996)). The World Health Assembly is the highest governing body of the World Health Organization. *See* World Health Organization, *Fact Sheet N160, An International Framework Convention for Tobacco Control* (visited Mar. 23, 1998) <http://www.who.org/inf/fs/fact160.html> (on file with the *Fordham International Law Journal*) [hereinafter *WHO, Fact Sheet N160*].

724. *See WHO, Fact Sheet N160*, *supra* note 723.

The problems posed to tobacco control authorities by smuggling could also be addressed in the convention.[725] Smuggling could be reduced by harmonization of tobacco pricing and taxation policies that would have the added benefit of discouraging tobacco usage.[726] The creation of effective standards for testing and reporting constituents in tobacco products could also be addressed in an international convention.[727] Finally, the convention could improve standards of reporting of production, sales, imports, and exports of tobacco products, as well as information sharing and coordination of control strategies amongst signatories.[728] The United States should not only lead the efforts to develop this convention and sign it, but also should undertake efforts to adopt and to ratify treaties implementing the convention in a binding fashion.[729]

The final international component of this reorientation should be U.S. support for the development of a non-governmental international tobacco control commission.[730] The commission could be controlled by a board of directors consisting of recognized leaders in the field of public health from throughout the world. The commission should be sufficiently empowered to accomplish a tripartite mission. Initially, the commission would be responsible for monitoring international tobacco control efforts.[731] The commission would also be responsible for developing uniform standards and procedures for international and regional non-governmental organizations advocating tobacco control.[732] Further assistance could be offered to such non-governmental organizations in the form of public education programs, technical assistance, media campaigns and strategy, and financial aid such as grants.[733] Finally, the commission could act as an international clearinghouse for the exchange of informa-

725. *Id.* According to the WHO, approximately six percent of world cigarette production is subject to smuggling in order to avoid cigarette taxes, resulting in lost revenues totaling US$16 billion annually. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. *See Kessler-Koop Report*, *supra* note 718.

730. *Id.*

731. *Id.*

732. *Id.*

733. *See* Action on Smoking and Health, *Senators Propose International Restrictions*, *supra* note 603.

tion including all publicly available documents released by the tobacco industry in response to governmental requests and litigation.[734]

The outcome of these efforts cannot be predicted with any degree of certainty. The implementation of comprehensive tobacco control measures cuts across many different fields including health, agriculture, labor, fiscal policy, and trade. Furthermore, the adoption and implementation of such control measures trigger concerns regarding sovereignty and the right of each country to determine what is best for its citizens. Additionally, international tobacco control efforts will be required to grapple with the ultimate unknown—the free choice of individuals to continue smoking or their inability to break their addictions. These choices and addictions ultimately drive global demand and may serve to blunt the effect of even the most rigorous control measures.[735] Finally, such measures would undoubtedly have an economic impact of indeterminate severity upon the labor force and balance of trade of those countries that rely upon tobacco cultivation and production for export revenues. Although the deleterious economic effects of such measures can be partially offset through programs such as quota buyouts and financial aid to promote cultivation of alternative crops, worker transition, and education, there will undoubtedly be economic hardship and suffering for some individuals as a result of the implementation of these recommended control measures.

As a result, any tobacco control measures proposed by the United States will undoubtedly provoke a firestorm of domestic and international controversy. Nevertheless, the present policies of the United States promoting the exportation and consumption of tobacco products cannot continue unchanged or unchal-

734. *See Kessler-Koop Report*, *supra* note 718.

735. Although the author has referred to the consumption of tobacco products both as an exercise of free choice and as an addiction, it bears to note that the WHO first recognized tobacco as dependence-producing in 1974 and included it upon its list of dependence-producing drugs in 1992. *See* FOOD AND DRUG ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NICOTINE IN CIGARETTES AND SMOKELESS TOBACCO PRODUCTS IS A DRUG AND THESE PRODUCTS ARE NICOTINE DELIVERY DEVICES UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT, JURISDICTIONAL ANALYSIS, *supra* note 54, app. 1. Thus, the author submits that the vast majority of those persons who regularly smoke cigarettes, and continue to do so despite stringent tobacco control measures, do so as a result of addiction rather than as a result of free choice.

lenged in light of the enormous toll that such products wreak upon the lives and health of the global citizenry. Simply put, these policies are a declaration of war upon the lives and health of the citizens of all members of the global community and constitute the single most pervasive and serious human rights violations in the world today. The time has come for the United States to address these issues in a responsible manner within the framework of international institutions. President Clinton recognized the inevitability of international action to address the smoking epidemic in August 1997, when he stated that "it is as inevitable as the sun coming out today that international institutions . . . and nations will be called upon to responsibly deal with [tobacco]."[736] The call for responsible leadership in this area remains unanswered in Washington, however. Nevertheless, the need for action by the United States is urgent in order to prevent a future U.S. president from "having to tour Eastern Europe or India one day to apologize for a lack of American sensitivity to and fair play for the vulnerable abroad."[737]

736. *Excerpts from President Clinton's News Conference*, *supra* note 572, at A16.
737. Hoagland, *supra* note 547, at A25.