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POLICY BRIEFING

Fifth Session of the Conference of the Parties to the
WHO Framework Convention on Tobacco Control, 12-17 November 2012, Seoul, South Korea

FCA Briefing Paper:

Article 19 – holding the tobacco industry liable for its illegal acts

FCA recommends that Parties should:

- Adopt the proposal in Secretariat report FCTC/COP/5/11 to establish an expert group on Article 19;
- Ensure it is funded to complete its work by COP6.

Introduction

As has been extensively documented in a number of legal cases,[1] the tobacco industry's rapid expansion in the 20th and early 21st century has involved massive and systematic violations of fundamental principles of civil and criminal law.

For example, from at least the mid-1950s, cigarette manufacturers had extensive knowledge of the extreme harmfulness and high addictiveness of their products. As manufacturers that regularly conducted detailed research on cigarette design and smoker behaviour, they were uniquely well positioned to understand the health impact of their products. Yet, until very recently, all major cigarette manufacturers denied there was any 'proof' that their products are harmful. They failed to disclose the very significant proof their own researchers had accumulated. Worse yet, they systematically funded research that attempted to cast doubt on the scientific evidence that the independent research community was accumulating, all the while proclaiming that they were investing large sums in discovering the 'truth' about the link between cigarettes and disease.

To add to this pattern of deception, the tobacco industry developed and massively promoted a number of 'health reassurance' products – cigarettes that were promoted as 'healthier', but did not in fact reduce risk. In particular, so-called 'light' or 'low-tar' cigarettes came to dominate the market in many countries, although the tobacco industry knew (well ahead of the public health community) that actual exposure to carcinogens and toxins was not reduced by switching from 'regular' to 'light' cigarettes. (The need to prevent such deception led to the inclusion of a ban on such misleading labelling in Article 11.1(a) of the WHO Framework Convention on Tobacco Control, FCTC.)

[1] To give just a few examples: a) United States of America v. Philip Morris USA, Inc. et al. [commonly known as the RICO case], http://www.tobaccofreekids.org/what_we_do/industry_watch/doj_lawsuit/timeline/; b) class action lawsuits now being heard in Québec: CQCT et Jacques Blais c. JTI-Macdonald Corp. et al., as well as Cécilia Létourneau c. JTI-Macdonald Corp. et al., http://tinyurl.com/9aufcfq; c) Rolah McCabe v. British American Tobacco Australia, http://archive.tobacco.org/Documents/020322mccabe.html; d) suit by the Public Prosecutors' Office of the Federal District of Brazil against Souza Cruz S.A. et al. for deceptive advertising.

Dealing with document destruction: the Australian example

The McCabe case in Australia provides an example of a lawsuit by an individual smoker against a cigarette manufacturer, BAT Australia. The trial court judge in the Victorian Supreme Court threw out the tobacco company's defence on the basis that the company's behaviour – including the systematic destruction of thousands of internal company documents – had denied Rolah McCabe a fair trial. A jury awarded McCabe $700,000 in damages. She died of lung cancer several months later.

On appeal, the decision was overturned, with the Court of Appeal disagreeing with the trial judge as to the purpose of BAT's "document retention" policy. However, several years later a former industry lawyer went public with allegations of systematic document destruction by BAT, supporting the trial court judge's findings, and became an important witness in the racketeering case in the United States, under which the US federal government successfully sued major cigarette manufacturers in that country, amongst other things for fraud.

In 2006, the state of Victoria enacted two pieces of legislation – one civil and one criminal – dealing with document destruction. The effect of the former was to overturn aspects of the Court of Appeal's ruling.

The McCabe case remained in the courts for almost 10 years, before being settled confidentially in March 2011.

Because of this ongoing pattern of fraud and deception, victims of tobacco-caused disease and their families, as well as a number of governments, have for decades attempted to hold the tobacco industry to account via civil and/or criminal litigation. Tobacco companies invested hundreds of millions of dollars in various tactics to delay litigation, to bankrupt plaintiffs, and to hide evidence of malfeasance, including abusive claims of solicitor-client privilege over sensitive research reports, as well as widespread destruction of documents.

Individual plaintiffs have found it difficult to overcome tobacco industry litigation tactics. Where lawsuits have been brought dealing with large numbers of victims – either in the form of class-action suits, where those are allowed, or in actions by governments to recover health-care costs for their citizens – the tobacco industry has generally sought to force plaintiffs to present medical evidence proving the role of tobacco products in the death or disability of each individual victim – a time-consuming undertaking.

In response to these tactics, a number of jurisdictions have adopted legislation to facilitate litigation against the tobacco industry. For example, such laws may:

- Clarify that statistical/epidemiological evidence is admissible;
- Stipulate that governments may recover health-care costs on an aggregate basis (that is, without proving each individual case of tobacco-caused illness separately);
- Stipulate that once deception has been proven, it is up to the manufacturer to prove that the deception had no impact on whether people smoked, not the other way round;
- Clarify the shared liability of parent corporations and subsidiaries for certain types of illegal behaviour;
- Exempt tobacco-related harm from normal time limits for civil liability, particularly in view of the sometimes long lag-time between uptake of tobacco use and disease/death, and in view of the tobacco industry's deliberate cover-up.

Tobacco industry liability and the FCTC

FCTC negotiators recognized the importance of liability by including a specific article on the issue in the WHO FCTC – Article 19, based in part on the work of a panel of legal experts convened by WHO. That article stipulates, inter alia, that "Parties shall consider taking legislative action or promoting their existing laws to deal with criminal and civil liability, where necessary, to deal with criminal and civil liability, including compensation where appropriate."

However, as the Secretariat's report to the COP (FCTC/COP/5/11) makes clear, relatively few Parties have taken concrete action to hold the tobacco industry accountable for illegal action. For example, only 17 percent of Parties filing official reports in 2012 reported launching any criminal or civil liability action with respect to tobacco, and only 5 percent reported efforts to recover health-care and other costs from the industry.

As the Secretariat's report correctly notes (see paragraph 10 of FCTC/COP/5/11), "the purpose of the compensatory regime [to implement Article 19] is not specifically set out, and could include recovery of health care, social or other costs; personal injury; duty and taxes; or recouping of the proceeds of crime."

There are multiple possible benefits to litigation against the tobacco industry:

1. **Truth** – since much of the global trade in tobacco products is controlled by a small number of multinationals, patterns of tobacco industry behaviour are generally similar in most of the world. However, there is value in uncovering the historical truth on tobacco-related fraud in every country and holding local subsidiaries (and independent local manufacturers) accountable for their actions;
2. **Justice and deterrence** – an important reason to litigate against any wrongdoer is to discourage future bad acts in the future – not just by the tobacco industry, but by any industry that might be tempted to cover up the harm caused by its products;
3. **Compensation** – tobacco products impose massive costs on users, their families, governments and society as a whole. Meanwhile, even in countries where the prevalence of tobacco use is falling, the tobacco industry remains immensely profitable*;*
4. **Health** – litigation can improve public health through a number of channels. First, litigation can have a tremendous public education effect, due to ongoing media coverage of malfeasance by the tobacco industry. Second, litigation typically leads to disclosure of previously secret industry documents that can lead to more informed policy-making. Third, if and when damages are awarded, this is likely to lead to an increase in the price of tobacco products, thereby reducing consumption. Fourth, courts may impose further restrictions on tobacco industry behaviour to prevent future wrongdoing. And finally, all or part of any damages awarded may be allocated to tobacco control initiatives.

However, it appears Parties are not fully aware of all these potential benefits, or lack strategies to overcome the obstacles to effective litigation. The question facing this session of the Conference of the Parties is how best to facilitate implementation of Article 19.

An expert group on Article 19: an excellent proposal

The key recommendation in the Secretariat's report on Article 19 is the formation of an expert group "to further develop means through which the COP could support Parties in their activities in accordance with Article 19".

In particular, the report suggests mandating this expert group to look at, amongst other things, draft principles for dealing with liability issues, up to and including the possible development of a model law (or basic elements thereof). This would be similar in principle to work done by the United Nations Environment Programme (see paragraph 24 of the Secretariat report on the UNEP Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment).

A possible mandate for an expert group on Article 19

The Secretariat's report, in paragraphs 34-36, proposes a possible mandate for an expert group on Article 19. This would include identifying best practices at the national level and suggesting appropriate support mechanisms (para. 34); preparing a set of draft principles (including commentary) for the development of civil and criminal liability – including the possibility of a model law (para 35), and the following matters (para 36):

(a) possible policy grounds for adopting legislation on tobacco industry liability (including, for example, deterrence, cost recovery and public education);
(b) guidance on how to obtain legal counsel;
(c) information on how best to involve local lawyers in litigation so as to build capacity;
(d) suggestions on the role of civil society;
(e) guidance on how best to use public education to further the goals of litigation, particularly when undertaken by a Party;
(f) how to locate relevant documents and other evidence and have it admitted;
(g) how best to gather, in a single place, key evidentiary materials that are already available;
(h) guidance on procedural matters, such as class actions;
(i) consideration of how best to engage in effective international cooperation; and
(j) making recommendations to the COP on additional measures that it could take to promote implementation of Article 19.

FCA whole-heartedly supports the proposed mandate.

As FCA understands it, this proposal would not involve drafting full implementation guidelines for Article 19, as has been done for Articles 5.3, 8, 9/10, 11, 12, 13, 14 and (in draft form for approval at COP5) Article 6. Rather, the expert group would look at the various obstacles to effective litigation against the tobacco industry, and the various ways they can be overcome by co-operation between Parties, including at the COP, as well as national action.

It is the considered opinion of the FCA that an expert group could be immensely valuable. It is likely that many Parties refrain from litigation not because they doubt its value, but because they doubt their ability to overcome tobacco companies' obstructionist tactics. A tool such as a model law, with commentary, could spark legislative action in all regions.

Further, action on Article 19 should not be delayed any longer, as it can make an important contribution to accelerating implementation of the whole of the FCTC.

FCA invites Parties to adopt the proposal for an expert group on Article 19 and to ensure it is funded to complete its work by COP6.

Canadian Legislation Facilitates Lawsuits Against Tobacco Industry

In the Canadian province of British Columbia, the Tobacco Damages and Health Care Costs Recovery Act came into force in 2001. This Act, inspired in part by an earlier statute in the US state of Florida, establishes a framework for the provincial government to sue the tobacco industry to recover public health care costs. The legislation, among its provisions:

- requires the tobacco industry to prove that the industry's wrongful actions did not cause tobacco-related health care costs (the evidentiary burden would normally be on the government as plaintiff);
- eliminates a limitation period (deadline) for the filing of a lawsuit, thus allowing the government to seek damages for wrongful actions going back to the 1950s, for example;
- allows the government to use various statistical evidence to prove its case;
- allows the government to seek to recover projected future costs, in addition to past costs, related to wrongful tobacco industry behaviour;
- allows damages to be allocated mainly based on company market share.

In 2005, the Supreme Court of Canada upheld the constitutionality of the British Columbia legislation, dismissing a tobacco industry legal challenge.[i] Nine of 10 Canadian provinces have common law systems

based on the British tradition, and each has adopted legislation essentially identical to the British Columbia legislation. The province of Quebec, which has a civil law system based on French tradition, has adopted legislation similar in effect to the British Columbia legislation, but worded differently.

Nine of 10 provincial governments have filed actual lawsuits against the tobacco industry, collectively seeking more than $100 billion in damages. Trial dates have not yet been set. Defendants include foreign parent companies such as Philip Morris and British American Tobacco. The remaining province, Nova Scotia, has announced its intention to file a lawsuit.

[i] British Columbia *v.* Imperial Tobacco Canada Ltd., Supreme Court of Canada, 2005, http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2282/index.do.