ASEAN Intellectual Property Association

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07 February 2018

Ministry of Health
16 College Road
College of Medicine Building
Singapore 169854

Attention: Director, Epidemiology and Disease Control Division

Re: Proposed Amendments to the Tobacco Act to Incorporate Plain Packaging Measures

Gentlemen:

I write on behalf of the ASEAN Intellectual Property Association ("ASEAN IPA") to reiterate our association's stand on plain packaging measures, and its adverse effect on the rights of stakeholders, specifically trademark holders.

On 02 April 2015, the ASEAN IPA wrote to the World Trade Organization, and attached a Declaration calling on ASEAN Member States to re-affirm its support for a full and effective implementation and protection of Intellectual Property Rights. In ASEAN IPA's letter to the WTO, the association took the position that plain packaging measures will deprive a trademark owner of protection of its intellectual property rights. Such measures will erode more than a century of intellectual property protection.

With the implementation of plain packaging measures, consumers are likely to perceive products as similar in terms of quality and characteristics because of the uniformity in appearance and packaging. Thus, price will become the primary distinguishing and competing factor, and producers will be forced to cut prices at the expense of a product's quality and its innovation. It cannot be overemphasized that trademarks is equivalent to a "brand" – a brand which is considered the selling point of a business. Plain packaging would violate intellectual property rights, and is tantamount to depriving the companies of one of its most valuable assets.[1] A brand takes years to build for the same to symbolize quality and reliability, and this is the reason why there are measures in place in various jurisdictions to protect the goodwill obtained by a brand.

Plain packaging also limits the distinctive elements of tobacco products' packaging, and aggravates the distribution of counterfeit goods as it limits the methods of identifying

[1] Letter of the International Chamber of Commerce – Georgia to the Substance Abuse Department of Singapore on 21 March 2016.

when a product is counterfeit. Thus, plain packaging measures is a double-edged sword. While it may contribute to the protection of public health, plain packaging measures may

lead to the proliferation of counterfeit[2], contraband[3] and illicit goods. Such counterfeit activity translates into significant loss for the government in terms of taxes and customs revenues.

Aside from the loss of revenue to government by non-payment of customs duties and taxes, counterfeit and/or illicit tobacco products are dangerous to the health of both smokers and non-smokers.[4] Studies reveal that counterfeit cigarettes have a higher level of heavy metals such as cadmium, which, in turn exposes smokers to more toxic and carcinogenic metals as against genuine tobacco products.[5] According to the UK Department of Health, tobacco smuggling exacerbates health inequalities and discourages younger smokers from quitting because of the cheaper price.[6] Ironically, this in effect runs counter to the supposed main objective of the government in implementing the plain packaging law to protect and preserve public health.

Moreover, the rights of a person as a consumer are violated. The inability to recognize a brand affects the consumers' freedom to make informed choices.[7] By limiting the information available on the packaging of tobacco products, the law effectively undermines both the accountability and responsibility of these producers to consumers who depend on the brand to identify the product most appropriate for their needs and thus, make the best choices in the marketplace.[8]

Many groups also believe that the passing and implementation of the plain packaging law will set a bad precedent, that the government will broaden plain packaging regulations to other consumer goods such as alcohol, sugary and salty food, junk food, fatty food, and even cereals.

In view of the impact to the intellectual property rights of trademark owners, the ASEAN IPA considers plain packaging measures an undue restriction on the intellectual property rights of trademark owners. Thus, in its 2015 Declaration, it called on member states to ensure the highest level of intellectual property rights protection, and to reject policies which contravene the international obligations to protect such rights. The same position was taken in the letter of ASEAN IPA dated 27 October 2015 addressed to the Minister of Law and Minister of Home Affairs of Singapore. Further, in a letter dated 16

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2 **NOTE: Counterfeit** is a copy or imitation of something that is intended to be taken as authentic and genuine in order to deceive another.

3 **NOTE: Contraband** refers to property that is illegal to possess or transport. It may be goods that are illegal to import or export, and are attempted to be smuggled into a country. Contraband goods are usually subject to seizure by government officials. (*See* https://definitions.uslegal.com/c/contraband/).

4 Paper by the Intellectual Property Owners Association.

5 *Source and Health Implications of High Toxic Metal Concentrations in Illicit Tobacco Products* by W. Edryd Stephens, Angus Calder and Jason Newton, Environmental Science and Technology Vol. 39, No. 2, 2005.

6 UK Department of Health (2008a, p.22).

7 Plain Packaging measures – Proposed Joint Statement of Global IP Associations.

8 ICC Discussion Paper of Labelling and Packing Measures Impacting on Brand Assets, International Chamber of Commerce, 03 February 2017.

March 2016 addressed to Singapore's Health Promotion Board, the ASEAN IPA reiterated its opinion that plain packaging proposal would have repercussions on intellectual property rights, and the same is not a "balanced" approach to deal with health issues.

This remains the position of ASEAN IPA. While the purpose of the plain packaging law is understandable, it must be emphasized that a State must always consider and balance the interests of the stakeholders involved. Regulatory approaches should be consistent and not be unduly restrictive to trade, intellectual property rights, and competition any more than necessary to achieve a public policy objective. Thus, considering the enormous impact and burden imposed on the industry / trademark owners, and the foreseen violations of various rights and laws, it is important to measure the policy against perceived benefits that the plain packaging law envisions. To reiterate, while there are reported benefits associated with the implementation of the plain packaging law, a state cannot discount the unnecessary burden it will impose not only to the key players in the industry, but to the government and the public, as well.

The government should also not underestimate the capacity of the consumers to make informed choices. Thus, an alternate measure it may take is to intensify educating the public as to the dangers of smoking. Compared to plain packaging measures, the World Health Organization's Framework Convention on Tobacco Control's mandate on graphic health warning or pictorial requirements did not meet extensive and strong opposition. This is because such measure is recognized to be a reasonable means given the sets of rights affected by mandating a certain design for packaging. The measure tends to balance the existing rights of stakeholders as it serves to give additional information to the consumer for the protection of their health, in consonance with consumer protection laws, without taking away the property rights of industry players since the same does not require the removal of the distinctive features of the brand.

Finally, there must be a collaborative effort among all the stakeholders – namely, e.g., government, industry players, consumers - in order to come up with measures which balance the interests of all the affected parties. Industry experts may offer their insights on the practicality and effectiveness of measures to be implemented. Transparency is the central pillar of good regulation, and public consultation is one of the key in regulatory tools to improve transparency, efficiency and effectiveness of a regulation.[9] At the end of the day, the welfare of the public is the shared responsibility of all stakeholders.

We trust that the views expressed will be given due consideration by your Ministry and will be happy to have a dialogue with respect to the same.

Very Truly Yours,

agquirino

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9 ICC Discussion Paper of Labelling and Packing Measures Impacting on Brand Assets, International Chamber of Commerce, 03 February 2017.