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5. Accountability, human rights and the responsibilities of the tobacco industry

Lottie Lane

1. INTRODUCTION

Tobacco companies have time and again taken action against laws and regulations that affect their own interests.¹ However, although they take action to further their own interests, the companies often seem unmoved by human rights-based arguments that they should be held accountable for the harms that tobacco causes to individuals and the environment. Although some tobacco companies have embraced a degree of corporate social responsibility, the fact remains that tobacco causes the deaths of over 7 million people each year.² The harmful relationship between tobacco and human rights was recognized by the World Health Organization Framework Convention on Tobacco Control (FCTC). The FCTC recalls in its preamble the International Covenant on Economic, Social and Cultural Rights (specifically Article 12 on the right to health), the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child.³ Human rights issues remain rife in the entire tobacco chain, from the production of tobacco to its marketing and consumption. Affected rights vary, with the rights of those

¹ Such action includes litigation and intimidatory and delaying tactics, among others. See, for example, 'Africa: Investigation reveals tobacco firms allegedly threatening efforts that could save millions from harmful effects of tobacco use; companies comment' (*Business and Human Rights Resource Centre*, 2017) <https://www.business-humanrights.org/en/africa-investigation-reveals-tobacco-firms-allegedly-threatening-efforts-that-could-save-millions-from-harmful-effects-of-tobacco-use-companies-comments#c159973>, accessed 30 May 2019; Paul Redfern, 'BAT accused yet again of unfair practices in Kenya' (*Business Daily*, 12 July 2017) <https://www.businessdailyafrica.com/corporate/companies/BAT-on-the-spot-again-over-business-practices-in-Kenya/4003102-4011490-142d5gx/index.html>, accessed 30 May 2019.

² WHO, 'Tobacco: Key Facts' (9 March 2018) <http://www.who.int/news-room/fact-sheets/detail/tobacco>, accessed 30 May 2019.

³ WHO, Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 116 (FCTC) Preamble.

involved in tobacco production (which is frequently criticized for using child labour)⁴ regularly experiencing violations of their right to a sustainable income and of various children's rights, including the right to education, among others.⁵ Tobacco marketing and consumption, meanwhile, as well as unwanted exposure to tobacco smoke, often interfere with the rights to life, health and a healthy environment, among others.⁶

The incompatibility between the tobacco industry and human rights is so evident that in 2017 the Global Compact removed the tobacco industry from its initiative, and, after conducting a human rights assessment of Philip Morris International (PMI), the Danish Institute of Human Rights (DIHR) declined to renew its collaboration with the tobacco giant.⁷ Vulnerable members of society such as children face particularly heightened risks to their human rights in a world where tobacco companies often have more money and resources than public authorities and use them to undermine State efforts to protect human rights through tobacco control.⁸ Such authorities regularly find it difficult to effectively regulate tobacco companies and their effects on human rights, for example through much-needed restrictions on marketing and (enforced) bans on the sale of tobacco to minors. This has led to many non-governmental organizations (NGOs), experts and some international and governmental bodies stepping in to try to hold tobacco companies accountable for their behaviour, with varying degrees of success.⁹

⁴ See, for example, Sarah Boseley, 'Child labour rampant in tobacco industry' (*The Guardian*, 25 June 2018) <https://www.theguardian.com/world/2018/jun/25/revealed-child-labor-rampant-in-tobacco-industry>, accessed 30 May 2019.

⁵ Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-Based Approach to Tobacco Control' (2012) 21 *Tobacco Control* 209, 210.

⁶ *ibid* 210. See also Kelsey Romeo-Stuppy, 'International Law: Tobacco Marketing: A Violation of Human Rights in Latin America' (2015) 44(2) *International Law News* 41.

⁷ See 'UN Global Compact Integrity Policy Update' (*UN Global Compact*, 13 October 2017) https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/integrity-recommendation-2017.pdf, accessed 30 May 2019; 'Human Rights assessment in Philip Morris International' (*DIHR*, 4 May 2017) <https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international>, accessed 30 May 2019; and Brigit Toebes, 'Human Rights and the Tobacco Industry: An Unsuitable Alliance' (2018) 7(7) *International Journal of Health Policy and Management* 667. The irreconcilable conflict of interest between tobacco and public health (and therefore the right to health) is arguably also reflected in Article 5(3) FCTC: 'The Network for Accountability of Tobacco Transnationals' 2 (*Corporate Accountability*) <https://www.corporateaccountability.org/wp-content/uploads/2017/09/natlleadership.pdf>, accessed 30 May 2019.

⁸ See Dresler and others (n 5) 208–209.

⁹ Key players include Action on Smoking and Health (and earlier the Human Rights and Tobacco Control Network) and NGOs such as Corporate Accountability.

Accountability for human rights is of paramount importance – it is vital to the successful protection of human rights; ‘unless supported by some form of accountability, human rights run the risk of becoming merely window dressing’.¹⁰ In the context of health, in his capacity as Special Rapporteur on the right to health, Paul Hunt repeatedly stressed the necessity of accountability for human rights.¹¹ As Hunt explains, from the perspective of victims, accountability is crucial because it allows them to understand how responsibility-holders have fulfilled their responsibilities¹² (or perhaps failed to do so). From the perspective of responsibility-holders, accountability provides the opportunity to explain their conduct and the reasoning behind it.¹³

This chapter seeks to scope out the current international human rights accountability of the tobacco industry, including its responsibilities and mechanisms available for holding the industry to account. First, the concept of accountability is introduced and defined (Section 2). The position of the tobacco industry under international human rights law is then explained, including an overview of the human rights standards applicable to tobacco companies under non-binding international human rights standards (Section 3). In Section 4, examples of accountability mechanisms that are used to hold tobacco companies to account, particularly vis-à-vis human rights, are provided. Conclusions are drawn in Section 5.

See, for example, Corporate Accountability, ‘About our tobacco campaign’, <https://www.corporateaccountability.org/tobacco/about-our-tobacco-campaign/>, accessed 13 May 2020; and Action on Smoking and Health, <https://ash.org>, accessed 13 May 2020. See also Section 4.1.1 on litigation against tobacco companies.

¹⁰ Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 543.

¹¹ See, for example, ECOSOC, ‘Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt’ (13 February 2003) UN Doc E/CN.4/2003/58; UNGA, ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt’ (31 January 2008) UN Doc A/HRC/7/11, [64]–[65], [99]–[106]. See also Yi Zhang, *Advancing the Right to Healthcare in China: Towards Accountability* (Intersentia 2018) 63. The UN CESCR has also emphasized this. See UN CESCR, ‘General Comment No. 9: The domestic application of the Covenant’ (3 December 1998) UN Doc E/C.12/1998/24; and UN CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (11 August 2000) UN Doc E/C.12/2000/4, cited in Zhang (above) 63.

¹² UNGA, ‘Promotion and Protection of all Human Rights’ (n 11) [99].

¹³ *ibid.*

2. ACCOUNTABILITY

Accountability is a concept debated in many different disciplines,¹⁴ without a consensus on its definition having been reached. The present chapter adopts a definition of accountability as comprising three elements: (1) responsibility; (2) answerability; and (3) enforcement.¹⁵ Responsibility allows us to identify what an actor can be held accountable for, by discerning which standards of behaviour an actor is expected to follow. Answerability and enforcement, meanwhile, demonstrate how the actor can be held to account.¹⁶ Simply speaking, answerability requires that actors explain and justify their reasons for taking certain decisions and actions both to the public and to bodies conducting oversight of each actor.¹⁷ In addition, mechanisms are needed to gather the information and evaluate the persuasiveness of it. In relation to enforceability, mechanisms also need to be in place to impose consequences on accountable actions, including sanctions, for failing to meet standards for which they are responsible.¹⁸ According to the World Bank, an instrumental organization in the development of 'good governance' (of which accountability is an element), 'enforcement' relates to the ability of oversight bodies to sanction actors for not complying with norms to which they are expected to conform, and to

¹⁴ These include, for example, law, political science, governance studies and international relations.

¹⁵ The two elements of answerability and enforcement are commonly found in definitions of accountability, although scholars disagree as to whether enforcement is a strict prerequisite, for example Mark Bovens, and Carol Harlow and Richard Rawlings: Mark Bovens, Andreas Follesdal and Simon Hix, 'Analysing and Assessing Public Accountability: A Conceptual Framework' (2006) European Governance Papers No C-06-01, <http://www.ihs.ac.at/publications/lib/ep7.pdf>, accessed 30 May 2019; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542, 545. However, due to the links between accountability and the right to an effective remedy, this chapter considers enforcement as a necessary element of accountability. The right to an effective remedy is found in various human rights treaties and is connected to accountability particularly through the mechanisms in place. A complaint against a human rights violation at the national level provides an individual with an avenue for receiving an effective remedy whilst simultaneously providing a mechanism through which to hold the State accountable for violating a right found in the relevant treaty.

¹⁶ See Zhang (n 11) 211.

¹⁷ Answerability is therefore closely connected to and can improve transparency, which is also considered a precondition of good governance. See, for example, Zhang (n 11) 200, citing Andreas Shedler, 'Conceptualizing Accountability' in Andreas Shedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 20.

¹⁸ See Zhang (n 11) 199–200.

provide a remedy for individuals suffering as a result of the non-compliance.¹⁹ However, it is important to point out that enforcement (and accountability more generally) is not about punishment as such.²⁰ Rather, in order to achieve the full implementation of applicable standards, 'it is a process that helps to identify what [kind of approach and mechanisms] works, so it can be repeated, and what does not, so it can be revised'.²¹ Indeed, although some sanctions may be viewed as *ex post facto* punishment, ideally accountability will have *ex ante* effects to prevent harmful decisions and activities from being taken and carried out.²²

To summarize, accountability can be said to exist 'when there is a relationship between the overseeing actor and the accountable actor, in which the accountable actor is obliged to provide information on, explain and justify their decisions and actions [answerability], while the overseeing actors can question accountable actors, pass judgement and impose consequences on them [enforcement]',²³ according to certain standards to which the accountable actor is held (responsibility).

Although it will not be discussed here, it is also important to note that there are many different kinds of accountability,²⁴ each using different methods and requiring different mechanisms to be put in place. Not all kinds of accountability and accountability mechanisms are appropriate for the same actors, however, as some kinds of accountability (mechanisms) specifically target public actors.²⁵ Nevertheless, some forms of accountability and accountability mechanisms are equally amenable to holding non-State actors, such as tobacco

¹⁹ *ibid.*

²⁰ UNGA, 'Promotion and Protection of all Human Rights' (n 11) [99].

²¹ *ibid.*

²² Zhang (n 11) 202–203.

²³ *ibid.* 207. An 'overseeing actor' is the actor holding another actor to account, whereas the 'accountable actor' is the actor being held to account.

²⁴ These include legal, political, horizontal, vertical, social and diagonal accountability. See Rick Stapenhurst and Mitchell O'Brien, 'Accountability in Governance' (*World Bank Institute*) <https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>, accessed 30 May 2019; Zhang (n 11) 203–208. Due to limited space, the types of accountability will not be discussed here. For a detailed discussion of accountability and its different forms, see Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014).

²⁵ For example, political and administrative accountability. Political accountability is achieved primarily through the electoral process, whereby voters 'delegate their power to representatives through elections' and hold them to account in the subsequent elections. Administrative accountability refers to internal supervision of the activities of public actors, although as a theory could also be applied to some non-State actors. See Zhang (n 11) 239, 642–643.

companies, accountable. This includes legal accountability, which entails holding actors to account through the adoption of laws enforced by legal mechanisms and courts (that is, judicial accountability mechanisms) as well as quasi-judicial mechanisms.²⁶ As mentioned above, this is crucial to the enjoyment of human rights. Examples of judicial and quasi-judicial accountability mechanisms applicable to the tobacco industry will be provided in Section 4.

3. THE TOBACCO INDUSTRY AND INTERNATIONAL HUMAN RIGHTS LAW

As explained above, the first element of accountability is responsibility, which details for what actors can be held accountable. While the answer is relatively straightforward for State actors, to whom the corpus of international human rights law (assuming ratification of the relevant treaties) can be readily applied, the answer is more complicated for the tobacco industry. The industry consists of private companies or businesses, which are classified as non-State actors under international law. As such, tobacco companies are not able to ratify international human rights treaties or be held directly responsible at the international level for failing to conform with standards contained therein. The following sections will provide an overview of the human rights standards currently applicable to businesses, and briefly explain how these relate to the activities of tobacco companies.

3.1 Tobacco Companies as Businesses under International Human Rights Law

International human rights law as laid down in international treaties does not apply directly to the tobacco industry. The current framework of international human rights law allows only States, to the exclusion of non-State actors (of which business is one), to ratify international human rights treaties and to be held to binding international human rights law obligations.²⁷ This rules out

²⁶ For a more comprehensive definition of legal accountability, see Jeff King, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 126–127.

²⁷ The lack of direct obligations for businesses at the international level also precludes them from being the direct subject of complaints before the UN human rights treaty monitoring bodies. For more explanation, see Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (2018) 5(1) *European Journal of Comparative Law and Governance* 5, 15–16.

the possibility of ‘direct horizontal effect’, which would allow international human rights law to be directly applied to and enforced against the tobacco industry in legal proceedings. Despite the lack of direct horizontal effect, adjudicatory bodies have been able to apply international human rights standards to businesses indirectly. This is most commonly achieved by relying on States’ positive obligations to protect individuals’ enjoyment of human rights from interference by third (non-State) actors. The obligation will not be explained in detail here as State obligations vis-à-vis the tobacco industry have been examined by Oscar Cabrera and Andrés Constantin in Chapter 4. It suffices here to note that the obligation to protect has been clearly delineated into several distinct obligations for States – most notably obligations of due diligence and an obligation to regulate private businesses.²⁸

Important inroads towards direct human rights obligations for businesses have also been made. Significantly, an intergovernmental working group is currently drafting a binding international human rights treaty ‘to regulate ... the activities of transnational corporations and other business enterprises’.²⁹ Despite the focus on business enterprises, the first draft of the treaty, released in July 2018,³⁰ follows the current framework of international law and only contains obligations directed at States. The draft reaffirms that States are the primary human rights responsibility-holders, even in relation to abuses (directly) caused by business enterprises.³¹ In terms of substantive obligations, great focus is placed on due diligence obligations, especially those relating to the prevention of abuse and allowing victims of abuse some access to remedy and justice.³² The draft places responsibility on States for ensuring

²⁸ See *ibid.* A recent overview of States’ obligation to protect regarding businesses is laid out in UN CESCR, ‘General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ (10 August 2017) UN Doc E/C.12/GC/24.

²⁹ The working group was established in 2014 by UN Human Rights Council Res 26/9, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (14 July 2014) UN Doc A/HRC/RES/26/9. See also Lottie Lane, ‘Private Providers of Essential Public Services and *De Jure* Responsibility for Human Rights’ in Marlies Hesselman, Antenor Hallo de Wolf and Brigit Toebes (eds), *Socio-economic Human Rights in Essential Public Service Provision* (Routledge 2017) 139, 152–153, cited in Lane (n 27) 17.

³⁰ Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (*Zero Draft*, 16 July 2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>, accessed 30 May 2019.

³¹ *ibid.*, art 1.

³² See *ibid.*, art 9.

that businesses conform to these due diligence obligations, which are couched as obligations to be placed on businesses at the national level.³³ Although the draft is much more specific and requires more positive activity by businesses themselves, the effect of the approach taken in the instrument generally aligns with that of the UN human rights treaty monitoring bodies (as well as regional human rights courts). Over time, these bodies have interpreted human rights treaties as imposing various positive obligations upon States to put measures in place domestically to ensure that non-State actors do not interfere with the enjoyment of human rights.³⁴ As Doug Cassel notes, the emphasis on State obligations and the fact that no enforcement mechanism is envisaged in the treaty make it more palatable to States, which may therefore be more likely to ratify it.³⁵ At this early stage in the process, particularly given the remaining issues to be ironed out (such as which companies exactly will fall under the scope of its provisions) and the reliance on ratifications once adopted, it is difficult to assess how effective the treaty will be.³⁶ What is clearer is that if the treaty enters into force and is properly implemented, as a transnational business enterprise the tobacco industry will, at least in the domestic law of Member States, be legally obliged to fulfil similar (though sometimes broader) due diligence obligations as those found in the UN Guiding Principles on Business and Human Rights (UNGPs),³⁷ which will be discussed in the following section.

³³ *ibid.*

³⁴ For an analysis of the jurisprudence of the UN human rights monitoring bodies on this, see Lane (n 27). In the context of business enterprises specifically, also see UN CESCR, 'General Comment No. 24' (n 28). The major difference between due diligence under international human rights law generally and under the draft is that the draft has transformed the obligation into one of result, rather than one of conduct, placing a much greater burden on States and a broader scope of State responsibility for the conduct of businesses. See John Ruggie, 'Comments on the "Zero Draft" Treaty on Business and Human Rights' (*Business and Human Rights Resource Centre*, 2018) <https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights>, accessed 30 May 2019; Lane (n 27).

³⁵ Doug Cassel, 'At Last: A Draft UN Treaty on Business and Human Rights' (*Letters Blogatory*, 2 August 2018) <https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/#more-27105>, accessed 30 May 2019.

³⁶ It is likely to be quite some time before a final version of the treaty has been adopted and gained enough State ratifications to enter into force. Chairmanship of the open-ended intergovernmental working group, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (*UN Human Rights Council*) http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf, accessed 30 May 2019.

³⁷ UN HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises:

3.2 Non-binding International Human Rights Standards Applicable to Tobacco Companies

The UNGPs constitute a major stepping stone on the path to human rights obligations for businesses. Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs were drafted by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The principles are based on three pillars, one of which is a direct responsibility of businesses to respect human rights.³⁸ While the UNGPs are considered to be soft law and therefore not legally binding, the inclusion of this responsibility, which encompasses a responsibility to act with due diligence, remains significant.³⁹ Not only do the principles highlight the importance of businesses taking action to avoid harming human rights, but they have also led to tangible action being taken by both States and businesses. For instance, several States have adopted ‘National Action Plans’⁴⁰ and national legislation (see below), and businesses have conducted human rights impact assessments, adopted human rights policy statements, and begun human rights reporting and training.⁴¹ The UNGPs pose a significant obstacle to the continued operations of the tobacco industry. In a recent collaboration between PMI and the DIHR, the DIHR examined how

Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’ (21 March 2011) A/HRC/17/31 (UNGPs); UN Human Rights Council Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

³⁸ The remaining pillars are the State’s obligation to protect human rights and access to effective remedy for victims of business-related human rights violations. See *ibid* Principles 11–24.

³⁹ *ibid* Principles 11 and 17.

⁴⁰ National Action Plans set out a government’s activities and plans for helping businesses improve their respect for human rights. See ‘State national action plans’ (UN OHCHR) www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx, accessed 30 May 2019. See also Claire Methven O’Brien, Amol Mehra, Sara Blackwell and Cathrine Bloch Poulsen-Hansen, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (2015) 1 *Business and Human Rights Journal* 117, discussed in Lane (n 27) 18.

⁴¹ For an extensive database detailing the action that has been taken by businesses and States to implement the UNGPs, see ‘Type of Steps Taken’ (*Business and Human Rights Resource Centre*) www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken, accessed 30 May 2019.

the UNGPs apply to tobacco, and evaluated in particular the company's value chain against the principles. The result was that

[a]ccording to the UNGPs companies should avoid causing or contributing to adverse impacts on human rights. Where such impacts occur, companies should immediately cease the actions that cause or contribute to the impacts. Tobacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the [United Nations Guiding Principles on Business and Human Rights] therefore require the cessation of the production and marketing of tobacco.⁴²

Another significant soft-law initiative that has contributed to the drive for human rights obligations of businesses is the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines).⁴³ States adhering to the OECD Guidelines are required to establish a 'National Contact Point' (NCP), a 'built-in grievance mechanism' that is unique among initiatives on the human rights responsibilities of businesses.⁴⁴ An example of how the mechanism has been used in relation to human rights abuse by tobacco companies will be examined in Section 4.2.1.

As soft-law initiatives, the contribution of the UNGPs and OECD Guidelines to direct horizontal effect vis-à-vis businesses is limited. They have, however, had a significant influence on (binding) national and European legislation.⁴⁵

⁴² This led the DIHR to end its collaboration with the tobacco company. See DIHR (n 7).

⁴³ Organisation for Economic Co-operation and Development (OECD), 'OECD Guidelines for Multinational Enterprises', 27 June 2000 (revised version 2011) www.oecd.org/corporate/mne/, accessed 30 May 2019 (OECD Guidelines). Unlike the UNGPs, the OECD Guidelines are not solely focused on human rights but on responsible business conduct more generally. See 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (OECD, 2014) 2 http://mneguidelines.oecd.org/MNEguidelines_RBCMatters.pdf, accessed 30 May 2019; Lane (n 27) 18–19. The 2011 version of the Guidelines is consistent with the UNGPs and requires business enterprises, inter alia, to respect human rights, avoid causing or contributing to adverse human rights impacts, adopt a human rights policy commitment and carry out human rights due diligence. See OECD, 'OECD Guidelines for Multinational Enterprises' (above) 31.

⁴⁴ 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (n 43), discussed in Lane (n 27) 18–19.

⁴⁵ Several examples at the regional level are Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330; and Regulation 2017/821/EU laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130. Also see CLT Envirolaw, 'Overview of Key Business & Human Rights Legislation for Companies' (*Business and Human Rights Resource Centre*)

Prominent examples are the United Kingdom's The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 and the Modern Slavery Act 2015. Both statutes require certain businesses to disclose human rights-related information.⁴⁶ The Modern Slavery Act, which requires businesses of a certain size to provide information as to 'what action they have taken to ensure there is no modern slavery in their business or supply chains',⁴⁷ has interestingly been taken up by British American Tobacco (BAT). The tobacco company has adopted a 'Modern Slavery Statement' in which it details the steps that are taken as part of its broader human rights strategy, 'to prevent modern slavery and human trafficking in its business and supply chains'.⁴⁸ Alongside UK legislation, French and US legislation has also been influenced by the UNGPs.⁴⁹ The relatively new French 'vigilance' law, for example, imposes obligations on some companies (including some tobacco companies) to adopt 'vigilance plans' which include, for instance, 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms'.⁵⁰

www.business-humanrights.org/sites/default/files/media/documents/clt_human_rights_legislation-1.pdf, accessed 30 May 2019, cited and discussed in Lane (n 27) 20.

⁴⁶ Specified companies are required by The Companies Act 2006, s 414C (7)(b) (Strategic Report and Directors' Report) Regulations 2013 No 1970 to prepare a 'strategic report' containing a review of their operations 'to the extent necessary for an understanding of the development, performance or position of the company's business, include ... social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies'. Lane (n 27) 20.

⁴⁷ Modern Slavery Act 2015, part 6 s 54(4), quoted and discussed in Lane (n 27) 20.

⁴⁸ 'Modern Slavery Act Statement 2017' (BAT) [http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DOAK8P7C/\\$FILE/medMDAWUNCY.pdf?openelement](http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DOAK8P7C/$FILE/medMDAWUNCY.pdf?openelement), accessed 30 May 2019. Such activities include the adoption of the Supplier Code of Conduct, which in relation to modern slavery requires that 'all suppliers ensure their operations are free from forced, bonded, involuntary, trafficked or unlawful migrant labour'. See also 'Supplier Code of Conduct' (BAT) [https://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9EAMHQ/\\$FILE/medMDB4GDSF.pdf?openelement](https://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9EAMHQ/$FILE/medMDB4GDSF.pdf?openelement), accessed 30 May 2019.

⁴⁹ In the US this comprises State law such as the California Transparency in Supply Chains Act (Civil Code Section 1714.43; Senate Bill 657 (Steinberg) (2009–10)), which requires 'efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale' to be disclosed by certain businesses. For discussion, see Kamala D Harris, 'The California Transparency in Supply Chains Act: A Resource Guide' (*State of California Department of Justice*, 2015) <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>, accessed 30 May 2019. See Lane (n 27) 20.

⁵⁰ Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (JO du 28^{ème} mars 2017, no.1) (Law No. 2017-399 on the Duty of Care of Parent Companies and Ordering Companies). For dis-

Now that the responsibility of the tobacco industry has been discussed (that is, what it can be held accountable for), the next section will consider examples of mechanisms in place that allow for the answerability and enforcement of the industry.

4. ACCOUNTABILITY MECHANISMS AND THE TOBACCO INDUSTRY

There are various mechanisms available for holding actors accountable for human rights violations. However, mechanisms within the international human rights law system apply only to States due to the lack of direct human rights obligations for non-State actors at the international level. This means that mechanisms to hold the tobacco industry accountable have necessarily been established or developed outside of the (binding) international human rights law framework or within national law. Indeed, many mechanisms do not actually refer to the responsibilities of the industry as explained above, often relying on standards that concern human rights without mentioning them specifically. Other mechanisms rely on ‘human rights’ in general, but not the particular standards applicable to the industry. Space does not allow a full overview of accountability mechanisms contributing to human rights accountability of the industry, however examples of a mixture of mechanisms, including judicial, quasi-judicial and social accountability mechanisms, will be discussed below.⁵¹

4.1 Judicial Accountability Mechanisms

Judicial accountability mechanisms refer to courts that make judicial decisions and adopt binding judgments.⁵² Given the framework of international law vis-à-vis businesses (as explained above), the present chapter focuses on domestic courts as a form of judicial accountability mechanism.

cussion, see Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 Business and Human Rights Journal 317. See also Lane (n 27) 20–21.

⁵¹ The chapter deals only with mechanisms aimed at holding the tobacco industry directly accountable – mechanisms that can hold them indirectly responsible, for example through States’ human rights obligations, fall outside the scope of this chapter. The possibility of holding the industry indirectly accountable is being investigated by Action on Smoking and Health (ASH). See ‘Could tobacco executives/corporations be found guilty of human right violations?’ (*ASH*) <https://ash.org/human-rights-violations/> accessed 30 May 2019.

⁵² This is distinguished here from quasi-judicial mechanisms such as tribunals, institutions and ombudsmen that do not render binding decisions (see Section 4.2).

Courts are capable of achieving accountability in different ways, for example by obliging actors ‘to perform certain duties, release information or refrain from acting in a certain way’.⁵³ This statement was made in the context of public accountability but applies equally to holding private actors to account – courts can require tobacco companies to, for example, provide information regarding the production of tobacco and decision-making processes concerning all aspects of tobacco production and marketing (answerability). Courts also have significant enforcement powers.⁵⁴ They could, for example, require the industry to comply with standards found in the State’s constitution or applicable (inter-)national health laws and policies that relate to human rights and/or tobacco control,⁵⁵ or impose compensation or guarantees of non-repetition of certain behaviour.⁵⁶

4.1.1 Litigation against the tobacco industry

Judicial accountability mechanisms have been used in various countries in an attempt to mitigate the harmful impact of the tobacco industry on individuals, particularly their health.⁵⁷ Although cases may not be legally based on human

⁵³ Matthew Flinders, ‘Mechanisms of Judicial Accountability in British Central Government’ (2001) 54(1) *Parliamentary Affairs* 54, 55.

⁵⁴ See Zhang (n 11) 237.

⁵⁵ Depending on whether a State’s national legal system follows the monist or dualist tradition, courts may be able to directly apply international law, including that related to human rights and tobacco control. The Netherlands, for example, follows the monist tradition and allows international treaties to which the Netherlands is party to be directly applied in national courts. See Article 93 of The Constitution of the Kingdom of the Netherlands (2008).

⁵⁶ These types of redress are listed by Helen Potts, who notes that while most of these remedies address the negative impact of a violation on specific rights-holders, guarantees of non-recognition are focused on the institutional or systematic level and address potential negative impacts on unidentified future rights-holders. Helen Potts, ‘Accountability and the Right to the Highest Attainable Standard of Health’ (*University of Essex Human Rights Centre*, 2008) 28–29 <http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf>, accessed 30 May 2019. See also Zhang (n 11) 237.

⁵⁷ Unfortunately, as previously mentioned (n 1), the industry itself has also used litigation to fight tobacco control, in particular in low- and middle-income countries such as Uganda and Uruguay and in relation to packaging regulations. See, for example, Celia Olivet and Alberto Villareal, ‘Who really won the legal battle between Philip Morris and Uruguay?’ (*The Guardian*, 28 July 2016) <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>, accessed 30 May 2019; ‘BAT Uganda sues Ugandan Government over the Tobacco Control Act, 2015’ (*Center for Tobacco Control in Africa*, 10 May 2017) <https://ctc-africa.org/index.php/news/373-bat-uganda-sues-ugandan-government-over-the-tobacco-control-act-2015>, accessed 30 May 2019. See also the work of the

rights, litigation can require tobacco companies in practice to fulfil some of their human rights responsibilities. Litigation against the tobacco industry is encouraged in Article 19 FCTC, which requires State Parties to ‘consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate’.⁵⁸

Cases brought in several countries have succeeded in requiring the industry to act in a certain way. For example, in the case of *Agência Nacional de Vigilância Sanitária (ANVISA) v Philip Morris Brasil Ind Com Ltda* the Regional Federal Court of the 2nd Region required PMI to place warnings of the harms tobacco consumption causes on its packaging.⁵⁹ This could contribute to greater accountability for the industry regarding the right to access to information in particular.

In the later Brazilian case of *Claudio Rodrigues Bernhardt v Philip Morris*,⁶⁰ the claimant filed a case against the Souza Cruz tobacco company claiming that the company was liable for damages for the death of his spouse, who the claimant argued had been a victim of misleading advertisements of the tobacco products, the consumption of which allegedly led to her death. On appeal, the 8th Civil Chamber of the Court of Justice of Rio de Janeiro based its decision in favour of the claimant on the Brazilian Constitution and a subsequent resolution which protect the rights to health, life, protection in commercial relations and dignity.⁶¹ Although accountability may have been achieved in this particular case, the general human rights accountability is limited here due to the narrow scope of the sanctions placed on the company.

In addition to Brazil, cases have been brought more recently in the US and Canada, as well as other States, to recover health care costs from the tobacco

Center for Health, Human Rights and Development, a key player in anti-tobacco advocacy in Uganda, available at <https://www.cehurd.org/>, accessed 30 May 2019.

⁵⁸ FCTC, art 19(1). See for discussion ‘About our tobacco campaign’ (*Corporate Accountability*) <https://www.corporateaccountability.org/tobacco/about-our-tobacco-campaign/>, accessed 30 May 2019.

⁵⁹ *Agência Nacional de Vigilância Sanitária (ANVISA) v Philip Morris Brasil Ind Com Ltda*, No 2009.02.01.006674-2 (2009) Tribunal Regional da 2a Região. See Tobacco Control Laws, <https://www.tobaccocontrolaws.org/litigation/decisions/br-20090923-agncia-nacional-de-vigilncia-s>, accessed 30 May 2019.

⁶⁰ *Claudio Rodrigues Bernhardt v Philip Morris* No 0000051-90.2002.8.19.0210 (2011) Oitava Câmara Civil do Tribunal de Justiça do Rio de Janeiro (*Global Health and Human Rights Database*) <http://www.globalhealthrights.org/health-topics/claudio-rodrigues-bernhardt-v-philip-morris/>, accessed 30 May 2019.

⁶¹ *ibid.*

industry for those that have been harmed by its products.⁶² Significantly, in 2016 a criminal complaint was filed in the Netherlands against four major tobacco companies for ‘attempted murder, alternatively attempted manslaughter and/or attempted severe and premeditated physical abuse and/or attempted deliberate and premeditated injuring of health’⁶³ as well as forgery relating to marketing practices. Dutch public prosecutors declined to take the case further as they saw little chance of the claim succeeding at trial since despite the health risks related to tobacco consumption, the companies operate within the confines of the law.⁶⁴ If successful, or even simply heard at trial, such a case would inevitably lead to answerability and perhaps enforcement against the tobacco industry for its interference with the enjoyment of health. This is generally true for litigation against the industry, although the scope of accountability depends on the nature of the complaint in a case, as seen above.

4.2 Quasi-judicial Accountability Mechanisms

Quasi-judicial accountability can be achieved by institutions that are autonomous and independent from the actor being held accountable, and are established by the State.⁶⁵ In the context of human rights, quasi-judicial accountability mechanisms often take the form of human rights treaty monitoring bodies at the international level, and human rights institutions, com-

⁶² In the case of *Saskatchewan v Rothmans* SKQB 357 (2013), for example, the Saskatchewan government sought the costs of the healthcare of individuals suffering from tobacco-related diseases. See ‘Litigation by Country: Canada’ (*Tobacco Control Laws*) <https://www.tobaccocontrollaws.org/litigation/decisions/ca-20131001-the-government-of-saskatchewan>, accessed 30 May 2019. See also ‘Tobacco-Related Litigation in Canada’ (*Smoking and Health Action Foundation/Non-Smokers’ Rights Association*, 2015) https://nsra-adnf.ca/wp-content/uploads/2016/07/Tobacco-related_Litigation_in_Canada_2015.pdf, accessed 30 May 2019. Regional legislation has also been passed within Canada (among other States) allowing necessary authorities ‘to recover health care costs resulting from the industry’s negligence and deceptive marketing practices’. The Crown’s Right of Recovery Act 2009 was passed in Alberta, Canada. See ‘Holding the Tobacco Industry Accountable’ (*Action on Smoking and Health*) https://www.ash.ca/holding_the_tobacco_industry_accountable, accessed 30 May 2019.

⁶³ ‘Dutch public prosecutor rejects criminal case against big tobacco firms’ (*DutchNews.nl*, 22 February 2018) <https://www.dutchnews.nl/news/2018/02/dutch-public-prosecutor-rejects-criminal-case-against-big-tobacco-firms/>, accessed 30 May 2019; and Jon Henley, ‘Dutch effort to charge tobacco firms with attempted murder fails’ (*The Guardian*, 22 February 2018) <https://www.theguardian.com/world/2018/feb/22/dutch-attempt-to-charge-tobacco-firms-with-attempted-murder-fails>, accessed 30 May 2019.

⁶⁴ *ibid.*

⁶⁵ Zhang (n 11) 238.

missions and tribunals at the national level.⁶⁶ The majority of quasi-judicial accountability mechanisms do not relate directly to businesses but focus on the accountability of State actors. One mechanism that does allow businesses to be held to account is the grievance mechanism established by the OECD Guidelines, explained above.

4.2.1 OECD National Contact Points

In cases of non-compliance with the OECD Guidelines, NCPs 'provide a mediation and conciliation platform for helping to resolve cases'.⁶⁷ Although the guidelines do not focus only on human rights, an increasing number of NCP cases deal with human rights, particularly since the 2011 revisions.⁶⁸ Significantly for the present context, a case was brought before NCPs on the basis of human rights against tobacco companies before the United Kingdom's NCP. The case, against BAT, was brought by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF). The IUF claimed that the abuse of migrant farm workers in the US could be linked to BAT, which was not fulfilling its obligations to end such abuse or to conduct due diligence. The claim, which referenced the International Covenant on Civil and Political Rights as well as two International Labour Organization Conventions dealing with rights,⁶⁹ was brought in 2016. However, despite an initial assessment by the NCP declaring further investigation to be merited, no outcome has yet been reached,⁷⁰ leaving the true impact of the guidelines in this instance unclear. At a minimum, the mechanism can result in answerability as investigations would require explanations from the company of its actions and decisions as well as a justification for them.

⁶⁶ This includes, in particular, national human rights institutions, *ibid*.

⁶⁷ 'Cases handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises' (*OECD*) 1 <http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>, accessed 30 May 2019, quoted in Lane (n 27) 19.

⁶⁸ *ibid*. A list of human rights-related NCP cases can be found on the OECD's database at [http://mneguidelines.oecd.org/database/searchresults/?q=\(Theme:\(Human%20rights\)\)](http://mneguidelines.oecd.org/database/searchresults/?q=(Theme:(Human%20rights))), accessed 30 May 2019.

⁶⁹ Steven Murdoch, Danish Chopra and Liz Napier, 'Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from IUF against BAT' (*UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, August 2016) [20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543808/initial-assessment-complaint-from-iuf-against-bat.pdf, accessed 30 May 2019.

⁷⁰ 'British American Tobacco (BAT) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)' (*OECD Specific Instance Database*) <http://mneguidelines.oecd.org/database/instances/uk0046.htm>, accessed 30 May 2019.

5. CONCLUSION

The above discussions show that accountability, both conceptually and in practice, can be difficult to pin down. Accountability consists of three elements: (1) responsibility (identifying what an actor can be held accountable for); (2) answerability (an actor's explanation and justification of their behaviour); and (3) enforcement (both concerning how an actor can be held accountable). However, in the context of international human rights, and even more so in the specific context of the tobacco industry as a non-State actor, standards setting out what exactly it can be held accountable for are limited. Despite the draft binding treaty on business and human rights, the industry's current international human rights responsibilities are limited to those found in soft-law instruments such as the UNGPs and OECD Guidelines.

This has an impact on the mechanisms available for answerability and enforcement, which in practice sometimes rely on moral standards or more general human rights arguments rather than industry-specific human rights responsibilities. The obvious exception to this is NCPs, but evidence of their use for human rights complaints against tobacco companies is very limited. Quasi-judicial accountability mechanisms, despite allowing answerability, lack strong enforcement powers. Therefore, it appears that currently, although the scope of accountability using purely judicial accountability mechanisms is often narrow, relating to a company's treatment of or effect on single individuals rather than on health more broadly, these mechanisms are the best option for achieving both answerability and enforcement. Judicial accountability mechanisms also exist at the national level. Although such mechanisms' direct reference to human rights is relatively infrequent, some important examples (such as those discussed above) can be found, bolstering the *de facto* protection of human rights. Nevertheless, in order to achieve accountability of the tobacco industry for international human rights in a more widespread and consistent manner, however challenging, further action must be taken at the international level.