March 13. 2018.

Ministry of Health
College of Medicine Building
16 College Road
Singapore 169854
Attn.: Director, Epidemiology and Disease Control Division
Tabacco Control@moh.gov.sg

Re: Response to the Ministry of Health's Public Consultation on the potential adoption of Standardised Packaging

Trade-related IPR Protection Association (TIPA) is a non-profit organization that protects the intellectual property rights of companies and consumers. We support high standards of intellectual property protection and the respect of international trade rules that are indispensable to the economic growth and sustainable development of Korea.

We, refer to the release by the Ministry of Health (MoH) on 5 February 2018 of its "Public Consultation on Standardised Packaging and Enlarged Graphic Health Warnings for Tobacco Products" and to our submission dated 8 March summarizing our views and concerns on standardised packaging (also known as "plain packaging") we made to the Singapore Government during its public consultation in early 2016.

We would like to hereunder reiterate our views and concerns over plain packaging as a formal response to the MoH's "Public Consultation on Standardised Packaging and Enlarged Graphic Health Warnings for Tobacco Products" and take this opportunity to again encourage the Singapore Government to take these into account before making any decision on the potential introduction of standardised packaging in Singapore.

Plain packaging does not work

Plain packaging is in fact a ban on branding: it removes trademarks, logos, non-prescribed colours and graphics and only permits the use of a brand name in a standard font/size. It deprives legitimate businesses of the value of their brands, impedes investments and creates ample opportunities for criminal activities.

The available evidence, including the studies that were considered by the MoH, clearly demonstrates that plain packaging does not change smoking behaviour and, accordingly, does not cause a reduction in tobacco consumption.

Why does Singapore aim to pursue this flawed policy knowing the outcome beforehand?

Many do not:

- Indonesia, Dominican Republic, Cuba, Honduras, Malawi, Nicaragua, Zambia, Zimbabwe, Denmark, Switzerland, Germany, Italy, Sweden, Spain, Portugal, Greece, Bulgaria, Slovakia and Czech Republic[i] are amongst the countries that remain opposed to plain packaging.

- The Netherlands, Taiwan, Brazil and Belgium[ii] are amongst the countries that earlier considered plain packaging, however are exploring less restrictive regulatory measures and studying the full impact of plain packaging before proceeding.

- Other reputable IP and business organizations continue to raise concerns over plain packaging and to oppose the measure. The International Trademark Association (INTA), the International Chamber of Commerce (ICC) and MARQUES[iii] are amongst them.

- Even the French health minister[iv] acknowledges the failure of plain packaging in changing smoking behaviour.

Plain packaging would infringe intellectual property rights

Trademarks are signs that are used to distinguish products and services and so guarantee their source and quality to consumers. By definition, trademarks are therefore meant to be used. The World Trade Organisation's Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPS Agreement") prohibits WTO Members from – without justification – being unable to use validly registered trademarks on lawfully available products where those trademarks are not misleading or otherwise inconsistent with public order. The use of, and the exclusivity conferred by, a trademark is a necessary corollary of the right to own and register it.

We strongly believe that plain packaging will lead to the deprivation of tobacco companies' brands and trademarks and as a consequence an infringement of these companies' intellectual property rights. Any mandating of plain packaging for tobacco manufacturers sets a dangerous precedent for all trademark owners in that it opens the door to extend this violation of intellectual property rights across a whole range of other consumer products and to other industries.

Plain packaging would increase illegal trade in Singapore

The spread of plain packaging to other consumer good categories and industries would make counterfeit and contraband products easier to make, distribute and sell which would result in a significant increase in demand for illicit products and have a negative impact on legitimate owners. As such, the implementation of any plain packaging regulation in Singapore would only add to and further exacerbate the existing significant problem of contraband tobacco products in the country, while potentially also causing an increase in the levels of counterfeit tobacco products, as plain packaging would only make it easier for criminal groups to manufacture imitation products.

The actual evidence confirms that plain packaging has led to negative consequences in trade.

- KPMG's analysis over the recent years, the methodology of which has been acknowledged by Australian public experts as "*probably the most appropriate way of collecting that type of information and tracking it over time*",[v] demonstrates that the level of illegal tobacco consumption has grown since plain packaging was introduced in Australia, reaching 13.9% of total consumption and representing about AUD 1.61 billion excise value loss for the Australian government in 2016.[vi] In addition, the Australian Border Force has seized considerable volume of illegal cigarettes, many of which contain *"metal shavings and even bird droppings"* that may risk creating serious health hazards for consumers of these products.[vii]

- The first counterfeit 'plain' packs have been officially discovered in the UK: *"Following a tip-off, Retail Express was sold a plain pack counterfeit of a premium brand by a London newsagent for £10.50. The retailer took a legitimate pack out of the gantry and swapped it out with a fake pack, while processing the card transaction"*.[viii]

Plain packaging for tobacco products would set a precedent for a similar measure to be applied across a whole range of other consumer products

This precedent is even stressed by the representatives of the World Health Organization (WHO): *"We are also watched by sugar and alcohol products manufacturers, who see the tobacco control movement as a precursor to threats they now face from public health campaigns. These industries fear a united international community acting on behalf of consumers. In the coming days, I hope their fears will be fully justified as we take further steps to end the tobacco epidemic"*.[ix]

Conclusion

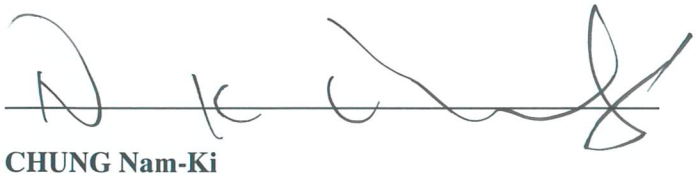
In light of the detrimental consequences of plain packaging highlighted in the foregoing paragraphs, we encourage the Singapore Government - in its capacity as a supporter of free trade and of intellectual property rights - not to implement such a far-reaching and damaging regulation.

We request at a minimum that the Singapore Government delay any consideration of plain packaging until after the final outcome of the WTO Dispute, inclusive of any appeal to the WTO Appellate Body, and strongly encourage it to carefully review the effectiveness of plain packaging in France, the United Kingdom and Ireland - as well as assess any further data emanating from Australia - before proceeding further with any plans to implement such a restrictive and detrimental policy in Singapore.

For your edification, we would add that our name has been added as a signatory to the Plain Packaging Joint Statement of the U.S. Chamber of Commerce, together with international trade and IPR organizations to this letter.

Thank you for your attention to our concerns and we hope that the Singapore Government will take this issue under advisement.

Sincerely yours,



CHUNG Nam-Ki
Chairman of Trade-related IPR Protection Association (TIPA)

[i] Indonesia, Dominican Republic, Cuba and Honduras are challenging the Australian legislation at the World Trade Organization (WTO). Malawi, Nicaragua, Zambia and Zimbabwe are amongst the countries that consistently raised concerns on Australia's measure at various meetings of the WTO. See via: www.wto.org. Denmark and Switzerland questioned the introduction of the measure in their national legislations as it goes beyond what is necessary in terms of public health, and Italy strongly opposed the measure as it breaches the IP rights. Germany stated its clear position on not introducing plain packaging. See more at: https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143993; http://www.ft.dk/samling/20161/spoergsmaal/s56/index.htm#tale224; http://www.eunews.it/2015/09/08/governo-pacchetto-di-sigarette-generico-danneggia-made-italy-e-qualita/41274 and http://www.genios.de/fachzeitschriften/artikel/LMZ/20140718/keine-plain-packs-in-deutschland-sc/20140718272159.html. The Swedish government faced a strong opposition from the law community on introducing plain packaging as it will breaches the principles for free competition and freedom of speech that are safeguarded by the Swedish constitution. Consequently, plain packaging was not included in the list of proposals that the government submitted to the Council of Legislation in June 2017. See at: http://www.regeringen.se/pressmeddelanden/2017/06/regeringen-foreslar-andringar-i-mediegrundlagarna/. Spain, Portugal, Bulgaria and Czech Republic are amongst those EU member states that have opposed plain packaging proposals by separate EU countries, issuing detailed opinions under the EU Technical Standards Directive (TSD). See more at: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/tris/index_en.htm.

[ii] Pain packaging was considered by Dutch and Taiwanese regulators on few occasions but was dropped in light of recent regulatory initiatives that these countries have chosen to pursue. See more on the Netherlands at: http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=339. See more on Taiwan at: http://www.taipeitimes.com/News/taiwan/archives/2017/10/08/2003679946.
The Brazilian health minister decided to keep his distance on the measure due to a lack of evidence to demonstrate its health benefits. See more at: http://istoe.com.br/fumo-ministro-evita-embalagem-padrao/. The Belgian and Singaporean health ministers put forward clear conditions (e.g. a wider public consultation, the assessment of the impact of the measure in other countries, local and international law implications) before progressing the measure further. See more on Belgium and Singapore at: http://www.maggiedeblock.be/2016/11/07/stand-van-zaken-antitabaksmaatregelen-in-parlementaire-commissie-volksgezondheid/ and https://www.moh.gov.sg/content/moh_web/home/pressRoom/speeches_d/2017/closing-speech-by-mr-amrin-amin--parliamentary-secretary-for-hea.html.

[iii] See, for example, INTA's May 2015 Board Resolution on *"Restrictions on Trademark Use through Plain and Standardized Product Packaging"* at: https://www.inta.org/Advocacy/Pages/RestrictionsonTrademarkUsethroughPlainandStandardizedProductPackaging.aspx. See, further the joint statement from APRAM, BMM, ICC-BASCAP, ECTA, MARQUES, UNION DES FABRICANTS and UNION-IP of March 28, 2014 in relation to plain packaging, at: http://www.marques.org/positionpapers/default.asp. See also, *"the ICC Discussion Paper on Labelling and Packaging Measures Impacting on Brand Assets"*, February 2017, available at: http://www.iccwbo.be/wp-content/uploads/2017/03/20170302-ICC-paper_LabellingPackaging-measures.pdf, and *"The ICC Intellectual Property Roadmap - Current and emerging issues for business and policymakers"*, 2017, at: https://iccwbo.org/publication/icc-intellectual-property-roadmap-current-emerging-issues-business-policymakers/.

[iv] See the French health minister Agnès Buzyn's November 2017 statement during a parliamentary debate on the Social Security Finance Bill and in response to a Member of Parliament, who interrogated her on the efficiency of plain packaging. She acknowledged that plain packaging: *"does not lead smokers to stop smoking"* and that it did not contribute to reducing tobacco sales in France. Available at: http://www.assemblee-nationale.fr/15/cri/2017-2018/20180075.asp.

[v] See Dr. Tim Beard, the Australian Institute of Health and Welfare (AIHW), Parliamentary Joint Committee on Law Enforcement, illicit tobacco, 4 March 2016, page 33. The AIHW is in charge for the NDSHS.

[vi] See KPMG 2016 Full-Year Report "Illicit Tobacco in Australia", March 2017, page 6. Available at: https://home.kpmg.com/content/dam/kpmg/uk/pdf/2017/04/Australia-illict-tobacco-Report-2016.pdf.

[vii] See more at: http://www.abc.net.au/news/2017-02-20/illegal-tobacco-cigarettes-smuggled-into-australia-fluffy-toys/8285470. In relation to lost government revenues, see also at: http://www.dailytelegraph.com.au/news/nsw/illicit-tobacco-imports-ripping-off-aussie-taxpayers-of-at-least-640-million/news-story/e8c1ff8ad04a466c94f4cba17c38e273.

[viii] *"Following a tip-off, Retail Express was sold a plain pack counterfeit of a premium brand by a London newsagent for £10.50. The retailer took a legitimate pack out of the gantry and swapped it out with a fake pack, while processing the card transaction."* See at: https://www.betterretailing.com/first-fake-plain-packs-discovered.

[ix] See the statement by the Head of the Secretariat of the WHO Framework Convention on Tobacco Control (FCTC) during the Seventh session of the Conference of the Parties to the FCTC in November 2016 at: http://www.who.int/fctc/secretariat/head/statements/2016/cop7-head-secretariat-speech/en/.