

4A. BOX 1 - 2: ENFORCEMENT OF GENERAL LAWS RELEVANT TO GENERAL TOBACCO: AN INTERNATIONAL OVERVIEW

In addition to considering whether tobacco company conduct might constitute a breach to specific tobacco control laws, Parties should consider whether the relevant conduct might constitute a breach of its general laws, such as laws preventing misleading advertising or fraudulent business practices

(a) United States

The case involving the *Racketeer Influenced Corrupt Organizations Act* (RICO Act) in the United States (U.S.) is a notable example of the value of taking enforcement action in respect to the tobacco industry's violations of general laws. The United States Department of Justice (DOJ) filed a civil suit under the RICO Act against the major U.S.-based tobacco companies in the United States District Court for the District of Columbia, alleging that the tobacco industry conspired to defraud the public by knowingly producing harmful and addictive products and misrepresenting the potential risks associated with such products.¹

The DOJ alleged that defendants purposely misled the public regarding the dangers of smoking; misled, and continue to mislead, the public about the dangers of exposure to second-hand smoke; misrepresented nicotine's addictiveness and manipulated nicotine delivery in cigarettes; deceptively marketed "light" and "low tar" cigarettes to exploit smokers' desire for less hazardous products; targeted the youth market; and conspired not to research or produce less hazardous cigarettes. The DOJ sought damages as well as declaratory and injunctive relief.

The District Court dismissed the medical recovery claims and an appellate court ruled prior to trial that the civil provisions of the RICO legislation did not permit disgorgement of the defendants' proceeds.² The DOJ proceeded to trial on its remaining, non-monetary claim nearly five years after filing the case, which resulted in a finding that cigarette manufacturers were liable for violating the civil provisions of the RICO Act.³

In a comprehensive final opinion/judgment, Judge Kessler found that the defendants had violated the RICO Act and ordered four major remedies:

- 1) the prohibition of certain brand descriptors;
- 2) corrective statements;
- 3) the disclosure of documents and disaggregated marketing data; and
- 4) general injunctive provisions, including no further violations of the RICO Act, the disbandment of certain industry associations, and not to make any further false, deceptive or misleading claims about tobacco products.⁴

Judge Kessler concluded that the companies conducted an enterprise that was an:

[I]ntricate, interlocking, and overlapping web of national and international organizations, committees, affiliations, conferences, research laboratories, funding

¹ *United States v. Philip Morris USA, Inc., et al.*, Final Order, 449 F.Supp.2d 1, (D.D.C. 2006.). In addition to injunctive relief, the DOJ originally sought to recover tobacco-related medical costs paid by the Federal Government, and to compel the defendants to disgorge profits from their unlawful conduct, but the district court dismissed the medical recovery claims and an appellate court ruled in 2004 that the civil provisions of the RICO Act did not permit disgorgement of the defendants' proceeds.

² *United States (U.S.) v. Philip Morris* 396 F.3d 1196 (D.C. Cir. 2005). Disgorgement is an equitable remedy used in U.S. securities law designed to deter future violations of securities laws and to deprive defendants of the proceeds of their wrongful conduct, such as profits illegally obtained.

³ *United States v. Philip Morris* 449 F.Supp.2d 1, 938-39 (D.D.C. 2006).

⁴ See Annex 1 FCTC/COP/6/8.

*mechanisms, and repositories for smoking and health information [that the Defendants] established staffed and funded.*⁵

The reason the companies established this enterprise was to accomplish the following goals: (i) counter the growing scientific evidence that smoking causes cancer and other illnesses; (ii) avoid liability verdicts in the growing number of plaintiff's personal injury lawsuits against Defendants, and (iii) ensure the future economic viability of the industry.⁶ Judge Kessler stated that the case was ultimately about:

*[A]n industry ... that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of "replacement smokers," as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.*⁷

The history of tobacco manufacturing, promotion and regulation varies in each country, but it must also be recognized that the global market for tobacco products is dominated by a small number of multi-national tobacco companies based in Europe and North America, most of whom were defendants in *U.S. v. Phillip Morris* case.⁸ Many of the business, marketing, lobbying and legal strategies of these companies, and their subsidiaries, are directed or closely supervised by their parent companies.

(b) Australia

In the 1980s, the Australian Federation of Consumer Organisations brought a claim in the Federal Court of Australia for a declaration that an advertisement run by the tobacco industry's trade association, the Tobacco Institute of Australia (TIA), was misleading and in breach of Australia's *Trade Practices Act*.⁹ The advertisement, which ran in major newspapers, stated that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers".¹⁰

The trial judge found that there was compelling scientific evidence that cigarette smoke causes lung cancer in non-smokers. The Judge made similar findings with respect to the impact of cigarette smoke, and subsequent respiratory disease, in infants under 12 months of age. On the basis of these findings, the Trial Judge held that the TIA had breached the *Trade Practices Act*, and ordered an

⁵ *United States v Philip Morris USA, Inc. et al*, No. 99-2496. Amended Final Opinion, p 33-34.

⁶ *United States v Philip Morris USA, Inc. et al*, No. 99-2496. Amended Final Opinion, p 15, 449 F.Supp.2d 1, (D.D.C. 2006). The Florida Supreme Court upheld similar findings made by a jury in the *Engle* class action in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

⁷ *United States v Philip Morris USA, Inc. et al*, No. 99-2496. Amended Final Opinion, p 33-34.

⁸ The Chinese tobacco monopoly and Indian tobacco companies are also major players given their size.

⁹ Section 52 of the *Trade Practices Act 1995* prohibited misleading or deceptive conduct in trade or commerce. (Now section 18 of the *Australian Consumer Law*.) See also, Annex 1 FCTC/COP/6/8 at para.14.

¹⁰ See Annex 1, FCTC/COP/6/8 at para. 18.

injunction preventing the further publication of the statement. The full bench of the Federal Court upheld the findings on appeal; however the court found that an indefinite injunction was inappropriate given that there was a chance, albeit very small, that the scientific evidence may change over time.¹¹

(c) India

In 2001, public interest litigation was successfully used to obtain orders from the Indian Supreme Court, consistent with the right to life under Article 21 of the Indian Constitution, that smoking in public spaces should be prohibited.¹² In making the order, the Supreme Court noted that the objects of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill 2001 provided that:

*Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco-related diseases and the loss of productivity caused therein cost the country almost Rs. 13,500/- crores annually which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry.*¹³

The Indian government subsequently passed legislation giving effect to the Supreme Court's order. Although this action was directed at requiring the government to take steps to protect fundamental rights, public interest litigation (PIL) in India extends to actions against individuals and corporations and, therefore, could also be used to stop tobacco companies from engaging in unlawful activities.

¹¹ See Annex 1, FCTC/COP/6/8 at para. 10.

¹² *Murli Deora v Union of India* (2001) 8 S.C.C. 766. See also *K. Ramakrishnan and Anr. Vs. State of Kerala and Ors* (AIR 1999 Ker 385) where the Kerala High Court, invoking the Indian Penal Code, held that smoking in public was a public nuisance and therefore, illegal.

¹³ Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001.