



WHO FRAMEWORK CONVENTION  
ON TOBACCO CONTROL

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

Fifth session  
Seoul, Republic of Korea, 12–17 November 2012  
**Provisional agenda item 6.4**

**FCTC/COP/5/11  
25 July 2012**

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## **Implementation of Article 19 of the WHO FCTC: “*Liability*”**

### **Report by the Convention Secretariat**

#### **INTRODUCTION**

1. This document was prepared in response to the request made by the Conference of the Parties (COP) at its fourth session (Punta del Este, Uruguay, 15–20 November 2010) to the Convention Secretariat to prepare jointly with WHO’s Tobacco Free Initiative a comprehensive report on the matter of liability in the context of Article 19 of the WHO Framework Convention on Tobacco Control (WHO FCTC), including possible mechanisms on appropriate means by which the COP could support Parties in their activities in accordance with this Article, for consideration at the fifth session of the COP.<sup>1</sup>

2. One of the guiding principles of the Convention is that “issues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control”.<sup>2</sup> While Article 19 of the WHO FCTC does not create a liability regime, it does require Parties to “consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate”. In addition, Parties are required to cooperate in the exchange of information in respect of various matters, including on “legislation and regulations in force as well as pertinent jurisprudence”. Parties also agreed in Article 19 to provide one another with assistance in legal proceedings relating to civil and criminal liability, as appropriate and mutually agreed, and within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements.

3. Article 19.5 states that the COP may consider “at any 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”.

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<sup>1</sup> See decision FCTC/COP4(15).

<sup>2</sup> Article 4.5.

## BACKGROUND

4. During the negotiation of the WHO FCTC, WHO convened in April 2001 a panel of legal experts to explore the nature and scope of potential liability and compensation provisions in the Convention. The main themes and questions considered during that consultation included the possible scope and feasibility of a liability regime, the applicability of liability regimes established by other conventions, experience in tobacco-related litigation, as well as the possible creation of funds to support preventive measures and compensation. The report of the expert group was presented at the second session of the Intergovernmental Negotiating Body to assist with the negotiation of the WHO FCTC.<sup>1</sup>

5. At the fourth session of the Conference of the Parties, in November 2010, the Secretariat provided a document to support the Parties' consideration of the implementation of Article 19 on liability.<sup>2</sup> That document provided a survey of background information, data on the experiences of Parties as found in the implementation reports submitted to the Secretariat, as well as relevant material on liability in international law in the field of the environment.

## PARTIES' EXPERIENCES REFLECTED IN PARTY REPORTS

6. The reporting instrument adopted by the Parties to provide information on their implementation of the Convention contains three questions relating directly to Article 19, as well as a request for a brief description of any progress made in implementing Article 19 in the previous two years or since submission of the Party's last report.

7. 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, of the 126 Parties that reported in the 2012 reporting cycle, 22 (17%) responded "yes", 100 (79%) responded "no" and 4 left the question unanswered. Concerning progress made in this regard since the submission of their last report, 7 Parties provided additional information that criminal or civil liability actions had been launched in their jurisdictions against tobacco companies by individuals or groups seeking compensation for adverse health effects caused by tobacco use (Australia, Canada, Finland, Ireland, Norway, Republic of Korea and the United Kingdom of Great Britain and Northern Ireland).

8. 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. Of the 126 Parties that reported, 6 (5%) responded "yes", 115 (91%) responded "no" and 5 left the question unanswered. In regard to progress made since the submission of their last report, Canada, Panama and Spain provided additional information that they had taken action against the tobacco industry for full or partial reimbursement of medical, social and other relevant costs related to tobacco use and Brazil indicated that legislation was in the process of development to establish the compensation to be paid by the tobacco industry to the government for the treatment costs of tobacco-related diseases.

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

<sup>2</sup> See: *Implementation of Article 19 of the Convention: "Liability"* (document FCTC/COP/4/13).

9. A number of Parties provided additional information in respect of progress made since the submission of their last report: 5 Parties reported that they had implemented measures in respect of civil liability for tobacco control (Burkina Faso, Canada, Djibouti, Honduras and Serbia), with 2 of those Parties specifically reporting that their implementation measures covered both civil and criminal liability (Djibouti and Serbia). In addition, 6 Parties reported that they had existing non-tobacco specific measures for civil and/or criminal liability (Austria, Botswana, Germany, Malta, Mongolia and Sweden); 5 other Parties reported that they had taken such measures for civil or criminal liability in terms of enforcement of their specific tobacco-control measures in fulfilling their obligations under the Convention (Cook Islands, Solomon Islands, Swaziland, Togo and France). Finally, 2 Parties reported that they were in the process of developing legislative measures for civil or criminal liability (Ghana and Senegal).

10. One aspect that has been highlighted in Party reports is the broad nature of Article 19. It refers to several different categories of possible legal regimes in respect of which Parties are required to consider taking action: existing legal regimes; legal regimes that should be established; criminal and civil liability regimes (in general or specific to tobacco control); and appropriate compensatory regimes. Moreover, it is left to the Party's discretion as to the legal or natural persons within their jurisdiction that are subject to these regimes, which could include tobacco manufacturers, or participants in the tobacco product supply chain, or individuals or groups that violate tobacco-related measures that have been put in place by the Party. In addition, the purpose of the compensatory regime is not specifically set out, and could include recovery of health care, social or other costs; personal injury; duty and taxes; or recouping the proceeds of crime.

## **ADDITIONAL INFORMATION ON PARTIES' EXPERIENCES**

11. In addition to Party reports, there exist several public online databases that provide detailed additional information on the experiences of Parties and non-Parties to the WHO FCTC. For example, there is an online electronic library of documents and key events related to tobacco litigation in Canada.<sup>1</sup> Another online resource<sup>2</sup> consists of a legislation database containing regularly updated information from countries, as well as a litigation database containing selected key tobacco-control litigation decisions from around the world.

12. The litigation database noted in the previous paragraph has grouped the legal decisions that it contains into the following types of litigation: actions against governments to advance the public interest; challenges to government policies relating to tobacco control or public health; enforcement actions by individuals or private entities; industry actions against individuals; governments or investors bringing cases to trade panels, investment tribunals or arbitration;<sup>3</sup> government enforcement actions; health care cost recovery; and personal injury cases. For the purposes of this paper, the latter three categories are the most relevant. Examples of litigation action can be found in paragraph 20, below.

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<sup>1</sup> See: [www.smoke-free.ca/litigation](http://www.smoke-free.ca/litigation).

<sup>2</sup> See: [www.tobaccocontrolaws.org](http://www.tobaccocontrolaws.org).

<sup>3</sup> Although not the focus of this paper, an increasing amount of information in respect of trade and investment litigation against the enforcement of tobacco-control measures may be found online. For example, Australia has published a well-documented and transparent account of various actions taken in respect of its plain packaging legislation (See: <http://www.ag.gov.au/tobaccoplainpackaging>).

## RELEVANT LIABILITY REGIMES UNDER OTHER TREATIES

13. Relevant liability regimes under other treaties have been reviewed in previous relevant documents.<sup>1</sup> This section of the paper will focus on international liability regimes that appear to be most likely to offer relevant information to the COP in its consideration of the implementation of Article 19.

14. The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal<sup>2</sup> was adopted in order to establish a comprehensive regime for liability and for prompt and adequate compensation for damage resulting from the transboundary movement of hazardous and other wastes. The Protocol establishes a strict liability regime for damages (including loss of life, personal injury, damage to property, economic loss and environmental damages), as well as a fault-based liability regime for intentional, reckless or negligent acts or omissions. It addresses each phase of transboundary movement and imposes liability on different parties participating in the different stages of the movement, thus spreading more broadly the burden of the strict liability. A hazardous waste compensation fund was initially proposed as part of the Protocol, but not adopted, although the possibility of improving existing compensation mechanisms or creating new ones has been kept under review by Parties.<sup>3</sup>

15. A number of conventions that provide for compensation for damage from pollution to the marine environment have been adopted under the auspices of the International Maritime Organization (IMO)<sup>4</sup> or in collaboration between the IMO and other intergovernmental organizations.<sup>5</sup> In general, these treaties take a similar approach to the issue of liability for maritime pollution: there is strict liability on the part of the shipowner or operator for any pollutant discharged; the liability of the shipowner or operator is limited to a certain amount, subject to certain exceptions; and an additional fund is established (and paid into by the receivers of the oil or hazardous substance in a contracting state after sea carriage, or by the contracting parties of the treaty) for the compensation of the victims of the damage caused.

16. Several treaties address civil liability issues resulting from the operation of nuclear facilities, such as power generating stations, or the transportation of nuclear materials. In this regard, though there are elements that differ from tobacco (e.g. sudden, accidental release of harmful radiation in the

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<sup>1</sup> See document A/FCTC/INB2/5 Rev.1, as well as the annex to document FCTC/COP/4/13: "Liability addressed in international law in the field of the environment".

<sup>2</sup> The Basel Protocol (1999) is a protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention).

<sup>3</sup> Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety: *Supplemental collective compensation arrangements in international environment-related liability instruments* (document UNEP/CBD/BS/WG-L&R/4/INF/3, 22 August 2007).

<sup>4</sup> These include the International Convention on Civil Liability for Oil Pollution Damage (1969), amended by protocols in 1976 and 1992; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971), amended by protocols in 1976 and 1992; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Sea Bed Mineral Resources (1977); the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996); and the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001).

<sup>5</sup> Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971), building upon the Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy and its Additional Protocol of 1964 and the Vienna Convention of 1963 on Civil Liability for Nuclear Damage, and supplemented by the Convention on Supplementary Compensation for Nuclear Damage (1997).

case of nuclear incidents versus ongoing harm from tobacco) there are important considerations for the tobacco context in that in both instances the potential for human harm is catastrophic and widespread. Moreover, both fissile nuclear materials and tobacco are known to the operators and manufacturers to be exceptionally dangerous in use. In recognition of the inherent dangers of using nuclear fuel, the nuclear treaties have opted for an absolute liability standard where typically no legal defences are available.

17. While most of the conventions that concern liability deal primarily with civil liability, it should also be noted that some of them also touch upon criminal liability. In particular, several treaties require States Parties to enact national legislation that imposes criminal liability for activities that are inconsistent with the obligations in the treaty.<sup>1</sup>

18. Some human rights treaties may also provide guidance to the COP in its consideration of possible mechanisms through which it could best support Parties in implementing Article 19 of the WHO FCTC. Generally speaking, human rights treaties provide for the protection of a specific set of human rights, and often for the establishment of a body, such as a committee, to supervise and monitor the implementation of the particular convention.<sup>2</sup> The supervisory and monitoring body may have various roles, including: receiving regular reports from States Parties;<sup>3</sup> receiving communications from individuals or groups regarding the violation of protected rights;<sup>4</sup> initiating inquiries into cases of grave or systemic violations of rights;<sup>5</sup> receiving and considering complaints by one State Party that another State Party is not fulfilling its obligations.<sup>6</sup> In some instances, human rights treaties may entitle victims of human rights violations to compensation and reparation<sup>3</sup> or require States Parties to provide remedies to victims of human rights violations.<sup>6</sup>

## **EXAMPLES OF TAKING LEGISLATIVE ACTION TO DEAL WITH CRIMINAL AND CIVIL LIABILITY**

19. Domestic regimes that deal with criminal and civil liability may do so by approaching the achievement of their domestic policy goals from different perspectives (see paragraph 26, below). Many Parties already have general civil liability regimes in place for injured persons to engage in legal proceedings to claim damages for their injury,<sup>7</sup> and many others have in place criminal liability provisions to allow for enforcement of their tobacco-control, tax or other legislative measures affecting tobacco control. Some Parties also have experience with persons using consumer protection laws or product liability legislation to make claims for injury against the tobacco industry, while other

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<sup>1</sup> For example, Article 25 of the Cartagena Protocol on Biosafety (2000) to the Convention on Biological Diversity (1992), or Articles 4.3 and 9 of the Basel Convention.

<sup>2</sup> See, for example, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979) and Optional Protocol; Convention on the Rights of the Child (CRC) (1989) and its Optional Protocol; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) (1984); International Covenant on Civil and Political Rights (ICCPR) (1966) and its Optional Protocols.

<sup>3</sup> CRC, Torture Convention and ICCPR.

<sup>4</sup> CEDAW, Torture Convention and ICCPR.

<sup>5</sup> CEDAW.

<sup>6</sup> ICCPR.

<sup>7</sup> The question of how well these regimes work in terms of suing successfully for tobacco-related injury is still somewhat open, but as more cases make their way through the court systems, it will become more apparent what (if any) additional aspects these domestic civil liability regimes may need in order to lead to successful injury claims.

claims for tobacco injuries have been based on human rights law and constitutional protections. In addition, liability claims may be brought not only by persons claiming physical injury either as individuals or collectively as a class of similarly harmed plaintiffs, but also by third parties such as insurance companies bringing subrogated claims, or Parties (or subnational governments) seeking to recoup public medical, social and other costs caused by tobacco use.

20. The following examples of legal regimes that have been used in respect of civil and criminal litigation have been drawn from the database referred to in paragraph 11:

- (a) Civil codes and civil liability regimes<sup>1</sup>
- (b) Constitutions<sup>2</sup>
- (c) Tobacco-control laws<sup>3</sup>
- (d) Consumer protection law<sup>4</sup>
- (e) Medical services and medical insurance legislation<sup>5</sup>
- (f) Tobacco damages and health care costs recovery legislation<sup>6</sup>
- (g) Advertising and labelling laws<sup>7</sup> and product advertising regulations<sup>8</sup>
- (h) Customs and excise legislation<sup>9</sup>
- (i) Racketeering and corruption legislation<sup>10</sup>
- (j) Labour laws<sup>10</sup>
- (k) Trade practices legislation.<sup>11</sup>

An explanation of how each of these regimes has been used in tobacco litigation may be found in the Annex to this document.

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<sup>1</sup> Brazil, and general civil liability regimes of a number of Parties and non-Parties.

<sup>2</sup> Brazil, Costa Rica, Marshall Islands and the United States.

<sup>3</sup> Costa Rica, France, India, Ireland, Israel, Japan, Netherland, Philippines, Ukraine and the United States.

<sup>4</sup> Australia, Brazil, Costa Rica and the United States.

<sup>5</sup> United Kingdom (Scotland) and the United States.

<sup>6</sup> Canada.

<sup>7</sup> Ukraine and the United States.

<sup>8</sup> Brazil.

<sup>9</sup> South Africa.

<sup>10</sup> The United States.

<sup>11</sup> Australia and the United States.

## **POSSIBLE APPROACHES THROUGH WHICH THE COP COULD SUPPORT PARTIES**

21. It would seem that an appropriate starting point for the COP to support Parties in their activities in accordance with Article 19 could be to focus on assisting them in taking legislative action or promoting their existing laws to deal with civil liability pursuant to Article 19.

### **Model laws**

22. One option in this context would be the development of model laws for consideration by Parties. In fact, it was agreed by experts participating in the 2001 meeting that “it would be useful to draft model laws for consideration by individual States, which could assist States in preparing national legislation and facilitate the harmonization of national legislative approaches”.<sup>1</sup>

### **Legal principles/guidelines**

23. Another option could be to draft a set of legal and procedural principles (possibly including commentary) which should be included in a Party’s domestic civil liability regime in order to optimize its usefulness in terms of tobacco control. In any event, the identification of such a set of principles (plus commentary) would seem to be the logical first step to take in supporting Parties in terms of establishing their civil liability regimes, and one that could lead to the development of draft model laws.

24. One example of such an approach is the recently-adopted United Nations Environment Programme “Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment” (UNEP Guidelines) and commentary. The UNEP Guidelines were prepared to highlight core issues that States must resolve when drafting domestic legislation and regulations on liability, response action and compensation for damage to the environment as a result of dangerous activities. They contain key elements that may be included in domestic legislation in addition to suggesting limited, specific text for possible adoption, such as definitions. The goal of the UNEP Guidelines was mainly to assist developing countries and countries with economies in transition to develop appropriate domestic legislation or policy on the issues of liability, response action and compensation. The Guidelines were prepared in response to principle 13 of the Rio Declaration on Environment and Development,<sup>2</sup> which stipulates that “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage”.<sup>3</sup>

25. The COP could also support Parties through promoting exchange of information and mutual legal assistance, contained in Article 19.

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<sup>1</sup> See paragraph 25 of document A/FCTC/INB2/5 Rev.1.

<sup>2</sup> See: *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

<sup>3</sup> UNEP convened a legal expert group meeting in 2002, which identified and recommended priority issues and gaps upon which UNEP was to focus in its future work on environmental liability and compensation regimes. Specific types of activities were evaluated and assessed to determine the best possible course of action, including the option to develop guidelines. A draft was prepared by the UNEP high-level advisory expert group and the text was further reviewed by an intergovernmental meeting in 2009, prior to its adoption by the Governing Council in 2010.

## Exchange of information

26. In addition to the liability and compensatory aspects of Article 19, Parties are required to cooperate in the exchange of information. The reporting requirements set out in Article 19.2 are covered in the reporting instrument adopted by the COP. To further promote the provision and exchange of information under Article 19, the COP could endorse adjustment of the relevant part of the reporting instrument and the step-by-step instructions that assist Parties in its completion, to cover various subcategories, such as whether criminal liability measures have been included in the Party's tobacco control legislation for any violations thereof, whether there are separate criminal liability provisions, whether any civil liability measures are specific to tobacco control or whether they are general civil liability provisions, and whether civil or criminal liability provisions provide for compensation for adverse health effects and/or for reimbursement of medical, social or other relevant costs. One other aspect that has come to light in Party reports is that there appears to be a lack of clarity regarding what is meant by "pertinent jurisprudence" in Article 19.2. This term could also be clarified in the step-by-step instructions.

## Mutual legal assistance

27. Article 19.3 requires that Parties provide one another assistance in legal proceedings relating to civil and criminal liability, as appropriate and mutually agreed. The procedural aspects of this obligation could be included as part of the set of legal and procedural principles (and/or model law) that may be the first step taken in assisting Parties in their implementation of Article 19.1.

28. It may also be possible for the COP to consider the establishment of a legal information exchange mechanism between Parties. In addition to the information on legislation, regulations and pertinent jurisprudence already provided by the Parties in their reports, various other ways to share legal information and support could be explored. For example, it could be possible for such a mechanism to facilitate cooperation among Parties in defending against legal challenges to tobacco-control measures (such as through the sharing of relevant documents and scientific reports), or providing consultations with relevant experts in person or online, or the management of a secure roster of relevant experts and important contact points. This type of cooperation would also be in line with the Article 22 requirement for Parties to cooperate in respect of, inter alia, scientific and legal expertise. In addition, Article 19.4 acts to clarify the fact that the WHO FCTC does not affect any existing rights of access that Parties may have to the courts of another Party.

## Other possible approaches

29. One approach that could be taken by the COP to support Parties in their activities in accordance with Article 19 would be to establish an intergovernmental negotiating body to prepare an **international civil or criminal liability regime, such as a protocol**. However, as noted above, most existing international liability regimes do not easily fit the tobacco-control model, and may offer only limited guidance to Parties in their legislative and other activities in accordance with this provision (see paragraphs 13–18, above). For example, adopting an international civil liability regime could be seen as beneficial in that it could allow persons who had suffered damage as a result of their use of tobacco products to claim compensation from tobacco manufacturers. The most common approach taken to civil liability in treaty law includes a limitation on liability and, often, the imposition of strict liability. Neither of these aspects would necessarily be attractive or easily agreed by Parties in the context of civil liability for damage caused by tobacco use.



30. In terms of the criminal liability aspect of Article 19, the focus of the provision would seem to be mainly on the creation of domestic criminal liability. As most Parties have already implemented or are in the process of implementing legislative measures to give effect to the various obligations in the WHO FCTC, they have already decided or would decide on whether or not to make violation of their domestic legislation subject to criminal liability. There is currently support available for Parties in the process of drafting and implementing domestic tobacco-control legislation, which could include such criminal provisions. While the creation of an international criminal liability regime would be possible, particularly as it could build on the foundations of national tobacco-control measures that employ criminal liability, it might be premature to enter into such negotiations. The recently negotiated draft protocol to eliminate illicit trade in tobacco products does not include specific criminal offences in the text of the protocol itself, but instead leaves the decision on which offences to criminalize to the discretion of each Party.<sup>1</sup> This could suggest that there is currently no enthusiasm among Parties for an international criminal liability regime.

31. Moreover, there would be a number of less attractive aspects to negotiating an international liability regime at this time. While national tobacco-control legislation is comparatively well-developed today as compared with the pre-WHO FCTC era,<sup>2</sup> other difficult issues in respect of the creation of an international civil liability regime identified at that time persist. For example, challenging private international law issues remain, such as difficult issues of jurisdiction, the recognition and enforcement of foreign judgments, conflicts of law, and complex transnational corporate structures.<sup>3</sup> In addition, an international liability regime would have to deal with the specific aspects of tobacco injury, including evidentiary matters, the complexity of establishing a causal relationship between a particular tobacco manufacturer and the specific claimant, and limitation periods for claims, all compounded by the problem that the tobacco injury resulted from extended use of the product. By way of contrast, the international environmental regimes were created to respond to situations where people and the environment required protection from sudden, occasional and accidental releases of harmful products, while it is reasonable that the industry is protected from excessive liability so as to keep intact their intrinsically beneficial activity.<sup>4</sup>

32. Another possible approach that could be taken by the COP to support Parties in their activities in accordance with Article 19 would be to draw lessons from the human rights conventions and establish a **standing body to receive complaints of violations of the WHO FCTC** from individuals, from groups and/or from other Parties. However, consideration of this possibility may be better left to a consideration of a compliance mechanism for the WHO FCTC.<sup>5</sup> Although discussed at the meeting of legal experts in 2001,<sup>6</sup> State responsibility was not specifically included in the WHO FCTC, and the focus of Article 19 is on the establishment of criminal and civil liability within the jurisdictions of the Parties rather than on establishing an international regime. It should be noted, however, that State

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<sup>1</sup> See Article 14 (*Unlawful conduct including criminal offences*) of the draft protocol (document FCTC/COP/5/6).

<sup>2</sup> Compare paragraph 16 of document A/FCTC/INB2/5 Rev.1, which noted that in 2001 there was no strong legislative baseline of national tobacco control from which to build an international liability regime.

<sup>3</sup> Complex private international law problems can greatly prolong and complicate an international negotiation, as occurred in respect of what became known as the “Judgments Project”, which began in 1992 as the Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, and concluded in 2005 as the much narrower Hague Convention on Choice of Court Agreements. See also paragraph 17 of document A/FCTC/INB2/5 Rev.1.

<sup>4</sup> See paragraph 18 of document A/FCTC/INB2/5 Rev.1.

<sup>5</sup> See paragraph 30 of document A/FCTC/INB2/5 Rev.1 and paragraphs 22–33 (Mechanisms of review) in *Reporting arrangements under the WHO FCTC* (document FCTC/COP/5/14).

<sup>6</sup> See paragraphs 9 and 26–30 of document A/FCTC/INB2/5 Rev.1.

responsibility need not be specifically mentioned to be relevant, as it is a principle of customary international law that States could be liable for violations of their obligations pursuant to a particular regime, such as the WHO FCTC. However, the topic of State responsibility has long been on the international agenda, and although draft articles and commentaries on Responsibility of States for Internationally Wrongful Acts were adopted by the International Law Commission in 2001, no international agreement has yet been reached in this area.<sup>1</sup>

33. The discussion in paragraphs 14 and 15 above also raises the question of whether the **establishment of a fund mechanism** would be an appropriate way to deal with the compensation aspect of Article 19. Such a fund could have several combined or distinct purposes, including financing preventive measures, supporting monitoring and assessment, compensating victims of tobacco injury, or acting as a litigation fund for other individuals or Parties to pursue civil liability cases. In addition, the fund could be established on either a domestic or international basis, or both. However, it would seem that the possibility of establishing a fund mechanism should be preceded by the provision of support for Parties to establish civil criminal liability regimes in their jurisdictions.

### Expert group

34. In light of the above analysis, the COP may wish to consider establishing an expert group to further develop means through which the COP could support Parties in their activities in accordance with Article 19, particularly in the context of civil liability regimes. In doing so, the expert group could consider domestic experiences in relations to liability, identify best practices and make recommendations to the COP at its sixth session on appropriate support mechanisms.

35. The COP may also wish to request the expert group to explore the possibility of preparing a set of draft principles (including commentary) for the development of civil and criminal liability and compensation, including possible development of a model law, for consideration at the sixth session of the COP.

36. In addition to the issues outlined above, the expert group could consider additional matters with a view to strengthening the draft principles and providing added support to Parties in their implementation of Article 19, including:

- (a) possible policy grounds for adopting legislation on tobacco industry liability (including, for example, deterrence, cost recovery and public education);
- (b) guidance on how to obtain expert legal counsel;
- (c) information on how best to involve local lawyers in litigation so as to build capacity;
- (d) suggestions on the role of civil society;
- (e) guidance on how best to use public education to further the goals of litigation, particularly when undertaken by a Party;

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<sup>1</sup> The draft was presented to the Fifty-sixth session of the United Nations General Assembly for consideration in 2002 (as document A/56/10), and was most recently considered during its Sixty-fifth session in 2011. The item is again on the provisional agenda of the General Assembly in 2013, to be further examined with a view to taking a decision, on the basis of the articles, on the question of establishing a convention on responsibility of States for internationally wrongful acts or other appropriate action.

- (f) how to locate relevant documents and other evidence and have it admitted;
- (g) how best key evidentiary materials that are already available could be gathered in a single place;
- (h) guidance on procedural matters, such as class actions;
- (i) consideration of how best to engage in effective international cooperation; and
- (j) making recommendations to the COP on additional measures that it could take to promote implementation of Article 19.

### **ACTION BY THE CONFERENCE OF THE PARTIES**

37. The COP is invited to note this report and to provide further guidance.



## ANNEX

**USE OF EXISTING LEGAL REGIMES IN RESPECT OF  
CIVIL AND CRIMINAL LITIGATION**

## (a) Civil codes and civil liability regimes

Many countries provide for compensatory redress of recognizable, quantifiable harm caused by others via common law tort or delicts specified in civil codes. The field of tobacco litigation is replete with such cases, primarily in the United States of America but also elsewhere. These cases encompass all of the major areas of tobacco control, involving both smokers and non-smokers, private and public litigants, and individual plaintiff cases as well as class actions. The precise causes of action are often quite specific to the jurisdiction but may involve one or more of the following: strict liability, negligent manufacture, breach of implied warranty, consumer fraud, misrepresentation, or conspiracy.

## (b) Constitutions

Human rights protections guaranteed in some constitutions, primarily rights relating to life, health or clean environments, have formed the basis of successful legal arguments particularly with respect to public smoking exposing non-smokers to harm.<sup>1</sup> These have, however, been comparatively rarely argued.

## (c) Tobacco-control laws

Many countries currently have comprehensive tobacco-control laws covering facets throughout the tobacco business, ranging from the initial agricultural inputs through manufacturing, packaging, marketing and promotion, sales and ultimate end use by the consumer. Prompted in recent years by the WHO FCTC negotiations, they are too numerous to list. Overall, however, it can be said that these tobacco statutes often bring together and further develop in a tobacco specific context the legal principles and policy objectives existing in laws of more general application. By doing so, they bring added clarity and enable interested parties to act with greater certainty that their actions conform to their legal obligations.

## (d) Consumer protection laws

Consumer protection laws can be thought of as a concurrently operating complement to tort law where some of the standard principles of tort for the purpose of the relationship between a manufacturer and consumer are set out as statutory obligations. Most relevant to the tobacco context are consumer protection laws relating to false, misleading or deceptive advertising or promotion. Tobacco cases based on consumer protection law have to date mostly dealt with misleading descriptors such as “light” and “mild”.

As with several other potential causes of legal action, there has been an evolution in approach. In many jurisdictions legal arguments to hold tobacco companies accountable began first with an initial law of general application, from which the principle was then extrapolated to the tobacco situation. In

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<sup>1</sup> For a discussion of constitutional cases in Bangladesh, India, Nepal and Uganda, see Gostin LO. The ‘tobacco wars’ – global litigation strategies, *JAMA*, 2007, 298:2537–2539.

the field of consumer protection, as with other areas, those general laws have now largely been supplanted by tobacco specific laws dealing more explicitly with the conduct in question.

(e) Medical services and medical insurance legislation

Sometimes forgotten in certain landmark tobacco litigation cases is that governments can be joined as plaintiffs by private insurers. However, courts have usually rejected tort actions in subrogated claims by third parties (such as insurance companies) primarily on the grounds that the insurance company's claim is too remote to any tort that might have occurred between the tobacco company and the smoker.

(f) Tobacco damages and health care costs recovery legislation

Prompted by public cost recovery litigation successes in the United States, governments elsewhere have commenced similar actions, perhaps most notably of late in Canada. Canadian provinces seeking reimbursement of tobacco-caused healthcare costs have followed the path initially pioneered by the State of Florida in the United States, by enacting tobacco specific legislation to facilitate the cost recovery lawsuit rather than relying on traditional tort or delictual law of general application. Such legislation typically provides for direct legal action by government in its own right, independent of any claim individual smokers might have. Subsequent legal action by government is then to recoup monies expended as a consequence of certain tobacco related torts as defined in the legislation. The legislation also typically seeks to simplify matters: for example, in the Canadian cases the legislation permits the allocation of responsibility of the total damage award to the various tobacco company defendants based on their market share of tobacco sales.

(g) Advertising and labelling laws and Product advertising regulations

Whether via general consumer protection laws protecting the public against false or misleading advertising, or tobacco specific advertising, promotion or package labelling laws, legislation in many jurisdictions provides a cause of action against tobacco companies by public officials or in some instances, private individuals. Applicable legislation typically sets out fines or other penalties, and may provide for simplified legal proceedings which in some jurisdictions are known as summary offences.

(h) Customs and excise legislation

Tobacco industry liability for infractions of customs and excise laws is of great importance, both for revenue reasons and the public health implications of contraband cigarettes entering the market at reduced prices. Prosecutions against tobacco companies and tobacco executives for breach of these laws, such as the case involving the complicity of R.J. Reynolds Tobacco in smuggling into Canada, have resulted in criminal sanctions, including incarceration, and heavy financial penalties in plea agreements. In Europe, a 2004 European Union case against Philip Morris resulted in a US\$ 1.25 billion settlement.

(i) Racketeering and corruption legislation

The United States Government has successfully sued major American tobacco companies for racketeering, with remedies resulting in imposed changed behaviour on the part of the defendant tobacco companies but no monetary penalties. Conversely, comparable lawsuits brought by foreign governments in American courts have been dismissed before proceeding to the merits of the case on procedural or jurisdictional issues.

(j) Labour laws

Although general labour laws relating to safe work environments have been used in court by employees to challenge smoking in the workplace, many jurisdictions have now enacted tobacco specific laws pertaining to smoking in indoor workplaces (and in some instances, outdoor workplaces as well). In terms of liability, typically that falls to the employer or the smoking co-worker, so penalties tend to be comparatively small, at least for initial offences. (One consequence of this is that although tobacco companies frequently bankroll political opposition to workplace smoking laws, they are not held to account when those laws are violated.)

(k) Trade practices legislation

Fair trade practices laws, particularly relating to price fixing, provide avenues for holding tobacco companies accountable. There have been cases on the upstream end of the tobacco business, with tobacco companies settling cases related to bid-rigging on the purchase of tobacco leaf from farmers. However, documentary evidence also exists suggesting that tobacco companies have colluded to fix retail prices of their cigarettes in dozens of countries.<sup>1</sup> Competition laws in many countries involve sanctions of both a civil and criminal nature; and given that the intent of these laws is to alter the behaviour of sometimes large corporations, the applicable fines can be very substantial.

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<sup>1</sup> The price is not quite right. *The Economist*, 5 July 2001 (available at: <http://www.economist.com/node/687703>).