

NOTE FOR THE RECORD

Second meeting of the Expert Group on implementation of Article 19 of the WHO FCTC on Liability

9–11 October 2024

WHO headquarters, Geneva

Opening of the meeting

1. The present report contains a summary of the discussions at the Second meeting of the Expert Group on implementation of Article 19 of the WHO FCTC (Liability), held in person (with virtual participation of one expert and the Special Advisor to the Convention Secretariat).
2. The Chairperson recalled that the objective of the meeting was to work on the development of the report requested in decision FCTC/COP10(13) of the Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (WHO FCTC) in relation to the three dimensions of the Expert Group's mandate set out in that same decision, and to agree on the next steps in that regard.

Adoption of the provisional agenda

3. The provisional agenda was adopted with an amendment proposed by a member of the Expert Group (the agenda, adopted as amended, is contained in the Annex of the present report).

Consideration of matters related to the mandate of the Expert Group

a. Review and collection of information of practice that has evolved at Party level

i. Presentation of key findings from the survey on Article 19 implementation

4. The Convention Secretariat provided an overview of the survey responses received as of the date of the meeting. There had been a total of 83 submissions from government departments and civil society, with 62 countries represented in the responses. Out of the official responses from countries that indicated a status of implementation of Article 19, five Parties had indicated that they had fully implemented Article 19, 34 had reported that they had achieved partial implementation and seven had stated that no action had been taken, although it was recognized that Parties may have differed in how they interpreted their implementation status. Seven countries requested an extension to submit their responses.
5. The Expert Group was presented with key findings of the survey. In terms of civil liability, a significant number of countries had indicated that they had no legislation in that area, while several countries with comprehensive civil and criminal liability legislation had reported that no cases had been brought against the tobacco industry in recent years. Where civil cases had been brought against the tobacco industry, the outcomes had been mixed. In addition, certain countries had indicated that they had taken steps to introduce enabling legislation and facilitate access to civil justice. Respondents had listed the following as reasons for the limited implementation of Article 19 in the area of civil liability: a lack of awareness regarding Article 19 and the tools for implementing it; the fact that implementation was resource intensive and required multi-agency cooperation; difficulties accessing the courts; and the power and influence of the tobacco industry.

6. Regarding criminal liability, respondents had indicated that cases had been brought in relation to both specific tobacco control laws (sales and import restrictions and bans, bans and restrictions on specific products, restrictions on packaging and labelling, etc.) and general criminal legislation (relating, inter alia, to customs and excise, competition, consumer protection, workplace protections and combating fraud, embezzlement and money laundering). In Latin America, claims had also been brought concerning the right to health and for crimes against public health. In total, 27 countries had reported cases or enforcement actions, many of which had been in relation to the smuggling or counterfeit production of tobacco products. Obstacles to implementation included weaknesses in the enforcement of tobacco control legislation, the long and arduous process of enacting legislation, issues relating to extraterritorial liability and the lack of funding.

7. In the area of administrative liability, the survey indicated that many countries interpreted the concept as a non-criminal legal responsibility resulting in penalties such as fines, warnings, or business closures for violating tobacco control laws. It was observed by a member of the Expert Group that the meaning of administrative liability may vary across common law and civil law countries, but that this understanding of administrative liability may be more familiar within civil law countries. This interpretation of administrative liability may also be particularly useful for addressing environmental damage caused by tobacco.

8. In respect of health care cost recovery studies, the survey showed that those studies varied greatly depending on their purpose, which ranged from assessing direct and indirect health care costs to policy development, taxation and awareness-raising. While the various methodologies used were scientifically sound, most of the studies did not focus on liability and were not designed to produce legal change or to establish causation – legal language was not employed, inferences were made that may be unfamiliar to lawyers and judges, and researchers and legal practitioners often lacked expertise on how to ensure that the studies had an impact on the legal system. The Expert Group's work would involve bridging those gaps by explaining the science and how it could be used to promote liability.

9. Respondents had also reported cases against the tobacco industry involving environmental liability (mainly regarding deforestation) and human rights violations (in relation to child labour, modern slavery, etc.).

10. In terms of the support that the Convention Secretariat could provide to strengthen implementation of Article 19, survey respondents had indicated that the Civil Liability Toolkit should be translated into the six official languages of the United Nations, a process that the Convention Secretariat confirmed was ongoing. The Convention Secretariat could also: raise Parties' awareness of existing resources concerning Article 19, potentially through a dedicated online platform; continue monitoring and collecting experiences of litigation cases; provide specific guidelines and recommendations concerning the implementation of Article 19; provide more support on extraterritorial claims against global tobacco companies; build Parties' capacity to implement and update legislation, including financial resources, strengthen the capacity of the judiciary; and increase cooperation among Parties by strengthening information and experience sharing.

11. In their discussion of the survey results, the experts agreed that the responses in the survey might not always fully reflect the reality of tobacco control within countries and that not all respondents may understand Article 19 in the same way or recognize its scope given different legal systems, domestic contexts, and levels of implementation. Countries that had reported full or partial implementation of Article 19 did not always have the necessary legislation and policies in place owing to a lack of resources, information and enforcement. Political will also played a critical role in the effective implementation of Article 19.

12. The experts discussed the need to provide Parties with a portfolio of options that could be used to strengthen their implementation of Article 19, based on a broad interpretation of liability under that article, with the overarching aim of strengthening legal systems and facilitating access to them. The portfolio could include a range of options covering civil and common law systems, judicial and non-judicial (e.g. environment, human rights, or taxation-related administrative liability) processes, public and private litigation, and high-, middle- and low-income settings, including first steps for Parties that had not begun implementation of Article 19. The possible advantages and risks of the various options, particularly any resource-related risks and the risk of intimidation by the tobacco industry, could also be laid out.

13. Furthermore, the experts noted that what constituted successful litigation may differ depending on the context. It was therefore important to also consider the intended outcome of the litigation process in terms of the judgment, the amount of compensation, forcing changes in industry practices, furthering tobacco control policies and raising awareness of tobacco control issues. Ensuring effective enforcement of the outcome of the litigation was also of utmost importance.

ii. Selected case studies

14. The following case studies were presented to the Expert Group by invited speakers:
- two ongoing class action lawsuits against tobacco companies that had begun in Quebec, Canada in 1998, presented by André Lespérance;
 - a criminal action against tobacco companies in the Kingdom of the Netherlands, presented by Wanda de Kanter, which had also involved a widespread publicity campaign;
 - several cases brought against tobacco companies by the *Comité National contre le Tabagisme* in France, presented by Hugo Lévy;
 - the litigation brought against tobacco companies by the Attorney General's Office in Brazil, presented by Davi Bressler;
 - the litigation initiated against tobacco companies by the National Health Insurance Service (NHIS) of the Republic of Korea, presented by Sungkyu Lee.

b. Development of options for Parties to detect and counter tobacco industry efforts to evade applicable liability regimes or to undermine tobacco control

15. The experts began their discussion under this item by considering the various tactics used by the tobacco industry to evade applicable liability regimes or to undermine tobacco control. They noted that many of the litigation-related tactics of the tobacco industry (such as delaying and complexifying litigation procedures) had been widely covered in previous expert group reports and focused their discussion on tactics, including:

- corporate restructuring, which raised jurisdictional issues;
- insolvency measures, which were used in certain jurisdictions to delay procedures and prevent or delay payment of compensation; and
- corporate social responsibility (CSR) and lobbying initiatives, such as the tobacco industry's financing of foundations involved in tobacco control and increasing involvement in the health sector in certain countries, with tobacco control companies rebranding themselves as tobacco control advocates.

16. The experts then discussed possible options for responding to and anticipating such efforts by the tobacco industry. They included:

- strengthening extraterritorial jurisdiction and bringing litigation against parent companies in their place of domicile, drawing on examples from countries such as Brazil and Canada;

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- ensuring greater cooperation around enforcement, in particular by raising awareness of existing international mechanisms;
 - ensuring that domestic mechanisms are available, such as creating or giving existing administrative tribunals the power to impose sanctions and remedial measures for violations of human rights or environmental laws by the tobacco industry;
 - enhancing the involvement of public health representatives in settlement discussions, including through guidance to ensure that such negotiations were not undermining general tobacco control efforts;
 - enhancing the role of civil society in litigation processes – drawing, for instance, on the case study from France – in particular by strengthening the role of *amicus curiae* interventions;
 - placing greater reporting obligations on the tobacco industry, including reporting of financial flows and corporate structures and on CSR and environmental, social and governance (ESG) issues;
 - ensuring better protection for whistleblowers and those monitoring the tobacco industry, including by enacting relevant legislation;
 - strengthening disclosure obligations, including in relation to entities funded by the tobacco industry and the allocation of funds from tobacco control efforts;
 - enabling monitoring of the tobacco industry and facilitating access to, and raising awareness of, monitoring information and data;
 - raising public awareness of tobacco industry litigation to, inter alia, strengthen public support and prevent misinformation.

17. In their discussion, the experts also considered the importance of ensuring that judgments against the tobacco industry were meaningful and enforceable. Guidance for Parties in that area would be useful, as would guidance on non-judicial impositions that could be included in settlements and on the options available in addition to compensation and recovery.

18. The experts noted that while strong underlying substantive legislation was clearly critical, so too was the need to establish and maintain an accessible and effective civil justice system. Several experts also emphasized the importance of public health advocacy in raising awareness of tobacco industry practices, the potential benefits of litigation and other mechanisms for holding the industry liable, and reducing as well as highlighting the harms of tobacco.

19. Several experts highlighted the link between Article 19 and Article 5.3 of the WHO FCTC, which also related to liability and should therefore be acted on by governments. Several experts referred to decision FCTC/COP8(18) and how it could be used by Parties in strengthening their liability regimes.

20. Experts suggested that much could be learned from other sectors, including the environmental sector and human rights.

Possible development of a methodology to estimate or quantify health care costs borne due to tobacco use

i. Updates on recruitment of a consultant through the University of Bath

21. The Expert Group was informed that the application from a diverse team of consultants would be considered. Discussions concerning the consultants, the terms of reference and the logistics of their work would take place over the coming weeks. The consultants' outputs would be received by the University of Bath, which would then submit them to the Expert Group to inform its work.

Next steps

Outline of the report to the COP

22. The Chairperson proposed an outline for the Expert Group's report to the COP, which included the following sections:

- background on the establishment, mandate and meetings of the Expert Group;
- a review of the work of the previous expert group on Article 19 implementation;
- a review and collection of information on the practice that has evolved at Party level, taking into account the work being done in relevant international fora, including a summary of the survey responses, case studies and an evaluation of current practice;
- options for Parties to detect and counter tobacco industry efforts to evade applicable liability regimes or to undermine tobacco control, including an overview of industry efforts in that regard;
- the possible development of a methodology to estimate or quantify health care costs borne due to tobacco use, with information on, and an explanation of, the scientific approaches currently used and their value in determining legal loss and causation;
- recommendations of the Expert Group;
- action which the COP is invited to take.

23. In their discussion on the proposed outline, the experts highlighted the importance of ensuring that the report provided options both for Parties that had not begun implementation of Article 19 and Parties whose implementation was more advanced. It was also important to ensure that the report was accessible to a diverse audience, including both public health and legal experts. The notion of access to justice, particularly in relation to low- and middle-income countries, should be addressed in the report. Distinctions should be made between short- and long-term recommendations and between judicial and non-judicial options.

24. The experts agreed that the proposed outline would be circulated via e-mail to enable them to provide additional input over the following days.

Task distribution and work sharing

25. The members of the Expert Group agreed to share the work of drafting the report to the COP, with experts allocated specific sections to work on. All members of the Expert Group were invited to submit, for inclusion in the report, recent case studies – particularly involving criminal liability or international cooperation – that built on the work of the previous expert group. The compilation of the report would be led by the Chairperson.

Timeline of the work of the Expert Group

26. Following a discussion of the proposed timeline of work, the Expert Group decided that:
- the experts would submit the case studies and the sections of the report assigned to them by 30 November 2024;
 - the compilation of the report would be led by the Chairperson and a first draft would be circulated among the experts by 31 January 2025;
 - the experts would be given until 14 February 2025 to submit their comments on the first draft of the report;
 - the revision of the report would be led by the Chairperson and the final draft of the report would be circulated among the experts by 14 April 2025;
 - to ensure the successful conclusion of the Expert Group's mandate, the Third meeting of the Expert Group would be held from 29 April to 1 May 2025, with a strong preference for an in-person meeting at WHO headquarters in Geneva.

Any other business

27. The Convention Secretariat provided an update on the work of the Expert Group on forward-looking tobacco control measures (in relation to Article 2.1 of the WHO FCTC) and on the preparation by

the Convention Secretariat of the report, as requested in decision FCTC/COP10(14), on the regulatory options regarding the prevention and management of waste generated by the tobacco industry and its products, including plastics used in the manufacture of tobacco products and their packaging.

Closure of the meeting

28. The Chairperson thanked participants for their contributions and closed the meeting.

ANNEX

Agenda

1. Opening of the meeting
2. Adoption of the agenda
3. Consideration of matters related to the mandate of the Expert Group
 - a. Review and collection of information on practice that has evolved at Party level, taking into account the work being done in relevant international fora
 - i. Presentation of key findings from the survey on Article 19 implementation
 - ii. Selected case studies (Invited speakers from Canada, Brazil, Korea, France, The Netherlands)
 - b. Development of options for Parties to detect and counter tobacco industry efforts to evade applicable liability regimes or to undermine tobacco control
 - c. Possible development of a methodology to estimate or quantify health care costs borne due to tobacco use
 - i. Updates on recruitment of a consultant through the University of Bath
4. Next steps
 - a. Outline of the report to the COP
 - b. Task distribution and work sharing
 - c. Timeline of the work of the Expert Group
 - i. Third meeting of the Expert Group in April 2025 (possible in-person)
5. Any other business
6. Closure