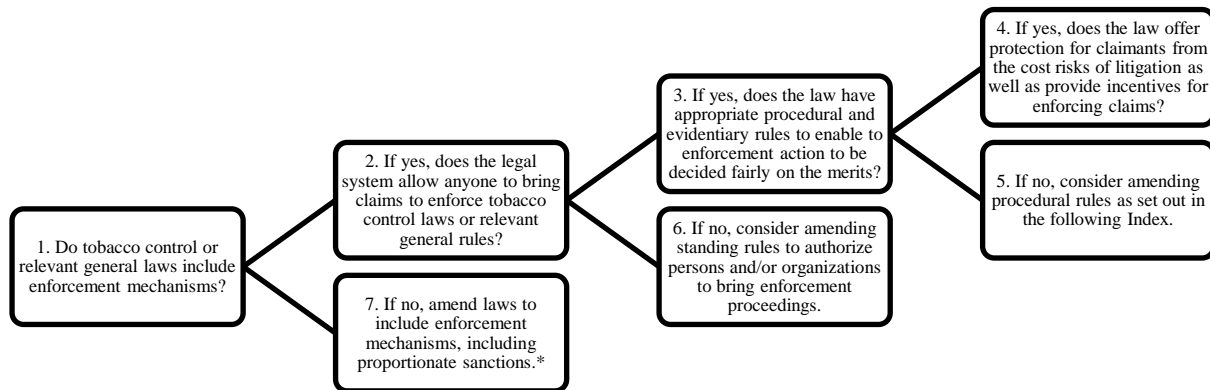


# SCENARIO 4: ENFORCING TOBACCO CONTROL LAWS, OR GENERAL LAWS RELEVANT TO TOBACCO, INCLUDING INJUNCTIVE RELIEF ADDENDUM/LINK

## DIAGRAM



\* Proportionate sanctions take into account the gains made by the industry by breaching the relevant legal obligation

## BEST PRACTICE/REFORM OPTION IDENTIFIED IN REPORT TO COP 6/8.

While a major focus of civil liability systems is to secure compensation for the harm caused by civil wrongs, they can also be an effective tool to enforce tobacco control laws or general laws relevant to tobacco. In this regard, legal action taken by Parties in line with Article 19 can directly complement other tobacco-control measures. Cases can be used to expose the conduct of those who manufacture, supply or market tobacco products, deter further wrongdoing, or obtain injunctive relief in order to stop unlawful behaviour such as misleading advertising. Enforcement proceedings of this kind are often referred to as ‘public interest litigation’ because their primary purpose is to secure compliance with the law rather than compensation for those who have suffered harm.<sup>1</sup> However, depending on the terms of the law, the relief sought may include civil fines, criminal penalties, and/or compensation for harm done to those as a consequence of a breach. Key liability rules and procedures that have now made it easier for courts to scrutinise the tobacco industry’s conduct include: (i) reversing the burden of proof in relation to fault or legal causation;<sup>2</sup> (ii) consumer protection legislation that has clear legal norms regarding marketing activities and/or manufacturing of dangerous products, and which regulates or limits defences to such claims;<sup>3</sup> and (iii) broad disclosure rules requiring tobacco manufacturers to disclose internal documents regarding their relevant research.<sup>4</sup>

Legislation that allows for public interest litigation is one means of enforcing existing tobacco control laws or other general laws applicable to the manufacture, marketing and supply of tobacco products. Generally, the purpose of such litigation is not to obtain compensation for victims, but rather to

<sup>1</sup> Of course securing compensation for the harm caused by tobacco is clearly also in the public interest. The use of the term in the current context is merely to highlight that the primary focus of the litigation is to enforce the law for the benefit of all, rather than claim compensation for those who have suffered loss.

<sup>2</sup> For example, Article 2050 of the Italian Civil Code used in *Stalteri*; The Principles of European Tort Law Article 4.201; Canadian provinces Tobacco Damages and Health Care Cost Recovery Legislation. Reversal of the burden of proof is discussed further below at part 8 (g).

<sup>3</sup> For example, the Australian Consumer Law’s prohibition on misleading and deceptive conduct, and Article 2050 of the Italian Civil Code which requires persons engaged in dangerous activities to take all appropriate measures.

<sup>4</sup> These are widely available in common law jurisdictions, and have been successfully utilized in the United States.

impose civil or criminal penalties, as appropriate, and injunctive relief, where necessary, to prevent further breaches, remedy conduct and/or correct misleading statements. In certain jurisdictions, public interest litigation has been used to allow third parties to bring a claim in cases where the relevant rights are of fundamental importance, and the persons who have those rights have difficulty accessing courts to enforce them. Legislation providing for public interest litigation could allow third parties to commence litigation on behalf of those harmed by tobacco consumption in order to establish the liability of the tobacco industry. Public interest litigation may also include enforcement of existing tobacco-control measures, and enabling legislation could provide for remedies of either a criminal or civil nature, including compensation.<sup>5</sup>

## **BENEFITS AND RISKS**

<u><b>Key Benefits</b></u>	<u><b>Key Risks/Costs</b></u>
<ul style="list-style-type: none"> <li>• <b>Opens up the enforcement of tobacco control measures to civil society, reducing financial burden on governments</b></li> <li>• <b>Can be an effective way of securing changes in industry practices</b></li> <li>• <b>Builds legal capacity amongst civil society organisations</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Governments might be tempted to leave enforcement measures to civil society, if all can take enforcement action</b></li> <li>• <b>Those bringing enforcement proceedings need costs protection, and in some countries may require financial incentives (typically paid out of any fines ordered).</b></li> </ul>

### **Benefits and Risks**

The value of public interest litigation under FCTC Article 19 is potentially relevant to all jurisdictions, but it is particularly useful in countries where people have difficulty accessing the courts. For example, public interest litigation can be effective when the government has limited resources to dedicate to enforcement, to pursue some other form of civil claims available, or to reform options, as outlined in FCTC/COP/6/8. It is a relatively low cost option in that it does not require the outlay of substantial public resources to initiate it. Of course liberalizing procedural rules is partly designed to make it easier to access court, and as a consequence, more judicial resources will be needed to deal with those additional claims. These costs can be alleviated by recognizing that claims can be brought on a representative and collective basis – and ensuring the costs of hearing tobacco-related claims are principally borne by those with the greatest capacity to pay, *i.e.* the tobacco industry defendants.

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<sup>5</sup> See Annex 1 FCTC/COP/6/8.