



WHO FRAMEWORK CONVENTION  
ON TOBACCO CONTROL

**Conference of the Parties to the  
WHO Framework Convention  
on Tobacco Control**

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## **Implementation of Article 19 of the Convention: “Liability”**

### **Report of the expert group**

#### **INTRODUCTION**

##### **Background**

1. At its fifth session (Seoul, Republic of Korea, 12–17 November 2012), the Conference of the Parties (COP) decided to establish an expert group on liability that was mandated to report on facts, information and options in relation to implementation of Article 19 of the WHO Framework Convention on Tobacco Control (WHO FCTC) to the sixth session of the COP.<sup>1</sup> In the preparation of the report, the COP directed the expert group to:

- (a) identify, examine and collect existing best practices for civil and criminal liability including compensation;
- (b) identify obstacles that impede effective action in the areas of civil and criminal liability, in particular in the context of civil liability, including compensation, and provide options to address them;
- (c) identify available options for developing legislation for Parties to consider, in the areas of civil and criminal liability, in particular in the context of civil liability; and
- (d) provide options for technical support, international cooperation and the exchange of information for the effective implementation of Article 19 of the WHO FCTC.

##### **Appointment and meetings of the expert group**

2. In accordance with decision FCTC/COP5(9) and under the direction of the Bureau of the COP, the Convention Secretariat invited Parties to the WHO FCTC to nominate a maximum of two experts each to serve in the group, and encouraged regional cooperation in the nomination process. Parties

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<sup>1</sup> See decision FCTC/COP5(9).

were provided with a list of areas of expertise, compiled by the Bureau of the COP, which would be beneficial to the work of the expert group.<sup>1</sup>

3. On the basis of the nominations received from Parties each member of the Bureau, in consultation with the Convention Secretariat, proposed three experts from within their region, who were invited to participate in the group.

4. The expert group held two meetings in Geneva (23–25 October 2013 and 10–12 March 2014). At its first meeting Mr Vuyile Dlamini from Swaziland was elected to chair the group. The first meeting was attended by 17 experts and the second by 14 experts, with substitutions approved by Bureau members when experts were not able to attend or were no longer able to fulfil the role.

5. The decision of the COP also provided that the Convention Secretariat would be able to invite up to one observer per region with specific expertise in the area of the expert group. Three observers were appointed by the Secretariat before the first meeting, following nominations from civil society, to address specific areas of expertise, and pending further advice by the expert group on additional expertise that may be needed. At the conclusion of the first meeting, members considered areas of additional expertise that would assist the work of the expert group. As a result, one expert in the area of criminal law was also engaged by the Secretariat.

### **Method of work of the expert group**

6. During the first meeting of the expert group, discussions focused on sharing of experiences relating to the mandate of the group, identification and collection of case studies and examples (primarily relating to civil liability), and agreeing on a work plan for the group. In addition to consideration of tobacco liability case studies the expert group also considered practices used to address similar obstacles in other fields of liability, where relevant.

7. At its second meeting the expert group discussed all matters falling within its mandate. In particular, it reviewed the work conducted between meetings and the case studies provided by expert group members; examined challenges and options related to the pursuit of criminal liability for tobacco-related harms; discussed options for technical support, international cooperation and exchange of information; and analysed the obstacles and best practices arising from the examples of civil liability actions collected by the group. Following the second meeting, the report of the expert group was revised by the Chair and finalized through online communication with the group.

8. The present report outlines the options for legislative action and international cooperation,<sup>2</sup> as well as possible future work identified by the group. Facts and information regarding experiences, obstacles and best practices in tobacco liability are presented in Annexes 1–3.<sup>3</sup>

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<sup>1</sup> Areas of expertise identified by the Bureau: jurists from various legal systems (e.g. common law, civil law) and judicial systems (e.g. system of courts, procedural matters); jurists with practical experience in cases against the tobacco industry, from both government and private practice; experts from academia with relevant specialization (e.g. comparative law, case law analysis); experts familiar with other treaties with liability aspects (e.g. environmental protection); experts from the field of tobacco control; jurists with expertise in litigation in areas other than tobacco control; experts in public health policy (e.g. on litigation as a policy tool); and experts in epidemiology, medicine, marketing, economics, tobacco products science (e.g. chemistry, toxicology) and consumer protection.

<sup>2</sup> Some of the reform options (especially the options for procedural reform) could be taken up by rule-making committees, while it would be possible for courts to take up the suggested legal principles directly. Nonetheless, legislation is an effective way in which Parties could incorporate reforms related to Article 19 into their domestic laws.

<sup>3</sup> The information relating to civil liability presented in Annexes 1–3 was drawn from the experiences shared by members of the group, which were compiled into a detailed *Consolidated review of best practices and obstacles*

## Importance of Article 19 in the context of the WHO FCTC

9. Article 19 of the WHO FCTC 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. It calls upon Parties to cooperate in exchanging information on various matters, such as legislation, regulations in force and pertinent jurisprudence, and to afford one another assistance in legal proceedings relating to liability, as appropriate and mutually agreed. The WHO FCTC further recognizes in its guiding principles, that “issues relating to liability, as determined by each Party, within its jurisdiction, are an important part of comprehensive tobacco control” (Article 4.5).

10. Implementation of Article 19 presents Parties with an opportunity to collaborate in their efforts to hold the tobacco industry liable for its abuses and, in doing so, to strengthen implementation of the WHO FCTC. The marketing of an inherently deadly and addictive product, promoted as a lifestyle consumer good and subject to gradual and still evolving regulation has few, if any, historical parallels. As a result, actions taken to address the harms caused by this behaviour are often without precedent, and legal systems may not immediately be well adapted to deal with the issues that arise.

11. A number of courts in jurisdictions around the world have already found that tobacco companies have committed civil wrongs, including fraud, in the way they manufactured, sold and promoted tobacco products over decades. A recurring theme in these decisions is that the tobacco companies aggressively promoted the uptake and consumption of a deadly and highly addictive product, while concealing evidence about the harmful effects of their products and undermining governmental and independent efforts to inform the public of the health consequences of tobacco use.

12. The successful pursuit of litigation can have the effect of securing compensation for the social and economic costs of suffering and/or health care resulting from tobacco-related disease, and in some cases punitive penalties arising from both civil and criminal proceedings and civil penalties arising from civil regulatory proceedings aimed at punishing wrongdoing, in addition to providing compensation for harm. Obtaining compensation from tobacco companies can have the effect of increasing tobacco prices, and thereby discouraging tobacco consumption.

13. However, litigation need not only be aimed at obtaining compensation. Legal action taken by Parties in line with Article 19 can complement numerous other tobacco-control measures. Cases can be used to expose the conduct of those who manufacture, supply or market tobacco products, deter further wrongdoing, or obtain injunctive relief in order to stop such behaviour, and/or require remedies for the conduct. For example, in the United States of America, the Master Settlement Agreement arising from the pursuit of liability actions by state governments against tobacco companies included provisions by which the companies are required to comply with restrictions on tobacco advertising in concert with other tobacco-control measures, fund education programmes, and make all documents produced in the litigation available on a website to be maintained for 10 years.<sup>1</sup> These provisions further strengthen both tobacco-control regulation and broad public health objectives within the relevant jurisdictions.

14. In addition, the exposure of tobacco industry conduct provides opportunities to implement media strategies to reveal the worst abuses to the public, and to build political will and shift public views in favour of tobacco-control measures. A significant outcome of tobacco litigation in a number of jurisdictions has been the disclosure of an immense number of internal tobacco industry documents that expose industry conduct, including its concealment and destruction of the results of sensitive

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*to establishing civil liability, and options for reform.* At the group’s request, the consolidated review is available to Parties as a background resource and a complement to the current report.

<sup>1</sup>The Master Settlement Agreement is available at: <http://www.naag.org/backpages/naag/tobacco/msa/>

research and other documents, and that provide opportunities for public education regarding both the industry's behaviour and the harmful effects of tobacco consumption.<sup>1</sup>

15. Article 19 and Article 4.5 of the WHO FCTC make it clear that legal action to establish liability is an important means of tobacco control. However, legal cultures vary in relation to how they use litigation as a vehicle for resolving certain types of disputes. For example, there are concerns that the legal process might be abused by the use of litigation to pressure defendants into settling unmeritorious claims. However, it is highly unlikely that victims of tobacco-related disease could pressure the tobacco industry into settling claims without merit. On the contrary, many victims of smoking-related disease as well as governments and health care providers often have strong claims against the industry that are worthy of court adjudication.

#### **AVAILABLE OPTIONS FOR DEVELOPING LEGISLATION FOR PARTIES TO CONSIDER, IN PARTICULAR IN THE CONTEXT OF CIVIL LIABILITY**

16. The available options for developing legislation for Parties to consider were identified by the expert group following its consideration of the experiences, obstacles and best practices relevant to liability presented in more detail in Annexes 1–3. The group identified best practices as those which would best address the challenges and obstacles in applying civil and criminal liability that are outlined in Annex 2. Many of the best practices identified by the expert group would require legislation in order to be implemented.

17. However, while the best practices highlight the core issues that Parties could consider resolving in drafting domestic legislation and regulations on tobacco industry liability, not all of the legislative options would be appropriate to all jurisdictions, or all types of litigation. Instead, the options outlined below and in further detail in Annex 3 are options that might assist Parties, depending on their jurisdictions, legal traditions, and the resources available to them, to establish effective and fair civil and criminal liability regimes for tobacco-related wrongs.

18. The available options for developing legislation for Parties to consider in the areas of civil and criminal liability identified by the expert group and set out below include legislation to:

- (a) enable victims of tobacco-related disease to pursue civil claims collectively through use of class action procedures;
- (b) enable health-care cost recovery action by states and health-care providers and insurers;
- (c) facilitate claims for injunctive remedies in relation to tobacco industry conduct;
- (d) facilitate “public interest” litigation to allow anyone to take legal action to enforce existing tobacco control measures, or pursue remedies for industry conduct;
- (e) amend procedural and evidentiary rules to facilitate the pursuit of civil claims for compensation and non-monetary relief;
- (f) amend and/or codify liability standards and available legal defences, to make it clearer in civil claims when the tobacco industry should be held liable; and

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<sup>1</sup> For example, see the discussion regarding experiences in tobacco liability litigation in the United States and Canada in Annex 1.

- (g) create or strengthen civil and criminal offences to enable the successful enforcement of tobacco-control measures.

19. The following paragraphs expand on the expert group's considerations in relation to paragraphs 18(e) – (g) above.

### **Legislation to facilitate procedural and evidentiary reforms**

20. The expert group noted that in order to facilitate and expedite tobacco-related liability claims, Parties could consider modifying rules of procedure and evidence so as to save time and money, and to redress the resource imbalances and information asymmetry common to tobacco litigation. Many of the best practices identified by the expert group for civil liability (outlined in more detail in Annex 3) are aimed at facilitating effective liability action through procedural changes to:

- (a) require disclosure of internal documents by tobacco industry defendants, and make it easier for claimants<sup>1</sup> to rely on tobacco industry documents already publicly available, including on the internet, by modifying the rules on admissibility of documentary evidence;
- (b) rules relating to the application of legal professional privilege to in-house counsel for tobacco companies, given that such communications rarely, if ever, constitute independent legal advice as opposed to ordinary business records regarding the company's affairs including its scientific research, lobbying, marketing and document management activities. Such documents are often highly relevant to the tobacco industry's liability and ought to be made available to courts;
- (c) rules relating to fault and causation, where appropriate, in order to place the burden of proof on tobacco companies where possible, limit availability of defences based on consumers' knowledge of risks, and to allow claimants to use statistical evidence to establish causation;
- (d) rules relating to time limits, where necessary, in order to ensure that the rules reflect the often long latency periods between exposure to tobacco and the onset of illness;
- (e) costs and funding models, in order to remove or restrict claimants' liability for adverse costs, and to allow the claimants' own costs to be funded through contingency fees and commercial litigation funding to address the resource imbalances between most claimants and the tobacco industry, and to ensure that tobacco companies bear the costs of defending litigation;
- (f) reduce costs and delays in court processes; and
- (g) ensure that claimants can pursue litigation in the jurisdiction where they suffered damage, or where the defendant is domiciled, and that judgments against tobacco defendants based in another jurisdiction can be enforced against them.

### **Legislation for enforcement**

21. In all jurisdictions, including those not able to pursue litigation for compensation for the harms caused by tobacco, it remains important to ensure that liability of tobacco companies and other industry participants for breaches of tobacco-control laws are able to be pursued. Enforcement of existing or new tobacco-control laws can use either civil or criminal penalties, or both. Several models for tobacco-control enforcement are discussed in Annex 3.

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<sup>1</sup> The party responsible for initiating a legal claim is known in some jurisdictions as a claimant and in others as a plaintiff or complainant. For consistency the term claimant is used throughout this report.

### **Legislation to strengthen criminal liability**

22. Criminal liability in relation to the harm caused as a result of tobacco consumption has been pursued less often and with fewer successes than civil liability. The expert group noted that despite the obstacles faced in pursuit of criminal liability for past conduct, legislation can be implemented to ensure that criminal offences are available for enforcement of tobacco control regulation (discussed above), and for possible future conduct in relation to the manufacture and supply of tobacco products. Criminal liability is further discussed in Annex 1 (paragraphs 26–27), Annex 2 (paragraphs 11–13) and Annex 3 (paragraphs 43–48).

### **Other legislative options**

23. In jurisdictions in which litigation has not proven to be an effective tool to compensate for tobacco-related harms, it may be feasible to use legislation to redistribute the costs of the tobacco epidemic, consistent with the WHO FCTC, and in doing so to reduce the total harm caused by tobacco. The implementation or increase of tobacco excise fees, widely used as an effective and important means of reducing tobacco consumption, may serve as a common type of such legislation.<sup>1</sup> An additional option is the implementation of a licence scheme for manufacturers in order to recoup the costs of tobacco regulation.<sup>2,3</sup>

24. The examples of legislation discussed above need not be implemented to the exclusion of proceedings seeking to establish civil or criminal liability, but can be adopted where possible, as part of comprehensive tobacco-control policies as indicated in Articles 4 and 5 of the WHO FCTC.

## **OPTIONS FOR TECHNICAL SUPPORT, INTERNATIONAL COOPERATION AND THE EXCHANGE OF INFORMATION FOR THE EFFECTIVE IMPLEMENTATION OF ARTICLE 19 OF THE WHO FCTC**

25. Parties agree in Article 19 to provide one another with assistance in legal proceedings relating to civil and criminal liability, as appropriate and mutually agreed, and within the limits of national legislation, policies, legal practices and applicable treaty arrangements. This provision complements Parties' agreement in Article 22 to promote the transfer of technical, scientific and legal expertise and technology, as mutually agreed, to establish and strengthen national tobacco-control strategies, plans and programmes.

26. The expert group noted that international cooperation and exchange of information are critically important in the context of Article 19, in light of the trans-boundary nature of the issues involved in pursuing litigation against multinational tobacco companies, and in a context where many tobacco-consuming countries do not have a domestic tobacco manufacturing industry.

27. During discussion of options for providing support to Parties in their activities in accordance with Article 19, the expert group reviewed the possible approaches through which the COP could

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<sup>1</sup> See Article 6 of the WHO FCTC and the guiding principles and recommendations for its implementation adopted by the COP at its fifth session (decision FCTC/COP5(7)) and the draft guidelines submitted for consideration by the COP at its sixth session (document FCTC/COP/6/7).

<sup>2</sup> For example, in 2009 the United States Food and Drugs Administration introduced a licence scheme as part of the Family Smoking Prevention and Tobacco Control Act. The total amount of user fees to be assessed and collected for a given fiscal year range from US\$ 85 million for 2009 up to US\$ 712 million for 2019 and each subsequent financial year. These user fees “are available only for the purpose of paying the costs of the activities of the Food and Drug Administration relating to the regulation of tobacco products...”

<sup>3</sup> Note that licensing fees are recognised as a possible means of financing tobacco product regulation (see the *Partial guidelines for implementation of Articles 9 and 10 of the WHO FCTC*), and that licensing is also a means of controlling or regulating the production and distribution of tobacco products in order to prevent illicit trade (see Article 15 of the WHO FCTC and the Protocol to Eliminate Illicit Trade in Tobacco Products).

support Parties as set out in the Convention Secretariat's report to the fifth session of the COP.<sup>1</sup> The group's conclusions in relation to these issues are set out below.

### **Offering guidance for Parties' implementation of Article 19**

28. The expert group noted and agreed that in order to assist Parties to develop their national legislation on liability, including compensation where appropriate, further guidance adaptable to various jurisdictions could be developed in light of the best practices for pursuit of civil liability within the limits of their national legal practices. Examples of the types of guidance that could be developed were discussed in the Convention Secretariat's report to the fifth session of the COP.<sup>1</sup> The expert group further noted that general principles providing guidance on implementation of best practices would be more adaptable for implementation by Parties, considering the variety of their legal systems, than model laws.

29. The expert group also discussed the examples of international liability regimes outlined in the Annex to the Convention Secretariat's report to the fourth session of the COP,<sup>2</sup> noting that such regimes do not easily fit the tobacco control context, and concluded that support for Parties should focus on implementation of Article 19 at the national level and practical mechanisms to facilitate exchange of information.

### **Exchange of information**

30. The group's discussions in relation to the exchange of information addressed the need for exchange of information among Parties, as well as the general demand for greater access to information, resources and expertise to assist Parties should they decide to pursue liability actions. Several possible options for support were identified.

#### *Protected website for sharing of information*

31. A useful way to facilitate cooperation among the Parties could be via a protected website facilitated by the Convention Secretariat for the sharing of information among Parties, the Secretariat and other invited experts where appropriate. Such a platform would allow Parties to communicate information about ongoing cases and relevant legal decisions to other Parties, and to seek assistance where appropriate.

#### *Referral system for access to relevant expertise*

32. The expert group agreed that it would be useful for Parties to have access to databases or networks of people with legal and scientific expertise who could provide technical assistance to Parties on request. Databases could be maintained on a protected website by the Convention Secretariat to allow Parties initiating or facing legal challenges to request and obtain referrals to appropriate experts.

33. The group noted that a referral system for legal and scientific expertise may not need to be limited to legal proceedings related to Article 19, but could potentially be extended to include litigation in which governments and other entities are required to respond to challenges to tobacco-control measures, noting that different types of expertise may be needed for different kinds of legal proceedings.

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<sup>1</sup> See document FCTC/COP/5/11.

<sup>2</sup> See document FCTC/COP/4/13.

### *Mutual legal assistance*

34. Article 19.3 requires that Parties provide one another with assistance in legal proceedings relating to civil and criminal liability, as appropriate and mutually agreed. Cooperation among Parties in relation to procedural matters could enable greater exchange of information. In cases where more than one Party has an interest in the outcome of a case, cooperation could extend to the arrangement of joint litigation agreements. Such agreements could allow information to be shared without waiving legal professional or attorney-client privilege. Rules on privilege differ between jurisdictions, but in most jurisdictions it would be prudent for these agreements to expressly recognize that the information shared pursuant to them remains privileged and confidential and that exchange of the material does not constitute a waiver.

### *Implementation of communication plans*

35. Tobacco liability litigation can provide valuable opportunities for exposure of tobacco industry behaviour to the media and the wider public. Such coverage can strengthen implementation of the WHO FCTC by further educating and reinforcing messages to the public about the health effects of tobacco consumption and the role of tobacco companies in the harms caused by tobacco consumption. The expert group agreed that Parties should, wherever possible, be encouraged to implement communication plans to publicize the outcomes, as well as the evidence and interim findings, of tobacco litigation.

### **Assistance that could be provided by the Convention Secretariat**

36. The expert group noted that in some cases it may be appropriate for the Convention Secretariat to provide assistance in relation to legal disputes, on behalf of the COP, to uphold the WHO FCTC and its principles. Assistance may take the form of public statements or “amicus curiae” briefs in support of WHO FCTC issues raised in legal disputes including, where appropriate, disputes relating to implementation of tobacco-control measures. The group further noted that WHO may be able to offer additional support to Parties in this context.

### **Mechanisms for financial support**

37. The expert group noted that litigation funding is a significant obstacle for Parties that are considering pursuing claims to establish civil or criminal liability. The group noted examples of domestic litigation funds that have been established to facilitate the pursuit of liability litigation in certain jurisdictions.<sup>1</sup> While the establishment of litigation funds on either a domestic or international basis would need to be subject to clear rules regarding access to any funds available, and should be preceded by support for Parties to establish effective civil liability regimes in their jurisdictions, the expert group considered that Parties could be encouraged to implement, at a national level, the best practices relating to litigation costs mechanisms, including contingency fees, commercial litigation funding and, where possible, the creation of public litigation contingency funds.

### **Existing resources**

38. The expert group recognized that, while additional resources and support are needed to facilitate Parties’ implementation of Article 19, a wide range of international, regional and national resources already exist to facilitate exchange of information and technical support, and further noted that Parties could be encouraged to utilize and refer to such resources, as appropriate, for international support and capacity building.<sup>2</sup> Parties could also be encouraged to make enhanced use of the

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<sup>1</sup> The existence of a public fund was important in making the class actions in Quebec (*Létourneau v. JTI-MacDonald Corp. et al. and Conseil québécois sur le tabac et la santé* and *Blais v. JTI-MacDonald Corp. et al.*), economically viable, by helping cover the costs of obtaining expert evidence.

<sup>2</sup> Such resources include: various international and nongovernmental organizations that provide resources, legal assistance training and support to tobacco control lawyers, advocates and governments; regional resources

reporting system of the Convention to provide and exchange information on implementation of Article 19.

### **OPTIONS FOR POSSIBLE FUTURE WORK**

39. Having identified and examined obstacles, best practices and options for legislative action, the expert group considered a range of possible options for technical support, international cooperation and exchange of information for effective implementation of Article 19 of the WHO FCTC, as noted above.

40. The COP may wish to consider developing further guidance to support Parties' implementation of effective civil and criminal liability regimes to address issues of liability in order to implement Article 19, as discussed above at paragraph 28. Such guidance should be adaptable for implementation in the widest possible range of Parties' legal systems under appropriate circumstances, and take account of the best practices outlined in Annex 3.

41. In light of the technical nature of the subject matter, should the COP decide to request the development of further guidance for Parties, it may wish to mandate that work to an expert group. Should the COP wish to extend the mandate of the current expert group, it would be appropriate to provide for a review of the expertise available within the group, and the incorporation of additional areas of expertise where necessary in order to take the work forward.

42. In addition, in order to further support Parties in their legislative and other activities in accordance with Article 19, and in responding to challenges to their tobacco control measures where necessary, the COP could consider requesting the Convention Secretariat to:

- (a) enable and encourage the voluntary sharing of relevant information, experiences and expertise among the Parties through a protected website;
- (b) develop a database of legal and scientific experts with experience in tobacco litigation, including liability, and establish a mechanism for the recommendation of experts on request of Parties engaged in relevant actions; and
- (c) prepare, maintain and make available to Parties a comprehensive list of the existing resources that may assist Parties in dealing with civil and criminal liability and other legal challenges where necessary.

### **ACTION BY THE CONFERENCE OF THE PARTIES**

43. The COP is invited to note the report of the expert group and to provide further guidance in relation to the options for possible future work.

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including knowledge hubs identified by the Convention Secretariat and maintained by partner institutions; reciprocal assistance agreements among Parties, and organizations that facilitate regional cooperation; national organizations; and online and documentary resources.

## ANNEX 1

### EXPERIENCES IN TOBACCO LIABILITY

1. Many of the health harms caused by tobacco are by now well established. Experiences in tobacco liability litigation have been aimed at holding those involved in the manufacture, supply and marketing of tobacco products legally accountable for their conduct; securing compensation for individuals or groups of individuals harmed by tobacco consumption; seeking injunctive relief to end wrongdoing or to correct past breaches; or recovering the costs of health care borne by health-care providers and insurers caused by tobacco consumption. However, there are still relatively few successful examples of the use of tobacco litigation in line with Article 19, even in countries with well-established legal systems and experience with complex litigation. This experience does not reflect the strength of the evidence demonstrating the unlawful behaviour of the tobacco industry over time.

2. This Annex presents a range of case studies examined by the expert group during the process of identifying both obstacles and best practices in the areas of civil and criminal liability.<sup>1</sup> While relatively few, the important litigation successes promisingly cover both developed and developing countries and common law and civil law jurisdictions.

#### **Civil liability**

3. Many Parties have in place general civil liability regimes for injured persons, groups of persons, or third parties in some jurisdictions, to pursue legal proceedings for compensation for their injuries. Despite this, many Parties lack the legal infrastructure to efficiently and fairly handle complex litigation affecting large numbers of people. The expert group identified a number of examples of successful legal action taken in jurisdictions of both Parties and non-Parties to the WHO FCTC.

#### Health-care cost recovery litigation

4. The United States of America is a noteworthy example in health-care cost recovery litigation. In 1994 a small number of US states initiated actions to recover tobacco-related health-care costs within their jurisdictions. These were followed by actions in more states. Successes during the process of several of these cases, including a trial in which many damaging internal industry documents were discovered, eventually led to the industry settling with four states and later entering into a Master Settlement Agreement with the remaining 46 states for a settlement which, up to 2013, had resulted in almost US\$ 100 billion in actual payments from tobacco companies to the states.<sup>2</sup> In addition, the companies agreed to discontinue most advertising, refrain from a variety of deceptive practices, open a website including all documents produced in smoking- and health-related lawsuits, and fund a substantial counter-advertising initiative.

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<sup>1</sup> The case studies set out in this section represent those identified by the members of the expert group as successful liability actions, in addition to some examples of unsuccessful cases. While the expert group considered all known examples of successful civil liability claims for compensation, the examples included here and in the *Consolidated review of best practices and obstacles to establishing civil liability, and options for reform* are not considered exhaustive in relation to tobacco liability actions in general. Rather, these case studies may be considered representative of the expertise of the members of the expert group.

<sup>2</sup> See Project Tobacco. "2013-11-15 Payments to States Inception thru October 29 2013". National Association of Attorneys General (2013) ([http://www.naag.org/backpages/naag/tobacco/msa-payment-info/2013-11-15%20Payments\\_to\\_States\\_Inception\\_thru\\_October\\_29\\_2013.pdf](http://www.naag.org/backpages/naag/tobacco/msa-payment-info/2013-11-15%20Payments_to_States_Inception_thru_October_29_2013.pdf)).

5. Most Canadian provinces have also now introduced legislation to enable the government to bring a health-care cost recovery claim, and have subsequently filed relevant claims. The two biggest provinces, Ontario and Québec, are seeking 50 billion and 60 billion Canadian dollars in compensation, respectively. While at the time of writing of this report no trial date had been set in any of the provinces' actions, the process to date illustrates notable legal tactics used by the tobacco industry, with enabling legislation subject to constitutional challenges in some provinces, and an unsuccessful attempt by the industry to add the Canadian Federal Government as a third party defendant on the grounds that it misled Canadian consumers.

6. The experiences of the Canadian provinces demonstrate the importance of procedural rules to facilitate litigation and ensure that cases are completed within a reasonable time and at a proportional cost. British Columbia was the first province to introduce enabling legislation in 1998, and subsequently filed a claim against the industry in 2001. Following a successful constitutional challenge, the revised legislation was upheld as constitutional by the Canadian Supreme Court in 2005.<sup>1</sup> Despite the enabling legislation for the health-care cost recovery litigation in Canadian provinces having been shown to be constitutional, and appearing to address all of the legal and evidentiary obstacles needed to make such litigation possible and viable, the continuing experience highlights procedural challenges.

7. The expert group noted that health-care cost recovery cases have been pursued with varying outcomes in other jurisdictions, including Israel, Marshall Islands and Saudi Arabia. In April 2014 the National Health Insurance Service (NHIS) in the Republic of Korea announced that it is preparing litigation against the tobacco industry to offset treatment costs for diseases linked to smoking.

#### Class actions

8. The most significant successes in civil liability have been achieved in the United States. Despite unsuccessful attempts over several earlier decades, since 1996 there have been successes in numerous individual claims, as well as consumer fraud cases, defective product claims and class actions. Two class actions are worth mentioning here.

9. The *Engle* case,<sup>2</sup> which was filed on behalf of Florida residents suffering tobacco-related disease between 1991 and 1996 as a result of addiction to the nicotine in cigarettes, considered common issues about the tobacco companies' conduct in relation to the group, finding the industry liable on a number of grounds. Following further trials (including one awarding significant punitive damages<sup>3</sup>), which were appealed by the tobacco companies, individual class members are permitted to use the findings made against the industry as a first and critical step in making their own claim in individual "follow-on" trials. Over 7000 individual cases were filed within the deadline. At the time of writing of this report, 104 trials had reached a verdict: 71 for claimants and 33 for the defendants.

10. The *Broin* case,<sup>4</sup> a class action brought on behalf of non-smoking airline flight attendants, resulted in a settlement requiring the six major cigarette companies to provide US\$ 250 million to fund a medical foundation to further investigate the adverse health effects of second-hand smoke.

11. Canada also has significant experience in tobacco litigation, with all major types of civil claims for compensation having been pursued with varying success. Notably, two class actions were brought to trial in Québec in 2013. The cases were the only two to be certified of several filed in the 1990s on behalf of hundreds of thousands of smokers and ex-smokers, and it took more than a decade

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<sup>1</sup> *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473, 2005 SCC 49.

<sup>2</sup> *Engle v. Liggett Group, Inc.* 945 So. 2d 1246, [Fla. 2006].

<sup>3</sup> *Martin v. R.J. Reynolds Tobacco Co.*, No. 2007-CA-2520 [Fla. 1st Cir. Ct].

<sup>4</sup> *Norma R. Broin, et al. v. Philip Morris Companies, Inc., et al.* Dade County Circuit Court, Florida 91-49738 CA 22.

of interlocutory processes for them to reach trial. The first case<sup>1</sup> was brought on behalf of the more than 800 000 Québécois who are addicted to smoking, under the Québec *Consumer Protection Act*, which does not require evidence of smokers' reliance on representations from the tobacco companies to establish liability. The second case<sup>2</sup> was filed independently and seeks compensation for Québec lung cancer, throat cancer, larynx cancer and emphysema victims. While not completed, the Québec lawsuits have already led to significant public and media scrutiny of numerous damaging internal industry documents.

#### Individual claims for compensation

12. Despite cases having been pursued over a long period of time, it was not until 1996 that a defendant, following appeals, was required to compensate a claimant for lung cancer caused by smoking in the United States. Since then, cases have included thousands of individual actions for lung cancer, class actions, consumer fraud cases and defective product claims. At trial in the United States, individual claimants obtain a favourable verdict more than 40% of the time and have collected hundreds of millions of dollars in compensation.<sup>3</sup>

13. The *Stalteri* case,<sup>4</sup> the only individual case for compensation successfully pursued in Europe, relied on classification of the manufacture of tobacco as a "dangerous activity" under the Italian Civil Code. This classification allowed the court to apply Article 2050 of the Italian Civil Code, which has two critical features: it reverses the burden of proof, and has a clear definition of fault, requiring the manufacturer to take all appropriate measures to avoid injury. The court found that the company had an obligation to inform consumers of the health hazards of smoking, which it failed to do. Determining the cause of Mr Stalteri's lung cancer was uncomplicated given that expert medical evidence indicated that there was an 80% probability that it was caused by tobacco use, and Mr Stalteri had only smoked tobacco products from one tobacco manufacturer. Unfortunately, the findings allowing Article 2050 of the Italian Civil Code to be applied to tobacco products were reversed in 2005,<sup>5</sup> making the use of Article 2050 in tobacco litigation no longer possible.

14. There have also been two important successes in smoking and health cases brought by individuals against tobacco companies in Brazil. In the first case,<sup>6</sup> compensation was awarded to the widow and children of a smoker who had died from smoking-related disease. On appeal, the majority held that even when an activity is legal, the party who engages in it may not, through omission, conceal the consequences of the use of the product, such as the fact that it causes addiction and cancer, and on the contrary, promote the use of the product with themes of success, wealth, well-being, and healthy life. In the second case,<sup>7</sup> the court also upheld a claim by the estate of a victim of tobacco-related disease, using very similar reasoning. In this case the defendant, a subsidiary of British American Tobacco, admitted it was already aware in 1964 (at the time the claimant had started smoking) of the harmful effects and risks inherent in tobacco consumption. The court found that the defendant was obliged to provide a warning in this regard and that it had failed to do so.

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<sup>1</sup> *Létourneau v. JTI-MacDonald Corp. et al*, District of Montreal, PQ No. 500-06-000070-983.

<sup>2</sup> *Conseil québécois sur le tabac et la santé and Blais v. JTI-MacDonald Corp. et al*, District of Montreal, PQ No. 500-06-000076-980

<sup>3</sup> Douglas C, Davis R, Beasley J. Epidemiology of the third wave of tobacco litigation in the United States, 1994-2005. *Tobacco Control*. 2006;15(Suppl 4):iv9-16. doi:10.1136/tc.2006.016725.

<sup>4</sup> *Stalteri v. BAT Italia*, Court of Appeal of Rome, decision no. 1015 of 7 March 2005 (in Italian).

<sup>5</sup> *Tonutto et al v. ETI Spa.*, Civil Court of Rome, decision no. 8067 of 11 April 2005 (in Italian).

<sup>6</sup> *Dias et al v Souza Cruz S.A* 2009 Court of Justice of Minas Gerais, 14th Civil Chamber (in Portuguese).

<sup>7</sup> *Sivieri v. Cia De Cigarros Souza Cruz*, 2010 3rd Civil court of the Central Court of the County of Porto Alegre. (in Portuguese).

Non-monetary claims, including those seeking injunctive relief

15. In addition to the successful claims for compensation outlined above, the expert group identified a number of successful actions for injunctive remedies. In these cases litigation has been used to obtain declarations regarding the lawfulness of tobacco companies' conduct, and to require that manufacturers and/or suppliers desist from certain activities, or correct previous misleading statements.

16. The *RICO* case in the United States is a significant example of the value of tobacco litigation that seeks declaratory and injunctive relief. The United States Department of Justice (DOJ) filed a civil suit under the *Racketeer Influenced Corrupt Organizations Act* (RICO) against the major United States based tobacco companies in the United States District Court for the District of Columbia, alleging that the tobacco industry conspired to defraud the public by knowingly producing harmful and addictive products and misrepresenting the potential risks associated with the products.<sup>1</sup>

17. The DOJ alleged that defendants purposely misled the public regarding the dangers of smoking; misled, and continue to mislead, the public about the dangers of exposure to second-hand smoke; misrepresented nicotine's addictiveness and manipulated nicotine delivery in cigarettes; deceptively marketed "light" and "low tar" cigarettes to exploit smokers' desire for less hazardous products; targeted the youth market; and conspired not to research or produce less hazardous cigarettes. In a comprehensive Final Opinion and Final Judgement, Judge Kessler found the defendants had violated RICO, and ordered four major remedies: the prohibition of certain brand descriptors; corrective statements; disclosure of documents and disaggregated marketing data; and general injunctive provisions, including no further violations of RICO, and not to make any further false, deceptive or misleading claims about tobacco products.

18. In the 1980s the then Australian Federation of Consumer Organisations brought a claim in the Federal Court of Australia for a declaration that an advertisement run by the tobacco industry's trade association, the Tobacco Institute of Australia (TIA), was misleading or deceptive conduct in breach of Australia's *Trade Practices Act*.<sup>2</sup> The advertisement, which ran in major newspapers, stated that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers". The trial judge held that TIA had breached the Trade Practices Act and ordered an injunction preventing the further publication of the statement. The full bench of the Federal Court upheld the findings on appeal; however it found that an indefinite injunction was inappropriate given that there was a chance, albeit very small, that the scientific evidence may change over time.

19. In 2001, public interest litigation was successfully used by nongovernmental organizations (NGOs) in India to obtain orders from the Indian Supreme Court that the Government must ban smoking in public spaces, consistent with the right to life under Article 21 of the Indian Constitution. The action led to the Government passing legislation to give effect to the Supreme Court's order. Although this action was directed at requiring the Government to take steps to protect fundamental rights, public interest litigation also has considerable potential to be used for enforcement of tobacco control measures, and to stop tobacco companies from engaging in unlawful activities.

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<sup>1</sup> *United States v. Philip Morris USA, Inc., et al.*, Final Order, 449 F.Supp.2d 1, (D.D.C. 2006.). In addition to injunctive relief, the DOJ originally sought to recover tobacco-related medical costs paid by the Federal Government, and to compel the defendants to disgorge profits from their unlawful conduct, but the district court dismissed the medical recovery claims and an appellate court ruled in 2004 that the civil provisions of RICO did not permit disgorgement of the defendants' proceeds.

<sup>2</sup> Section 52 of the *Trade Practices Act 1995* prohibited misleading or deceptive conduct in trade or commerce. (Now section 18 of the *Australian Consumer Law*.)

20. In France successive tobacco-control laws have given rights to bring enforcement actions for breaches of the law to NGOs. French NGOs have used this ability to bring numerous cases relating to tobacco advertising, health warnings and non-smokers' rights.<sup>1</sup> Similarly, The European Union Tobacco Advertising Directive<sup>2</sup> enables NGOs to take legal action against illegal advertising or bring such advertising to the attention of an administrative body competent either to pronounce on complaints or to institute the appropriate legal proceedings.

### **Cases that demonstrate obstacles**

21. Key examples of challenges in the pursuit of establishing civil liability on the part of tobacco companies were identified by the expert group in jurisdictions within Europe, Australia, Canada and Japan.

#### Lack of clear liability standards

22. As discussed in Annex 2, the absence of clear liability standards that require tobacco companies to take all appropriate steps to avoid harm, including to fully inform consumers of the consequences of using tobacco and to refrain from misleading marketing, have been exploited by tobacco defendants to successfully argue that they have complied with all tobacco control laws. In Europe, with the exception of the *Stalteri* case outlined above, most cases of individual civil liability claims have been unsuccessful. In some jurisdictions courts have found that tobacco companies need only comply with relevant labelling requirements and other laws regulating the supply of tobacco products.<sup>3</sup> For this reason and others discussed below, collective claims and claims mounted against tobacco companies by health-care bodies have not been successful.

#### Acceptance of defences based on victim's consent

23. Acceptance of defences based on the victim's alleged consent to the effects of tobacco consumption (often referred to as "voluntary assumption of risk") can fail to reflect the ways in which awareness of risk has evolved over time, or how tobacco industry marketing and lobbying influenced levels of awareness, and therefore obscures the harm caused by tobacco use. They also fail to acknowledge the highly addictive nature of tobacco products, which means that by the time many smokers develop greater awareness of the harms, they are already addicted. In civil law, and European traditions in particular, courts have typically found that smokers were aware of the risks of smoking and therefore voluntarily assumed the risk of health effects, presenting a significant obstacle to the pursuit of compensation for victims of tobacco-related disease.

#### Industry's misuse of interlocutory processes

24. Interlocutory processes are abused in order to create delays, increase costs and avoid courts considering the merits of each case. In Australia, despite some important successes in exposing the deliberate destruction of sensitive documents by the tobacco industry, several individual proceedings and class actions have been filed, although only one claim has made it to trial. The tobacco industry has consistently raised points of procedure to delay matters reaching trial and being considered on their merits. A similar experience of delay effected through interlocutory processes can be seen in the example of Canadian health-care cost recovery litigation, described above (see paragraphs 5–6).

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<sup>1</sup> See for example, *Non-Smokers Rights Association v. BAT France*, Court of Appeals of Versailles, No. 653 (2013) (in French) and an earlier decision, *Non-Smokers Rights Association v. BAT France*, Court of First Instance of Nanterre, No. 11206045240 (Oct. 5, 2012) (in French).

<sup>2</sup> See Article 7 of Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (26 May 2003).

<sup>3</sup> See *A Study on Liability and the Health Costs of Smoking*, DG SANCO (2008/C6/046), Final Report, December 2009.

### Reluctance to find causation

25. A reluctance to find causation between a claimant's tobacco exposure and disease despite the robust epidemiological evidence identifying tobacco exposure as the major risk factor for a range of fatal diseases has been observed in some jurisdictions. In Japan, most litigation has centred on efforts to limit exposure to environmental tobacco smoke against defendants other than tobacco companies. Although the courts have recognized the harmful and addictive nature of tobacco to a certain degree, it has been expressed as "weak".<sup>1</sup> In addition, courts have tended to doubt the epidemiological research methods and findings demonstrating the seriousness of exposure to second-hand smoke.<sup>2</sup> Courts have also relied on concepts such as "societal approval" of smoking as a "personal preference" to request tolerance for smoking, stating that "smoking measures are adequate if they are instituted to the degree generally demanded in Japan at the present time."<sup>3</sup> Despite this, there have been two successes in cases related to second-hand smoking in 2012, which may suggest that judicial attitudes are slowly changing.<sup>4</sup> A similar experience of reluctance to find causation has been observed within jurisdictions in Europe, in combination with the findings of voluntary assumption of risk discussed above.

### **Criminal liability**

26. There are few examples of criminal liability regimes having been used to pursue the tobacco industry for the harm caused as a result of manufacture and supply of tobacco products. The expert group considered the example of two cases in which the tobacco industry's responsibility was considered under criminal law in Argentina.<sup>5</sup> Both cases were dismissed for similar reasons, based on the public knowledge of health risks associated with tobacco consumption and smokers' "voluntary" assumption of those risks. These cases exemplify the challenges faced in relation to this type of action, which are outlined below in Annex 2.

27. Despite the challenges faced in pursuing criminal liability for the manufacture and supply of tobacco products, Parties are increasingly implementing criminal liability provisions for enforcement of their tobacco-control measures. Such provisions support the implementation of the WHO FCTC by enabling governments to take criminal liability action in respect of breaches of tobacco-control laws.

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<sup>1</sup> See for example, the first tobacco-related diseases lawsuit, against Japan Tobacco Inc (Supreme Court, January 26, 2006, not listed in case reports); and Yokohama tobacco-related diseases lawsuit (Tokyo High Court, March 14, 2012, not listed in case reports) (in Japanese).

<sup>2</sup> Case against Japan National Railways (JNR) (Tokyo District Court, March 27, 1987, Hanrei Jiho No. 1226, Pg. 33); Case regarding employees of the City of Iwakuni (Yamaguchi District Court, Iwakuni Branch, July 16, 1992, Hanrei Jiho No. 1429, Pg. 32) ('City of Iwakuni case'); Case involving Shiga Junior High School in Nagoya (Nagoya District Court, February 23, 1998, Hanrei Times No. 982, Pg.174); and Case involving Kyoto Business Center of Postal Life Insurance (Kyoto District Court, January 21, 2003, Rodo Hanrei No.852, Pg. 38) (in Japanese).

<sup>3</sup> Case involving Meinan Junior High School in Nagoya (Nagoya District Court, March 22, 1991, Hanrei Jiho No. 1394, Pg.154); Case regarding employees of the City of Iwakuni; Case involving Shiga Junior High School in Nagoya; Case involving the Kyoto Business Center of Postal Life Insurance; and Case involving JR West (Osaka District Court, December 22, 2004, Rodo Hanrei No. 889, Pg. 35) (in Japanese).

<sup>4</sup> Case involving wrongful dismissal of a worker claiming damage from secondhand smoke inhalation (Tokyo District Court, August 23, 2012, Rodo Hanrei No. 1061, Pg. 28); and Case involving smoking on balconies in Nagoya (Nagoya District Court, December 13, 2012, not listed in case reports).

<sup>5</sup> As discussed in Flores ML, Barnoya J, Mejia R, Alderete E, Perez-Stable EJ. Litigation in Argentina: challenging the tobacco industry. *Tobacco Control*. 2006;15:90–96. doi:10.1136/tc.2004.010835 (page 93).

## ANNEX 2

### **OBSTACLES THAT IMPEDE EFFECTIVE ACTION IN THE AREAS OF CIVIL AND CRIMINAL LIABILITY, IN PARTICULAR, IN THE CONTEXT OF CIVIL LIABILITY, INCLUDING COMPENSATION**

1. The expert group identified a number of reasons why Parties, individuals and groups of individuals may find it difficult to pursue claims against the tobacco industry, let alone succeed in doing so. Examples of obstacles to successful tobacco litigation have a number of common features, many of which have nothing to do with the merits of the case, whether those pursuing the claim deserve redress, or whether the tobacco industry has committed any unlawful acts in the manufacture, supply and marketing of tobacco products. As per the mandate provided by the COP decision,<sup>1</sup> the expert group focused in particular on examples relating to civil liability for the purposes of obtaining compensation, but also considered other forms of liability where relevant.

#### **Civil liability**

##### Resource imbalances

2. Litigating against the tobacco industry, like many types of litigation, can be very expensive. Generally, almost all individual claimants (or potential claimants) against the tobacco industry lack sufficient resources to pursue legal proceedings against it, while the tobacco industry has ample resources to defend itself. The imbalance of resources can be a major deterrent to the commencement of liability proceedings.

3. The deterrent effect of resource imbalances is compounded by the use of cost-shifting rules based on the “loser pays” principle. Such rules increase the risks associated with initiating a claim for liability against the tobacco industry, as very few claimants will have the resources to pay the costs of the tobacco industry in the event they lose a case. Claimants can be forced to pay these costs even if their case is not decided on its merits, but dismissed on a technicality.

##### Establishing fault and causation, especially in civil law systems

4. Many jurisdictions do not have a clear definition of fault for manufacturers of dangerous products, including tobacco. In some jurisdictions this leads to courts equating fault with failure to comply with applicable tobacco-control laws, rather than considering other applicable laws and legal principles relevant to all manufacturers and/or manufacturers of dangerous goods. The tobacco industry then defends itself on the grounds that it has breached no law related to tobacco use, even though it has actively promoted use of the product while obscuring information about the dangers associated with such use.

5. In addition, where possible, tobacco companies will often avail themselves of the defence that consumers of their products use them freely and voluntarily with knowledge of their harmful effects and consequences. The effect of this defence is to attribute responsibility for the harms caused by tobacco consumption to the individual for choosing to consume the products, and does not acknowledge the role played by the tobacco industry in encouraging consumers to take up tobacco consumption, and the substantial effect of addiction on the individual’s decisions to continue to consume tobacco products.

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<sup>1</sup> Decision FCTC/COP5(9).

6. As discussed in Annex 1,<sup>1</sup> some courts have also been willing to accept arguments put forward by the tobacco industry that injuries cannot be shown to have been caused by exposure to tobacco (and in some cases the particular tobacco produced by the defendant) rather than some other risk factor. In some cases the courts have accepted that there is no causal relationship between the particular company's act and the claimant's smoking behaviour.

#### Limitations on time for commencement of proceedings

7. All jurisdictions have time limits for bringing claims, which can be complicated in the case of tobacco-related illness or injuries, many of which have long latency periods between exposure to the product and manifestation of disease. Tobacco companies routinely assert that claims based on smoking-related injuries are time barred. Unless there are rules allowing limitation periods to be extended, or providing that limitation periods run from the time the injury is discoverable, limitation defences can be fatal to the success of a liability claim.

#### Information asymmetry

8. Tobacco companies have engaged over many years in large-scale schemes to conceal from the public the harmful effects of tobacco consumption and use, especially by suppressing research documents that demonstrate their knowledge of the harmful effects of tobacco use. Combating this imbalance requires access to the tobacco industry's internal documents, which can be difficult in jurisdictions that do not have broad disclosure rules, or where documentary evidence, already freely available on the internet as a result of litigation in the United States, may not be admissible.

#### Abuse of interlocutory proceedings

9. A common feature of tobacco litigation experience is the tobacco industry's strategy to abuse interlocutory proceedings and appeal wherever available, to raise trivial procedural points and prolong the case. The effect of doing so is to make even the most straightforward case drawn-out, burdensome and expensive for claimants.

#### The international nature of the tobacco industry

10. Liability claims against those involved in the manufacture, supply and marketing of tobacco give rise to a number of issues due to the international nature of the industry, as most, if not all, tobacco companies are part of a multinational corporate structure, and many tobacco-consuming countries are not tobacco producers. The international corporate structure can present difficulties in determining the appropriate jurisdiction in which to pursue liability claims relevant to tobacco-consuming countries. In some circumstances rules relating to the enforcement of judgments in other jurisdictions may make it difficult to obtain compensation from foreign tobacco companies even in the event of a successful claim.

### **Criminal liability**

11. The obstacles faced in pursuit of criminal liability for the manufacture and supply of tobacco products include the guarantee of legal certainty, the higher burden of proof applicable to criminal law, and the presumption of innocence favouring the defendant. All of these can be described as fundamental tenets of criminal law and are therefore challenges which can be difficult to address through legislative actions. In addition to the key obstacles outlined below, the challenges discussed above in relation to civil liability can all apply to some extent in relation to criminal liability.

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<sup>1</sup> See Annex 1, paragraph 25.

Guarantee of legal certainty/ban on retroactive application of criminal law

12. The guarantee of legal certainty as it applies to criminal law, also known as “*nullum crimen sine lege*” provides that behaviour should only be able to be punished when there is a law in place criminalizing that behaviour at the time of the conduct. The application of this principle means that it is generally not possible to create a criminal law to retroactively address the conduct of the tobacco industry. Therefore, relevant criminal laws needed to exist at the time of the manufacture, marketing and/or selling of tobacco products. In many jurisdictions it is difficult to identify directly relevant criminal offences, although not impossible. In some jurisdictions the criminal offence of reckless endangerment, and possibly negligent manslaughter, may be applicable to conduct of those involved in the manufacture, supply and/or marketing of tobacco products.

Higher burden of proof and presumption of innocence favouring the defendant

13. Even where a relevant criminal offence exists, the standard of the burden of proof applied to criminal liability, usually requiring fault to be proved beyond reasonable doubt, favours the defendant in criminal actions. This higher burden serves to amplify the obstacles to establishing fault and causation which are discussed in relation to civil liability above. In particular, as identified in the relevant case studies, tobacco companies have successfully pointed to the “voluntary” consumption of tobacco products to cast doubt on their liability for the resulting harms.

## ANNEX 3

### EXISTING BEST PRACTICES FOR CIVIL AND CRIMINAL LIABILITY INCLUDING COMPENSATION

1. Best practices to enable legal action will always depend on the particular legal context of each Party. However, there are common features to existing examples of successful litigation, particularly in relation to civil liability, which may aid in overcoming the obstacles discussed above and ensuring that the wrongs committed by those who manufacture, supply and market tobacco products are exposed, discontinued where still ongoing, and where appropriate result in penalties and/or compensation to the victims.

2. The best practices identified below were selected by the expert group after consideration of the relevant case studies. They are mostly practices found in the successful case studies outlined in Annex 1. However, in some circumstances best practices are drawn from experiences in other fields of litigation. All of the best practices can be implemented to address one or more obstacles identified in Annex 2. A best practice refers only to the particular procedure within a specific context; it does not refer to all practices within the relevant jurisdiction.

3. The best practices were selected by the expert group on the basis that each of them would contribute to more effective liability systems, and thereby increase the prospects of successful legal claims holding the tobacco industry to account in the jurisdictions of at least some Parties. However, while each option presented will be applicable to a range of jurisdictions it will not necessarily be appropriate for adoption in all jurisdictions.

#### **Civil liability**

##### *Forms of litigation*

4. The expert group identified three forms of litigation that could be considered best practices as each has the potential to overcome a number of the obstacles discussed in Annex 2.

##### *Dedicated class action procedures for tobacco-related claims*

5. Dedicated class action procedures allow victims of smoking-related diseases to pool resources in order to pursue liability claims with similar features. In almost every tobacco-related action, at least one common issue arises which, where the legal system allows, could be resolved on a class-wide basis. Doing so would save significant resources for claimants and those funding the litigation, save courts time (by hearing the common issues together), and minimize the risk of inconsistent judgments. To date, some jurisdictions have been more willing than others to certify or permit tobacco class actions. In jurisdictions that do not currently have provisions for class action procedures, legislation could be introduced that would enable class actions to be undertaken. In addition, a range of additional legislative options are available to facilitate efficient use of class action procedures even where they are already available, and to provide clear rules specifying when tobacco-related claims are suitable for class action treatment.

##### *Health-care cost recovery claims*

6. Health-care cost recovery claims are a form of civil litigation brought by either public or private health-care providers or funders in order to recover the health-care costs of tobacco-related harms. Such litigation may require enabling legislation to ensure a cause of action. Health-care cost recovery claims can counter many of the obstacles common to tobacco liability litigation, particularly by addressing the power and resource imbalance usually inherent in individual claims by giving standing to large bodies such as governments and private health insurers. In addition, claims brought

by governments and health insurers remove the industry's ability to argue that the victim voluntarily consented to the risk or is partially responsible for the injuries he or she suffered. Enabling legislation for health-care cost recovery claims can also be used to address procedural and evidentiary challenges in the pursuit of liability claims.

#### *Public interest litigation*

7. Legislation can be adopted to enable public interest litigation to be pursued as a means of enforcing existing tobacco control laws and other laws applicable to the manufacture, marketing and supply of tobacco products. The purpose of such litigation is not generally to obtain compensation for victims, but rather the imposition of civil or criminal penalties, as appropriate, and injunctive relief to prevent further breaches and remedy conduct or correct misleading statements where necessary. Public interest litigation has been used in certain jurisdictions to allow third parties to bring a claim in cases where the relevant rights are of fundamental importance, and the persons who have those rights have difficulty accessing courts to enforce them. Legislation providing for public interest litigation could allow third parties to commence litigation on behalf of those harmed by tobacco consumption in order to establish the liability of the tobacco industry. As outlined in Annex 1, public interest litigation may also include enforcement of existing tobacco-control measures, and enabling legislation could provide for remedies of either a criminal or civil nature, including compensation.

#### *Access to and admissibility of evidence*

##### *Broad disclosure/discovery rules*

8. The availability of disclosure has been important in securing successful outcomes in civil proceedings in the United States, and has allowed the use of materials disclosed in those proceedings in cases in other jurisdictions. Disclosure rules have also enabled public access to tobacco industry documents as a result of litigation in Canada. As outlined above, ensuring that rules require the tobacco industry to disclose internal documents can allow claimants to comprehensively counter the asymmetry of information between the industry and consumers, and has additional awareness-raising benefits for tobacco control. While there is a lot of information available through materials already disclosed from a small number of jurisdictions, successful litigation in other jurisdictions will depend on similar information being made available in a timely and cost effective manner.

##### *Relaxing hearsay rules with respect to documentary evidence and minimizing disputes about the authenticity of internal tobacco industry documents*

9. Evidentiary hurdles in some jurisdictions require the author of a document to testify in person where available, and allow defendants to challenge the authenticity of documents even if authored by them or their affiliated companies or organizations. This makes it more difficult to rely on internal tobacco industry documents (now widely available on the internet<sup>1</sup>). Legislation in the United Kingdom (England) abolishing the hearsay rule for civil proceedings could provide a model for dealing with hearsay, while Australia's Uniform Evidence Legislation, which allows a court to examine a document and draw any reasonable inference from it, including as to its identity and authenticity, could also serve as a model.

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<sup>1</sup> The Master Settlement Agreement in the United States required tobacco companies to open, at their expense, a website containing all documents produced in state and other smoking- and health-related lawsuits, maintain it for 10 years, and add all documents produced in future civil actions involving smoking and health cases. The court's order in *U.S. v. Philip Morris* extends the duration of that obligation. That database is available at <http://www.legacy.library.ucsf.edu>.

*Abrogation of legal professional privilege*

10. Parties' disclosure laws could be adapted in order to ensure access to the widest range of relevant internal tobacco industry documents. There is considerable evidence that the tobacco industry has abused the lawyer-client relationship and the rights to legal professional privilege. The abrogation of legal professional privilege for communications with in-house counsel would ensure that communications that are really concerned with the tobacco company's scientific research, lobbying, marketing and even document management activities are not withheld from the court under the protection of privilege. European Union law could serve as a model in this regard.<sup>1</sup> Parties should also be encouraged to continue to apply – or adopt – robust exceptions to legal professional privilege where the purpose of a legal document or communications was criminal, fraudulent or iniquitous.

*Appropriate sanctions and remedies for destruction of documents*

11. Given the evidence that the tobacco industry has knowingly destroyed documents and thereby prejudiced legal proceedings, it is important to ensure that such activities are a criminal offence, and that courts have a broad range powers to remedy the unfairness caused by the destruction, including the ability to strike out all or part of party's claim or defence, to reverse the burden of proof in relation to certain issues, or draw adverse inferences in relation to certain issues. Document destruction legislation in Victoria, Australia, could be used as a model.<sup>2</sup>

*Amended standards of fault / liability**A clear definition of fault for manufacturers of dangerous products*

12. A clear standard of fault (or liability where fault is not a pre-requisite to liability<sup>3</sup>) is critical to ensuring that the responsibility for the harms caused by tobacco consumption is fairly apportioned. A regular feature of successful tobacco litigation outside the United States is reliance on consumer protection legislation (including consumer-focused rules in civil codes) or legislation regulating trade and commerce. In this regard it is important that the standards of fault associated with the use of dangerous or risky products apply to tobacco products as well. Examples of consumer legislation that has facilitated tobacco liability actions can be found in Canada (Québec), Italy, Brazil and Australia.<sup>4</sup> The argument that a tobacco company, having complied with all tobacco control laws, has not committed any wrong, which has been successfully relied on in a number of European civil law countries, could no longer be employed as a defence where a clear standard of fault is codified.

*Limit defences available to the tobacco industry based on knowledge of risk and consent*

13. It has been proven in a number of cases that the tobacco industry has awareness of the harms of tobacco products above and beyond that of the ordinary consumer, and indeed has tried to conceal that information from consumers. Defences based on the consumer's knowledge of risk and consent to harm should therefore be limited in tobacco litigation in order to acknowledge the imbalance between the knowledge of the consumer and the knowledge of the manufacturers. Common law jurisdictions recognize principles of equitable estoppel that prevent persons from maintaining legal claims or defences that are inconsistent with their own conduct. These principles are relevant to tobacco litigation given that the tobacco industry denied for decades the existence of the risk they now claim consumers voluntarily consented to. There are also a number of cases in the United States in which courts have found that the assumption of risk defence does not lie in tobacco cases, since the evidence shows that the public did not understand the nature and extent of the risk during the relevant time periods.

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<sup>1</sup> See case C-550/07 P Akzo Nobel Chemicals v European Commission (2010) 5 CMLR 1143 [44]-[49].

<sup>2</sup> *Crimes (Document Destruction) Act 2006 (Vic)* and *Evidence (Document Unavailability) Act 2006 (Vic)*.

<sup>3</sup> By way of example, laws against misleading advertising are normally based on the effect of the advertisement and not the fault of the advertiser.

<sup>4</sup> See paragraphs 11, 13, 14 and 18 in Annex 1.

*Reverse the burden of proof in relation to fault and/or legal causation*

14. In many jurisdictions the burden of proof requires the claimant to establish the harm they suffered and that it was caused by the fault of the defendant, usually the tobacco industry. This task is made more difficult without access to internal industry documents, or where claimants have limited resources to establish that the defendant's conduct, including its marketing practices, fell short of the standard required of the manufacturer/supplier in light of the available independent evidence and industry knowledge about the harmful effects of tobacco use. A reversal of the burden of proof in relation to fault, such as that demonstrated in the Italian case of *Stalteri*,<sup>1</sup> coupled with a clear standard of fault, would require the tobacco companies to justify their own responses to the growing evidence about the health consequences of tobacco use. Reversal of the burden of proof also played a part in the reasoning of the Brazilian courts in holding British American Tobacco subsidiaries liable for personal injuries and wrongful death.<sup>2</sup>

15. Similarly, tobacco damages and health-care cost recovery legislation in Canadian provinces includes a rebuttable legal presumption of causation where a tobacco-related wrong is established on the part of the manufacturers, and there is a population-level causal link between tobacco exposure and particular diseases. The defendant can reduce their total liability by proving on the balance of probabilities that in the case of a particular victim of disease the defendant's breach was not the cause of the exposure or disease.

*Allow causation between tobacco exposure and disease to be proved by statistical evidence*

16. Despite the well-established evidence causally linking tobacco exposure to a host of serious or fatal diseases, the tobacco industry frequently defends claims by disputing whether an individual's disease was caused by exposure to tobacco smoke as opposed to some other risk factor. Some European courts have been unwilling to find causation where there were other risk factors present. The Canadian provinces' tobacco damages and health-care cost recovery legislation deals with this issue by providing that in cases brought on an aggregate basis causation can be proved by use of statistical evidence without the need to prove causation for any individual claimant or health-care recipient; legislation in Québec also allows causation to be proved on the sole basis of statistical epidemiological evidence in individual proceedings.<sup>3</sup> This approach limits the ability of the tobacco industry to make spurious scientific arguments about the likely causes of an individual's disease.

*Modify rules of causation so that claimants who cannot establish which of several defendants caused their injury are able to recover against any of them*

17. Such amended rules would only be necessary where there is doubt as to whether an individual brand of tobacco smoked by a claimant made a material contribution to the claimant's disease, and would apply in cases where the fault of the defendant can be shown. The Canadian provinces' tobacco damages and health-care cost recovery legislation provides a model for this type of rule.<sup>4</sup>

*Allow damages to be calculated on an aggregate basis without proof of causation for individual claimants in health-care cost recovery litigation*

18. To make health-care cost recovery litigation practicable, compensation to governments and other health-care providers or funders can be calculated by statistical, epidemiological or other scientific evidence without having to prove causation for each individual health care recipient. It is also possible to extend this rule to class actions brought on behalf of victims of smoking-related

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<sup>1</sup> See paragraph 13 in Annex 1.

<sup>2</sup> See paragraph 14 in Annex 1.

<sup>3</sup> *Tobacco Related Damages and Health Care Costs Recovery Act 2008*, (Québec, Canada) sections 15 and 24.

<sup>4</sup> See for example *Tobacco Damages and Health Care Costs Recovery Act 2000* (State of British Columbia, Canada), section 7.

disease. The Canadian provinces' tobacco damages and health-care cost recovery legislation provides models for this type of rule.<sup>1</sup>

*Apportion damages between defendants based on market share*

19. In health-care cost recovery litigation where compensation is calculated on an aggregate basis, the amount payable by each defendant found to have committed a breach and to have caused damage, could be calculated by reference to the defendant's market share. Similarly, where individual claimants are able to claim against tobacco industry defendants despite being unable to prove causation against the particular defendant, the defendant's liability could be calculated on a proportional basis to the amount of exposure to tobacco attributable to the defendant's brands.<sup>2</sup>

*Ensure that rules on time limits reflect the long latency periods between exposure and illness*

*Make limitation periods run from the date of discoverability of injury*

20. Time limits on initiation of cases exist in all jurisdictions, but can be problematic where the harm caused or complained about arises after a long period of latency between first exposure and becoming ill. Tobacco liability claims have failed because of time restrictions. In order to prevent this from happening, and to permit legitimate cases to be heard, time should run from the date of discoverability of the injury, rather than the date of the first exposure to disease. Such rules on limitations exist in the United States, United Kingdom (England)<sup>3</sup> and various jurisdictions in Australia.

*Abrogate "long stop" limitation periods*

21. Coupled with limitation periods commencing from the date of discoverability of injury, it is important that limitation periods that prevent claims being brought under any circumstances after a specified period, whether or not an injury has been suffered, are abrogated or able to be extended because of the long latency period between breach, exposure and injury.

*Prohibit time limits from being raised as a defence for a specified period after the passing of tobacco litigation-enabling legislation*

22. Where enabling legislation is used to facilitate liability actions in connection with Article 19 of the WHO FCTC, it may be useful to allow all current potential claimants to take advantage of those laws within a certain period of time without the defendants being able to raise limitation periods as a defence. The Canadian provinces' tobacco damages and health-care cost recovery legislation provide models for this type of rule.<sup>4</sup>

*Costs and funding rules*

23. Rules that allow two-way cost shifting based on a loser pays principle can be a significant deterrent to commencement of all types of tobacco litigation, due to the potential enormity of the financial risks associated with orders to pay the tobacco defendant's costs. To ensure that costs are reasonable, predictable and do not act as deterrent to meritorious claims, a number of jurisdictions have implemented reforms either abolishing liability for adverse costs, or strictly regulating the amount for which unsuccessful litigants can be liable for adverse costs. In addition, many jurisdictions now allow claimants to fund their own legal costs through contingency fees with their lawyers or litigation funding agreements with third parties. Models that could be followed are discussed below.

<sup>1</sup> See for example *Tobacco Related Damages and Health Care Costs Recovery Act 2008* (Québec, Canada) sections 13 and 15 and 24.

<sup>2</sup> Where the defendants were acting independently.

<sup>3</sup> See for example *Limitation Act 1980* (c 58) (England),

<sup>4</sup> See for example *Tobacco Related Damages and Health Care Costs Recovery Act 2008*, (Québec, Canada) section 27.

*Qualified one-way cost shifting*

24. Under this system the defendant pays the claimant's costs if the defendant is found liable, and the claimant pays the defendant's legal costs only if he or she acts unreasonably in bringing their claim to court, or the way they conduct their case. Such rules recognize that a claimant who conducts an arguable case in a reasonable manner is not committing any wrong but is exercising their fundamental right of access to the court, and should not have to pay the defendant's costs in the event of an adverse decision. This system was introduced in the United Kingdom (England) in 2013 following a major review of costs rules, and could be used as a model.<sup>1</sup>

*Abolition of cost shifting*

25. In the United States, each litigant is typically responsible for their own costs whether their case is successful or not, in recognition of all litigants' rights to access court to enforce and defend their legal rights and interests. These rules limit, but do not entirely remove, the incentives for tobacco companies to drive up the costs of litigation.

*Fixed recoverable costs*

26. For jurisdictions that retain two-way cost shifting, the fairest and most efficient way to regulate cost shifting is that followed in civil law jurisdictions like Germany, Switzerland and Japan, where recoverable costs are fixed as a percentage of the total compensation claimed. The parties to the case are free to incur additional costs but these must be borne by the parties themselves.

*Costs immunity for authorized non governmental organizations (NGOs) acting as claimants*

27. In legal systems that permit NGOs to bring claims on behalf of others, or in their own right – which is frequently the case for consumer litigation in Europe – rules that cap the costs that NGOs might have to pay in the event of losing a case are important to facilitate legitimate claims.

*Means based approach to court costs*

28. Parties could also consider a means-based approach to court costs dispersed between the parties to litigation. In practice this would mean that the tobacco industry would bear the bulk of the court's costs of litigation brought against it, whether the case is successful or not.

*Permit contingency fees by lawyers and third party litigation funding to help claimants secure legal and financial assistance needed to pursue tobacco-related litigation*

29. Costs and funding rules should allow claimants to share the costs and risks involved, and provide access to private funding through contingency fees and/or third party funding in order to ensure that cases are able to be brought regardless of the financial situation of claimants. In almost all health-care cost recovery litigation, and most, if not all, individual and class action claims brought in the United States and Canada the action has been brought with the assistance of one or more private litigation firms, who bear most of the expenses and benefit from fees to be paid on successful conclusion of the litigation.

30. *Other reforms to reduce cost and delays*

*Use of specialist procedures and specialist judges*

31. In order to ensure timely, affordable and effective access to court for all types of tobacco litigation in accordance with Article 19, cases could be allocated to specialist judges who are experienced in hearing such cases. This could be achieved by creating specialist lists within existing court structures or, where the volume of tobacco litigation warrants it, by establishing specialist tribunals.<sup>2</sup> This would allow judges to develop expertise in tobacco litigation, including public health evidence and the application of the special substantive and procedural rules outlined in this report.

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<sup>1</sup> *Civil Procedure (Amendment) Rules 2013*, rules 44.13 to 44.17.

<sup>2</sup> For example, Australia's New South Wales Dust Diseases Tribunal, was established to deal with a large number of liability claims for dust-related illness, particularly relating to asbestos.

32. In addition, courts hearing claims that seek to establish civil liability consistently with Article 19 could employ simplified rules of procedure designed to reduce cost and delay. Such procedures would include those outlined above as well as the following.

*Simplified pleading requirements*

33. Tobacco companies frequently resort to technical pleading arguments in an attempt to have claims delayed or dismissed altogether. The more complex a jurisdiction's pleading rules, the more opportunity the industry has to engage in this tactic, which has nothing to do with resolving the real issues in dispute in a case. A basic rule that, provided a pleading gives adequate notice of the claim being made against the industry, it cannot be struck out as being defective, would help avoid technical pleading disputes. Rules on pleadings in the United States could serve as a model. The Indian courts' approaches to public interest litigation are also relevant here. The Indian Supreme Court places an emphasis on substance rather than form in hearing public interest litigation. Accordingly it does not matter precisely how claims are commenced – even letters constitute a valid originating process – provided that the claim, in substance, is intended to protect a fundamental right that is covered by the public interest litigation guidelines.<sup>1</sup>

*Reform appeal processes by restricting interlocutory appeals*

34. Frivolous interlocutory and final appeals could be limited by restricting interlocutory appeals to exceptional circumstances, allowing such appeals only with leave of the court, in situations in which there are strong prospects of success, and reducing the number of appeals to one unless there are exceptional circumstances. Rules on appeals in the United Kingdom (England) and the United States could serve as a model, and would limit the tobacco industry's ability to tie up resources and delay cases getting to trial, or avoid having to pay compensation or comply with other orders of the court.

*Adopt robust case management and guideline timeframes*

35. Delays and satellite litigation are not unique to tobacco litigation. A number of jurisdictions have developed effective solutions for dealing with these problems. These include judicial docketing, active case management by the judge, the setting of procedural timetables, including the trial date, at an early stage of the proceedings, and sticking to those timetables unless there are exceptional circumstances. There is no practical reason why tobacco litigation should drag on year after year without a trial or end in sight. Implementation of robust case management has been successful in reducing delay in jurisdictions in Singapore and China (Hong Kong SAR).

*Adopt rules of preclusion*

36. Rules of preclusion would allow claimants to rely on findings made against tobacco companies in previous cases, and could save claimants, and courts, significant resources by avoiding the need to re-litigate issues that have already been decided in earlier proceedings. One method of issue preclusion successfully employed in tobacco litigation was the approach taken in the *Engle* class action in relation to liability findings on common questions of fact and law.<sup>2</sup> The findings made by the Court have been relied on by class members seeking to establish their individual entitlement to compensation in what have become known as “*Engle* progeny” cases. A successful example of issue preclusion outside tobacco litigation comes from Australia's New South Wales Dust Diseases Tribunal, which does not permit parties to re-contest general findings made in earlier proceedings without the court's permission. The tribunal also has rules allowing claimants to rely on evidence filed in earlier proceedings.

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<sup>1</sup> Indian Supreme Court, “Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation”.

<sup>2</sup> See Annex 1, paragraph 9.

### Jurisdiction and enforcement of judgments

#### *Abrogate the doctrine of forum non conveniens*

37. The common law doctrine of forum non-conveniens provides that a court may stay a case on the ground that it should be determined in another, more appropriate, jurisdiction. The determination will usually involve weighing the factors that “connect” the wrong and the parties to each jurisdiction. Abrogation of this doctrine would prevent tobacco defendants seeking to avoid being sued in the jurisdictions where they are domiciled or the jurisdictions where they caused harm. European Union laws could serve as a model.<sup>1</sup>

#### *Allow easier enforcement of foreign judgments through rules of satisfaction of judgement*

38. Parties might consider adopting a procedure allowing the straightforward enforcement of judgements by the courts of other Parties in tobacco-related claims, where those claims formed part of a Party’s implementation of Article 19.

### **Options that are not related to obtaining compensation**

39. The expert group identified a number of options that can be implemented independently of legal action aimed at obtaining compensation, and may be implemented by Parties in conjunction with the best practices listed above.

#### *Enforcement models*

40. Liability for breaches of existing tobacco-control laws is discussed further below in relation to best practices for criminal liability. However, it should be noted that Parties may also use civil penalties and/or regulatory offences for breaches of tobacco-control laws.

#### *Enforcement models that rely on regulatory offences*

41. In some jurisdictions the law provides for regulatory offences, in which offences are punished by an administrative fine rather than a criminal offence or imprisonment, and in some cases the ability to determine liability is delegated as an administrative function to public agencies. Implementation of regulatory offences could be considered in addition to criminal liability regimes, and could be implemented in countries which do not consider infringement of tobacco-control laws a crime.

### **Criminal liability**

42. As a result of the obstacles outlined in Annex 2, there are limited existing best practices to be identified in relation to criminal liability. While the guarantee of legal certainty prevents retroactive application of criminal law, Parties remain able to implement criminal offences for future conduct in relation to manufacture and supply of tobacco products. Criminal offences are not generally applicable to the individual directors or managers of companies, although there are some exceptions. Parties should consider when implementing new criminal liability offences related to the manufacture, supply and marketing of tobacco products, that it may be appropriate for individual directors or managers to be personally liable for their conduct, particularly when it is negligent or fraudulent. The expert group identified a range of criminal offences, the implementation and/or pursuit of which can assist Parties in their implementation of Article 19.

#### Existing offences relevant to past conduct

43. Existing criminal offences for death and bodily harm, as well as for fraud, could be investigated by Parties for their applicability in relation to the established behaviour of the industry in knowingly misleading the public as to the harms of tobacco products. Criminal offences for reckless endangerment, and possibly negligent manslaughter, may be particularly relevant to the conduct of tobacco companies, and could be created in jurisdictions where it does not already exist, in order to ensure that an offence exists in the event of similar circumstances occurring in the future.

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<sup>1</sup> See the European Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (22 December 2000).

*Enforcement of tobacco-control laws*

44. Parties to the WHO FCTC have agreed to implement a range of tobacco-control measures, and in doing so can and have created conduct crimes for breaches of these laws. Implementation of criminal liability in relation to tobacco-control, by way of implementation (or strengthening) of provisions intended to enforce tobacco-control laws through the inclusion of criminal liability, is therefore open to all Parties.

45. While not related to liability of tobacco companies for past conduct, inclusion of criminal penalties for breaches of tobacco-control laws will create offences for future conduct in contravention of tobacco-control laws. Doing so helps to ensure that regulation of tobacco industry conduct is enforceable. Such provisions are therefore important for the successful implementation of effective tobacco-control measures consistent with the WHO FCTC.

*Enforcement of other legal measures*

46. As outlined above, civil litigation has been used to seek injunctive relief in relation to tobacco industry conduct. Relief in this context has included the imposition of penalties for ongoing breaches of tobacco control regulation and requirements for the industry to correct misleading statements. In cases where injunctive relief is sought, criminal penalties can be imposed for failure to comply with the injunction.

*Creation of offences for document destruction*

47. Also as outlined above, it has been shown that the tobacco industry has destroyed documents for the purposes of prejudicing legal proceedings. In addition to implementing other civil remedies, Parties can make such behaviour a criminal offence so as to ensure that appropriate penalties are available. The common law criminal offence of attempting to pervert the course of justice may also apply in these circumstances.

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