



STOPPING TOBACCO  
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# Tobacco Industry Accountability and Liability in the Time of COVID-19

**The tobacco industry must be held to account for health care costs, compensation to victims, corruption, illicit trade, environmental damage, food insecurity, human rights violations, and more.**

## Frequently Asked Questions

### Summary

The tobacco industry must be held to account for health care costs, compensation to victims, corruption, illicit trade, environmental damage, food insecurity, child labor, and more. Under the global tobacco control treaty, the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), governments are called on to adopt stronger tobacco control laws, create robust legal frameworks, and take action to make the tobacco industry pay compensation for the harms it has caused.

The tobacco industry must not be granted incentives to run its business. To enable corporate accountability, governments must demand transparency from the tobacco industry and adopt policies to resist its influence. Due to limitations of legal systems in many jurisdictions and the escalated impact of tobacco harms during COVID-19, the most rational way to make the tobacco industry pay in a manner that responds to the crisis is to increase and dedicate taxes to a wide range of areas where the industry has caused harm, including creating compensation mechanisms to ensure fair distribution to beneficiaries. This would support countries' COVID-19 responses as well as help achieve UN Sustainable Development Goals (UN SDGs).

## I. What is accountability and liability in the context of the tobacco industry?

Corporate accountability is generally defined by the ability to hold a corporation to account for its operations by those it has affected. Liability involves making a corporation legally answerable.

In the context of the WHO FCTC, a global treaty which is embodied in the UN SDGs, “liability” is interpreted broadly, ranging from accountability to liability. The broad scope is that corporate liability is part of a broader governance system where the role of regulation and corporate governance is key in ensuring compliance with laws.<sup>1</sup> The coverage ranges from the availability and enforcement of policies/measures to the actions taken to make it liable for harms caused by its products or behavior. Based on the Reporting Instrument of the WHO FCTC,<sup>2</sup> this covers:

### A. Policies, laws, or measures:

1. Criminal liability provisions in tobacco control or other laws covering tobacco control or civil liability provisions in general and/or pertaining specifically to tobacco control; and,
2. Criminal or civil liability provisions that provide for compensation for relevant costs.

### B. Actions taken against tobacco companies or the tobacco industry:

1. Criminal or civil action taken by any person (including private persons)<sup>3</sup> against any tobacco companies as to health effects of tobacco use; and,
2. Any government action<sup>4</sup> (including administrative or other action) taken against the tobacco industry for reimbursement of relevant costs related to tobacco use.

## II. Why are accountability and liability important during the COVID-19 pandemic?

### Box 1. Links between smoking and COVID-19

The WHO and health experts<sup>5</sup> have cautioned that tobacco use carries risks of COVID-19 transmission/infection, and leads to worse outcomes in those diagnosed with COVID-19,<sup>6</sup> including admission to the intensive care unit, the need for mechanical ventilation, and death.<sup>7</sup> Smoking weakens the immune system, making it less able to fight infections;<sup>8</sup> and increases the risk of viral and bacterial respiratory infections.<sup>9</sup> Smoking, vaping, and waterpipe smoking pose risk of transmission from the hand-to-mouth action and sharing of mouthpieces,<sup>10</sup> or vape that could carry the virus.<sup>11</sup> COVID-19 also endangers the life of those with pre-existing conditions like cancer, heart disease, stroke, lung disease, diabetes, and chronic obstructive pulmonary disease,<sup>12</sup> for which smoking is a major risk factor.<sup>13</sup>

Source: Stopping Tobacco Organizations and Products (13 May 2020). The Role of the WHO FCTC in COVID-19 Responses. Retrieved from <https://exposetobacco.org/resources/counter-tactics-maximize-health/> (accessed on 11 July 2020).

The COVID-19 pandemic is a tremendously difficult time for governments. The tobacco industry, despite giving an impression of being a benefactor, has made governance more difficult during the crisis:

- It resisted lockdown measures in many countries, insisting that its products were “essential” to the extent of filing cases,<sup>14</sup> and endangering the health of its workers.<sup>15</sup>
- It obscured facts about the dangers of smoking with flawed information<sup>16</sup> on the benefits of nicotine and vaping.<sup>17</sup>
- It laundered its corporate image with donations<sup>18</sup> and with publicity stories about vaccine development.<sup>19,20</sup>
- It accelerated marketing of its products to the youth, even brazenly placing its brand logos on facial masks flouted by social media influencers.<sup>21</sup>
- It demanded compensation for smuggling even when it is complicit in illicit trade.<sup>22</sup>

### III. Why make the tobacco industry pay?

Smoking is the leading cause of preventable deaths worldwide. The tobacco industry, which is dominated by four large producers outside China (i.e., PMI, BAT, JTI, ITC), has now admitted that its products are so harmful that it needs to shift its business to become “less harmful,” but it has yet to be held to account for the global scourge it has already created. The industry has employed “decades of duplicity and deception”<sup>23</sup> to market its products and is seen repeating the same tactics to market its new products under the guise that they are safer. Among others, the tobacco industry needs to pay for:

- 1. Health costs:** The tobacco industry sells products that kill up to half of its users when used as intended, with a toll of 8 million deaths every year,<sup>24</sup> costing the world US \$1.4 trillion per year in health care costs and productivity losses.<sup>25</sup> Over 50 chemicals found in cigarettes are known to cause cancer (e.g., 90% of lung cancers);<sup>26</sup> chronic obstructive pulmonary diseases (COPD),<sup>27</sup> and tobacco-related diseases that require critical care. Critical care is modest in low-income settings,<sup>28</sup> and a single day’s use of mechanical ventilators can cost more than a month’s income.<sup>29</sup>
- 2. Long-term impact on the youth:** About 1.3 million children who work in tobacco fields are exposed to green tobacco sickness and deprived of schooling.<sup>30</sup> <sup>31</sup> Among the young, smoking and exposure to secondhand smoke are associated with learning problems/cognitive impairment,<sup>32</sup> and the effect of nicotine exposure can become permanent.<sup>33</sup> Nicotine and nicotine dependence are also associated with worsened anxiety,<sup>34</sup> irritability,<sup>35</sup> and impulsivity<sup>36</sup> in young adults. Transnational tobacco companies (TTCs) are known to have researched the effects of manipulating nicotine doses on the brain.<sup>37</sup>
- 3. Poverty:** Tobacco products cause chronic diseases<sup>38</sup> that are costly to treat, and premature deaths caused by tobacco put financial burdens on families.<sup>39</sup> Addiction to tobacco products depletes the budgets of poor families;<sup>40</sup> in some cases, more is spent on tobacco than on essentials, including nutritious food and education. Further, contract growing schemes of large tobacco dealers keep farmers in debt.<sup>41</sup>
- 4. Food insecurity:** Tobacco growing takes up large tracts of land that can be used for food production.<sup>42</sup> Tobacco crops strip soil nutrients faster than other crops, making the land less productive for growing food crops.<sup>43</sup> Due to the toxicity of tobacco growing and the net harm it causes, governments have committed to shift tobacco growing to alternative livelihoods.<sup>44 45</sup>
- 5. Environmental damage:** Growing<sup>46</sup> and curing<sup>47</sup> tobacco cause “aggressive” deforestation especially in low- and middle-income countries (LMICs).<sup>48</sup> Cigarette butts are “the most widely littered product globally<sup>49</sup>”—4.5 trillion are discarded yearly,<sup>50</sup> comprising around 15% of the total debris collected worldwide.<sup>51 52</sup> Toxins from butts and tobacco pesticides leach into water sources,<sup>53 54</sup> and have serious implications on drinking water and aquatic life.
- 6. Complicity in illicit trade:** Around 9% of cigarettes in the world are smuggled.<sup>55</sup> Large transnational tobacco companies (TTCs) have been investigated for their complicity in smuggling and have been made to pay substantial sums in some jurisdictions.<sup>56</sup> Sixty to seventy percent (60-70%) of seized illicit cigarettes were legally manufactured by major TTCs but have been diverted into illegal markets.<sup>57 58</sup> Research also shows that TTCs are “over-producing products in some markets and over-supplying to others, both in the knowledge that excess products will end up on the illicit market.”<sup>59</sup>
- 7. Human rights violations:** The tobacco industry “flagrantly violates human rights.”<sup>60</sup> Because the nature of tobacco is immensely harmful, production and marketing of tobacco products are considered irreconcilable with the human right to health and must be ceased.<sup>61</sup> The tobacco industry’s supply chain is fraught with poor labor practices including exploitation of child labor.<sup>62</sup>
- 8. Disinformation and fraud:** Large TTCs have a history of spreading public disinformation to undermine tobacco control policy.<sup>63</sup> In some jurisdictions, this amounts to fraud. In the U.S., this behavior constitutes a factor in the violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>64</sup> For instance, tobacco companies have funded lawyers, scientists, and public relations agencies to conceal the harms caused by smoking and secondhand smoke<sup>65</sup> in order

to counter smoke-free regulations. They also fund research that exaggerates the magnitude of illicit trade to counter tobacco tax increases.<sup>66</sup> Tobacco companies continue to invest in research that propagates this practice.<sup>67</sup> The industry also uses its so-called corporate social responsibility (CSR) actions around the environment and child labor<sup>68</sup> to obscure its devastating impact on society.<sup>69</sup>

**9. Lobbying, interference, and corruption:** TTCs aggressively lobby policymakers to gain a favorable business environment<sup>70</sup> even to the extent of paying bribes.<sup>71</sup> Governments consider such industry interference to be the greatest obstacle to tobacco control implementation.<sup>72</sup> Moreover, TTCs give an impression of promoting anti-corruption<sup>73</sup> even when proven to be guilty under racketeering and corruption

laws.<sup>74</sup> They also continue to engage in acts that are opposed to business integrity.<sup>75</sup> For instance, they give gifts to public officials and hire former public officials,<sup>76</sup> resulting in violations of ethical standards set by the global tobacco control treaty.<sup>77</sup>

**10. Cost of legal challenges:** The tobacco industry has launched numerous cases to attack tobacco control legislation,<sup>78</sup> resulting in significant delays in the passage of life-saving measures<sup>79</sup> in at least thirty (30) countries in the past decade.<sup>80</sup> These exclude cases filed to avoid taxes, claim tax exemptions, and enjoy certain privileges. It has abused dispute settlement proceedings,<sup>81</sup> and despite tobacco control victory in trade and investment fora,<sup>82</sup> has led to significant costs<sup>83</sup> and global delays in adoption of packaging laws.<sup>84</sup>

The economic burden of tobacco far outweighs the benefits from tobacco taxes even in countries that dedicate certain portions of their taxes to health programs or sports in response to tobacco-related harms. In most countries that allocate excise taxes for health or sports, the contribution of total tobacco excise taxes in relation to economic costs is less than 10%, and only a nominal percentage of the tobacco excise is earmarked for the aforementioned programs (see Table 1).

**Table 1. Economic costs vs. tax**

Country	Economic Cost of Tobacco (annual) in million, US\$ <sup>85</sup>	Tobacco Total Excise (Specific & Ad Valorem) in million, US\$ <sup>86</sup>	Percent of Tobacco Total Excise Allotted to Programs <sup>87</sup>	Beneficiary Programs/Activities relating to Health or Sports <sup>88</sup>
Cape Verde	120	0.99	100%	Sports and health
Colombia	3,226	298	10%, 16% <sup>89</sup>	National health insurance program, sports
Costa Rica	186	53	100%	Prevention/treatment of diseases related to tobacco use, cancer treatment, harmful use of alcohol, and sports
Estonia	943	229	3.5%	Cultural/sports endowment, physical fitness
Gabon	270	21	2%	Tobacco control
Guatemala	405	47	100%	Health programs
Indonesia	196,218	10,884	2%, 37.5% <sup>90</sup>	Social and economic programs, national health insurance plan, health
Iran	5,261	210	2%	Tobacco control, education, youth affairs, sports
Lithuania	8,418.	340	1%	Physical education, sport support fund

Country	Economic Cost of Tobacco (annual) in million, US\$ <sup>85</sup>	Tobacco Total Excise (Specific & Ad Valorem) in million, US\$ <sup>86</sup>	Percent of Tobacco Total Excise Allotted to Programs <sup>87</sup>	Beneficiary Programs/Activities relating to Health or Sports <sup>88</sup>
Morocco	4,804	1,061	5.4%	Health care for the poor and physically handicapped
Nepal	1,033.	137	25%	Health Tax Fund
Panama	252	26	50%	Oncology, cessation services, fighting illicit trade in tobacco products
Paraguay	555	64	40%, 18% <sup>91</sup>	NCDs, sports
Philippines	16,646	2,546	5%, 50%, 100% <sup>92</sup>	Support for tobacco farmers and tobacco-growing regions, universal health coverage, health facilities enhancement program
Romania	14,950	2,423	1%	Health, sports
Thailand	17,465	2,110	2%, 2% <sup>93</sup>	Thaihealth Fund, Sports Promotion Fund
Vietnam	12,656	634	2%	Vietnam National Tobacco Control Fund, tobacco control
Yemen	800	15	100%	Social programs, youth sports

#### IV. What does the FCTC recommend for holding the tobacco industry accountable and liable?

Overall, the FCTC provides governments a minimum standard of behavior they should impose on the tobacco industry, including increasing taxes and graphic warnings, prohibiting misleading packaging, and more. Governments must impose these standards<sup>94</sup> and hold the industry to account for violating them. Governments must also ensure that compensation is afforded to those wronged or harmed.

FCTC guidelines provide that governments should also require the tobacco industry and those working to further its interests to be transparent, and that governments should penalize it for inaccurate or false disclosures. Governments should also exclude it from benefits or incentives typically granted to other sectors.

Because issues relating to liability are an important part of comprehensive tobacco control,<sup>95</sup> the FCTC requires governments to consider actions to deal with tobacco industry liability, including compensation.<sup>96</sup> Governments should cooperate with each other in terms of information exchange<sup>97</sup> and assistance in legal proceedings,<sup>98</sup> and can consider international approaches and mechanisms of assistance in relation to liability.<sup>99</sup>

To effectively fulfill their duty to protect public health policies,<sup>100</sup> governments must also raise awareness about the tobacco industry's motives and tactics, avoid conflicts of interest, limit engagements, and de-normalize its so-called CSR.<sup>101</sup>

## **Box 2. Actions to hold the tobacco industry accountable and liable under the WHO FCTC**

Based on treaty documents, the following have been identified as important actions to take to hold the tobacco industry accountable and liable under the WHO FCTC:

- I. Regulate/impose obligations for implementation of substantive articles, ensure compliance, and impose liability for non-compliance (Article 5.3, Articles 6-11, 13, 15-18). Take action to ensure compliance including liability for non-compliance or violations.
- II. Adopt a strong legal framework for liability that reaches all legal persons involved, (e.g., including taking into account domestic and international mechanisms to exact corporate accountability).
- III. Require compensation for harms, e.g., take action to recoup costs/seek compensation or to facilitate access to justice for victims (Article 19).
- IV. Take action towards preventive measures:
  - a. Require information to facilitate enforcement (Article 5.3).
  - b. Adopt clear codes or guidance in dealing with the tobacco industry and those furthering its interests: Avoid conflicts of interest, limit engagements, reject partnerships and so-called CSR (Article 5.3).
  - c. Remove or deny benefits for the tobacco industry (Article 5.3).

Treaty implementation tools for liability include a civil liability toolkit for civil suits to recoup health care costs or help victims gain access to courts to seek compensation. It also includes model rules and legislation to facilitate attaining justice in courts.<sup>102</sup>

Because legal systems vary, liability is framed broadly and goes beyond civil litigation. Treaty tools are not available

for the whole spectrum of liability and compensation. However, standards do exist for the liability of legal persons in the relevant international conventions and related instruments. Standards also exist for legislation and practices around financial crimes, corruption, and environmental damage. To ensure the effectiveness of laws, reviewing policies in light of international conventions was specifically encouraged in the Illicit Trade Protocol.<sup>103</sup>

Principles and guidance based on findings of highly qualified publicists on international law,<sup>104</sup> which that have been adopted in environmental treaties, provide an understanding of international liability regimes to address damage or harm. The following are some of the features of a liability regime:

### **A. A strong legal framework for liability that reaches all legal persons involves:**

1. Strict responsibility/liability for operator (tobacco companies),<sup>105</sup> as appropriate, for ultrahazardous activities or activities entailing risk;<sup>106</sup>
2. Presumptions for causality for activities attributable to a sector (instead of single entity) may be established;<sup>107</sup> and,
3. Legal persons that are subjected to effective, dissuasive, and proportionate penalties for offenses or omissions.

### **B. Mechanisms that allow for compensation:<sup>108</sup>**

1. A back-up system of liability in case the industry is unable to pay (without prejudice to the state obtaining reimbursement from the operators);
2. Insurance coverage or other financial guarantees from the operator or national insurance funds in its absence;<sup>109</sup> and,
3. Compensation funds or a similar mechanism of collective reparation where operators may be required to contribute.<sup>110</sup>

### **C. Preventive mechanisms:**

1. Increased use of health impact assessments, and precautionary and “polluter pays” principles are considered.<sup>111</sup>

## V. How can governments make the industry pay for all the damages it has caused?

Being a unique product covered by a global treaty, tobacco products are typically covered by special regulatory laws which provide for administrative, civil, and criminal sanctions when violated. Governments need only to improve such laws and enforce them. Governments can also introduce laws that apply the “polluter pays” principle, wherein those responsible for damages should bear the cost of preventing the harm caused. Although this concept originated in the field of environment, this has been applied in tobacco control. For instance, based on the “polluter pays” principle, Thailand exacts a 2% surcharge from the tobacco industry in order to pay for health promotion programs.

Aside from special laws pertaining to tobacco, governments can turn to general laws relating to “breach of duties.” In most societies, a basic standard of care exists (e.g., reasonable person’s standard of ordinary care) to which a product manufacturer can be held to wherein failure to

exercise this duty could be deemed negligence resulting in civil liability. In some civil law regimes, the “strict liability” rule applies to manufacturers of hazardous or harmful substances such as tobacco. As a result, the tobacco industry is held to a higher standard of care such that negligence need not be proven, and once an injury occurs, there is a presumption that the manufacturers are liable.

### A. Regulate/impose obligations for implementation of substantive articles, ensure compliance, and impose liability for non-compliance (Article 5.3, Articles 6-11, 13, 15-18)

Some governments have stringent tobacco control measures with robust enforcement plans in place, including administrative investigation bodies and civil society participation. Cases have been filed to enforce smoke-free laws, advertising bans, labelling regulations, consumer protection laws, and anti-trust laws. Below are some examples of enforcement cases initiated by civil society that resulted in a positive ruling:

**Table 2. Examples of enforcement cases initiated by civil society that resulted in a positive ruling**

Areas	Countries / Year Initiated	Party who Instigated	Outcome
Enforcement of advertising ban	France, 2019	National Committee for Tobacco Control (CNCT), a civil society group	French court ordered Philip Morris and Ducati to pay €10,000 and prohibited them from displaying “Mission Winnow” logo in the races.
Enforcement of advertising ban	U.K., 2019	Action on Smoking and Health, Campaign for Tobacco-Free Kids, and Stopping Tobacco Organizations and Products	U.K.’s Advertising Standards Authority (ASA) ruled that BAT can no longer use its social media account to promote e-cigarettes (as this reaches the youth).
Enforcement of transparency rules (WHO FCTC Article 5.3)	EU, 2014	Corporate Europe Observatory, a civil society group	The EU Ombudsman declared that transparency rules that apply to health (DG Sante) should also apply to the rest of the European Commission, and that its failure to publish online meetings of its staff with the tobacco industry constitutes “maladministration.”

Source: Towards Health with Justice 2 (forthcoming publication)

Government agencies are in the best position to enforce a law and make the tobacco industry liable for violations. They should be vigilant in holding corporations accountable for financial crimes, such as those involving taxes and corrupt practices, as these affect the investment climate.

**Table 3. Sample actions taken by Parties to make the tobacco industry liable for violations**

Areas/ Charge	Year	Party who Instigated	Outcome/Status
Tax evasion	2019	Thailand – Attorney General’s Office	Thai criminal court ruled that Philip Morris is guilty of evading taxes for under-declaring cigarette imports from the Philippines <sup>112</sup> and ordered it to pay \$39.7 million.
Tax evasion	2019	Ukraine – National Police	State Fiscal Service settled the case by abolishing the notification for \$23 million taxes and penalties based on Philip Morris Ukraine’s claim that it was granted conditional exemptions from import duties and VAT during the covered period. <sup>113</sup>
Bribery/ Foreign Corrupt Practices Act	2014	United States – Securities and Exchange Commission	Department of Justice entered into non-prosecution agreements with both Alliance One International (\$9.45 million) and Universal Leaf (\$4.4 million), <sup>114</sup> which were involved in paying bribes or improper payments to secure contracts in China, Greece, Indonesia, Kyrgyzstan, and Thailand. <sup>115</sup>

**B. Adopt a strong legal framework for liability that reaches all legal persons involved**

Many developing countries do not have sufficiently strong legal frameworks for liability.<sup>116</sup> A handful of countries have successfully taken action against the tobacco industry using existing or novel legal frameworks, including the U.S. (Master Settlement Agreement involving a legal settlement for five tobacco companies to pay about US \$206B; Racketeer Influenced and Corrupt Organizations case) and Canada (class suits arising from Healthcare Cost Recovery Act, where the claims have reached about \$120B). Recently, the Brazilian government filed a lawsuit against local affiliates of Philip Morris and British American Tobacco as manufacturers of hazardous products that caused harm in light of the deceptive conduct of the tobacco industry in the past decade. The case seeks recovery of costs and moral damages related to the top 26 diseases scientifically proven to be linked with smoking.<sup>117</sup> Like many tobacco lawsuits, allegations include known facts such as concealment of evidence regarding the link between smoking and cancer, the addictive nature of smoking and dangers of passive smoking, the misleading marketing of “light/mild” cigarettes as safer products, and advertising and promotion aimed at the youth.

Support from the FCTC and some tools are available but strengthening legal frameworks will take time. One fundamental aspect is the design of effective and

dissuasive penalties when developing tobacco control laws. Standards set for financial corporations in accordance with money laundering conventions<sup>118</sup> can be a benchmark. Sanctions provided in accordance with anti-bribery conventions<sup>119</sup> can also be reviewed. Most of the TTCs are covered by anti-corruption laws in the U.S., U.K., and other parties to the anti-bribery convention, and these laws provide sanctions that are effective, dissuasive, and proportionate, in accordance with the FCTC.

**C. Require compensation for harms, e.g., recouping costs, seeking compensation or facilitating access to justice for victims (Article 19)**

Seeking recompense from companies through courts is perhaps the most impactful way to make the tobacco companies pay. Some cases have resulted in not only payment of damages, but also the establishment of research funds, trust funds for victims, improved rules of procedure for claimants, and changes in policies. For example, circumstances surrounding the US flight attendants’ (Broin, et al. filing on behalf of a class of 60,000 or so flight attendants) lawsuit against the tobacco industry in the early 90s,<sup>120</sup> hastened the adoption of inflight smoking bans. As part of the settlement that was announced in 1997, the named plaintiffs secured compensation; the rest of the class were given leeway to file individual claims, and a research fund was established. The flight attendants’ advocacy has influenced domestic



laws that ultimately has global consequences. By 1997, smoking is banned in all domestic flights, and Australia, Canada, EU, and the US have agreements to ban inflight smoking. However, it was not until 2000 that US aviation law banned smoking in all inbound and outbound flights.<sup>121</sup> Tobacco-related litigation is well-documented in the Civil Liability Toolkit discussed in Box 4, and will not be further discussed here.

It bears stressing that the legal systems of a vast majority of jurisdictions are unable to allow for successful litigation against the tobacco industry despite the catastrophic harms it has caused. Nevertheless, some form of compensation fund or mechanism<sup>122</sup> has been considered. This has allowed reparation for harms of many forms and serve to reduce the externalities caused by tobacco. For instance, Thailand applied the “polluter pays” principle and requires tobacco companies to pay a 2% surcharge that goes into a health promotion fund, which includes funding tobacco control programs and empowering civil society to counter tobacco industry tactics.<sup>123</sup> A significant portion of excise taxes in the Philippines is earmarked to fund the country’s universal health care program and alternative livelihood of farmers,<sup>124</sup> in accordance with FCTC provisions.<sup>125 126</sup>

FCTC guidelines recommend consideration for “dedicating revenue to tobacco-control programmes, such as those covering awareness raising, health promotion and disease prevention, cessation services, economically viable alternative activities, and financing of appropriate structures for tobacco control.”<sup>127</sup> Forty-three (43) countries are dedicating proceeds or parts of taxes (including surcharges and fees)<sup>128</sup> to health programs or tobacco control.<sup>129</sup> However, governments have yet to use tax proceeds to compensate for actual harms caused. This compensation can be in the form of: payment for other damages suffered by the victims or their families; recouping the costs of harms to the environment, human rights, child labor or illicit trade;<sup>130</sup> and costs of aggravating poverty, corruption, public deception, and food insecurity.

Many jurisdictions have adopted administrative compensation mechanisms. Workmen’s Compensation laws are adopted to facilitate workers’ claims and avoid

lengthy processes<sup>131</sup> just to receive compensation. The same rationale should apply to victims of tobacco-related harms. Compensation mechanisms typically require funds to be pooled and an administrative body to manage and release funds to beneficiaries when certain criteria are met. Disbursement mechanisms utilized for social welfare benefits could be tapped. Some examples include:

- Motor Vehicle Accident Fund (New Zealand): Financed with the country’s gas/diesel levy and administered by a government body.<sup>132</sup>
- Mesothelioma Fund/Financial Services Compensation Scheme (FSCS) (U.K.): Funded with a levy from insurance companies and disbursed by the FSCS.<sup>133</sup>
- Vaccine Injury Compensation Trust Fund (U.S.): Financed with a small amount of tax per vaccine sold to compensate anyone who is injured from it.<sup>134</sup>

In the past decade, large transnational corporations that have inflicted far less devastation than the tobacco industry have been held accountable in many jurisdictions. Mostly initiated as suits by claimants or prompted by investigations by government agencies, these resulted in compensation via court settlements, government agreements, or legislation. These cases demonstrate the capacity of the legal system to accommodate liability regimes as well as reflect the challenges faced by litigants. Nevertheless, there is some legal basis in holding corporations liable for damages, either in strict liability, tort law or environmental law, in countries like India, Japan, and Mexico, but the tobacco industry has yet to be made to fully account for damages in these countries (see Tables 1 & 4).

## **VI. How can governments take actions towards preventive measures?**

### **A. Require information to facilitate enforcement (Article 5.3)**

Currently, few jurisdictions demand a comprehensive range of information from the tobacco industry.<sup>135</sup> However, FCTC guidelines have elaborated on the scope of information to be required and recommended that governments provide public access to these (see Box 3).<sup>136</sup> An even broader array of information needs to be added in response to technology developments and the emergence of new digital platforms.<sup>137</sup>

Demanding transparency from the tobacco industry would address the dearth of evidence in holding the industry to account—a common challenge in investigation and prosecution. The need to protect capital markets<sup>138</sup> and the trends<sup>139</sup> in incorporating environmental, social, and governance (ESG) indicators in investment decisions,<sup>140</sup> have resulted in frameworks of transparency for transnational companies.<sup>141</sup> TTCs assert ESG alignment and claim to be transparent<sup>142</sup> as these help improve investor perception, but these assertions are primarily based on self-reporting and can be properly tested when governments actually demand a comprehensive range of information in accordance with the FCTC (see Box 3). Notably, investors can also take action against tobacco companies for damages resulting from misleading statements in their ESG/sustainability reports.<sup>143</sup>

The importance of transparency cannot be overstated even during the pandemic. For instance, if legally required information had been available with respect to all those that have received funds from the tobacco industry, it would have enabled governments to hold the perpetrators liable for the misinformation in relation to the “protective effect” of smoking/vaping during COVID-19,<sup>144</sup> which was coupled with social media marketing of tobacco companies.<sup>145</sup> Such an action could have prevented public confusion arising from unscrupulous marketing practices.

Giving the public access to a wide range of information from the tobacco industry is important for purposes of holding it to account. Civil society plays a role in analyzing the information provided, reporting violations, exposing anomalies, and using it for advocacy. In addition, the public needs a source of legally-mandated and accurate information, to avoid being deceived. This is because the tobacco industry is duplicitous and deceptive, and yet it continues to have avenues to address the public despite bans on advertising. For instance, Philip Morris markets IQOS as a “safer alternative;”<sup>146</sup> however, in its legally-required disclosure to the U.S. Food and Drug Administration (FDA), it declared that switching to IQOS “has not been demonstrated... to reduce the risk of developing tobacco-related diseases compared to smoking

cigarettes.”<sup>147</sup> Although the FDA allowed IQOS to be sold, it qualified its permission, specifically prohibiting Philip Morris from misleading consumers that it is “FDA-approved” or that the FDA deems it to be safe.<sup>148</sup>

### Box 3. Information that should be required from the tobacco industry

1. **Persons:** Registration of tobacco industry entities, affiliated organizations, and individuals acting on their behalf, including lobbyists and entities where they hold memberships. (Article 5.3)
2. **Manufacturing:** General information on market volumes, trends, forecasts, and other relevant information; quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock, in tax and customs warehouses under the regime of transit or trans-shipment or duty suspension as of the date of the request; revenue and pricing. (Article 6)
3. **Supply chain:** Information on manufacture, market share, and those listed in the Illicit Trade Protocol, including details on and from entities in the supply chain, e.g., those required for licensing, due diligence, and tracking and tracing purposes.
4. **Marketing:** Information on marketing expenditures and details about tobacco advertising, promotion, and sponsorship (TAPS), including, but not limited to:
  - The kind of TAPS, including content, form, and type of media.
  - The placement and extent or frequency of TAPS.
  - The identity of all entities involved in TAPS, including advertising and production companies.
  - In case of cross-border TAPS originating from a Party's territory, the territory or territories in which it is intended to be or may be received.
  - The amount of financial or other resources used for TAPS (Article 13).
5. **CSR/research:** Tobacco industry's so-called CSR activities and entities engaged in the same (Article 5.3);<sup>149</sup> marketing expenditures and any other activity, such as research (research grants), policy submissions, funding of third parties/nongovernmental organizations (FCTC/COP8 (18)).<sup>150</sup>
6. **Lobbying:** Expenses or activities on lobbying, philanthropy, and political contributions; initiatives to engage government, directly or indirectly, such as meetings with public officials, proposed partnerships, draft or proposed legislation, policy papers or offers of assistance.<sup>151</sup> Names of employees and consultants, including former government employees; gifts, services or contributions extended directly or indirectly to public officials or persons related thereto; any political contributions made.<sup>152</sup>
7. **Evidence:** Information that would support filing cases against the tobacco industry to hold it liable, e.g., revenue, scientific claims and studies, activities in foreign countries, scientific funding, public relations strategies, etc., in accordance with Article 19.<sup>153</sup>
8. **Production:** Information on tobacco production, including tobacco industry practices and cultivation of tobacco.<sup>154</sup>
9. **Other:** Activities of the tobacco industry that have an impact on the Convention or national tobacco control activities,<sup>155</sup> or any information required to support tobacco control measures.<sup>156</sup>

Source: Updated from SEATCA & HealthJustice Toolkit on Article 5.3 Implementation

**B. Adopt clear codes or guidance in dealing with the tobacco industry and those furthering its interests: Avoid conflicts of interest, limit engagements, and reject partnerships and so-called CSR (Article 5.3)**

The tobacco industry is not a stakeholder in the eyes of the FCTC. Early on, the WHO warned the public health community against participating in industry-initiated dialogues because the industry portrays such participation as endorsements<sup>157</sup> and uses these as part of its publicity or even so-called CSR.<sup>158</sup> Because of its colorful and long history of influencing policymakers to the detriment of public health,<sup>159</sup> including inappropriate activities leading to reports of bribery and corruption,<sup>160</sup> <sup>161</sup> public officials must take every precaution as provided in treaty guidelines. Failure to manage conflicts of interest would result in policy capture and ultimately lead to weakening public trust in government.<sup>162</sup>

Details in the treaty guidelines<sup>163</sup> demand a higher level of precaution in dealing with the tobacco industry than those found in general codes of conduct that have been widely adopted in many jurisdictions.<sup>164</sup> These include avoiding conflicts of interest, rejecting contributions of and partnerships with the tobacco industry, including its so-called CSR, as well as limiting<sup>165</sup> interactions with it, unless strictly necessary for its regulation.<sup>166</sup> In interpreting “those who are furthering the tobacco industry’s interests,” the WHO includes organizations that further the interests of the tobacco industry. This may include lobbyists, membership organizations with industry representatives, and those that are funded or supported by tobacco-related entities.<sup>167</sup>

A few countries have specific guidelines on how to deal with the tobacco industry and those furthering its interests. In 2019, Australia issued guidance, aligned with current domestic codes of conduct, that applies to public officials interacting with the tobacco industry. Some countries have adopted detailed rules of conduct in their tobacco control laws (Uganda) and national civil service regulations (Philippines).<sup>168</sup> To address the tobacco industry’s use of foreign missions to undermine foreign tobacco control policy, the U.K. government issued special guidance that applies to tobacco-related dealings of public officials in

overseas posts.<sup>169</sup> The European Union’s (EU) Directorate-General for Health and Food Safety (DG Sante) adopted stringent measures to require, among others, transparency of all meetings involving the tobacco industry, in accordance with FCTC provision. Considering the profile of the tobacco industry and the treaty obligation, the EU Ombudsman recommends that the rest of the European Commission adopt a similar policy and declared that failure to do so constitutes “maladministration.”<sup>170</sup>

Tobacco industry CSR is used to access policymakers and increase influence on policy decisions,<sup>171</sup> which inevitably undermines public health. Throughout the COVID-19 pandemic, tobacco company donations have been publicized in a manner that promotes their image and shows an association with government agencies and public officials.<sup>172</sup> The conflict is apparent because the tobacco industry offers donations on the one hand, but on the other, is seeking financial gain and pro-industry policies.<sup>173</sup> In Indonesia, for instance, the industry was granted deferment of excise tax payments.<sup>174</sup>

**C. Remove or deny economic benefits (Article 5.3)**

Governments routinely provide benefits to certain industries or sectors to promote economic growth. Examples include tax cuts, reduced fees, deferred payments, duty-free treatment, and even relaxed regulations for certain periods of time. Some even provide agricultural subsidies to the tobacco sector.

FCTC guidelines specifically recommend that governments do not grant benefits to the tobacco industry to run its business.<sup>175</sup> Special treatment can be significant such as in Laos<sup>176</sup> and the Philippines;<sup>177</sup> and withdrawing can be difficult, but not impossible. For instance, Argentina’s Special Tobacco Fund, financed with a 7% charge on tobacco retail prices that goes into tobacco agriculture subsidies, will be shifted towards COVID-19 responses consistent with World Trade Organization (WTO) rules.<sup>178</sup>

Denying incentives to the tobacco sector is best done as a preventive measure to avoid giving benefits to an industry that has yet to be held to account for the harms it continues to cause. Examples are the U.S. Doggett Amendment and EO 13193 which prohibit government funding from being used to promote tobacco exports or to undermine foreign tobacco control measures.<sup>179</sup>

## Trade and investment

The tobacco industry is excluded from benefits of the investor-state dispute settlement proceedings of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) among eleven (11) countries across the Pacific. This allows governments to bar tobacco industry access to a mechanism commonly enjoyed by all foreign investors.<sup>180</sup> This language has been incorporated into some of the subsequent bilateral investment treaties (BITs) of Australia, which has historically excluded sales and distribution of tobacco from several of its free trade agreements.<sup>181</sup> Some countries have deliberately treated tobacco as an unwelcome foreign investment, e.g., Turkey (U.S.-Turkey BIT),<sup>182</sup> India (proposal in 2017),<sup>183</sup> and China (announcement in 2016).<sup>184</sup>

## Sustainable investment and divestment

FCTC guidelines provide that countries that do not have a state-owned tobacco industry should not invest in the industry and related ventures.<sup>185</sup> Not only does this remove conflicts of interest, it is also consistent with divesting from unhealthy assets for promoting sustainable investments,<sup>186</sup> which takes ESG into account in investment profiles.<sup>187</sup> In 2019, the EU required the financial sector (fund managers and advisers) to incorporate ESG issues into their investment analysis and recommendations and ensure that these are aligned with sustainable development.<sup>188</sup> In 2017, members of the investment community,<sup>189</sup> managing around US \$3.8 trillion in assets, voiced support for stronger regulation around tobacco control.<sup>190</sup>

Divesting is an important tool to hold the industry to account for its harms. Some governments and large portfolio managers have started divesting or removing tobacco from their portfolios (e.g., in Australia and EU)<sup>191</sup> and find this to be a financially sound decision,<sup>192</sup> because investors are increasingly becoming aware of the material risks involved in tobacco stocks such as regulatory, litigation, and supply chain risks.<sup>193</sup> On the flip side of divesting is impact investing to support UN SDGs. This has been proposed in the context of tobacco, e.g., Tobacco Social Impact Bonds (TSIB), which are intended as financing tools to facilitate the transition from tobacco growing to other economically-viable alternative livelihoods.<sup>194</sup>

## VII. What is the best way to make the tobacco industry pay during COVID-19?

As governments attempt to stimulate the economy in response to the crisis, allocating or dedicating tobacco taxes or surcharges to address the harms caused, including health care costs, alternative livelihood, and partial compensation to victims, will not only help in economic recovery, but also contribute to attaining the UN SDGs. Increasing tobacco taxes for this purpose can play a key role as this would further reduce tobacco consumption and increase revenue.<sup>195</sup>

Respiratory symptoms caused by COVID-19 have allowed the world to visualize the advanced stages of tobacco-related diseases and their cost implications.<sup>196</sup> And the pandemic also revealed some of the more egregious behavior of the tobacco industry.<sup>197</sup> For instance, it sought special treatment to be considered an “essential item” for the purpose of unhampered sales during the lockdown.<sup>198</sup> It can be expected to continue demanding incentives or benefits for running its business, including its sale of “less harmful” products,<sup>199</sup> and will inadvertently enjoy financial benefits from economic stimulus packages unless specifically excluded.<sup>200</sup> This practice would be opposed to aligning COVID-19 responses with UN SDGs.

In the meantime, cigarette prices remain affordable in the developing world even in countries with the highest levels of tobacco consumption where tobacco excise has reached 70% of the retail price (e.g., Bangladesh, Philippines, and Ukraine) (see Table 4.). Notably, only 25% of countries in the world have reached the recommended tobacco excise tax rate of 70% of retail price, most of which are in high-income countries.<sup>201</sup> Moreover, investment analysts’ reports and smokers’ increased propensity to quit<sup>202</sup> during the pandemic suggest that cigarette volume has decreased, which would lead to decreased government revenues, if tax remains unchanged.

This should herald an opportunity to increase tobacco taxes in any form appropriate in order to make up for the lost revenue, improve health outcomes, and secure sufficient revenues that can be earmarked. Taxes, charges or levies should be dedicated towards contributing to the economic package in a manner that aligns with treaty commitments and UN SDGs. Although the tobacco industry will argue,

as it almost always does, that it will lose business if prices are increased, it bears stressing that cigarettes are price inelastic and that assurance has been given to investors that the addictive nature of cigarettes will allow smokers to absorb price increases.<sup>203</sup> Furthermore, the tobacco industry can be expected to link tax increases to smuggling<sup>204</sup> by over-estimating the magnitude of illicit trade, even when evidence shows that capacity and corruption are main factors of smuggling, not taxes.<sup>205</sup>

Increasing tobacco taxes for LMICs is a win-win solution for health and economic well-being.<sup>206</sup> Earmarking is deemed a practical “health financing policy tool for political, fiscal or public health reasons.”<sup>207</sup> Absent robust legal frameworks to hold the tobacco industry liable for harms during the crisis, earmarking of tobacco taxes can be used to partially serve this purpose as well as to keep the world on track with the UN SDGs.

Owing to the tobacco industry’s publicity and so-called CSR efforts during the crisis, beneficiary policymakers may resist the imposition of stringent regulatory or tax measures on tobacco companies. Such instances need to be monitored and documented so that governments can further investigate the tobacco industry’s behavior and demand information to facilitate regulation. Governments must also adopt policies to avoid conflicts of interest and require public officials to reject and de-normalize the tobacco industry’s so-called CSR.

Making the tobacco industry pay as part of the response to the pandemic is consistent with the call to action of the Committee on Economic, Social and Cultural Rights (ECOSOC): When State Parties devote their maximum available resources to the full realization of all economic, social and cultural rights, including the right to health, they must ensure that “the extraordinary mobilization of resources to address the COVID-19 pandemic provides the impetus for long-term resource mobilization towards the full and equal enjoyment of the economic, social and cultural rights enshrined in the Covenant. In so doing, they will lay the foundation for achieving the ideal enshrined in the Universal Declaration of Human Rights of achieving a world of free human beings enjoying ‘freedom from fear and want.’”<sup>208</sup>

**Table 4. Economic costs vs. tax in 10 priority countries of the Bloomberg Initiative**

Country	Economic Cost of Tobacco in million, US\$/year <sup>209</sup>	Tobacco Total Excise <sup>210</sup> in million, US\$/year <sup>211</sup>	Excise Tax/ Economic Costs*	Tax Level <sup>212</sup> (% of retail price)	Percent of Tobacco Total Excise Allotted to Programs <sup>213</sup>	Beneficiary Programs/ Activities Relating to Health <sup>214</sup>
Bangladesh	7,031	2,085	30%	71%	1%	Health, NCDs
Brazil	49,009	1,540	3%	83%	n/d	n/d
China	121,202	87,397	72%	56%	n/d	n/d
India	132,834	2,697	2%	54%	n/d	n/d
Indonesia	196,218	10,884	6%	59%	2%, 37.5% <sup>215</sup>	Social and economic programs, national health insurance plan, health
Mexico	7,733	1,982	26%	67%	n/d	n/d
Pakistan	6,022	598	10%	56%	n/d	n/d
Philippines	16,646	2,546	15%	71%	5%, 50%, 100% <sup>216</sup>	Support for tobacco farmers and tobacco-growing regions, universal health coverage, health facilities enhancement program
Ukraine	12,946	1,411	11%	75%	n/d	n/d
Vietnam	12,656	634	5%	37%	2%	Vietnam National Tobacco Control Fund, tobacco control

\*This provides a general indication only. The dataset comes from two different sources taken at different times with varying currencies. Foreign exchange rates used were based on the year the data was taken, where that information is available. The data on economic costs have not been adjusted for the time lapsed. Excise tax levels were taken from latest publicly-available WHO data.

#### **Box 4. Article 19 Civil Liability Toolkit**

The Toolkit is an online resource that demonstrates approaches that would, among others, help improve access to justice for victims and facilitate government efforts in seeking reparation of harms including reimbursement of health care costs and claims for damages in civil cases. It also provides case briefs of landmark cases in tobacco litigation, such as the Master Settlement Agreement (U.S.),<sup>217</sup> Letourneau class action case (Canada),<sup>218</sup> and Engle class action (U.S.).<sup>219</sup>

Particularly, the tools focus on three types of approaches:

- a. Health Care Cost Recovery Suits:** Tools include case studies and sample legislation/rules to allow victims to confer a direct cause of action,<sup>220</sup> provide clear liability standards,<sup>221</sup> let courts use statistical evidence,<sup>222</sup> reverse the burden of proof,<sup>223</sup> and allow for joint and several liability of defendants.<sup>224</sup>
- b. Access to Justice on a Collective and Individual Basis** (those injured can have better access to courts whether individually or as a class): This focuses on procedural rules that serve to reverse the burden of proof, allow the use of statistical evidence in proving causation, extend limitation periods, and encourage joinders by multiple claimants.<sup>225</sup>
- c. Public Interest Litigation for Enforcement Action:** Tools include case studies featuring a variety of laws that allow filing of public litigation cases to advance tobacco control, such as Racketeer Influenced and Corrupt Organizations (RICO) Act (U.S.), Trade Practices Act (Australia),<sup>226</sup> Code of Public Health & Code of Penal Procedure (France),<sup>227</sup> and Constitution (India).<sup>228</sup>

A list of resources external to the Toolkit are also featured such as:

- a.** [Tobacco Industry's Internal Documents](#) housed at the University of California, San Francisco,<sup>229</sup>
- b.** WHO FCTC [decisions](#) and [reports](#) relating to FCTC Article 19;<sup>230</sup>
- c.** US Surgeon General's reports on tobacco in 2000<sup>231</sup>, 2012,<sup>232</sup> and 2014;<sup>233</sup>
- d.** Public Health Law Center's<sup>234</sup> [explainer on the MSA](#)
- e.** U.S. Department of Justice [website on tobacco litigation](#);<sup>235</sup>
- f.** Physicians for Smoke-Free Canada's [timeline of tobacco litigation in Canada](#);<sup>236</sup>
- g.** Campaign for Tobacco-Free Kids' [database of tobacco lawsuits around the world](#);<sup>237</sup>
- h.** Corporate Accountability's [campaign efforts to make the tobacco industry pay](#);<sup>238</sup> and,
- i.** Available resources on tobacco industry challenges and tactics in judiciary/court (e.g., [Friedman, 2006](#); [Proctor, 2006](#)).<sup>239</sup>

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- 90 Ibid. – “2% of federal tobacco excise tax revenue is allocated to a variety of social and economic programs, half of which supports the national health insurance plan [(JKN), under excise law PKM 222/2017]. In addition, 37.5% of local excise tax revenue (the local excise is 10% of the central excise tax) is allocated to health, which also funds the JKN.”
- 91 Ibid. – “From total excise tobacco tax revenues, 40% are directed to the Ministry of Health for prevention and treatment of NCD and 18% to the National Development Sports Fund.”
- 92 Ibid. – “5% of the total tobacco and vapor product excise tax revenue is allocated to provinces to support tobacco farmers and tobacco growing regions. 50% of the remaining revenue and 100% of the incremental revenue from tax increases will be allocated as follows: 80% of this money for PhilHealth to fund universal health coverage, the other 20% for a health facilities enhancement program.”
- 93 Ibid. – “2% of excise on tobacco and alcohol are directed to the Thaihealth fund. Another 2% of excise revenues are directed to a Sports Promotion fund.”
- 94 WHO (2003). WHO Framework Convention on Tobacco Control, Article 12. Geneva, Switzerland: World Health Organization. Retrieved from [https://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](https://www.who.int/tobacco/framework/WHO_FCTC_english.pdf) (accessed on 28 April 2020). – Article 2: “Relationship between this Convention and other agreements and legal instruments – 1. In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.”
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- 100 Ibid., Article 5.3.
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- 105 Ibid. – Note that responsibility and liability regime is assigned to the “operator” without prejudice to States incurring international responsibility for its failure to comply with obligations to establish its civil liability mechanisms including insurance mechanisms, compensation funds, and other remedies and safeguards.
- 106 Ibid., Articles 4 & 5; note that Article 9 provides for limits to responsibility for harm to avoid discouraging investments and still ensure adequate reparation of damage. “The rules of international law may also provide for the engagement of strict responsibility of the State on the basis of harm or injury alone. This type of responsibility is most appropriate in case of ultra-hazardous activities, and activities entailing risk or having other similar characteristics.” (emphasis supplied)
- 107 Ibid., Article 7.
- 108 Ibid. – Compensation must be complete. Article 23 explains that reparation for damage to environment is separate from those relating to death, injury or loss of economic value.
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