KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA
MINISTRY OF TRADE

DIRECTORATE GENERAL OF INTERNATIONAL TRADE NEGOTIATION

Jalan M.I. Ridwan Rais No.5 Jakarta Pusat 10110
Phone 021-23528600
Fax 021-23528610

Our Ref No. : 275/PPI/SD/03/2016
Date : 29 March 2016

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

The Government of Indonesia is pleased to have the opportunity to provide its comments on several potential tobacco control proposals put forward by the Government of Singapore for public consultation starting from December 29, 2015 – March 29, 2016.

Indonesia understands that Singapore's Ministry of Health, together with the Health Promotion Board (HPB) and the Health Sciences Authority (HSA), are considering potential enhancements to its tobacco control policies. The objectives are to discourage Singaporeans, especially youths, from picking up smoking, and to encourage smokers to quit the habit.

The specific measures that the Government of Singapore is considering are as follows:

1) Reducing the appeal of tobacco products through standardized packaging.
2) Enhancing graphic health warnings.
3) Restricting the sale of flavored products.
4) Increasing the minimum legal age for the purchase, possession and use of tobacco in Singapore, from 18 to 21 years.

I. Indonesia's Tobacco Industry

Indonesia is a major producer and exporter of tobacco products. In the upstream sector, tobacco plantations are an important agriculture sector for Indonesia and have become one of the national strategic commodities as stipulated in the Plantation Law. In addition to tobacco plantations, clove plantations are also an important sector as the main tobacco product produced and sold in Indonesia is "Kretek" (or clove cigarettes). Indonesia is the biggest clove producer in the world, contributing more than 70% of the world's production. It is important to note that tobacco and clove production are closely linked, as almost all of the clove production in Indonesia is used by the tobacco industry.

Based on data from the Indonesian Ministry of Agriculture, we produce approximately 165,000 tons annually of tobacco and 100,000 tons annually of cloves. It is estimated that the livelihood of 3.5 million tobacco and clove farmers depends on the tobacco industry.

In the downstream sector, the tobacco industry is a labor-intensive industry with nearly 1,000 businesses operating in the production sector. In total, it provides employment for more than 6 million people, comprising 2 million tobacco farmers, 1.5 million clove farmers, 2 million retailers, and 600 thousand cigarette factory workers where most are employed in the cigarette hand rolling sector.

The tobacco industry in Indonesia contributes approximately 11.3 percent of Indonesia's total tax revenue in excise tax. The tobacco industry is an essential component of Indonesia's agriculture sector, which contributes over 13 percent of our GDP. Furthermore, there is a growing potential for export development. As it stands now, Indonesia is a net exporter of tobacco products and listed as the world's 2nd largest producer-exporter of manufactured tobacco products. In this regard, Singapore is one of the important export destinations for Indonesia's tobacco products. Currently Indonesia is the 2nd largest source of imports for Singapore, enjoying an approximately 17.9% share of Singapore's imports. Overall, the tobacco industry contributes to the success of other related industries and services throughout the value chain.

Despite the importance of tobacco and cigarettes to its economy and its people, Indonesia does not object to efforts by governments to reduce the use of cigarettes by their citizens. Nor does Indonesia object to reasonable measures designed to keep cigarettes, including clove cigarettes, out of the hands of minors. Indeed, Indonesia has itself undertaken its own tobacco control measures. However, for the reasons outlined below, Indonesia has significant concerns with certain tobacco proposals currently under consideration in Singapore, most notably plans to require "plain packaging" of tobacco products and the restriction on the sale of flavoured tobacco products.

II. Standardized ("Plain") Packaging

Indonesia understands that Singapore is considering a new requirement that tobacco products be sold in so-called "plain" packaging, without any promotional information (e.g. trademarks, logos, colour schemes and imagery).

A. Role of Trademarks For Consumer Products

Trademarks are a critical property right protected under both national law and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). Manufacturers invest heavily and over many years to develop their trademarked brands and the associated reputations for providing high-quality goods and services. Consumers rely on trademarks the world over, and anywhere a trademark is present, a manufacturer stands behind it to vouch for authenticity and quality. In this way, trademarks serve as vital motivators for businesses to invest in quality maintenance, value creation and responsibility. While trademarks often identify the commercial source of goods, their ability to distinguish goods goes well beyond merely identifying the manufacturer of a product. This is particularly true when one manufacturer

produces several different brands within the same product category, often with dramatically different characteristics and/or intended for different segments of the market.

The definition of a trademark in Article 15.1 of the TRIPS Agreement provides that "*any sign, or any combination of signs*, capable of distinguishing the goods ... shall be capable of constituting a trademark. Such signs, in particular words, . . . *figurative elements* and combination of *colours*, as well as any combination of these signs shall be eligible for registration"(emphasis added). As such, the TRIPS Agreement protects all trademarks and their ability to distinguish in the marketplace. In the modern, globalized economy, figurative signs and colors that cross linguistic and cultural divides often serve to distinguish goods more than word marks ever could. Section 2 of the TRIPS Agreement sets out detailed obligations in relation to the protection of trademarks, building on the extensive protections already provided in the Paris Convention for the Protection of Industrial Property (1967) ("the Paris Convention"). The TRIPS Agreement expressly prohibits WTO Members from withholding trademark protection based on the *nature of the goods or services* to which a trademark is to be applied. This requirement reinforces the principle that trademark protections are not to vary by product or industry, and are equally strong in the tobacco context as any other. Plain packaging requirements strip trademarks from tobacco products and interfere with the trademark's ability to perform its primary function of distinguishing products, denying manufacturers the ability to use important aspects of their protected intellectual property ("IP") on a legally available product.

Given the important role trademarks play as valuable intellectual property, adopting plain packaging could undermine Singapore's efforts to position itself as a global leader on IP. Singapore has expressed a desire to play a facilitating, bridging role within Asia and provide trusted, neutral support for the development and growth of IP in the region. In May 2012, the Singaporean government established an IP steering committee to formulate the IP Hub Master Plan. Among the strategies identified for the Master Plan is "nurturing a progressive environment that shapes and promotes IP thought leadership, and builds international perception." Imposing draconian and unprecedented restrictions on the use of trademarks in Singapore runs counter to the goals and strategies Singapore has set for itself to become an IP hub in Asia.

B. WTO Issues and Concerns

A number of WTO members have voiced concerns about plain packaging proposals from a range of countries. Australia's Plain Packaging Act is the subject of formal dispute proceedings in the WTO brought by four countries (including Indonesia). More than 34 other WTO Members have signed on as third party participants in the case. Plain packaging proposals from several WTO Members, including New Zealand and Ireland, have drawn concern at meetings of both the WTO Committee on Technical Barriers to Trade ("TBT"), which addresses technical regulations that apply to all manner of goods, and the TRIPS Council, which covers intellectual property rights.

In *Australia – Plain Packaging*, Indonesia and the other complainants have argued that plain packaging violates several provisions of the WTO TRIPS Agreement and is more trade restrictive than necessary to fulfill a legitimate objective, in violation of TBT Article 2.2. Singapore itself is a third party in this dispute. What is clear from the available data in Australia is that plain packaging is resulting in "downtrading" to cheaper brands, which creates a trade-restrictive loss of competitive opportunities for premium tobacco products, such as Indonesia's kretek cigarettes. Standardizing the presentation of tobacco products reduces the ability for product differentiation. As identifying marks, symbols, and colors are removed, consumer loyalty and willingness to pay decline because consumers perceive all plainly packaged products as increasingly similar in terms of quality and characteristics.

Whether or not such extensive interference with the use of trademarks is consistent with the WTO TRIPS and TBT Agreements has not yet been determined by the WTO panel hearing the case, nor reviewed by the WTO Appellate Body. In Indonesia's view it would be premature for Singapore to adopt plain packaging without first knowing whether, and if so how, plain packaging is permitted under WTO rules. A decision from the panel is expected this summer. Any appeal, if filed, will be heard later this year. There is no reason for Singapore to rush to adopt plain packaging when critical questions regarding its consistency with WTO rules will be addressed in the near term. Indonesia encourages Singapore to reconsider adopting any form of plain packaging, or at a minimum, to delay action on these measure until the WTO Dispute Settlement Body has had an opportunity to assess plain packaging's consistency with WTO obligations.

C. Plain Packaging Has Not Lived Up to Promises

Singapore, as a third party to the WTO plain packaging dispute, has received the large body of evidence regarding plain packaging in Australia. As a complainant in that dispute, Indonesia has examined in detail the purported "evidence" regarding plain packaging. More than three years after plain packaging was adopted, there is simply no evidence that plain packaging has had *any* impact on the rate of smoking prevalence in Australia.

On 26 February 2016, the Australian Department of Health and Ageing ("DHA") released its Post-Implementation Review ("PIR") of plain packaging. This review is required under Australian law because the Australian government failed to satisfy certain regulatory requirements in advance of implementing plain packaging, in particular by failing to demonstrate that there was a need for further regulation of tobacco packaging.

Australia commissioned the National Plain Packaging Tracking Survey ("NPPTS") for the express purpose of evaluating the effectiveness of Australia's plain packaging measures.[1] The NPPTS (or "Tracking Survey" as it is referred to in the PIR) was a "national, monthly tracking survey of

[1] Australian Department of Health and Ageing, "Post – Implementation Review: Tobacco Plain Packaging 2016," (March 2016) ("PIR"), para. 69.

smokers and recent quitters undertaken by the Centre for Behavioral Research in Cancer, Cancer Council Victoria ("CCV"), and funded by the DHA.[2] CCV, led by Professor Melanie Wakefield and her team, designed and implemented the survey, with assistance from the Social Research Centre, at the considerable cost of over A$3 million.[3] The Australian Government described the NPPTS as the "key survey" for the PIR.[4]

In April 2015 the journal *Tobacco Control* published a special issue devoted to papers evaluating Australia's plain packaging policy (available online in March 2015) based on the NPPTS data. During the course of the WTO dispute against Australia, experts advising Indonesia and other complainants were given full access to the NPPTS dataset, and the authors' computer code. These experts identified several serious flaws in the analysis, including a pattern indicating poor results from plain packaging, which Professor Wakefield and her co-authors simply chose not to report in their papers. Indeed, the published papers failed to report the results for more than half of all variables in the dataset (28 unreported results out of 50 variables). The overwhelming majority of the unreported results showed that plain packaging had little to no lasting effect on the variables being measured. Some variables (e.g., quit attempts) even showed a small but statistically significant *decline* after plain packaging went into effect, leading the experts to conclude that the published papers painted an *inaccurate and misleading picture* of the NPPTS results.

Beyond the obvious findings that the pack is less visually appealing and people more often notice the much larger graphic health warning ("GHW") first, the empirical evidence shows little or no effects of plain packaging on the behaviors related to smoking. Variables relating to beliefs, attitudes and intentions towards smoking were almost entirely unaffected by plain packaging. Further, the NPPTS showed no changes in consumption, quitting, and relapse as a result of plain packaging. The lack of an effect on consumption from plain packaging was also reported by Australian tobacco control researchers in *Scollo et al.*[5] Although people like tobacco packs less, and notice the GHW more, respondents enjoy smoking just as much; and their concerns about smoking, beliefs in its harmfulness, quit intentions, and consumption, quitting and relapse behaviors, are all unaffected by plain packaging. Further, as the authors of the published papers on the NPPTS dataset rightly acknowledge, one can expect – and the data confirms – wear-out effects, meaning certain effects that are observed initially are not sustained over time.[6] This wear-out means that, rather than increase in strength over time, the rather limited impact of plain packaging to date will tend to weaken over time.

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[2] PIR, para. 69.

[3] Senate Community Affairs Committee, "Answers to estimates questions on notice health and ageing portfolio", Questions E13-126 (13 and 15 February 2013).

[4] Commonwealth of Australia, Proof Committee Hansard, Finance Administration Legislation Committee, Estimates (26 May 2015 and 2 June 2015).

[5] Scollo, M; Zacher, M; Coomber, K; Bayly, M; Wakefield, M. Changes in use of types of tobacco products by pack sizes and price segments, prices paid and consumption following the introduction of plain packaging in Australia. *Tobacco Control* 24, no Suppl 2 (2015): ii66-ii75 ("Scollo et al. (2015)").

[6] Zacher, Meghan, Megan Bayly, Emily Brennan, Joanne Dono, Caroline Miller, Sarah Durkin, Michelle Scollo, and Melanie Wakefield. "Personal pack display and active smoking at outdoor café strips: assessing the impact of plain packaging 1 year postimplementation." *Tobacco Control* 24, no. Suppl 2 (2015): ii96 ("Zacher et al. (2015)").

In response to these allegations, Australia took the surprising approach of criticizing the design of its own NPPTS survey, claiming that it was ill-suited for assessing the impact of plain packaging. This view was previously unreported by Australia, the entities collecting the data, or the authors relying on the datasets in peer-reviewed publications. Conveniently, Australia still views the NPPTS dataset as well-suited – and even a "powerful tool" – for evaluating plain packaging when the results *do* show an impact from plain packaging. However, Australia no longer regards the NPPTS as suitable for evaluating the impact on the vast majority of NPPTS variables, virtually all of which happen to be unaffected by the pack changes. It would appear that Australia paid A$3 million for a survey that was allegedly not suited to measure the vast majority of the variables it was designed to evaluate.

Despite Australia's own misgivings about the suitability of the NPPTS for evaluating the effectiveness of plain packaging, the PIR relies extensively on its questionable findings, as Australia continues to contort the survey data by whatever means necessary to create support for its foregone conclusion that plain packaging is working. This is particularly true of the work by Dr. Chipty. In particular, Indonesia is concerned with the multiple inconsistencies between Dr. Chipty's work during the course of the WTO dispute and the results reported in the PIR.[7] In her work for the PIR, Dr. Chipty selectively reported the results of only one statistical model and disregarded not only other metrics of smoking behavior, but also other models she previously used (and advocated for) in the WTO.

Indonesia recognizes that there is a chorus within the Australian government and among plain packaging proponents proclaiming that plain packaging has been a "success" in Australia. However, when the evidence is examined in an objective way, it is clear that the chorus is either wrong or is misrepresenting the objective data. The PIR of plain packaging is an excellent example of such overstatement. It is understandable that an Australian government review of its own policy would conclude that plain packaging has been a 'success'. As the respondent in a WTO dispute over its plain packaging measure, any other outcome besides 'success' of the measure could adversely affect Australia's litigation posture before the WTO. However, an objective examination of the data on plain packaging, now three years after it went into effect, continues to show plain packaging is not working to change smoking behaviour in Australia and is unlikely to do so in the future.

D. Plain Packaging Measures May Harm Exports To Other Markets

The potential destruction of trademark rights through plain packaging for tobacco products will have ramifications globally across other industries. Other consumer and food products, including products that Singapore exports, may well be subject to plain packaging requirements by international and national regulatory bodies based on health concerns. For example, India has suggested that the World Health Organization ("WHO") should create regulations for alcohol

[7] PIR, Appendix A.

products based on WHO tobacco regulations.[8] Questions about whether plain packaging for tobacco products could be expanded to "other consumer products that may be damaging to health, such as fast food or alcohol" have been raised before the United Kingdom's House of Commons Health Committee.[9] South Africa's Health Minister has indicated his goal of using Australian and other tobacco control measures for tobacco, alcohol and processed foods.[10] Thailand and Kenya have proposed graphic health warnings for all alcoholic beverages.[11] Chile has proposed "STOP" signs on fatty, salty and sugary foods to discourage consumption.[12] Finally, certain countries in Asia and the Middle East are taking action to restrict the use of certain trademarks on infant formula labels.[13] Allowing the WTO to determine whether plain packaging measures are consistent with WTO obligations before they are widely adopted across the consumer goods spectrum would be in Singapore's own interest.

III. Restricting The Sale Of Flavored Tobacco Products

Singapore has also indicated it is considering imposing a ban on the use of flavored tobacco products, alleging that flavors can mislead consumers, particularly youth, into thinking that these tobacco products are less harmful. As Indonesia has previously indicated, it supports efforts to prevent youth from taking up smoking. Certain flavors, especially when combined with brightly colored packaging, cartoon figures, etc. might be particularly attractive to youth or minors. In Indonesia's view, Singapore should specifically target candy, fruit, or other flavors that may be targeted at youth or minors without adopting an across-the-board ingredient ban on the use of all flavors. The addition of clove or menthol does not increase the existing toxicity of tobacco products. Indonesia's kretek cigarettes have never been targeted or marketed to youth, and reflect over 3 percent of the Singapore tobacco market, while menthol cigarettes are widely used by adults

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[8] Kounteya Sinha, "India urges WHO to set target to reduce alcohol consumption," *Times of India*, May 23, 2012, available at http://timesofindia.indiatimes.com/india/India-urges-WHO-to-set-target-to-reduce-alcohol-consumption/articleshow/13402728.cms.

[9] UK Department of Health, "Consultation on the future of tobacco control," May 31, 2008, available at http://www.plain-packaging.com/downloads/UK_DOH_consultation_paper.pdf; UK Parliamentary Health Committee, "Government's Alcohol Strategy," March 26, 2012, available at http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/news/12-03-26-alcohol-torcfe/

[10] IOL Business Report, Drinks makers oppose ad ban, April 17, 2013, available at: http://www.iol.co.za/business/business-news/drinks-makers-oppose-ad-ban-1.1277265; Sipokazi Fokazi, "Put graphic images on alcohol," *IOL Lifestyle*, May 21, 2012, available at http://www.iol.co.za/lifestyle/put-graphic-images-on-alcohol-1.1301088.

[11] WTO, "Technical Barriers to Trade: Tobacco and alcohol again among members' trade concerns," June 23 and 24, 2010, available at http://www.wto.org/english/news_e/news10_e/tbt_23jun10_e.htm; Philip A. Pfeffer, "Graphic Health Warnings for Alcohol Products..." *The Lawyer*, October 21, 2011, available at http://www.thelawyer.com/1009910.article.

[12] WTO, "Technical Barriers to Trade: Members discuss guidelines for trade-friendly regulation and STOP sign for 'junk food'," March 5-7, 2013, available at http://www.wto.org/english/news_e/news13_e/tbt_13mar13_e.htm.

[13] Lawrence Kogan on Hong Kong's Draft Infant Formula & Complementary Foods Marketing Code Violates WTO Law, available at http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2013/08/06/lawrence-kogan-on-hong-kong-39-s-draft-infant-formula-amp-complementary-foods-marketing-code-violates-wto-law-part-3-of-3.aspx. "DOH wins breastmilk case vs multinationals" available at http://www.abs-cbnnews.com/business/06/13/12/doh-wins-breastmilk-case-vs-multinationals.

worldwide. Removing popular kretek and menthol cigarettes from the legal tobacco market could increase demand for the products on the illicit market, which would have negative consequences for Singapore's tobacco control program.

IV. Association of Southeast Asian Nations (ASEAN)

Finally, the Government of Indonesia encourages ASEAN members to further enhance regional economic integration. ASEAN remains a cornerstone of Indonesia's economic and foreign policies where economic integration efforts are aligned through greater regulatory coordination in the best interest of the ASEAN economic trade zone.

We hope these integration efforts include member state's regulations that could impact Indonesian exports to fellow ASEAN members. Such exports to Singapore include tobacco products that represent a substantial and growing amount of Singapore's tobacco product imports, including products such as the Indonesian traditional clove cigarettes. ASEAN members should consult to the largest extent possible as to not hinder intra-ASEAN trade.

Further, and in an effort to forge a closer ASEAN community, and pending WTO dispute resolution over plain packaging, we hope our views on the WTO dispute will be taken into consideration by the Republic of Singapore. Such considerations always help the effort to forge a closer ASEAN community based on economic integration and, importantly, members solidarity ties.

V. Conclusion

Indonesia believes the legitimate health objectives Singapore is pursuing through its tobacco control policies could be met through other tobacco control measures that are both less trade restrictive and are genuinely effective. As Indonesia has indicated above, there is at least some evidence in Australia that the enlarged GHW (and not the removal of tobacco trademarks) is contributing to decreased appeal of the tobacco packs. Indonesia has recently adopted GHW on tobacco packaging, but left the use of trademarks intact.

Restrictive plain packaging provisions eviscerate almost all aspects of trademarks, which creates an unnecessary obstacle to trade, is more trade restrictive than necessary to fulfill any legitimate objective, and is not supported by credible scientific evidence. Where a measure does not and will not contribute materially to the permitted objectives, its restrictive effect on international trade and intellectual property rights cannot be justified. If less restrictive means of securing the desired objective are available, they are to be preferred. In Indonesia's view, it makes little sense to provide registration and protection for a trademark on the one hand, and then to prohibit its use on a lawfully available product on the other hand, especially where such use is necessary to protect the trademark. Trademarks are not harmful to public health and their use does not prevent regulation of the products they distinguish in the marketplace.

To conclude, the Government of Indonesia would welcome the opportunity to work constructively with Singapore as its closest neighbor and a fellow ASEAN country on issues of common concern. We believe it is important for Indonesia and Singapore to continue to uphold the importance of regulatory harmonization to promote the economic integration in the ASEAN Economic Community. We also believe it is essential to ensure that all potential tobacco control proposals not cast a shadow over our overall trade relations.

Yours Sincerely,

Iman Pambagyo
Director-General

Copy to:
1. Ambassador of Indonesia to Singapore;
2. Secretary to Directorate General of International Trade Negotiation;
3. Director of Multilateral Negotiation;
4. Director of Bilateral Negotiation;
5. Director of ASEAN Negotiation;
6. Trade Attache in Singapore.

30 March 2016

Health Promotion Board

Health Promotion Board
3 Second Hospital Avenue
Singapore 168937

Tel. 6435 3500
Fax. 6438 3848

www.hpb.gov.sg

Mr Iman Pambagyo
Director-General
Directorate General of International Trade Negotiation
Jalan M.I. Ridwan Rais No 5
Jakarta Pusat 10110
Indonesia

Dear Mr Pambagyo

RE: PUBLIC CONSULTATION ON POTENTIAL TOBACCO CONTROL POLICIES

I refer to your letter dated 29 Mar 2016 addressed to the Health Promotion Board.

The Ministry of Health, together with the Health Promotion Board and the Health Sciences Authority, is seeking the public's views on longer-term enhancements to Singapore's tobacco control measures.

Your feedback will be considered as part of the feedback received for this public consultation exercise.

Thank you.

Yours sincerely,

Gary Khoo
Director
Preventive Health Programme Divisions
Health Promotion Board

SINGAPORE QUALITY CLASS STAR
PEOPLE DEVELOPER SINGAPORE
SINGAPORE INNOVATION CLASS
SINGAPORE SERVICE CLASS
WHO Collaborating Centre for Health Promotion and Disease Prevention