

28th October 2011

Assistant Secretary, Tobacco Control Taskforce  
Attention: Tobacco Reform Section  
Department of Health and Ageing  
GPO Box 9848  
Canberra, ACT 2606  
Australia

Dear Assistant Secretary:

The Government of Cuba makes this submission in response to your Department's 30 September 2011 release of the consultation paper titled *Tobacco Plain Packaging: Proposed approach to non-cigarette tobacco products* ("*Consultation Paper*"). The Government of Cuba wishes to express its concern over the latest developments on the proposed Tobacco Plain Packaging Bill 2011 and its adverse impact on trade in non-cigarette tobacco products such as cigars.

The Tobacco Plain Packaging Bill 2011 and its announced implementing regulations would eliminate the use of trademarks on all tobacco packaging and on tobacco products themselves, with the exception of the brand name appearing in a standardized form. The *Consultation Paper* proposes that retail packaging for cigars must be the same specific drab dark brown colour as was proposed for cigarette products. Importantly, the *Consultation Paper* confirms that the trademark prohibition also applies to non-cigarette products. Only the brand name and variant name may appear on packaging, and only in a specified font, colour, and location on the packaging. No other logos, symbols, or other distinctive marks or brands may be visible on the package.<sup>1</sup> The *Consultation Paper* also indicates that the Government proposes that cigar bands be removed, or replaced with a drab dark brown band with the brand name and variant and country of origin printed in a standard font style, size, and colour.<sup>2</sup>

The measure as outlined in the *Consultation Paper* would severely undermine the fundamental protection of essential intellectual property rights. By eliminating the elements of branding and packaging design, the proposed bill will standardize the appearance of all tobacco packages making it difficult for adult consumers to identify and recognize their preferred tobacco products.

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<sup>1</sup> See, *Consultation Paper* at 4.

<sup>2</sup> See, *Consultation Paper* at 6



In this way the trademarks would no longer fulfill key functions such as: "distinction of the product or service of another" (allows the consumer to choose the preferred product or service), "indication of origin" (product connection with the producer) and "identification of quality" (guarantee of a uniform quality). Moreover, without the use of the distinctive elements that accompanies a trademark packages are easier to reproduce and could cause an increase in illicit trade of counterfeit products.

It is not clear the real effectiveness of anti-counterfeiting measures proposed in the *Consultation Paper*, specially the use of a unique alphanumeric code that could be equally reproduced in a counterfeit package. Moreover, for consumers will be impossible to identify with this code whether a product they are consuming is really false or not.

Cuban cigars have been subject to numerous counterfeit activities in the world, so the industry has over the years introduced various measures to make it increasing difficult to produce and sell counterfeit "Cuban" cigars. It is not enough one measure but the combination of several with the main goal of proving that the product is an Authentic Cuban Cigar. Some of the various proof of origin are: Habanos Protected Designation of Origin Seal printed in each box and packaging; a Republic of Cuba - National Warranty Seal for Cigars and Cut Tobacco; the Cigar band used in each individual cigar surrounding the top of the product with the brand name and "Havana-Cuba" imprinted. The prohibition to use such proofs will have an impact on counterfeit Cuban cigars.

The Department of Health and Ageing should be aware that this legislation is a cause for great concern internationally and is being closely followed by many of Australia's trading partners, including Cuba. In this regard, the Government of Cuba has already expressed to the Australian government our concerns and questions about the legislation that now seeks to apply with equal force to cigars and other non-cigarette tobacco products. These concerns and questions have been raised both bilaterally and at the World Trade Organization ("WTO"). Unfortunately, the Government of Australia has provided no substantive responses to our questions and concerns regarding the WTO consistency of the plain packaging measures.



The Government of Cuba recognizes and strongly supports Australia's right to legislate to protect health. We are also aware that public health is a priority and a right of human race to be defended. However, we are concerned by the Bill's impact on trade with Cuba and the manner such measures are consistent with WTO rules. The Government of Cuba considers that, unfortunately, the pending plain packaging measure would set a damaging precedent that would undermine protection for all intellectual property rights in Australia and abroad.

In this respect, the Government of Cuba considers that Australian authorities might have considered taking a less restrictive measure for achieving the same objective of public health, especially without affecting the value of trademark use.

Finally, we would like to note that the Tobacco Plain Packaging Bill 2011 and the *Consultation Paper* state that the plain packaging measure is being adopted to give effect to Australia's obligations under Articles 5, 11, and 13 of the WHO Framework Convention on Tobacco Control ("FCTC").<sup>3</sup> However, nothing in these provisions of the FCTC oblige Australia to adopt such measures. The FCTC Guidelines merely propose that countries "consider" adopting plain packaging, while saying nothing about banning the use of lawfully registered trademarks. Thus, the FCTC Guidelines do not require Australia to adopt the plain packaging measure.

The Government of Cuba is grateful for this opportunity to present its view to the Department of Health and Ageing and sincerely hopes that its significant concerns in respect of the Tobacco Plain Packing Bill of 2011 and the most recent *Consultation Paper* will be taken in to account.

Pedro Morizon  
Ambassador of the Republic of Cuba



<sup>3</sup> See, *Consultation Paper* at Appendix B.

