Conference of the Parties to the WHO Framework Convention on Tobacco Control

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Implementation of Article 19 of the Convention: "*Liability*"

BACKGROUND

1. This document was prepared to support consideration by the Conference of the Parties of Provisional agenda item 5.9 concerning liability. The document provides a summary of implementation of Article 19 of the WHO Framework Convention on Tobacco Control (FCTC) by Parties based on their reports submitted in accordance with Article 21 of the WHO FCTC as well as experiences in other relevant areas, such as, in particular, the environment.

2. Article 19 of the WHO FCTC does not establish a liability regime, but stipulates that Parties shall consider taking legislative action or promoting their existing laws to deal with criminal and civil liability, including compensation where appropriate. Parties shall also cooperate in exchanging information on various matters, such as legislation, regulations in force and pertinent jurisprudence, and afford one another assistance in legal proceedings relating to liability, as appropriate and mutually agreed.

3. Article 19.5 stipulates that the Conference of the Parties "may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article".

4. It is also important to note that in the course of the negotiations of the WHO FCTC, a panel of legal experts was convened by WHO in April 2001 to explore the nature and scope of potential liability and compensation provisions in the Convention. The main themes and questions discussed during that consultation included the possible scope and feasibility of a liability regime, the applicability of liability regimes established by other international conventions (including the "polluter pays" principle), experience in tobacco-related litigation, as well as funds for preventive and

compensation measures. The report of the expert group[1] was presented to the Intergovernmental Negotiating Body to assist with negotiations of the Convention.

Parties' experiences

5. Reports of the Parties on implementation of the Convention provide the opportunity to analyse the experiences of Parties and discern trends in implementation of Article 19.

6. Of the 135 Parties that have submitted their implementation reports so far, 46 Parties (34%) reported having implemented measures dealing with criminal and civil liability, including compensation where appropriate, for the purposes of tobacco control. Eighty-one (60%) replied "no" to the question, and eight (6%) left it unanswered.

7. The questionnaire adopted by the Conference of the Parties at its third session (Durban, South Africa, 17–22 November 2008) for the second (five-year) reports of Parties included two additional questions in order to allow Parties to report on liability actions that had been taken to advance tobacco control in their jurisdictions. When asked whether any person in their jurisdiction had launched any criminal and/or civil liability action, including compensation where appropriate, against any tobacco company in relation to any adverse health effect caused by tobacco use, out of 30 Parties that submitted their second (five-year) implementation reports, nine responded "yes", 20 responded "no", and one left the question unanswered. Parties were also requested to report whether they had taken any legislative, executive, administrative and/or other action against the tobacco industry for full or partial reimbursement of medical, social and other relevant costs related to tobacco use in their jurisdiction. Out of the 30 Parties that submitted their second reports, only three responded affirmatively and 27 replied "no".

8. Several Parties provided details on their implementation of Article 19 of the Convention. Canada and Japan indicated that they included liability in their national legislations and also provided the text of such legislation. Canada in addition provided an extensive list of provincial legislation (which varies across provinces) concerning compensation for health damage by the tobacco industry. Five Parties (Finland, Japan, Marshall Islands, Norway and Panama) reported on court cases seeking compensation for health damage caused by tobacco use.

9. Though individual progress has been reported by several Parties, globally, Article 19 is one of the few articles of the Convention for which no notable progress can be traced across the two reporting cycles (two-year reports and five-year reports).

Liability in international law in the field of the environment

10. International treaties concerning liability have been developed in response to environmental emergencies of international significance, in particular those that have occurred since the 1960s, such as large-scale oil spills from tanker accidents at sea, accidents involving nuclear installations and incidents of hazardous waste dumping across borders. In addition, there have been efforts to address liability in other areas involving potentially hazardous activities, installations, or substances. These treaties cover areas such as hazardous waste, marine pollution, nuclear safety, and transport. Under those existing international treaties, the focus has been specifically on civil liability.

[1] See also document A/FCTC/INB2/5 Rev.1 (*Secretariat update on the WHO consultation on potential liability and compensation provisions for the framework convention on tobacco control*).

11. Generally, the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction has been recognized, as emphasized in the Declaration of the United Nations Conference on Human Environment (the Stockholm Declaration) of 1972 and the Rio Declaration on Environment and Development of 1992. This responsibility is coupled with the sovereign right of States to exploit their own resources pursuant to their own environmental and developmental policies, in accordance with the Charter of the United Nations and the principles of international law.

12. Regarding the development of national and international law concerning liability, the Rio Declaration also asserts that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage" and that "States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction". The latter was also addressed in the Stockholm Declaration, which proclaims that States shall "cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction".

13. It should also be noted that the Governing Council of the United Nations Environment Programme recently adopted guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment.[1] The objective of the guidelines, which address issues such as response action, liability, exoneration from liability, claims for compensation and financial limits, is to provide guidance to States regarding domestic rules on liability, response action and compensation.

14. A detailed note on liability addressed in international law in the field of the environment was prepared by the Division of Environmental Law and Conventions of the United Nations Environment Programme at the request of the Convention Secretariat and is attached at Annex.

ACTION BY THE CONFERENCE OF THE PARTIES

15. The Conference of the Parties is invited to note this report and provide further guidance.

[1] Governing Council of the United Nations Environment Programme Decision SS.XI/5, part B, 26 February 2010.

ANNEX

LIABILITY ADDRESSED IN INTERNATIONAL LAW IN THE FIELD OF THE ENVIRONMENT

1. This Annex[1] provides a brief overview of the liability regimes as contained in existing international legal instruments, in particular international treaties in the field of the environment.

General trend and principles in addressing liability in international environmental treaties

2. International treaties concerning liability have been developed in response to environmental emergencies of international significance, in particular those that have occurred since the 1960s, such as large-scale oil spills from tanker accidents at sea, accidents involving nuclear installations and incidents of hazardous waste dumping across borders. Consequently, international environmental treaties concerning liability have generally evolved to cover those areas. In addition, there have been efforts to address liability in other areas involving potentially hazardous activities or installations, or activities involving potentially hazardous substances (such as their transport).

3. At the regional level, an international treaty to address civil liability with regard to environmental damage has been adopted in Europe. Under the protocol on environmental protection to the Antarctic Treaty, an annex on liability arising from environmental emergencies has been adopted. A number of regional seas conventions and protocols also have provisions on liability to enable their Parties to take appropriate action.

4. Under those existing international treaties, the focus has been specifically on civil liability.

5. There has generally been a recognition that States have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction, as emphasized in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) of 1972 and Principle 2 of the Rio Declaration on Environment and Development of 1992. This responsibility is coupled with the sovereign right of States to exploit their own resources pursuant to their own environmental and developmental policies, in accordance with the Charter of the United Nations and the principles of international law, as also stated in the above-mentioned principles.

6. Regarding the development of national and international law on liability, Principle 13 of the Rio Declaration asserts that “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage” and that “States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction”. The latter was also addressed in Principle 22 of the Stockholm Declaration which proclaims that “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other

[1] This Annex was kindly prepared by the Division of Environmental Law and Conventions of the United Nations Environment Programme, at the request of the Convention Secretariat.

environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction".

Hazardous waste

7. The **Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal**[1] was adopted in 1999 as a protocol to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The Basel Protocol establishes a comprehensive regime for assigning liability in the event of an accident involving hazardous waste as well as adequate and prompt compensation for damage resulting from its transboundary movement, including incidents occurring because of illegal traffic in such materials. Damage, as defined in the Protocol, includes traditional damage (loss of life, personal injury or damage to property), economic loss, and the costs of reinstatement and preventive measures (environmental damage). Liability is strict and the notifier or exporter is liable for damage until the disposer has taken possession of the waste. Fault-based liability can be imposed for intentional, reckless or negligent acts or omissions. The Protocol applies to the territories under the jurisdiction of the Parties, including any land, marine area or airspace within which a Party exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment. It applies only to damage suffered in an area under the national jurisdiction of a Party arising from an incident as defined, as well as to areas beyond national jurisdiction and non-Contracting States of transit, provided those States afford reciprocal benefits on the basis of international agreements.

Marine pollution

8. The **International Convention on Civil Liability for Oil Pollution Damage** was adopted in 1969 and amended by protocols in 1976 and 1992. It was adopted under the auspices of the International Maritime Organization (IMO) in response to the *Torrey Canyon* oil spill disaster of 1967, as a regime to guarantee the payment of compensation by shipowners for oil pollution damage. The objective of the Convention is not only to ensure that adequate compensation is available to persons who suffer damage caused by oil pollution, but also to standardize international rules and procedures for determining questions of liability and adequate compensation in such areas. The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged. The 1992 protocol widens the scope of the convention to cover pollution damage in exclusive economic zones. The 1992 protocol also further limits liability to costs incurred for reasonable measures to reinstate the environment.

9. The **Convention on the Establishment of an International Fund for Compensation for Oil Pollution damage** was adopted in 1971 and amended by protocols of 1976 and 1992. It was adopted under the auspices of the IMO to ensure that adequate compensation is available to persons suffering damage caused by oil pollution discharged from ships in cases where compensation under the 1969 International Convention on Civil Liability for Oil Pollution Damage was inadequate or could not be obtained.

10. The **Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Sea Bed Mineral Resources** was adopted in 1977 with the objective of ensuring adequate compensation is available to victims of pollution damage from offshore activities,

[1] The Protocol had not entered into force at the time of writing.

by means of the adoption of uniform rules and procedures for determining questions of liability and for providing such compensation. The operator is liable for damage originating from the installation, and liability extends for five years after abandonment of the installation.

11. The **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea**[1] was adopted in 1996 to regulate compensation for victims of accidents involving the transport of hazardous and noxious substances. Damage, as defined in the Convention, includes loss of life, personal injury, loss of or damage to property outside the ship, loss or damage by contamination of the environment, and the costs of preventive measures. It does not apply to damage caused by radioactive material or to warships or other ships owned by the State and used for non-commercial service. Under this Convention, the shipowner is strictly liable for damage and is required to have insurance and insurance certificates.

12. The **International Convention on Civil Liability for Bunker Oil Pollution Damage** ("Bunker Oil Pollution") was adopted in 2001.[1] Its objective is to ensure that adequate, prompt, and effective compensation is paid to persons who suffer damage caused by oil spills when carried as fuel in ships' bunkers. It applies to damage caused in the territory of the Contracting Party, including the territorial sea and exclusive economic zones.

Nuclear safety

13. A comprehensive liability regime with regard to nuclear installations was established through the **Convention on Third Party Liability in the Field of Nuclear Energy** ("Paris Convention"), concluded under the auspices of the Organisation for Economic Co-operation and Development in 1960, and the **Convention on Civil Liability for Nuclear Damage** ("Vienna Convention"), concluded under the auspices of the International Atomic Energy Agency in 1963. Their J**oint Protocol Relating to the Application of the Vienna Convention and the Paris Convention** ("Joint Protocol") was adopted in 1988. The objective of the Paris Convention is to ensure adequate and equitable compensation for persons who suffer damage caused by "nuclear incidents", which covers cases of gradual radioactive contamination, but not normal or controlled releases of radiation. The Convention establishes a regime of absolute liability for the operator of a nuclear installation for damage including loss of life, and damage or loss to property other than the nuclear installation itself and it was supplemented by the **Convention Supplementary to the 1960 Paris Convention** ("Brussels Supplementary Convention") in 1963. Upon entry into force of the Joint Protocol most features of the Paris Convention were harmonized with the Vienna Convention. The latter provides financial protection against damage resulting from the peaceful uses of nuclear energy. The Vienna Convention is unique in that it defines "persons" to include both individuals and states. Nuclear damage includes the loss of life, personal injury, and damage to property. Under the Vienna Convention, the operator of the nuclear installation is absolutely liable for damage caused by a nuclear incident, and is required to maintain insurance. The Joint Protocol established a link between the Vienna Convention and the Paris Convention, combining them into one expanded liability regime.

14. The **Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material** was adopted in 1971 to resolve difficulties and conflicts which arise from the simultaneous application to nuclear damage of certain maritime conventions dealing with shipowners' liability. A person otherwise liable for damage caused in a nuclear incident shall be exonerated for liability if the

[1] The Convention had not entered into force at the time of writing.

operator of the nuclear installation is also liable for such damage by virtue of the Paris Convention or the Vienna Convention, or national law of similar scope of protection.

15. The **Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage** ("Vienna Protocol"), adopted in 1997, extends the possible limit of the operator's liability and the geographical scope of the Vienna Convention to include the territory of Non-Contracting states, established maritime zones, and exclusive economic zones. It provides for jurisdiction of coastal States over actions incurring nuclear damage during transport. It also extends the period during which claims may be brought for loss of life and personal injury with respect to the Vienna Convention.

16. The **Convention on Supplementary Compensation for Nuclear Damage,**[1] adopted in 1997, establishes a worldwide liability regime to supplement and enhance the measures provided in the Vienna Convention and the Paris Convention with a view to increasing the amount of compensation for nuclear damage. Compensation in respect of nuclear damage per nuclear incident is to be ensured by financial resources made available by the Contracting Parties concerned, including public funds provided in accordance with the formula for contributions under the Convention. The procedure concerning supplementary funding is set out, including the notification of nuclear damage, calls for public funds, listing of all nuclear installations, rights of recourse, and disbursement and allocation of funds.

Transport

17. The **Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels**[1] was adopted in 1989. The objective of the Convention is to encourage technically safe methods of carrying dangerous goods by road, rail and inland navigation vessels, by prescribing uniform rules of liability, and for adequate and prompt compensation where damage occurs. The Convention applies to incidents occurring and to damage caused in States Parties. It covers claims not provided for in contracts for carriage of goods; but it does not cover situations in which the dangerous goods are loaded in a vehicle carried by a sea-going ship, sea-borne craft or aircraft. Liability provisions under the Convention include evidentiary matters, modes of determining causation of damage, and apportionment of responsibility. States Parties are to enact domestic legislation giving effect to the Convention. The Convention also sets out limitation periods for claims and the procedures for making them, and of the authority of juridical determinations made.

Regional treaties

18. A general instrument in the field of civil liability for environmental harm, although adopted at the regional level, is the **Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment** ("Lugano Convention")[2]. The Convention aims to ensure that there is adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement. It only applies to dangerous activities involving, for example, hazardous substances specified in Annex I, genetically modified organisms, micro-organisms and waste. It covers all types of damage including loss of life, personal injury, damage to property, loss or damage by impairment of the environment, and the costs of preventive measures

[1] The Convention had not entered into force at the time of writing.

[2] The Convention was adopted in 1993 by the Committee of Ministers of the Council of Europe.

(both traditional damage and environmental damage) when caused by a dangerous activity. The Convention applies whether the incident occurs inside or outside the territory of a Party, but does not apply to damage arising from carriage, or to nuclear substances. The extension of the territorial application of the Convention is based on rules of reciprocity.

19. Another important instrument in the field of international civil liability for environmental damage at the regional level is the **Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents** ("Civil Liability Protocol")[1]. The Civil Liability Protocol provides individuals affected by the transboundary impact of industrial accidents on international watercourses (such as fishermen or operators of downstream waterworks) with a legal claim for adequate and prompt compensation. According to the Protocol, companies will be liable for accidents at industrial installations, including tailing dams, as well as during transport via pipelines. Damage covered by the Protocol includes physical damage, damage to property, and loss of income. The cost of reinstatement and response measures is also covered by the Protocol. The Protocol contains a non-discrimination provision, according to which victims of the transboundary effects cannot be treated less favourably than victims from the country where the accident has occurred.

20. In addition to the above, Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty concerning Liability Arising From Environmental Emergencies was adopted in 2005. A number of regional seas conventions and protocols also set out provisions governing liability issues.

Others

21. The need to address the subject of liability was also envisaged in a number of international environmental treaties in other fields, such as the **Cartagena Protocol on Biosafety to the Convention on Biological Diversity**. Article 27 (Liability and Redress) of the Cartagena Protocol states that the Conference of the Parties serving as the meeting of the Parties (COP-MOP) shall adopt a process for the elaboration of international rules and procedures in the field of liability and redress, preferably within four years. Accordingly, at its first session, the COP-MOP established an open-ended working group of legal and technical experts to elaborate options for such rules. The results were presented to the fourth session of the COP-MOP. At the time of writing, it was expected that the fifth meeting of the COP-MOP (Nagoya, Japan, 11–15 October 2010) would consider the outcome of the negotiations of the Group of Friends of the Co-Chairs established at the previous meeting[2] and take appropriate action.

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[1] The Protocol, adopted in 2003 at the Ministerial Conference "Environment for Europe" in Kiev, Ukraine, had not entered into force at the time of writing.

[2] See document UNEP/CBD/BS/COP-MOP/5/11.