



WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

CONFERENCE OF THE PARTIES TO THE
WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

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Provisional agenda item 6.5

Implementation of Article 19 of the WHO FCTC: Liability

Report by the Convention Secretariat

Purpose of the document

The present report provides an overview of the work undertaken by the Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (WHO FCTC) in relation to Article 19 (Liability) of the WHO FCTC and provides considerations for potentially expanding that work. The report is intended to facilitate the deliberations of Parties under the item “Implementation of Article 19 of the WHO FCTC: Liability” proposed by Parties and pursuant to decision FCTC/COP9(2).

Action by the Conference of the Parties

The COP is invited to note the present report and provide further guidance.

Contribution to the Sustainable Development Goals (SDGs): All SDGs; in particular, SDG 3 and Target 3.a.

Link to Workplan and Budget item: To be decided by the COP.

Additional financial implications if not included in the Workplan and Budget: None.

Related document(s): None

BACKGROUND

1. The agenda item entitled “Implementation of Article 19 of the WHO FCTC: Liability” was proposed by several Parties. The item had been proposed for consideration at the Ninth session of the Conference of the Parties (COP9) to the WHO Framework Convention on Tobacco Control (WHO FCTC). In decision FCTC/COP9(2), in light of restrictions made necessary as a result of the COVID-19 pandemic, COP9 deferred the item for consideration at the Tenth session of the Conference of the Parties (COP10).¹

2. The present report provides an overview of the work that was undertaken by the Conference of the Parties (COP) to WHO FCTC in relation to Article 19 and provides information relevant to potentially expanding that work, in particular by exploring synergies between Article 19 and Article 5.3 of the WHO FCTC, as well as building on work conducted in relevant international fora on issues related to liability.

WORK UNDERTAKEN AT THE COP IN RELATION TO ARTICLE 19

“Liability” in the context of the Convention

3. One of the guiding principles of the Convention, articulated in Article 4.5, establishes that issues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control.

4. Article 19 (Liability) provides that for the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate. The article further calls on Parties to cooperate with each other in exchanging information through the COP in accordance with Article 21, including information on the health effects of the consumption of tobacco products and exposure to tobacco smoke and information on legislation and regulations in force, as well as pertinent jurisprudence. It also provides for Parties to afford one another assistance in legal proceedings relating to civil and criminal liability consistent with the Convention, and states that the Convention shall in no way affect or limit any rights of access of the Parties to each other’s courts where such rights exist. Finally, the article states that the COP may consider, taking account of the work being done in international fora, issues related to liability; this would include considering appropriate international approaches to liability issues and appropriate means to support the Parties in their legislative and other activities in accordance with Article 19.

5. Article 19 has been one of the least-implemented articles by Parties to the WHO FCTC. Implementation of Article 19 was first considered by the COP at its fourth session, at the request of a Party. Based on the implementation reports of the Parties, the Convention Secretariat informed the COP at that session (document FCTC/COP/4/13) that, globally, Article 19 was one of the few articles of the Convention for which no notable progress could be noted. Since then, implementation of Article 19 continued to be reported – in the global progress reports on implementation of the WHO FCTC – as one of the least successfully implemented provisions of the treaty.

¹ The proposed item was titled “Accountability of the tobacco industry (item proposed by several Parties)”, as recorded in the annotated provisional agenda of COP9 (FCTC/COP/9/1(annotated)).

COP reports and decisions on implementation of Article 19

6. The Convention Secretariat produced two reports on Article 19 for consideration by the COP. In report FCTC/COP/4/13, it provided a summary of the experience of Parties in implementation of this provision, as well as an overview of liability issues as considered in international law in the field of environment: general trends and principles, and more specifically in relation to hazardous waste, marine pollution, nuclear safety, transport, and other international and regional treaties.

7. Further, in its report FCTC/COP/5/11, prepared in response to decision FCTC/COP4(15), the Convention Secretariat provided the COP with updated information on Party experience reflected in Party reports, as well as additional sources of information. The report also contained information on relevant liability regimes under other treaties, examples of taking legislative action to deal with criminal and civil liability, and possible approaches through which the COP could support Parties in their activities in relation to Article 19. Such approaches referred to the development of model laws, legal principles and guidelines, facilitating the exchange of information and mutual legal assistance. Some other possible approaches included the preparation of an international civil or criminal liability regime such as a protocol, the establishment of a standing body to receive complaints of violations of the WHO FCTC, and the establishment of a fund mechanism to deal with the compensation aspect of Article 19.

8. To progress on this matter, the COP established an Expert Group to report on facts, information and options in relation to implementation of Article 19 (decision FCTC/COP5(9)). The COP extended the mandate of the Expert Group once (decision FCTC/COP6(7)) requesting it that it focus on approaches that may assist Parties to strengthen civil liability mechanisms across a variety of legal systems. Accordingly, the Expert Group produced two reports for consideration by the COP.

9. In its first report (FCTC/COP/6/8), the Expert Group highlighted the importance of Article 19 and provided available options for developing legislation for Parties to consider, in particular in the context of civil liability. The Expert Group shared best practices and legislative models to facilitate procedural and evidentiary reforms, legislation for enforcement, and some considerations in relation to legislation to strengthen criminal liability. Further, it outlined options for technical support, international cooperation and the exchange of information for the effective implementation of Article 19.

10. In its second report (FCTC/COP/7/13) the Expert Group underlined the common benefits and challenges in implementation of Article 19 and proposed the content for a civil liability toolkit. The toolkit built on scenarios for strengthening implementation of Article 19 (through facilitating access to justice for victims of smoking-related disease, on a collective and individual basis; enabling health-care cost recovery; and enforcing existing tobacco control measures or general laws relevant to tobacco) and an index of procedural reforms relevant to all civil claims (such as reforms related to the proof, cost and length of claims, as well as reforms related to the recovery of compensation from foreign tobacco companies). In decision FCTC/COP7(11), the COP adopted the civil liability toolkit and requested the Convention Secretariat to work on resources to assist Parties with implementation of Article 19, through developing and maintaining a database of experts and resources on liability (a request that was reiterated in decision FCTC/COP8(18)).

11. Parties to the WHO FCTC can benefit from several resources to assist them in the implementation of Article 19. Parties may refer to the Expert Group report FCTC/COP/6/8 for best practices and legislative models to strengthen liability regimes in various legal systems. The WHO FCTC Article 19 Civil Liability Toolkit¹ is available for the use of Parties as an interactive guide to the most viable ways

¹ Available at <http://untobaccocontrol.org/impldb/tobacco-control-toolkit/#/>.

of taking legal action against the tobacco industry; the Toolkit is hosted and maintained, including through updates of the “resources section”, as a living tool by the Convention Secretariat. The Convention Secretariat has also been working, in consultation with the Bureau of the COP, on the development of a digital database of experts and institutions that can provide Parties, upon request, with technical assistance related to tobacco industry liability. The database is expected to be available for the use of Parties prior to COP10. Finally, the Convention Secretariat continues to monitor and report on progress in Party implementation of Article 19 through existing WHO FCTC reporting mechanisms.

POTENTIAL WORK TO FURTHER STRENGTHEN AND EXPAND IMPLEMENTATION OF ARTICLE 19

12. Several Parties shared with the Convention Secretariat their concern with the persistent strategies of the tobacco industry to subvert tobacco control efforts and the challenge posed as a result of successful tobacco control and sustainable implementation of the WHO FCTC at the country level. In particular, Parties raised the issue of the recent acquisitions by transnational tobacco corporations of pharmaceutical companies that could complicate and hinder tobacco control implementation, as recalled by decision FCTC/COP9(10). While recognizing that resources in relation to liability issues were available, and that the pursuit of a specific legal action by one Party may not be suitable for another Party, these Parties highlighted their need for further advice and tools for Parties to address: liability-related issues, in particular in relation to seeking compensation for tobacco industry harms; administrative, legislative, or judicial action that would facilitate enforcement of tobacco control policies; and the prevention of tobacco industry interference generally. These Parties also highlighted a need to increase international cooperation and to learn from deliberations on liability issues in other international fora. In this context, the COP was requested to consider an item that could facilitate a discussion on administrative, legislative and judicial tools that could support Parties in holding the tobacco industry accountable for its harms and, in particular, in light of the persistent tobacco industry strategies to undermine public health policies.

Consideration of Article 19 in relation to Article 5.3

13. The COP has not often considered implementation of Article 19 in the context of Article 5.3. However, in decision FCTC/COP8(18), the COP encouraged Parties to promote national and international cooperation to enhance implementation of Article 5.3 of the WHO FCTC in relation to Article 19 of the WHO FCTC to reduce tobacco industry interference in tobacco control policies. In that decision, the COP had emphasized that tobacco industry interference remained one of the greatest obstacles to the implementation of the Convention, undermining tobacco control efforts at the global, regional and country levels, particularly exacerbating the challenges faced by developing countries and countries with economies in transition. The COP also encouraged Parties to enhance policy coherence within governments and require that all government sectors relevant to the implementation of the Convention, not only the health sector, comply with the requirements of Article 5.3 of the WHO FCTC.

14. Article 5.3 of the WHO FCTC does not refer to “liability” issues. However, the *Guidelines for implementation of Article 5.3 of the WHO FCTC*¹ stipulate that monitoring implementation of Article 5.3 of the Convention and its Guidelines is essential for ensuring the introduction and implementation of efficient tobacco control policies. In that respect, the Guidelines indicate that Parties should be encouraged to use and enforce mechanisms to ensure compliance with the Guidelines, such as the possibility of bringing an action to court. Further, the Guidelines highlight the notion of

¹ Available at <https://fctc.who.int/publications/m/item/guidelines-for-implementation-of-article-5.3>.

“accountability”. One of the guiding principles of the Guidelines is that Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent. Another principle states that Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.

15. Article 5.3, as a general obligation of the Convention, informs the implementation of the tobacco control measures contained in the WHO FCTC, including Article 19. Further, pursuant to Article 4.5, a guiding principle of the treaty, issues relating to liability, as determined by each Party within its own jurisdiction, are an important part of comprehensive tobacco control.

16. Parties may wish to explore implementation of Article 5.3 and Article 19 in a mutually reinforcing manner, using civil and criminal liability, as well as other accountability mechanisms, as a further means of protecting the development and implementation of their public health policies from the commercial and other vested interests of the tobacco industry.

Liability issues in relevant international fora and other considerations

17. In its report FCTC/COP/5/11, the Convention Secretariat described liability regimes under other treaties as well as other sources of information that may be relevant to implementation of the WHO FCTC. Those sources of information included international environmental regimes and human rights regimes. Discussions in relation to liability issues in those fora could be relevant to tobacco control, including those that are currently underway. For example, in decision FCTC/COP7(26), the COP noted the work of the United Nations Human Rights Council’s Open-ended intergovernmental working group on transnational corporations and business enterprises with respect to human rights established by resolution A/HRC/RES/26/9¹ and the overlap of the Council’s work with the spirit of the WHO FCTC. Upon invitation, the Convention Secretariat shared information about Article 19 with the working group; “liability” is a topic of discussion in the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

18. Work on liability issues as undertaken in international law in the field of environment, and business and human rights – particularly when implemented at the national level – could also be an additional conduit through which to explore how improving those liability regimes could be used to strengthen tobacco control efforts.

19. Finally, while the Expert Group report (FCTC/COP/6/8) focused on civil liability, more experience could be gathered on criminal liability, or enforcement models that rely on regulatory offences. The Expert Group highlighted these as areas that Parties used, or could use, to take action with respect to breaches of tobacco control measures.

ACTION BY THE CONFERENCE OF THE PARTIES

20. The COP is invited to note the present report and provide further guidance.

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¹ Available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.