INTERNATIONAL CHAMBER OF COMMERCE

BASCAP
Business Action to Stop Counterfeiting and Piracy

Director, Epidemiology and
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Ministry of Health
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By email:
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Dear Sir/Madam,

On behalf of the International Chamber of Commerce (ICC) Business Action to Stop Counterfeiting and Piracy (BASCAP), we would like to express our serious concerns over the intention to further pursue a plain packaging initiative for tobacco products in Singapore, following the launch of a second consultation period announced in February this year. We have shared these concerns with the Health Promotion Board - Substance Abuse Department as part of the public consultation process in 2016 and to the Ministry of Health (MOH) in 2017.

BASCAP recognizes the MoH's response to the issues surrounding the impact on intellectual property rights (IPRs) but would like to reaffirm that these are not issues limited solely to the tobacco industry. We support the protection of public health as an underlying principle. As such, our views pertain to extenuating impacts on intellectual property rights and counterfeiting, and not the health-related aspects of Singapore's health programme. Furthermore, we preface our views with the acknowledgement that BASCAP membership comprises, inter alia, companies engaged in the manufacture and sale of tobacco products. Nonetheless, these views are registered on behalf of the cross-sector representation of BASCAP member companies equally concerned about the wider implications of standardized packaging for other products. BASCAP's primary concern is the impact the introduction of 'standardised/plain' packaging for tobacco products will have on our on-going battle against counterfeiting and the illicit tobacco trade.

In summary, our concerns are that:

1. Plain packaging is a deprivation of brand owners' legally authorised intellectual property rights;
2. Plain packaging will contribute to an increase in the size of the illicit tobacco market, as criminals will be able to much more easily copy standard pack designs than replicate existing pack artwork;
3. Plain packaging will make it more difficult to distinguish between genuine and counterfeit tobacco products, for both consumers and enforcement officials – who already face a significant burden in enforcing intellectual property rights;
4. Any growth in the illicit market will have a negative impact on government tax revenues, with money instead flowing to organised crime groups involved in the illicit tobacco supply chain.

5. Plain packaging restricts trademarks and branding, removing critical tools that consumers depend on to verify the source and quality of a product and make informed purchasing choices; and
6. Plain packaging is inconsistent with Singapore and international laws established to protect intellectual property rights.

We strongly believe that plain packaging will lead to a number of unintended consequences, not least the negative impact it will have on intellectual property rights, government tax revenues, illicit trade, money laundering and the financing of criminal activities in Singapore.

Please find below BASCAP responses to your questions which include our key concerns related to the impacts on counterfeiting and illicit trade. Also enclosed is a discussion paper on *Labelling and Packaging Measures Impacting on Brand Assets* prepared by an ICC Joint Task Force on this issue. This paper provides additional perspective on the business implications of disproportionate policy interventions like the proposed plain packaging measure in Singapore.

We trust that our submission provides valuable input to the consultation process and we are at your disposal to discuss these matters further.

Yours faithfully,

Sophie Peresson
BASCAP Director
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– Attachments:

ICC Discussion Paper on Labelling and Packaging Measures Impacting on Brand Assets, February 2017

Copy of letter to Ministry of Health, June 2017

Copy of letter to the Health Promotion Board, March 2016

BASCAP responses

PART 7: QUESTIONS FOR CONSULTATION

As set out in Part 3.1, the SP Proposal is intended to operate alongside other existing and possible future tobacco control measures (such as increased taxation and public education) to contribute towards meeting the Government's obligations under the FCTC, promote public health through the reduction of the prevalence of smoking in Singapore, and thereby constitute a significant step towards Singapore becoming a tobacco-free society. Specifically, the SP

Proposal aims to:

(a) Reduce the attractiveness of tobacco products;

(b) Eliminate the effects of tobacco packaging as a form of advertising and promotion;

(c) Reduce the ability of the packaging of tobacco products to mislead about the harmful effects of smoking (including on the relative harmful effects between products);

(d) Increase the noticeability and effectiveness of health warnings; and

(e) Better inform smokers and non-smokers of the risks associated with tobacco use.

Given these objectives, we would like to hear your views with regard to the SP Proposal under consideration, as outlined in Part 3.3.3. In particular, we seek your views on the following:

1. Do you agree that the SP Proposal would contribute to reducing smoking prevalence and improving public health over and above existing tobacco control measures? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support or contradict this.

This is not within our area of expertise or knowledge.

2. Do you agree that the SP Proposal has the potential to achieve one or more of the five objectives set out above? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support or contradict this. (Please specify which of the above objective(s) you think the SP Proposal may achieve.)

Globally, trade in counterfeit tobacco products continues to be a major challenge for national and international enforcement authorities. The World Customs Organization (WCO) has said that there has been "an unparalleled growth in illicit trade of tobacco products over recent years and we need to step up efforts to tackle this problem." The WCO's 2010 Tobacco Report (which includes reporting from 67 of its 177 member customs administrations) shows that over 3.2 billion illicit cigarettes were seized in that year alone. In 2016, Euromonitor estimated the volume of duty-non-paid cigarettes at 488 billion sticks (value of USD 35 bn)[1].

For BASCAP, which advocates against illicit trade, it has been of considerable concern that the illegal trade in tobacco products in Australia has been growing constantly since standardised packaging was introduced in 2012. In its report on illicit tobacco in Australia, KPMG[2] revealed that Australia's illegal tobacco consumption had risen from 11.5% in 2012 to 13.9% in 2016.

3. Do you have any suggestion(s) to improve the SP Proposal measure under consideration as set out in Part 3.3.3 of this document? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support your suggestion(s).

This is not within our area of expertise or knowledge.

4. If you do not support the proposal to introduce the SP Proposal, do you have any suggestions to regulate the shape, size and look of tobacco products and packaging to achieve the objectives set out above? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support your suggestion(s).

In order to avoid ineffective layering of regulations and to preserve essential branding elements on legitimate packs, it would be more sensible to increase the size of health warnings with frequently rotated pictograms, instead of pursuing standardized packaging. This will also help meet public health goals without damaging the key assets of legitimate businesses, proliferating illicit trade and putting into jeopardy the Government's efforts to protect intellectual property.

5. If you do not agree that the SP Proposal should be introduced, what other options do you think should be adopted to reduce smoking prevalence, and the harm it causes? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support your suggestion(s).

This is not within our area of expertise or knowledge.

[1] © Euromonitor International (Illicit Trade in Tobacco Products, February 2018)
[2] KPMG. Illicit Tobacco in Australia. March 2017.
https://home.kpmg.com/content/dam/kpmg/uk/pdf/2017/04/Australia-illict-tobacco-Report-2016.pdf

6. If adopted, do you agree that the SP Proposal should be applied to non-cigarette tobacco products such as cigarillos, cigars, ang hoon, and roll-your-own tobacco? Please cite any relevant studies (specifically, the particular page or part of these studies) or information that support or contradict this.

This is not within our area of expertise or knowledge.

7. If adopted, do you think that the SP Proposal might have any incidental impact in the Singapore context other than matters addressed in answer to the above questions? If so, please elaborate on the possible incidental impact and any evidence in support of the same.

At the 5th Global Forum on IP (GFIP) in 2015, Mr K Shanmugam, Singapore Minister for Foreign Affairs stressed the importance of protecting and supporting Intellectual Property Rights. He stated:

"I think we were right in taking the approach of supporting IP, protecting IP and making sure people are confident about IP protection in Singapore, even though the easier route might have been to not be so strict about it. But we decided we'd have a strict IP regime and we would enforce it, and that was the way to encourage creativity and encourage foreign investors to invest in Singapore knowing that their IP is safe. And we created an ecosystem, or sub system, that would be supportive of that value creation and IP. We will continue to create more opportunities for all to participate in the IP ecosystem,"

In its May 2015 survey, the Intellectual Property Office of Singapore found that 80% of Singaporeans recognize the importance of Intellectual Property protection. Notably, Singapore was ranked second in the world and top in Asia for having the best IP protection by the World Economic Forum's Global Competitiveness Report of 2014-2015. The US Chamber of Commerce Global Intellectual Property Center Report, 2016 also noted that Singapore was top in the Asia-Pacific region for a conducive Intellectual Property environment.

BASCAP commends Singapore for its record in fostering a strong IP rights environment. We fear, however, that such a reputation would be put at risk if the Government pursues standardised packaging. Ultimately, restricting branding on products will undermine trade with, and investment in, Singapore; it will interfere with the growth of legitimate markets and enable illicit trade to exploit opportunities which will inevitably arise due to the ease of counterfeiting unbranded product packaging.

8. Please include any other comments or concerns regarding the SP Proposal that you would like the Government to take into account.

We are concerned that the underlying assessment of whether there is reason to introduce plain packaging in Singapore does not adequately account for impacts upon existing Intellectual Property policies, laws and enforcement regimes. Intellectual property rights are a key growth and economic driver for Singapore, and Singapore is recognized for its IPR protection and enforcement. We believe that plain packaging regulations seriously harm IPR and protection of those rights. BASCAP is also concerned that plain packaging will make Singapore even more vulnerable to an increase in the illicit tobacco trade. We therefore strongly urge the Government of Singapore to reconsider any proposed legislation in light of these specific concerns listed below:

1. Standardised packaging is a deprivation of brand owners' intellectual property rights, especially trademarks and designs. Intellectual property rights are protected under both international and domestic law, as well as constitutional law in many countries.

Standardised packaging undermines one of the essential functions of trade marks, which is to guarantee the 'origin' and 'quality' of the goods upon which they are placed.

2. Standardised packaging is inconsistent with international laws established to protect intellectual property rights, including the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement (1994) and the Agreement on Technical Barriers to Trade (TBT) (1994). The introduction of standardised' tobacco packaging in Australia in 2012 has resulted in legal challenges from four countries under the World Trade Organisation's dispute settlement system. Similar challenges are likely to be filed against other countries introducing 'standardised' packaging. Although the final WTO report is likely to be made public imminently, almost three-quarters of WTO cases are appealed and it is expected that an appeal will be made to the WTO Appellate Body in relation to plain packaging. Many countries (including Malaysia, Turkey and Belgium) have indicated that they will await the outcome of the WTO process. Given that Singapore has seven free trade zones and is a leading trading hub globally, a prudent step would be to await the final outcome of an appeal before proceeding with any plain packaging proposal.
3. By mandating the removal of trademarks, standardised packaging removes a critical tool used by consumers to make informed purchasing decisions. Branding, trademarks and logos provide assurance about the quality of the product and are essential for product differentiation, and thus promote competition in the marketplace.
4. Standardised packaging would make counterfeiting and smuggling far more prevalent as it would be much easier for counterfeiters to replicate standard pack designs than to copy existing pack artwork. Counterfeit cigarettes have been known to contain a mixture of lethal substances well in excess of the toxins found in ordinary cigarettes. Through distribution by unregulated and untaxed criminal networks, standardised packaging will therefore increase the availability of illicit and hazardous products.
5. Standardised packaging will impose an increased burden on police and customs authorities who will have to deal with a growing illicit market and other unintended consequences. Furthermore, similar looking packs will make it even harder for customs, trading standards and revenue officials to differentiate illicit product from legally manufactured, tax-paid products, further complicating enforcement efforts.
6. Any growth in the illicit market will have a negative impact on government tax revenues, with money instead flowing to organised crime groups involved in the illicit tobacco supply chain.
7. Introducing plain packs for tobacco products will set a dangerous precedent for the removal of trademarks from other consumer goods deemed by some to be 'controversial', such as alcohol and foods with a high fat, salt or sugar content. Standardised packaging legislation therefore directly impacts the interests and rights of all trademark owners.
8. Standardised packaging will undermine a country's international reputation as a good place to do business. Depriving brand owners of their valuable intellectual property rights signals that innovation, creativity and investment can be put at risk, negatively impacting foreign direct investment and, ultimately, economic growth. Countries that introduce standardised packaging also risk facing retaliatory action by tobacco producing countries - for example, Indonesia has already indicated it intends to introduce 'plain/standardised' labelling for wine imported from Australia.

9. By diminishing brand value, countries implementing standardised packaging are likely to have to compensate tobacco companies for the loss of their valuable trademark rights.
10. Standardised packaging erodes intellectual property rights while offering no benefit to public health. Three years following the implementation of standardised packaging in Australia, the measure has not achieved its intended policy objectives. Furthermore, the consumption of illicit tobacco has increased nearly 30% over the same period. No government should support a policy that so significantly attacks Intellectual Property Rights while failing to offer any public good.

In light of our highlighted concerns, BASCAP encourages the Singapore Government to give careful consideration to the unintended and negative consequences of implementing legislation that erodes the value of Intellectual Property Rights. We do not believe standardized packaging for tobacco products will achieve the intended public health objectives and will, in fact, lead to various significant unintended consequences. As such, we strongly urge the Government of Singapore to consider alternative approaches.

About BASCAP

Business Action to Stop Counterfeiting and Piracy (BASCAP) is an initiative of the International Chamber of Commerce (ICC) that unites the global business community across all product sectors to address issues associated with intellectual property theft and to petition for greater commitments by local, national and international officials in the enforcement and protection of intellectual property rights.