

Implementation of Article 19 of the WHO FCTC: Liability

10th Session of the Conference of Parties to the WHO Framework Convention on Tobacco Control Provisional Agenda Item 6.5 Accountability and Liability of the Tobacco Industry (FCTC/COP/10/12)



Global Center for Good Governance in Tobacco Control

Background

For Agenda Item 6.5, the Islamic Republic of Iran, Oman, and Pakistan have proposed a Draft Decision Implementation of Article 19 of the WHO FCTC: Liability. The sponsors welcome like-minded Parties to co-sponsor the Draft Decision. It will be strategic to have additional co-sponsors who are tobacco control leaders in their respective regions and willing to support this Draft Decision. The Draft Decision points to extra-judicial/administrative solutions such as strengthened sanctions/enforcement, funding mechanisms, polluters pay principle in the context of environmental harms, surcharges or taxes, and the like.

A. WHY IS IT IMPORTANT FOR THE CONFERENCE OF THE PARTIES (COP) TO DECIDE ON THE AGENDA ITEM ON ACCOUNTABILITY AND LIABILITY?

The tobacco industry has been getting away with its deceptive tactics and has grown even bolder.

1. The tobacco industry continues to wreak havoc on public health with cigarettes, e-cigarettes, heated tobacco products and other similar products, greenwashing, youth marketing, etc. It remains the single greatest obstacle to government efforts to adopt life-saving tobacco control measures.¹
2. Tobacco investments in and acquisitions of pharmaceutical companies is a concern raised at the Ninth session of the Conference of the Parties (COP9) ([COP9 Declaration](#)).² Without accounting for the harms caused, the tobacco industry, in pursuit of more profit, is [marketing itself](#) as a purveyor of products that will solve the tobacco epidemic and treat tobacco-linked diseases. Notably, putting the tobacco industry in a position to provide both the poison and the cure, to increase profits, would lead to a perverse incentive for it to cause more harm.³

B. THE PAST COPS TACKLED ART 19 AND ADOPTED A LIABILITY TOOLKIT. HOW IS THIS GOING TO BE DIFFERENT?

The Draft highlights the inextricable link between WHO FCTC Article 5.3 and Article 19, and the agenda item put forward includes the term “Accountability”. This agenda item aims to go beyond the judicial system to exact accountability and liability.

1. The WHO FCTC Article 19 [Civil Liability Toolkit](#) focuses on making the tobacco industry liable for its harms through court proceedings. Litigating against the tobacco industry does not work for most countries because most nations, especially developing ones, do not have a reliable judicial system/liability legislation.⁴
2. The Draft seeks to look at [alternative ways](#) to make the tobacco industry liable, such as through:
 - Increased sanctions and penalties, keeping in mind the best practices in the country and globally.
 - [Compensation mechanisms](#) funded through increased tobacco taxes or surcharges.
 - Financial guarantees like a bond to secure against future harms.
 - Other liability regimes to be studied/ proposed.

C. WHY IS IT CRUCIAL TO DECIDE ON THE ISSUE OF LIABILITY CURRENTLY?

In the environment and human rights/ corporate governance sectors, governments are negotiating global policies that will affect tobacco/tobacco control, including industry liability. The COP's guidance on the matter will facilitate [policy coherence](#).

1. Cigarette filters are one of the most significant sources (5-9%) of marine plastics,⁵ and an environmental treaty ([UN Plastics Treaty](#)) is being negotiated on this. Liability will be on the treaty's agenda since the polluters pay principle (PPP) is a generally accepted principle in environmental agreements. Notably, the tobacco industry is considered a stakeholder in the environmental fora.
2. Deaths and harms caused by tobacco undermine human rights. A business and human rights treaty is being negotiated ([Binding Treaty on Business and Human Rights](#)), and one of its initial drafts includes a section on the liability of transnational corporations. This encompasses the concepts of ensuring accountability and deterrence, improving access to justice, providing remedies to those harmed, and applying effective, proportionate, and dissuasive sanctions.

3. There is an opportunity for the delegates of the COP, operating in an environment shielded from tobacco industry interference, to set the standard on how to make the tobacco industry liable for environmental/health harms and human rights violations.

D. WHAT DOES THE DRAFT DECISION SEEK TO ACCOMPLISH?

The Draft urges Parties to strengthen liability regimes, apply best practices and exchange information on sanctions, monitor tobacco industry investments, and ensure policy coherence concerning tobacco industry regulation.

It also seeks the provision of guidance on:

- Recommendations for administrative measures in deterrence, sanctions, justice, and remedies/ compensation.
- (Policy) options for detecting the evasion of liability
- A methodology to estimate the costs of health and environmental harms/ damages the tobacco industry can be accounted for.

NOTE: Although the current draft calls for establishing an expert group, there is flexibility in the modality for producing these reports, subject to the availability of funds. For instance, these studies can be undertaken by the WHO or the WHO Secretariat pursuant to its ongoing work to engage in other sectors and to promote policy coherence.

Recommendations

Parties should:

- a. Support the Draft Decision Implementation of Article 19 of the WHO FCTC: Liability to seek intersessional groundwork done to make better decisions at the upcoming COP.
- b. Allow for flexibility on the modality for producing reports, options paper, and other intersessional work outputs.

Parties can also consider clarifying that the intersessional work output should:

- Include “environmental harms” in studies relating to costing out tobacco harms, including clean-up costs and mitigation of legacy waste, and take into consideration the possibility of imposing eco-taxes and surcharges, if appropriate.
- Include “options on dealing with tobacco’s toxic plastics”⁶ in the deterrence, sanctions, remedies, and compensation measures.

References

- 1 WHO report on the global tobacco epidemic, 2023: protect people from tobacco smoke, World Health Organization, July 31, 2023, available at: <https://www.who.int/publications/i/item/9789240077164>
- 1 For example, Philip Morris investments in Medicago for a Covid vaccine, and in Vectura for an inhaler intended for the treatment of emphysema.
- Source: D. Sy, Big Tobacco's Investments in and Acquisitions of Pharmaceutical Companies, STOP, Oct 5, 2021, available at: <https://ggtc.world/knowledge/partnerships-lobbying-and-corruption/big-tobaccos-investments-in-and-acquisitions-of-pharmaceutical-companies>
- 1 Sy, Deborah. "Tobacco industry's 'wellness' tactic: Ethical dilemma and solutions." *Tobacco Prevention & Cessation*, vol. 9, no. April, 2023, 11. doi:10.18332/tpc/159119.
- 1 D. Sy, Tobacco Industry Accountability and Liability in the Time of COVID-19, STOP, Jul 28, 2020, available at: <https://ggtc.world/knowledge/novel-emerging-tobacco-products-and-product-regulation/tobacco-industry-accountability-and-liability-in-the-time-of-covid-19-2> ; citing: Eriksson F, et al. (n.d.). OECD public consultation on liability of legal persons. Retrieved from <http://www.oecd.org/corruption/anti-bribery/U4-Submission-CorporateLiability-28-10-2016.pdf>
- 1 Conradi, M., Sánchez-Moyano, J.E., Toward a sustainable circular economy for cigarette butts, the most common waste worldwide on the coast, *Science of The Total Environment*, Volume 847, 2022, 157634, ISSN 0048-9697, Available at: <https://doi.org/10.1016/j.scitotenv.2022.157634>.
- 1 This will include but will not be limited to treating such plastics as hazardous waste, liability regime for such type of waste, compensation options for legacy waste, potential for increasing tobacco taxes as eco taxes etc.
- See: Sy, D., United Nations Environment Programme Options Paper: The Impact on Tobacco Control, May 15, 2023, Global Center for Good Governance in Tobacco Control (GGTC) and Stop Tobacco Pollution Alliance (STPA), available at: <https://ggtc.world/knowledge/sustainability-and-human-rights/united-nations-environment-programme-options-paper-the-impact-on-tobacco-control>

Acknowledgments and Authorship

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