

Intervention by Leah Margulies, Esq.

Panel II, Sub-theme 2,

Madam Chairperson, Distinguished Delegates and colleagues,

Thank you so much for inviting me to speak to you today on behalf of Corporate Accountability International. Please take the time to review the recommendations we submitted directly to the Working Group Secretariat, they are available on the back table.

Since 1979, Corporate Accountability International (formerly Infact) has participated, as an official civil society observer, in the development of groundbreaking international instruments designed to protect specific human rights from abuses by transnational corporations. We were deeply involved in developing the International Code of Marketing of Breastmilk Substitutes, adopted in 1981, and the groundbreaking Framework Convention on Tobacco Control, both under the auspices of World Health Organization. The Tobacco Treaty entered into force in 2005; currently 180 countries have ratified the Convention. While this is the first and still only Convention adopted by the WHA, it has garnered more support than almost any other treaty in the UN system.

Both the Code of Marketing of Breastmilk Substitutes and the Tobacco Convention in their preamble note the priority of health as a human right. And each is an instrument designed to save lives.

So, I want to share with you today three lessons learned from these experiences that I hope can be helpful as we undertake this exercise of elaborating a general treaty to provide remedies for the human rights abuses of transnational corporations, while enumerating ways that states can adopt and legislate these treaty obligations on the national level.

The first lesson: It is critically important to have the data to support the Treaty provisions. Among the most important kinds of data for governments to consider is data that demonstrates that the costs of human rights abuses by TNCs are largely born by the governments themselves in the forms of health care costs, public sanitation and water infrastructure costs, environmental damage repair costs, and a range of other costs that governments have to bear, as articulated so well on the panel yesterday. Examples include the health care costs of tobacco-related diseases and the cost of caring for and re-hydrating babies to save them

from diarrhea-related death stemming from the truly predictable harms of bottle feeding with insufficient resources and unsafe water.

In the case of the tobacco treaty, a Rockefeller Foundation-funded study revealed the socialized costs to specific national health care systems from tobacco related disease—because of this, not only were Health ministries convinced of the importance of the treaty, but finance and industry-related Ministries had the data to rely on that showed the costs were unfairly borne by governments—and this was very convincing.

We hope governments here will include a recommendation in its final report that several such studies be commissioned and circulated among delegations, hopefully in time for the next meeting of the Working Group.

The second major lesson learned is that it's crucial to protect the process from conflicts of interest. In the case of the Tobacco Convention, eliminating conflicts of interest was built right into the treaty itself. Article 5.3 of the treaty, states clearly that "Parties shall act to protect [public health] policies from the commercial and other vested interests of the tobacco industry." This is a very strong precedent within international UN treaty law. In addition, the Conference of the Parties unanimously adopted a detailed set of Guidelines for implementation of this groundbreaking measure. The Guidelines are very specific and cover 10 pages of recommendations beginning with how to implement the Principle that *"There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests."*

As is evidenced by the broad civil society support for this proposal, it would be advisable that this treaty process embrace the Article 5.3 precedent and fully examine and understand the very clear and detailed Guiding Principles and Recommendations articulated in the Guidelines, with an eye towards incorporating these lessons learned. Remember, nearly every government involved in this process (if not all) is likely to be a Party to the Tobacco Treaty, meaning that this international legal provision and its Guidelines already apply to your countries.

Without including the obligation to prevent conflicts of interest in this process, it will be nearly impossible to create a meaningful instrument, and even harder to protect national-level implementation. For example, although the Code of Marketing itself is designed to eliminate such conflicts of interest in the

healthcare system, it falls short because of, among other things, the Code's legal status is as a resolution. To have any teeth, it has to be adopted as national law, which has proven to be elusive and difficult. This year, 35 years after its adoption, WHO is launching yet another project to advance the development of national laws implementing the provisions of the Code. Here, we have a unique opportunity to avoid this problem at the outset.

Despite its regulatory weaknesses, though, the Code has already saved millions of lives. When I began working at UNICEF in 1992, it was estimated that 1.2 million infant lives would be lost each year if we did not protect breastfeeding. In 2016, WHO and UNICEF's estimates are down to 820,000 lives lost, approximately 400,000 fewer lives lost per year. Over the course of a 20-year period, that means many millions of lives saved.

Some will argue that because the Tobacco Treaty deals with a single product that has no redeeming social value, adopting the No Conflict of Interest provision was relatively easy. No, it wasn't easy. But whether in national law or in international treaty, if you allow an industry, any industry, with vested interests to participate in developing a set of legal obligations that they will be required to follow, they will always seek to weaken the regulations or treaty, seek longer timelines for implementation and less liability. This is not rocket science. Ensuring that treaty rules are protected from Conflicts of Interest will also give the treaty more widespread acceptance and even great kudos and glory from the world's citizens. Civil society already supports and deeply understands the significance of this action.

The third and last major lesson learned from the FCTC is in the adoption of Article 19, which invites Parties to pursue criminal and civil liability to hold the industry legally liable for its abuses. It is not the only international instrument with a liability scheme—an even older convention, the Basel Convention on the transboundary movement of hazardous wastes also has a sophisticated liability provision. For the Tobacco Treaty, in 2012, 7 years after the Convention went into force, the COP established an Expert Group on liability, who's latest report on Implementation of Article 19 was just issued this year. These reports include a Civil Liability Tool Kit and an extensive library of resources dealing with a wide range of legal liability issues. Madam Chairperson, we recommend that this Working Group review all the resources on liability available under the Tobacco Convention and report on its findings to the next session of the Working Group.

There is no need to duplicate quality work from a convention the parties here already have ratified.

Madam Chairperson, on behalf of Corporate Accountability International, I thank you for the honor of being invited to participate in this panel and look forward to the discussion that will follow.