INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

BASCAP
Business Action to Stop Counterfeiting and Piracy

March 21, 2016

The Health Promotion Board
Substance Abuse Department
3 Second Hospital Avenue
Singapore 168937

Dear Sir/Madam,

Ref: Public Consultation on Potential Tobacco Control Policies

On behalf of BASCAP, I am pleased to have the opportunity to contribute to the Health Promotion Board's consultation on potential tobacco control policies. In this instance, I particularly welcome the opportunity to comment on the Singapore Government's proposal to reduce the appeal of tobacco products through standardised packaging.

BASCAP acknowledges that public consultation is an important part of the legislative process to ensure that a wide range of perspectives, data, and research are considered, especially in areas not yet contemplated or where unintended consequences have not been anticipated.

While BASCAP supports the protection of public health as an underlying principle, our position pertains to extenuating impacts on intellectual property rights and counterfeiting, and not the health-related aspects of standardised packaging.

BASCAP's position is that 'standardised packaging' will lead to a number of unintended consequences, not least the impact it will have on Intellectual Property Rights. BASCAP therefore believes 'evidence based' policy development and a thorough investigation of the impact of the proposed legislation should be conducted before standardised packaging is even considered.

We reviewed the online consultation form with great interest and are keen to provide input into the consultation based on our expertise on these issues and experience in previous countries like France, Ireland and the United Kingdom. We hope that you find our submission of value. However, in view of our experience with the subject issue, we find that the survey has considerable limitations for collecting information, particularly information on the unintended consequences of introducing standardised packaging. Consequently, we have prepared a short paper outlining our comments and views, which I attach as an addendum to this letter. In summary, our concerns are that:

1. Standardised packaging is a deprivation of brand owners' intellectual property rights.
2. Standardised packaging would make it much easier to counterfeit tobacco products. Once tobacco products are counterfeited, it will be 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.

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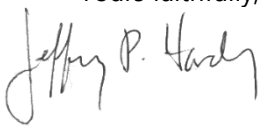
3. Standardised packaging restricts trademarks and the branding of products, removing a critical element of accountability and responsibility that consumers depend on to make informed choices in the marketplace.
4. There is no evidence that 'standardised packaging' as a policy in its own right reduces tobacco consumption. No government should support a policy that so significantly attacks Intellectual Property Rights while failing to offer any public good.
5. Standardised packaging is inconsistent with international laws established to protect intellectual property rights and to which Singapore is a signatory.

BASCAP strongly urges the Singapore Government to carefully consider any proposals to introduce 'standardised packaging' within the wider context of existing Intellectual Property policies, laws and enforcement regimes and how it will undermine the ability of businesses and governments to effectively fight counterfeiting, piracy and illicit trade. We therefore respectfully ask that our submission and comments be given due consideration.

Yours faithfully,



Jeffrey Hardy
BASCAP Director

Cc: Dr Vivian Balakrishnan, Minister for Foreign Affairs
Mr K Shanmugam, Minister for Law
Mr S Iswaran, Minister for Trade & Industry
Mr Gan Kim Yong, Minister for Health
Mr Daren Tang, CEO Intellectual Property Office of Singapore
Mr Ho Chee Pong, Director General, Singapore Customs
Mr Ho Meng Kit, Chief Executive Officer, Singapore Business Federation

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.

BASCAP supports 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 health 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.

BASCAP submission to Singapore Public Consultation on Potential Control Policies

BASCAP key concerns

BASCAP supports the protection of public health as an underlying principle and regulation which has been shown to be effective and does not unjustifiably interfere with Intellectual Property Rights. We strongly believe that standardised packaging will negatively impact on the rights of Intellectual Property owners.

Our key concerns are:

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.

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.

Impacts on counterfeiting and illicit trade

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.

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 2013. In its latest report for 2015, KPMG revealed that Australia's illegal tobacco consumption had risen from 11.5% in 2012 to 14.5% in 2014, almost entirely offsetting the decline in the legal tobacco market and, as a result, meaning tobacco consumption remained broadly stable. Other findings of the KPMG study regarding Australia include:-

- Unbranded consumption increased 51% in the twelve months to June 2015;
- The overall level of tobacco consumption in Australia was estimated at 17.5 million kilograms in H1 2015, of which 2.5 million kilograms were estimated to be illicit;

In the Australian 'empty pack' survey of 2013, during which MS Intelligence collected 12,000 discarded cigarette packs across 16 different towns and cities in Australia, it was discovered that illicit tobacco consumption grew from 11.8% to 13.3% since the introduction of standardised packaging.

BASCAP also notes that the Australian Department of Health recently published, after eight months delay, its Post Implementation Review (PIR) of the standardised packaging law. The conclusions of the Review are untenable and lack credible analysis. Significantly, the PIR admits that standardised packaging did not, on its own, drive down smoking rates and accepts that the impact of massive tax increases which came into force during the same period were strongly influential. The PIR accepts that 'the full effect [of plain packaging] will only be clear over time'. This is not exactly a ringing endorsement of 'standardised packaging'.

Legal implications and impact on trademark law

Importantly, trademarks are one of the most effective means of guaranteeing the origin, quality and safety of products. This principle has been recognised time and again by courts in Singapore and beyond. By way of illustration, in the Singapore case of *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd, v Qinghai Xinyuan Foreign Trade Co Ltd, (2009)*, the Court stated:

> *The cornerstone of a mark or sign which has been registered as a trade mark is its capacity to distinguish, i.e., its ability to distinguish the goods or services of a particular supplier so as to serve as a badge of trade origin to the average consumer who encounters the mark. As stated in Executrices of the Estate of Diana, Princess of Wales' Application [2001] ETMR 25, "it is clear that the ability to distinguish the goods or services of one undertaking from those of other undertakings remains the essential function of a trade mark.*

The mandated removal of trademarks from product packaging eliminates, in an instant, the primary function of a trademark - one of the most effective mechanisms a consumer has of knowing whether a product is genuine or fake. The 'consumer protection' function of trademarks will therefore be seriously undermined by the introduction of 'standardised packaging'. This is not a solution that serves public interests.

BASCAP also notes that under Section 36 of the Trade Marks Act 2005, a registered trade mark is personal property. BASCAP is concerned that standardised packaging will essentially deprive trademark owners of this important statutory right. A trademark registration is effectively redundant and useless against third party infringers if it cannot be used.

Impact on Singapore's Intellectual Property reputation

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.

Conclusion

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.