

WHO FCTC ARTICLE 19: USING THE JUDICIAL SYSTEM TO FIGHT TOBACCO



Global Center for
Good Governance
in Tobacco Control



Global action for *everyone's* health.

November 10, 2020

Article 19

Liability

1. 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.
2. Parties shall cooperate with each other in exchanging information through the Conference of the Parties in accordance with Article 21 including:
 - (a) information on the health effects of the consumption of tobacco products and exposure to tobacco smoke in accordance with Article 20.3(a); and
 - (b) information on legislation and regulations in force as well as pertinent jurisprudence.
3. The Parties shall, as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements, afford one another assistance in legal proceedings relating to civil and criminal liability consistent with this Convention.
4. The Convention shall in no way affect or limit any rights of access of the Parties to each other's courts where such rights exist.
5. The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article.

SPEAKERS



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Amos Hausner

Israeli attorney and
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MODERATOR



Laurent Huber

ASH Executive Director



Global Center for
Good Governance
in Tobacco Control



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Global action for *everyone's* health.

Art. 19 in the lead up to COP 9

+ Pedagogical presentation, without commercial purpose.

Today's agenda

1. Context & Developments
 - a. Art. 19 at COP7 and COP8.
 - b. Postponement of COP 9.
2. Art. 19 a dream or a reality?
3. Final thoughts

Context & developments

Decisions at COP 7



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

Seventh session
Delhi, India, 7–12 November 2016

12 November 2016

DECISION

FCTC/COP7(11) Implementation of Article 19 of the WHO FCTC: “Liability”

FCTC/COP7(11)

Noting also the “lack of clear information on the differing mechanisms of assistance and resources available and on how to access them as described by the working group on Sustainable measures to strengthen the implementation of the WHO FCTC contained in document FCTC/COP7/18;

1. ADOPTS the report of the expert group, including the toolkit, as a mechanism of assistance for those Parties that may require assistance in their implementation of Article 19;
2. ENCOURAGES Parties to consider options, including developing their legislation or liability procedures, as appropriate, and increasing their international cooperation in order to strengthen their implementation of Article 19;
3. REQUESTS the Convention Secretariat, in accordance with its mandate as described in FCTC/COP6(7):
 - (a) to make the toolkit available on the WHO FCTC information platform and keep it updated by incorporating relevant information and material, including information received from the Parties pursuant to their reporting obligations under the Convention;
 - (b) to develop a database of experts and institutions that can provide Parties, upon request, with technical assistance related to tobacco industry liability, create a digital platform for international cooperation, and make available and regularly update related resources;
 - (c) to prepare, maintain and make available to Parties a comprehensive list of the existing legal resources that may assist Parties in dealing with all forms of liability and other legal challenges where necessary;
4. FURTHER REQUESTS the Convention Secretariat:
 - (a) to explore options to mobilize resources, mechanisms of assistance and other forms of cooperation to ensure Parties have sufficient access to the information and expertise necessary to implement Article 19;
 - (b) monitor progress on Parties’ implementation of Article 19 through existing WHO FCTC reporting mechanisms;
 - (c) report on progress at the eighth session of the COP.

(Fifth plenary meeting, 12 November 2016)

Source:

https://www.who.int/fctc/cop/cop7/FCTC_COP7_11_EN.pdf?ua=1



Decisions at COP 8



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

Eighth session
Geneva, Switzerland, 1–6 October 2018

6 October 2018

DECISION

FCTC/COP8(18) Protection of public health policies with respect to tobacco control from
commercial and other vested interests of the tobacco industry

1. ENCOURAGES Parties:
 - (g) to promote national and international cooperation to enhance implementation of Article 5.3 of the WHO FCTC in relation to Articles 17, 18 and 19 of the WHO FCTC to reduce tobacco industry interference in tobacco control policies;
2. REQUESTS the Convention Secretariat:
 - (d) to fully comply with its mandate as provided under decision FCTC/COP/7(11) and report on progress at the Ninth session of the COP;

Source:

[https://www.who.int/fctc/cop/sessions/cop8/FCTC_COP8\(18\).pdf?ua=1](https://www.who.int/fctc/cop/sessions/cop8/FCTC_COP8(18).pdf?ua=1)

COP 9-Postponement

What's next?

Article 19: A dream or reality?

Civil Liability Toolkit Launch



Source:

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



Purpose of toolkit

Article 19 tool kit is meant to:

- Provide guidance.
- Spur questions.
- Encourage collaboration.

Toolkit will make Article 19 more than just words on a piece of paper

- Encourage activities that will realign power and resources.
- Promote justice for impacted people and countries.

Article 19 in action



Source:

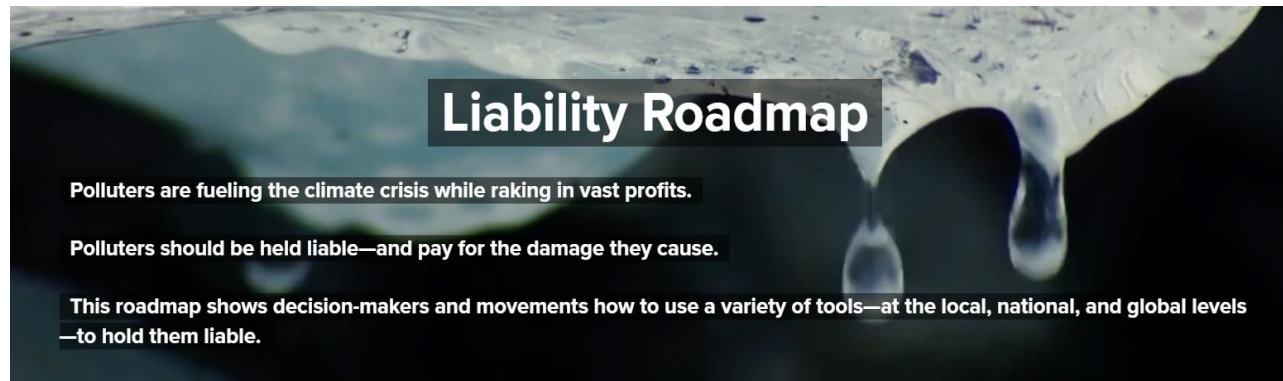
<https://www.reuters.com/article/us-brazil-tobacco-lawsuit-idUSKCN1SS2DN>

The precedent of Article 19

Action inspires action

Article 19 has influenced other areas of social justice

- **Climate Change**
 - Make Big Polluters Pay
 - Hold fossil fuel industry liable for fueling climate crisis and funding climate denial
 - Resources:



Sources:

<https://makebigpolluterspay.org/>

<https://liabilityroadmap.org/>



Action inspires action

- **TNC Treaty**
 - UN treaty on transnational corporations and human rights
 - Regulate corporations with respect to human rights

Source:

<https://focusweb.org/civil-society-drives-momentum-for-un-treaty-on-tncs-and-human-rights/>



Final thoughts

Final thoughts

- Why it is important to advance Art. 19 in the COVID & POST-COVID context?
- COP9 & Art. 19: Dream big?
- Industry accountability and liability (criminal liability+other forms).

THANK YOU!

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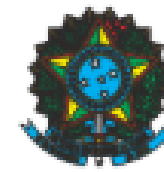
CorporateAccountability.org





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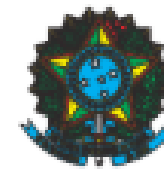
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FEDERATIVE REPUBLIC OF BRAZIL
ATTORNEY GENERAL'S OFFICE

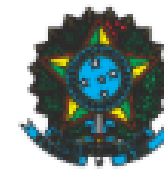
TOBACCO INDUSTRY ACCOUNTABILITY AND LIABILITY – BRAZIL'S HEALTH SYSTEM CASE

DAVI BRESSLER
Attorney for Brazil
Attorney General's Office



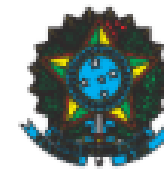
CONTEXT:

- Brazil has an universal and free health care system. The tobacco products have a massive impact on it;
- Since all the Brazilian society contributes to the financing of the public health system, the tobacco industry imposing a undue burden;
- Law and economics approach;
- The tobacco activity is licit, but the profits of the industry can't generate a cost to society.

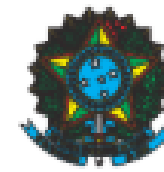


BRAZIL'S INITIATIVE – LITIGATION:

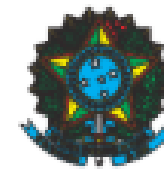
- Brazil filed a lawsuit, in may 2019, against the major tobacco companies, seeking reimbursement for the damages;
- Not only the Brazilian Subsidiaries, but also the international headquarters are defendants in the lawsuit.
- Brazil selected 26 diseases that has an **epidemiological nexus** with tobacco consumption, using the Surgeon General's (U.S.) compilations.



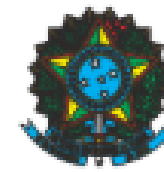
- Several actions (and omissions) of the Tobacco Industry, throughout history, are described in the lawsuit;
- It is an opportunity to disclose their conduct through the years;
- A claim of collective moral damages (different from punitive damages) is made specially because of all the wrongdoings that Tobacco Industry has done to Brazil, by the Brazilian subsidiaries and the headquarters, that has (and still have) effects in Brazil (specially withholding of information).



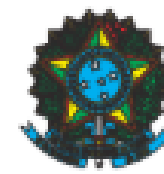
- Raising awareness in governments and in civil society, about the actions of TI is an important tool to shape further interactions between these actors;
- In these specific field, Brazil's lawsuit can already be consider a success. The filling of the lawsuit initiated discussions about the conducts of the TI that Brazil has never seen before;
- Academia, media and civil society are discussing the wrongdoings and will continue to do so, specially with the development of the lawsuit.



- TI is using every possible defense in the lawsuit, and already has showed that their main strategy is to delay the lawsuit as long as they can, and to protect the headquarters at all costs;
- Brazil now has to keep seeking the conviction of the TI, and also, in every step of the lawsuit, raise awareness about their way of doing business.



- The way that TI presents themselves in the lawsuit is similar to the way that they present themselves in their business (aggressive, but not presenting any new argument).
- The lawsuit is the perfect environment for showing to society the damages caused and their conduct along the years (a debate that TI cant run from).



FEDERATIVE REPUBLIC OF BRAZIL
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Article 19-

How it has been utilized, how it could be utilized, and problems that might arise in the process.

November 10, 2020

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ASH

ACTION
ON SMOKING & HEALTH

Global action for everyone's health.

U.S. Civil Liability

Past and Present

Master Settlement Agreement (MSA)



United States v. Philip Morris (D.O.J. Lawsuit/ RICO case)



African American Tobacco Control Leadership Council (AATCLC), Action on Smoking and Health (ASH), and the American Medical Association (AMA) vs. The United States Food and Drug Administration (FDA)

Case 3:20-cv-04012 Document 1 Filed 06/17/20 Page 1 of 45

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 AFRICAN AMERICAN TOBACCO)
15 CONTROL LEADERSHIP COUNCIL and)
ACTION ON SMOKING AND HEALTH,)

Plaintiffs,

Case No.:

COMPLAINT
(Administrative Procedure Act Case)

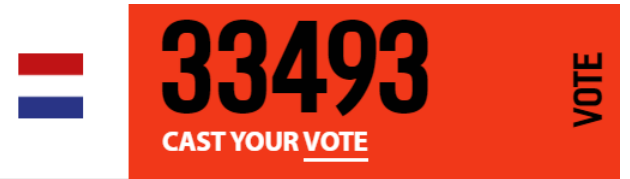
Criminal Cases



The Netherlands



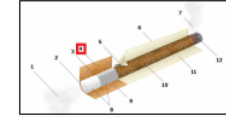
*'I do not want my children to fall victim to the tobacco industry like I did.
I do not want them to become MY 'replacement-smokers
when I died of lung cancer ...'*



“The directors of companies that manufacture and distribute tobacco in France are criminally liable for willfully endangering the person of others...”

Filtergate : ouverture d'une enquête préliminaire

Publiée vendredi 4 mai



Dans le prolongement du dépôt de plainte par le Comité National Contre le Tabagisme pour mise en danger de la vie d'autrui consécutive à la manipulation des filtres par les fabricants de tabac, une enquête préliminaire vient d'être ouverte.

Paris, le 5 mai 2018 - Le **Filtergate** représente la manipulation des filtres par les fabricants de tabac via la **perforation** de ces filtres et l'existence de minuscules trous destinés à falsifier les tests des caractéristiques des cigarettes. Les fabricants de tabac ont ainsi modifié secrètement les propriétés techniques des cigarettes afin de **tromper les laboratoires agréés en charge de mener les tests requis par le code de santé publique** devant mesurer les taux de goudron, de nicotine, et de monoxyde de carbone contenus dans les émissions des cigarettes fumées.

Il s'ensuit que la mise en place de ce dispositif de micro-orifices dans le filtre des cigarettes empêche les autorités en charge de l'application de la loi de savoir si les seuils de goudron, de nicotine, et de monoxyde de carbone qu'elles ont fixés sont dépassés.

Un tel système de ventilation invisible **trompe les fumeurs** puisqu'ils ignorent l'ampleur réelle du risque qu'ils prennent. Ils croient en effet, à tort, qu'ils inhalent une certaine quantité de produits dangereux alors que les doses qu'ils absorbent sont supérieures à celles qui leurs sont indiquées.

Le CNCT a porté plainte il y a quelques mois contre les fabricants de tabac pour mise en danger de la vie d'autrui. Dans le prolongement de ce dépôt de plainte, une enquête préliminaire vient d'être ouverte.

« *Nous nous réjouissons de cette décision*, a indiqué le Pr Yves Martinet, Président du Comité National Contre le Tabagisme, *et espérons qu'un juge d'instruction soit prochainement désigné* ».

[Pour plus de précisions](#)

Contact presse :

Pr Yves Martinet : 01 55 78 85 10



Hurdles, Pitfalls, and Unintended Consequences



Thank you!

Kelsey Romeo-Stuppy
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<https://ash.org>



@ASHOrg



@ASH: Action on Smoking and Health



The solution?

for selling the
ONLY consumer
product that kills
when used AS
INTENDED.



The Future of Tobacco Industry Liability

WHO FCTC Article 19

Deborah Sy, LIB, LIM
Head of Global Public Policy & Strategies



Global Center for
Good Governance
in Tobacco Control

GGTC is the designated Secretariat's Knowledge Hub for Art 5.3 & a Partner in STOP, a Tobacco Industry Watchdog

The Future of Art 19

Current Situation

Goal

Gaps

Ways Forward

Judicial System in LMICs

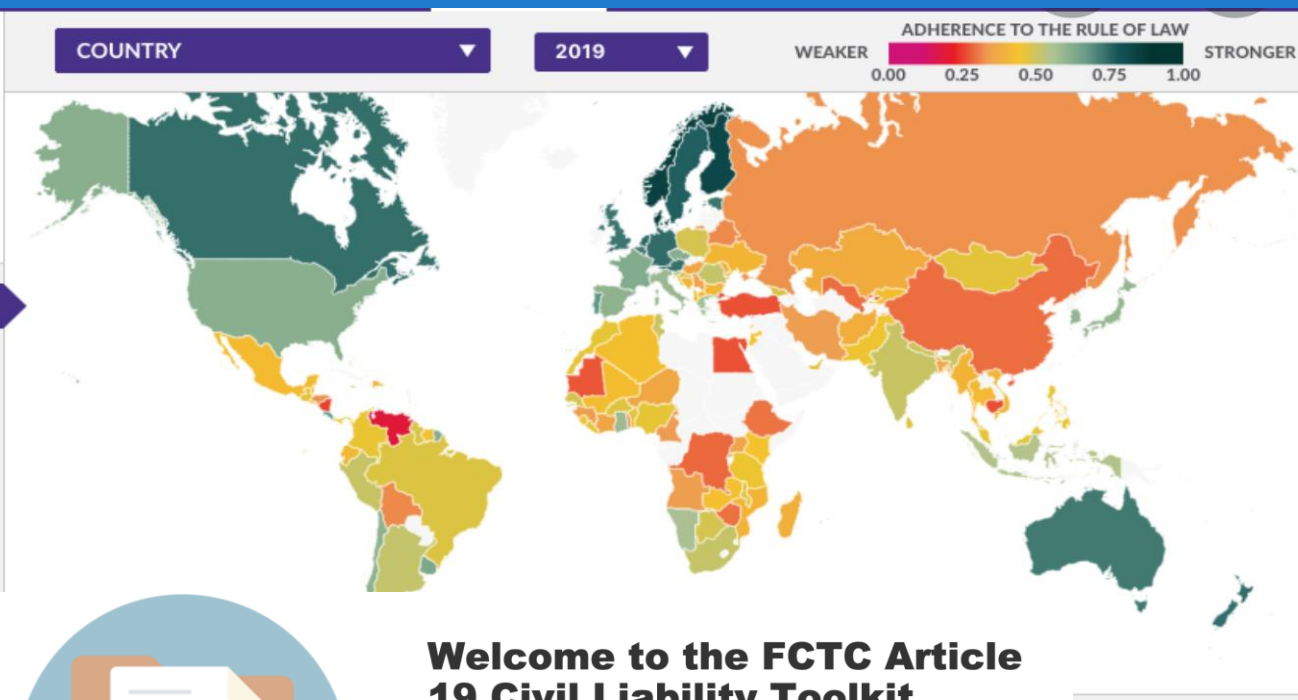
Victims and Harms

Trends in International Law

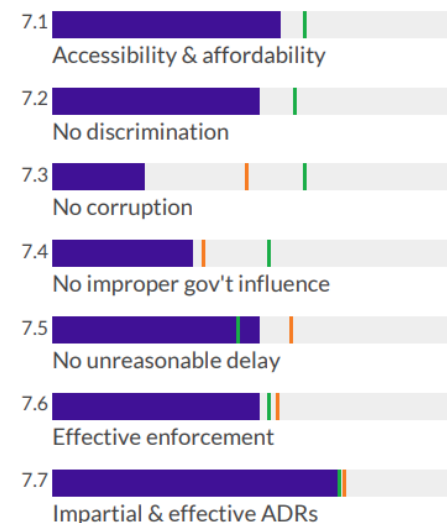
The Expanded Arsenal

Judicial System in LMICs

*low and middle-income countries

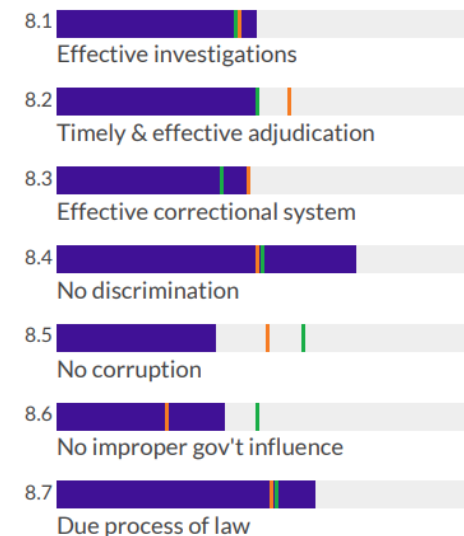


Civil Justice



World Rule of Law Index, 2019

Criminal Justice



Welcome to the FCTC Article 19 Civil Liability Toolkit

Your interactive guide to taking legal action against the tobacco industry.

[Read More](#)



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in Tobacco Control

10 Reasons Why It's Time that #TobaccoPayUp

Tobacco companies know their products cause destruction and death, but they make and sell them anyway. Now, they should be held accountable and face the financial consequences. Here are 10 reasons policymakers and victims of tobacco growth and use should make #TobaccoPayUp.



1 Tobacco use **costs the world U.S. \$1.4 trillion every year** in health care expenses and productivity losses.



2 Around **1.3 million children work in tobacco fields** where they're exposed to green tobacco sickness and deprived of schooling, hurting their chances at healthy, successful futures.



3 **Addiction to tobacco creates poverty** by causing families to pay high medical bills and divert funds for food and education to tobacco products.



4 Growing tobacco **strips soil of nutrients** faster than other crops and takes up land that could be used to grow food.



6 Governments **miss out on tax revenues** when tobacco companies over-supply to certain markets, knowing the excess will end up on the black market.



7 Tobacco companies **routinely violate human rights** through poor labor practices.



8 The tobacco industry has **paid lawyers, scientists and agencies to conceal the truth about smoking** and second-hand smoke, amounting to disinformation and even fraud.



9 Tobacco companies **create ethical and global problems** as they expand their market.

Victims & Harms

Image Source: STOP, www.exposetobacco.org



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in Tobacco Control

International Law: UN Treaty on Transnational Corporations & Human Rights

UN Guiding Principles on Business and Human Rights

Liability regime in the Draft Treaty:

- Mechanisms to report violations of human rights by businesses
- **Sanctions and reparation for victims**
- Judicial/ **non-judicial grievance mechanisms**
- Financial security to cover **compensation (inc future claims)**

Learn more at ASH Webinar: [Incorporating Human Rights into the WHO FCTC Nov 11, 2020](#)



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in Tobacco Control

International Law: UN Convention against Corruption

- **Criminal, civil or administrative liability**
- Criminalize offence of bribery of foreign public officials
- Use “**effective proportionate and dissuasive criminal or non-criminal sanctions** including monetary sanctions”
- Return property or **compensate the victims**



International Law: Environment Treaties & Country Implementation

- Environmental courts (non-judicial)
- Administrative sanctions (treble damages)
- Surcharge (Polluters Pay / as a form of compensation)
- Trust fund for clean up (restitution)



International Law: WHO FCTC

Tobacco industry: Never a private sector partner

Art 2.1 Implement **measures beyond** the treaty (stricter requirements in accordance with international law)

Art 5.3 Protect public health from interests of tobacco industry (TI)

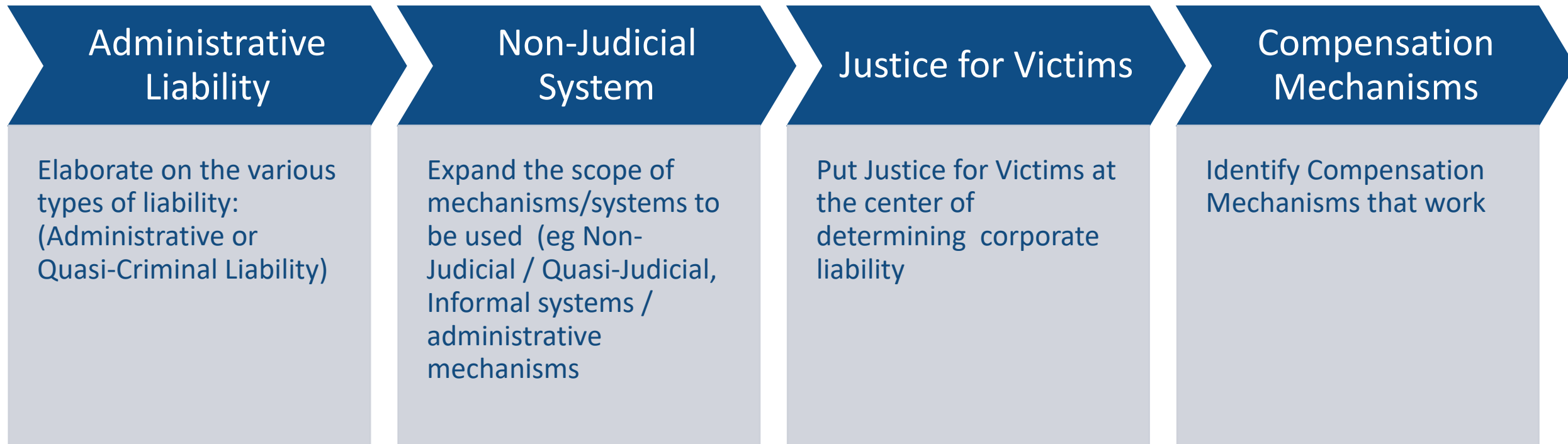
3.1-4 Reject partnerships, TI initiatives, voluntary codes, offers of assistance

5.2 Require information

5.3 Require disclosure or registration of TI & those acting on their behalf

5.4 Impose mandatory penalties for misleading information

WHO FCTC Article 19: Expanded Arsenal



ADMINISTRATIVE/ QUASI-CRIMINAL LIABILITY

- Polluters pay principle
- Restitution or compensation
- Absolute or strict liability
- Efficient administrative systems for adjudication and enforcement



NON-JUDICIAL/ QUASI-JUDICIAL MECHANISMS

- Environmental Adjudicatory Bodies (~40 countries)
- Human Rights Bodies in LMICs (e.g. Brazil, India, Kenya, Pakistan, Philippines)
- Labor Dispute Adjudicatory Bodies
- Anti-Corruption Agencies (~55 countries)



JUSTICE FOR VICTIMS

UN Declaration of Basic Principles of Justice
for Victims of Crime and the Abuse of Power

Victims entitled to affordable, fair, expeditious
proceedings and compensation

Entitlement applies even when

- Not “crime” but violation of human rights
- No conviction / adjudication of guilt
- Informal proceedings are involved

Environmental harms: Restitution including for
future harms



COMPENSATION MECHANISMS

- Principle: Offender must pay
- Funding from the offender
 - Convicts: Sweden Victim Support Fund
- If insufficient, establish national fund sourced from fees, taxes and charges
 - Motor Vehicle Accident Funds
 - Workmen's Compensation Funds



Case Studies: Compensation Funds

ASBESTOS Trust Funds

- Trust funds for damages (AU SA UK US)
 - Future claims & Foreign claims (US-CA, UK-SA)
 - Levy on insurance companies (UK)
- ~70 countries ban asbestos (CA, SA)

VACCINE Injury Funds

- Available in ~19 countries
- Levy/ tax on companies
- Speedy compensation for victims (FR NZ US)
- More liberal/ practical, non-adversarial



The Future of Art 19

- Systems appropriate for most LMICs
- Practices and policies in environmental, human rights, transnational crimes and Article 5.3
- Human rights guidance in re justice for victims



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BIG TOBACCO

WHO FCTC Art 19

The Present: Art 19 and Covid-19

- Make the Tobacco Industry pay
- Save lives, save healthcare, & contribute to Covid-19 recovery
- Set up victim compensation schemes to ensure justice for victims

REFERENCES

1. Webinar on Tobacco Industry Accountability and Liability as a COVID-19 Response co-hosted by Framework Convention Secretariat's Knowledge Hub on Art 5.3 (GGTC) and Stopping Tobacco Organizations and Products (STOP), June 2020
2. Sy, Deborah, Tobacco Industry Accountability and Liability in the Time of COVID-19, STOP, 2020
3. STOP's Tobacco Pay Up Campaign, 2020



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in Tobacco Control

Thank you.



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[TheGGTC](#)

WEBINAR NOV 17, 2020

Global Tobacco Industry
Interference Index 2020

LAUNCH WEBINAR

17 November 2020 | 12:30 PM GMT

FREE E-LEARNING COURSE



LEARN

Implementing **ARTICLE 5.3**
of the WHO Framework Convention on Tobacco Control:
from **POLICY TO PRACTICE**



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GGTC is the designated Secretariat's Knowledge Hub for Art 5.3 & a Partner in STOP, a Tobacco Industry Watchdog

Q&A

Stay Involved



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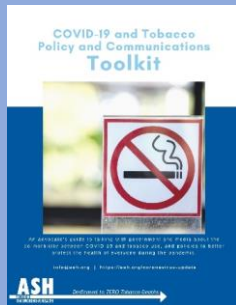
@ASHorg



Info@ash.org



Recordings from previous webinars and Live Chats on social media: <https://ash.org/webinars>



Toolkit for Advocates

Talking with government and media about the COVID-19 and tobacco use co-morbidity and policies to protect the health of everyone during the pandemic.

ash.org/covid19



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in Tobacco Control

NEXT WEBINARS:

Daily THIS WEEK at 9:00am ET

ASH with support from its partners, including the Framework Convention Alliance and Corporate Accountability International, will host **a week of webinars**. These webinars are focused on the FCTC and at times may be more technical than some of our previous webinars, but the topics we will cover, including endgame, liability, human rights, and COVID, will be useful to advocates from every background.

Wednesday, Nov. 11th: Incorporating Human Rights into the WHO FCTC

Thursday, Nov. 12: COVID-19's Impact on the FCTC, Cessation, and Tobacco Policy

Friday, Nov. 13th: Closing the Funding Gap for FCTC Implementation at the Global and National Level

Full Descriptions & Registration Links:

<https://ash.org/cop2020>



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Article 19

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