Viability of liability

The problems, risks and opportunities of a defining a liability regime in the WHO Framework Convention on Tobacco Control

Clive Bates

Action on Smoking and Health (London)

9th April 2001

[Summary]
[Difficulty of defining a health-related liability regime]
- *Liability for harm to smokers*
- *Liability for health care costs*
- *State owned companies*

Who would be eligible?
Relationship to the courts
The old-fashioned way to recover costs – tobacco taxation
Opportunity cost and negotiating time
The danger of involvement of the tobacco industry
What could be done on health-related liability?
Liability for tax losses due to smuggling – the most promising option

Summary

The Chair's January 2001 text of the FCTC will be the basis for the second meeting of the Intergovernmental Negotiating Body (INB-2, 30 April to 5 May, 2001). This text refers to 'liability and compensation' at section J. This document describes ASH's views on the question of a liability regime within the FCTC. In summary:

- The practical difficulties in formulating a substantive liability regime for tobacco-related harm to health within the WHO FCTC are probably insurmountable, but there are opportunities and existing models to define a liability regime to tackle smuggling;
- The opportunity cost of expending WHO resources, Parties' negotiating time and political capital on the attempt is substantial and resources would be better used elsewhere;
- There is an easier and far more efficient alternative that in economic terms amounts to the same thing, namely tobacco taxation;
- There is considerable danger that negotiation of a liability regime will become a negotiation with the tobacco industry, and follow the 'model' of the US Master Settlement Agreement;
- There is a considerable danger that the tobacco companies could 'capture' the FCTC process by offering a financial liability settlement to the Parties individually, funded through an industry-wide internationally co-ordinated price rise. By doing this, they could effectively 'buy' their way in to the FCTC and national health policy.
- The health-related liability provisions of the FCTC should be restricted to statements of broad principle and process measures that support transnational claims in the existing courts under existing laws;

- There is scope for a liability regime to be developed as part of the approach to tackling tobacco smuggling. This would cover deal with liability for lost tax revenues.
- An anti-smuggling liability regime could be modelled on the Basel Convention on the trade in hazardous waste and its liability and compensation protocol. There are many parallels between the provisions of the Basel Convention and what would be needed to tackle tobacco smuggling.

Difficulty of defining a health-related liability regime

There are a numerous concerns about the development of an international liability regime for health-related impacts of tobacco use with the FCTC. Many of these are spelt out in the summary of the paper prepared by Professor Sean Murphy[1] for the FCTC legal experts' meeting on liability of 9/10th April 2001 in Geneva. Murphy highlights the complexity of designing a liability regime in his summary:

> *Although it is technically possible to craft an international civil liability regime that would channel liability to major tobacco product manufacturers and exporters, certain important factors that were present when creating existing international liability regimes appear absent in the case of tobacco regulation, thus making it unlikely that an effective, widely adhered to liability regime could be established.*
>
> *Among those factors are:*
> - *the diverse nature of the tobacco industry (i.e., large and small manufacturers and exporters, as well as state-run, quasi-state-run, and private manufacturers and exporters);*
> - *the difficulty of establishing a causal relationship between a particular manufacturer or exporter and the harm suffered by a particular claimant from tobacco consumption over an extended period of time;*
> - *the difficulty in finding common ground among States on issues normally addressed in liability regimes, such as the relevance of the claimant's assumption of risk and on ceilings on the defendant's total liability.*

Liability for harm to smokers

Even in the relatively simple cases where it is clear a smoker has smoked a particular brand all their life, there have still been formidable obstacles in establishing fault. For example, the harms included – and the standards for establishing cause; contributory negligence; the influence of warnings; the nature of addiction and suspension of the smoker's free choice; limitations and timing issues; the eligible costs; defences and mitigating factors (is the claimant a coal miner or asbestos worker) … the list could go on. Many of these issues have been faced in the US courts, but only after protracted argument, endless appeals and case-by-case judgments have they been resolved – if they ever have.

Liability for health care costs

In the case of liability for health care cost, there are the added complications of the funding of the health care system (insurance based, local, national); the attribution and quantification of tobacco-related harm to the population; the estimation of tobacco-related additional health care costs; the tobacco tax regime in place; and the bottomless pit of social cost-benefit analysis of smoking. Again a long list of complex variables would need to be considered to develop a regime.

State owned companies

The difficulty of large current and former state-owned companies and the extent to which Parties will agree a liability regime that transfers public sector assets from one organisation to another or to the private sector is a further and formidable difficulty – especially if this transfer is transnational.

Who would be eligible?

Smokers?

Even if liability for smoking related harm could be established and sums transferred from tobacco companies, the question would quickly become: "who gets the money?" Would funds be given to smokers or their living relatives to compensate them for the harm done? If money were to be given to smokers, there would be a huge administrative burden in managing the 'gold-rush' and preventing fraudulent claims. If money collected was not given to smokers, this could hardly be regarded as a liability regime.

Governments or health care institutions?

Money paid to health care institutions or to the government as general revenue (as in the practice of the US Master Settlement Agreement) may be helpful and attractive, but it would be better raised through taxation.

Relationship to the courts

It is not possible simply to fine Philip Morris $1 million for everyone that dies as a result of smoking and has seen a Marlboro cowboy advert. Parties to the FCTC cannot impose a liability regime regardless of how arbitrary and unfair it is – many of the variables above would need to be formulated into a fair regime. In many countries, any affected party, including a tobacco company, has the right to challenge what they consider unjust laws and the unfair exercise of administrative power – a process known as 'judicial review' in Britain and elsewhere. The passage of a manifestly 'unfair' law through a legislature would also be difficult.

In most countries, the executive or legislature cannot simply instruct the courts to interpret the law in a particular way (for example according to the provisions of a treaty). A new law would need to be passed, survive legal challenges and judicial review, and then be interpreted by the courts. Governments could, however, take steps to assist foreign parties to bring action in the courts – for example by filing statements to the court in support of such actions. .

The old-fashioned way to recover costs – tobacco taxation

The US Master Settlement Agreement in effect provides compensation to States for the expenditures they have made on health care for smokers. The MSA is paid for by the tobacco companies through an increase in consumer prices – the whole cost is passed to the consumer. The price increase, co-ordinated among manufacturers, of approximately 50 cents is likely to be sufficient to generate the US$ 200 billion or more over the life of the settlement.

Exactly the same price increase could have been introduced through taxation – had the political circumstances in the United States allowed this. Taxation would have numerous benefits:

- Simplicity and no need for negotiation
- No concessions to the companies
- Administration already in place to collect it
- No payments to lawyers
- Does not allow or encourage cartel behaviour in price setting
- Politically honest and transparent

Opportunity cost and negotiating time

Professor Murphy points out that:

> *Proceeding with the development of a liability regime, which typically takes several years of negotiations, risks committing significant WHO time, energy and resources to a project that may not prove successful.*

The task of tobacco control is extremely demanding and the negotiation of a liability regime will be a distraction from other issues that are more pressing and can give a greater return – for example tackling smuggling, banning advertising, regulating packaging and contents of tobacco products.

The danger of involvement of the tobacco industry

The most serious danger of attempting to agree a liability regime is that the tobacco companies will enter the scene and offer to 'solve' the problems described above. This may not be apparent at the beginning of this process, but it is an inevitable future development as the parties become stuck in the quagmire of complexity set out briefly above. Professor Murphy has even suggested this:

> *Further, rather than focus on liability issues, WHO Member States might consider possibilities for entering into voluntary arrangements with major tobacco companies for the establishment of a fund that would be used to support WHO initiatives in regulating tobacco.*

A voluntary agreement inevitably has to offer something to the tobacco companies. It is possible that they companies would offer to establish a substantial 'liability fund' or

to pay developing countries directly. This could be used to secure immunity from legal action and to shape tobacco control measures in parties or even in the FCTC in the interests of the companies. The money would be provided by a co-ordinated international price rise (one percent would generate about US$2 billion per year).

It might be argued that this sort of scenario, mirroring the Master Settlement Agreement, could only happen in the United States. However, the negotiation of a liability regime is the most obvious entry point of the FCTC to the tobacco industry and countries would have the incentive of money (albeit with strings); a way of circumventing the need for a tax rise; and some ring-fencing of the money to health ministries (albeit to spend on things that do not work).

What <u>could</u> be done on health-related liability?

Professor Murphy suggests three options: do not include liability; include language supportive to transnational liability claims; develop a full liability regime. We favour the second option, which he summarises as:

> *Alternatively, WHO Member States might include in the WHO Framework Agreement language that promotes transnational liability claims but without imposing obligations that require extensive negotiation and difficult implementation.*

Such language might include statements of principle, and maybe an obligation for governments to file a standard deposition in support of a transnational liability claim in their courts. Professor Murphy provides the following language, which ASH broadly supports:

> *1. The Parties shall cooperate as appropriate to ensure that persons harmed by the use of tobacco are aware of any legal remedies available in their national legal systems to pursue claims for compensation. To that end, each Party shall submit information on such remedies to the Conference as part of its report under Article [ ].*
>
> *2. When a national of one Party pursues a claim in the legal system of another Party for harm from the use of tobacco manufactured in or exported from that other Party's territory, that other Party shall file an official statement with its appropriate judicial or administrative authorities upon the request of the national. The official statement shall make known to the appropriate judicial or administrative authorities the determination by the Parties to this Convention that access to national legal systems for foreign claimants, including governments acting on behalf of themselves or their nationals, to seek redress for such claims is a vital means for addressing the global public health issues involving tobacco consumption and exposure to tobacco smoke.*

It is unlikely that provisions requiring comprehensive 'tort reform' which would have implications beyond tobacco could be negotiated in a tobacco treaty.

Liability for tax losses due to smuggling – the most promising option

One of the most important issues in tobacco control is the problem of 'transit' smuggling, in which large consignments of cigarettes are diverted into the black market while moving untaxed and in transit between the manufacturing plant and final market. A substantial body of evidence now exists to show that tobacco companies

have played an active role in orchestrating smuggling, and that they could control it if it was in their interests.

It is helpful to draw a parallel between the trade in tobacco products and the trade in hazardous waste.

Characteristic	**Hazardous waste**	**Tobacco products**
Legal product	Waste	Cigarettes
Proper result of trade	Sound management of waste	Tax-paid sale to tobacco user
Illegal act	Dumping	Smuggling
Damage from illegal act	Pollution	Tax losses
Multilateral institution	UN Environmental Program	WHO
Convention	Basel Convention[2]	FCTC
Liability protocol	Yes	Possible

The Basel Convention has a number of features that could be incorporated into an anti-smuggling regime for tobacco products. Some of the relevant articles of the Basel Convention are listed below:

- Consent of importing state to the export (4.1.c)
- Duty of care on persons handling the product (4.2.b)
- Requirement for exporting state to ensure importing and transit
- Authorisation of persons involved in the trade (4.7.a)
- Packaging and labelling to international standards (4.7.b)
- Movement document that stays with the product (4.7.c)
- Exporting state responsible for assuring the proper result of trade (4.8)
- Responsibility cannot be shifted from export countries to transit or import countries (4.10)
- Appoint a body in each state responsible for approving shipments and notifications (5)
- Notification of all shipments with prior consent from importers and transit countries (6)
- Requirement to insure goods in transit (6.11)
- Generator or exporter is responsible for illegal traffic due to their conduct (9)
- Protocol on liability (12)

The Basel Convention's protocol on liability and compensation [**PDF**] also has useful features that could be adapted for control of smuggling.

- Objective to provide for compensation arising from accidents or illegal trade (1)
- Exporter (either the state or company) has strict liability until proper result of trade (ie. final disposal) including transit. (4.1)
- Limited defences for exporters (4.5)
- Joint and several liability (4.6)
- Duty of care on persons handling the product (6)

- Sliding scale of maximum strict liability for different participants (12 and Annex B)
- Requirement to hold insurance to cover strict liability (14)
- Each party to ensure its courts can handle compensation claims (17)

The liability regime builds on the basic ‘housekeeping’ and security built into the Basel Convention. The Convention secures the distribution and holds exporters responsible for their conduct. The protocol makes them pay if things go wrong.

---

[1] Murphy S. Evaluation of an International Liability Regime for the WHO Framework Convention on Tobacco Control, George Washington University Law School, Washington, D.C. February 13, 2001
[2] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, agreed March 1989, entered into force 5 May 1992