

Worldwide news and comment

URUGUAY: BIG TOBACCO OVERPLAYS TRADEMARK RIGHTS, AGAIN

Philip Morris International's (PMI) six year legal action against Uruguay's pictorial health warning legislation finally came to a close in July. The International Centre for Settlement of Investment Disputes (ICSID), an arbitration court of the World Bank, ruled that the country's anti-smoking laws did not violate a bilateral investment treaty between Uruguay and Switzerland. PMI's headquarters are located in Switzerland, and the case was initiated through its Swiss subsidiary. PMI was also ordered to pay US\$7 million reimbursement to Uruguay for legal costs (although this falls significantly short of what has been incurred in fighting the action).

This was an important test case for the ability of governments to legislate measures that protect public health. Although the tobacco industry has used legal action to try and block laws, and perhaps more effectively, threatened legal action to deter governments from enacting effective policies, the case against Uruguay was the first time a tobacco company had taken on a national government.

It is instructive that PMI chose a country whose gross domestic product is less than PMI's annual revenue. While the legal costs for such actions run into millions of dollars, the deterrent value of dragging the country through a protracted legal stoush is likely to pay off many times over in policies delayed or shelved by other countries with much larger markets.

Two measures were challenged: the restriction on selling multiple varieties of a brand, and the increase in health warning size to cover 80% of the pack, increased from 50%.

PMI used arguments similar to those used to try and block Australia's plain packaging laws: that PMI was being denied rights to its intellectual property and that investors should be entitled to the right to full use of their trademarks. ICSID found that the trademark holder only has a right to exclude third parties

from using the trademark; it does not have an unfettered right to use its trademarks as it pleases. Essentially, the right to use the trademarks can be limited by legislation enacted for public health purposes.

Uruguay's fight received substantial international support, both financial and technical, notably from Bloomberg Philanthropies. Michael Bloomberg stated that the victory "shows countries everywhere they can stand up to tobacco companies and win...No country should ever be intimidated by the threat of a tobacco company lawsuit, and this case will help embolden more nations to take actions that will save lives".

While the decision is a welcome win for common sense public health policy making, the fact that Philip Morris had been able to initiate the legal action is itself problematic, as a July 28 op ed in *The Guardian* points out (<https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>).

The case contradicted the terms of the bilateral investment treaty on which the action rested, as well as the WHO Framework Convention on Tobacco Control. Fighting such cases soaks up government resources – financial, human and other – as well as deterring other countries considering similar measures. It also has the potential to encourage similar actions by other corporations and industries to fight regulations viewed as unfavourable to their interests.

The arbitration process itself has also been subject to criticism that it vests excessive power in a small number of individuals to review laws and regulations made by national parliaments. In February 2016, the German Magistrates Association issued a statement rejecting the legal basis and need for a separate investment court, asserting that sufficient protections exist through national and European legal protections.

WORLD: CODENTIFY SYSTEM FINDS NEW OWNERS, SAME EXECUTIVES

The anti-smuggling system Codentify, owned by the tobacco industry until May, has recently been sold. The system, first developed by Philip Morris International (PMI), and licenced in 2010 at no cost to the other three major tobacco manufacturers, has been the subject of ongoing criticism and controversy. The World Health Organization has raised concerns that the system lacks transparency and might have features only known to the tobacco industry, and experts have identified a range of technical inadequacies.

The four tobacco companies formed the Digital Coding and Tracking Association (DCTA) to promote Codentify as part of the European Union's approach to combat illicit tobacco. Beyond its lack of suitable technology, many health experts pointed to the structure and membership of DCTA, which owned Codentify, as a critical reason to disqualify Codentify from consideration by the EU.

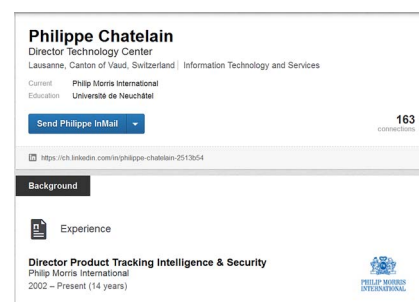
After many called for Codentify to be scrapped by the EU, the DCTA announced that they had sold Codentify's technology to a third-party company named Inexto. On the face of it, the sale to a third party company appears to satisfy WHO FCTC and European Tobacco Product Directive requirements for the system to be independent from the tobacco industry.

However, investigations suggest that 'Inexto' is not an independent third party, but a front company comprised of former Philip Morris International executives who have been intimately involved in the development and promotion of Codentify.

Philippe Chatelain, who now serves as the managing director at Inexto, also served as the Director of Product Tracking Intelligence and Security at Philip Morris International for the past fourteen years. Chatelain is also listed as one of the inventors of Codentify in its European Patent Registration. Erwan Fradet, who has a similar background to Chatelain, now serves as Inexto's Chief Technological Officer.

Chatelain and Fradet are joined by Nicholas Stubi and Patrick Chanez, who were recent executives at PMI and now serve as Inexto's Development Manager and Chief Operating Officer. The Inexto office is based in Lausanne, a short distance from PMI's offices.

This move was foreshadowed as early as 2012. A paper authored by Luk Joossens of the Association of European Cancer Leagues and Anna Gilmore of the University of Bath and published in



A screenshot of Inexto Managing Director Philippe Chatelain's LinkedIn profile, showing his role with Philip Morris. Credit: LinkedIn/Oscar Larsson.

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company, the sale has raised deep concerns. Dr Vera Luiza Costa e Silva, head of the FCTC secretariat was quoted in an EU Observer report opposing the use of Codentify, regardless of its new ownership:

"If the new company's purpose is to continue to promote Codentify as a track and trace system allegedly in compliance with the (FCTC illicit trade) protocol, then this independence is irrelevant since...analyses of Codentify have found it not to be compliant with protocol recommendations".

The 2013 Joossens and Gilmore paper can be accessed at <http://tobaccocontrol.bmj.com/content/early/2013/03/11/tobaccocontrol-2012-050796.full>

Oscar Larsson

Investigative blogger, UK
<https://whyitisbad.wordpress.com/>

MALAYSIA: MQUIT SERVICE STRENGTHENS QUIT SMOKING STRATEGY

Offering quit smoking service is said to be the 'weakest' link of the MPOWER strategy recommended by the World Health Organization. Malaysia however, plans to reverse this with the mQuit service which is a strategy to strengthen FCTC Article 14. The mQuit is also part of the National Strategic Plan 2015–2020 document released in late 2015 to assist Malaysia in achieving the endgame target for tobacco by 2045.

The mQuit service was introduced in November 27, 2015 through a strategic partnership by the Ministry of Health Malaysia working with universities namely the University of Malaya (UM) and University Sains Malaysia (USM); a non-governmental organization in the Academy of Pharmacy; and a private entity, Johnson and Johnson Malaysia.

The mQuit strategy includes upgrading of all existing quit smoking clinics in Malaysia (almost 450), an update of the clinical practice guidelines and provision of smoking cessation treatments in all clinics. All healthcare providers were also expected to undergo one of three training programs to assist with upskilling them with latest evidence based practices. The training programs were Smoking Cessation Organizing, Planning and Execution (SCOPE), developed by University of Malaya and another two by the Academy of Pharmacy and the Ministry of Health. The accreditation of these training programs is intended to increase knowledge and best practices in smoking cessation in Malaysia.

Clinics where staff have undergone training will be given an mQuit plaque

A screenshot of the European patent application for Codentify, showing Philip Chatelain as one of the inventors. Credit: Oscar Larsson.

Erwan Fradet

Chief Technology Officer at INEXTO SA
Geneva Area, Switzerland | Computer Software

Current Inxto SA
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Background



Experience

Chief Technology Officer

Inxto SA
June 2016 – Present (1 month)

Product Manager Codentify

Philip Morris International
September 2010 – May 2016 (5 years 9 months)

A screenshot of Inxto Managing Chief Technology Officer Erwan Fradet's LinkedIn profile, showing his role with Philip Morris. Credit: LinkedIn/Oscar Larsson.

Tobacco Control, detailed the tobacco companies' strategy to promote Codentify. Quoting an internal tobacco industry document, the authors outline how the "tobacco companies would licence the Codentify technology for free in a specific

market to 'credible' third party providers who in turn would promote Codentify on their behalf, providing training and support to relevant government officials".

While the DCTA has stated that Inxto is fully independent from any tobacco



The signing of the mQuit MOU. From left to right: Associate Professor Dr Mohamad Haniki Nik Mohamed, (Academy of Pharmacy), Mr Chin Keat Chyuan, (General Manager Johnson and Johnson Malaysia), Professor Dr. Noor Hayaty Abu Kasim (Dean of Wellness Research Cluster, University of Malaya), Dato' Seri Dr. Chen Chaw Min (Secretary General, Ministry of Health Malaysia), Datuk Dr. Noor Hisham Bin Abdullah (Director-General of Health, Ministry of Health Malaysia), Datuk Dr. Lokman Hakim Bin Sulaiman (Deputy Director-General of Health (Public Health), Ministry of Health Malaysia), Professor Dato' Dr. Muhamad Jantan (Deputy Vice-Chancellor (Research and Innovation), Universiti Sains Malaysia (USM)).



The mQuit official launch. From left to right: Dr. Wan Mansor Bin Hamzah (Deputy Director of Health (Public Health), Department of Health Federal Territory of Kuala Lumpur and Putrajaya), Datuk Dr. Lokman Hakim Bin Sulaiman (Deputy Director-General of Health (Public Health), Ministry of Health Malaysia), Associate Professor Dr. Farizah Mohd Hairi (Faculty of Medicine, University of Malaya), Ms. Mah Suit Wan (Department of Pharmacy, Universiti Kebangsaan Malaysia), Mr Chin Keat Chyuan, (General Manager Johnson and Johnson Malaysia).

launched on May 29, 2016 to inform the general public of their services. The difference with mQuit is the inclusion of both the public quit smoking services and private entities such as general practice clinics, hospitals both public and private, dentists and also community pharmacists.

Through the mQuit services, a national Quitline is hoped to be launched through

the collaboration between the Ministry of Health and USM. This inclusion will further assist in treatment provision to smokers in the country. UM also plans to evaluate the Quitline with a partnership with the National Health Research Institute in Taiwan, which has been involved with the Quitline there. It is, without question, in the best interest of Malaysia to have more research and expertise in this area.

There is great hope that the strengthening of the "O" of MPOWER together with existing tobacco control measures will be that tipping point to reduce smoking prevalence further in the country.

Amer Siddiq Amer Nordin

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AUSTRALIA: PROGRESS ON TASMANIA'S SMOKE FREE LEGISLATION

In 2012 and 2014 we reported that the Australian state of Tasmania was developing mechanisms for implementing the tobacco free generation (TFG). Tasmania

has been paradoxically both a leader in legislative reform and a laggard in allocating resources to tobacco control.

The Public Health Amendment (Tobaccofree Generation) Bill 2014 was tabled in the Tasmanian Parliament in November 2014 by an Independent MP Hon. Ivan Dean. The Bill proposes to phase out the sale of tobacco products to any person born after the year 2000. It is a measure to curtail supply; smoking would not be criminalised and there would be no penalties for using or possessing tobacco.

The Bill was referred to a Parliamentary Committee in March 2015. It has been debated and scrutinised for well over a year. The committee was asked to look at the workability and practicality of the Bill. The Committee brought down its report in July 2016.

The report found that there does not appear to be any significant legal impediment to the operation of the Bill in delivering the policy intent, however it did recommend that the parliament should take a measured and cautious approach in considering a Bill which could limit or 'extinguish' fundamental rights relating to age, equality and liberty. It noted that it raises some practical legal issues in relation to online sales and the impact of the Bill on tourism/tourists, and suggested consideration be given to amending the Bill to avoid negative impacts on tourism. Additionally, the report noted that appropriate education programs would be required to effectively implement the Bill, which would incur a cost and would be a matter for the Government of the day.

Numerous submissions were made to the committee, notably one from a retailer who said: "I made a conscious decision to stop gaining a profit from sales of a product that I knew to be highly addictive and that was causing long term health issues with those who I knew personally as members of my community. I knew they would go elsewhere to purchase their cigarettes but I did not wish to be further implicated in their poor health choices. As a result, I fully endorse any moves that make it more difficult for young people to take up/continue smoking, despite any effects such measures may have on businesses. To be honest I'd be happy to see a ban on all sales – think how much lower our hospital costs would be!"

Other submissions were made by the tobacco industry and their front organisations, including the Alliance of Australian retailers (AAR) which was set up to lobby against plain packaging but seems to have extended its reach. The UK University of

Bath website has exposed AAR as a tobacco industry front organisation.

The Tasmanian Anti-Discrimination Commissioner has written to the Parliament to advise that the Bill does not constitute unlawful discrimination.

A number of lawyers and an international human rights expert also provided reports and advice to the Committee. Dr. Gogarty from the University of Tasmania said there was no legal impediment to the Bill, but expressed concerns about age discrimination and liberty. A comprehensive response and rebuttal to Dr. Gogarty's advice was provided by Barrister Neil Francey, who says that Dr. Gogarty abandons a strict legal approach and adopts an "extreme libertarian" approach.

Ethicist Dr Yvette van der Eijk added, relating to the absence of a "right to smoke": "It is highly unlikely that, given the toxic and addictive nature of smoking, it can be defended as liberty right.....and [this also involves] children's rights." Also, "Smoking can also not be defended as a privacy right."

Eminent international Professor of Law, and Professor of Public Policy and Urban Affairs in Boston USA, Professor W. Parment also commented:

"Critically there is no fundamental right to exercise all of one's choices without any, even indirect, legal hurdles. If that were the case, cigarette taxes, which also make it harder for some people to exercise their choice to smoke by raising the cost of cigarettes would also violate individuals' fundamental rights. Indeed, all public health laws would violate someone's fundamental right, as all impose some road blocks on individual choice.In debating the wisdom of any particular public health law, it is important not to confuse the question of whether the benefits conferred by the law outweigh the inconveniences and hurdles it imposes, with the question of whether it violates recognized fundamental rights, such as the right to bodily integrity or free speech".

The current conservative Liberal Tasmanian government has said that it might raise the legal smoking age to 21 or 25 years instead of proceeding with the TFG. This proposal has been met with a deluge of criticism in Tasmania, as all major local health groups support the TFG proposal and there is immense community

support. Professor Simon Chapman criticised the raising of smoking age to 21 proposal as a "symbolic political gesture".

The TFG Bill may be debated in the Legislative Council in August 2016. However, the conservative Liberal government remain opposed to the TFG, and have implemented no new initiatives on tobacco control since being elected over two years ago.

This is an edited version of a blog post by Dr Kathryn Barnsley, University of Tasmania. The original article can be accessed at <http://blogs.bmj.com/tc/2016/07/15/australia-progress-on-tasmanias-tobacco-free-generation-legislation/>.

UK: PLAIN PACKAGING INTERESTS 'COLLIDE IN THE MOST IRRECONCILABLE OF WAYS'

The decision on 19 May 2016 by the High Court of Justice of England and Wales to dismiss the legal challenges brought by the four multinational tobacco companies against the UK's tobacco plain packaging legislation was a major blow to the industry. The 386 page ruling addresses a wide range of legal claims and evidence; together with lessons learned from the industry's failed attempts to overturn Australia's 2012 plain packaging legislation, it provides an important resource for countries planning to introduce similar laws.

The McCabe Centre for Law and Cancer, a joint initiative of Cancer Council Victoria and the Union for International Cancer Control, has prepared a paper on the UK decision which draws out eight key aspects likely to be of widest relevance to litigation and policy development in other jurisdictions.

Included in the aspects of the ruling which are explored and analysed are: the intent and limits of the laws, the conflicting interests of the tobacco industry and public health, the complementary nature of comprehensive tobacco control measures, and the relevance of the World Health Organisation Framework Convention on Tobacco Control.

Among the many noteworthy points highlighted in the analysis, the court pointed out that the tobacco companies overstate the restrictive effects and implications of standardized plain packaging and the interests at stake "collide in the most irreconcilable of ways".

Also highlighted is the fact that the court notes that not all rights and interests are of equal value or worth. The protection of public health is one of the highest of all public interests. Health is a fundamental right.

Crucially, the analysis points out that the court notes the need for a comprehensive approach to tobacco control, which "requires the implementation of a number of complementary, mutually reinforcing measures, and that it can be difficult (if not impossible) to evaluate the contribution of individual measures in isolation to the reduction of tobacco use".

Finally, in relation to property rights, the court's ruling unequivocally rebuts claims that the notion that the right to exercise intellectual property is a fundamental, absolute right:

"...the Court recognises the fundamental reality of intellectual property rights – they are created and protected to serve public purposes and interests, and are not absolute. Their exercise can be limited or restricted to serve other public purposes and interests. Public health is universally recognised as a public purpose and interest which justifies limitations and restrictions on the exercise of intellectual property rights".

"...the Court explains why, even if standardized packaging laws did constitute an expropriation of property, standardized packaging would fall within the category of 'exceptional' circumstances in which it would not be appropriate to require the payment of compensation".

Together with the recent win by Uruguay, and the comprehensive defeat of challenges to Australia's plain packaging laws, the international legal landscape appears to be strongly in favour of governments taking strong action to end the tobacco epidemic.

More information, including a link to the McCabe Centre analysis, can be found at <http://blogs.bmj.com/tc/2016/07/04/uk-plain-packs-court-interests-at-stake-collide-in-the-most-irreconcilable-of-ways/>.



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