

October 5, 2012

Plain Packaging Consultation
 Ministry of Health
 P.O. Box 5013
 Wellington 6145
 New Zealand

Dear Sir or Madam:

The Institute for Policy Innovation (IPI) appreciates the opportunity to share our views and provide input and comment for your consultation on proposed plain packaging requirements for tobacco products.

About the Institute for Policy Innovation (IPI)

The Institute for Policy Innovation (IPI) is a 25 year-old non-profit, non-governmental organization (NGO) based in the United States. Among our key areas of policy concern are trade policy and intellectual property policy.

IPI is an accredited observer NGO with the World Intellectual Property Organization (WIPO), and we have participated as an *ad hoc* observer NGO with the World Health Organization (WHO).

In pursuit of our work on trade policy IPI was honored to host an event in Washington DC last May 16 featuring your Ambassador, the Right Honourable Mike Moore, whose commitment to liberalized trade is well-known.

Because of the obvious harmful impact on international intellectual property protection and trade, it is appropriate for us to be concerned about the implications of your proposed plain packaging requirements.

Summary

The Institute for Policy Innovation (IPI) recognizes the important role of New Zealand's government in protecting and furthering the public health of its citizens, and we do not question the sincerity of the proponents of this proposal. Nevertheless, we are particularly concerned about the *means* that are currently proposed.

Specifically, it seems clear to us that the proposal

- 1) violates WTO rules, including the TRIPS Agreement, and the Paris Convention, to which New Zealand is signatory;
- 2) reflects an incomplete understanding of the importance and value of trademarks in an economy;
- 3) sets a harmful and misguided precedent that would inevitably be extended to other types of products; and

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- 4) will inevitably lead to an increase in counterfeit tobacco products which by virtue of their illegality escape regulatory compliance.

The Proposed Plain Packaging Regulation Is a Clear Violation of WTO rules, including the TRIPS Agreement, and the Paris Convention, to Which New Zealand Is a Signatory.

New Zealand's proposed plain packaging regulation is in clear violation of its obligations under the World Trade Organization (WTO) Agreements and the Paris Convention for the Protection of Industrial Property (Paris Convention). Additionally, plain packaging of tobacco is NOT required under the World Health Organization (WHO) Framework Convention on Tobacco Control.

Trade agreements are negotiated precisely because of the tendency of nations to adopt policies harmful to their international trading partners out of domestic considerations.

Trade agreements are thus a negotiated discipline between countries to discourage domestic policies that harm their international trading partners, such as would the proposed regulations. And while protecting its citizens against tobacco may seem to proponents as morally superior to another country protecting itself against the importation of some of New Zealand's domestic products, it is the nature of international relations that countries disagree about both domestic and international priorities. Trade agreements are designed to prevent nations from either purposeful or inadvertent disruptions in the critical trade relations that not only promote economic growth, but also peaceful relations between nations.

The proposed plain packaging regulation is an example of a policy intended for domestic purposes that would have the inadvertent impact of harming important trade relationships, so it should be no surprise that it violates agreements to which New Zealand is a signatory.

Already three countries have filed complaints against Australia at the WTO because of their ill-advised plain packaging requirement. New Zealand can expect similar recriminations should it choose to ignore its trade obligations and knowingly move forward with plain packaging requirements.

1. The Plain Packaging Regulation Is a Violation of Obligations Under WTO Agreements

A plain packaging requirement violates Article 20 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Article 20 states:

“use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trade mark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.”

While some may argue that the proposed regulation is “justifiable” for public health reasons, evidence to that effect has not been demonstrated. Indeed, as we shall comment later, the likelihood is that eliminating trademark differentiation will drive down prices to commodity levels and encourage counterfeit and subpar quality products contrary to the intentions of the proponents.

Further, according to an analysis by the law firm Sidley Austin LLP, the regulation is also likely to be found in violation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). The TBT Agreement prohibits signatory nations from adopting technical regulations that create “unnecessary

barriers to trade” which are “more restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” Further language insists that “available scientific and technical information” should be considered. Since proponents cannot muster scientific or economic studies proving that the proposed plain packaging regulation would accomplish the goal of reducing smoking to such a level that it justifies the economic damage done to the holders of the trademarks, the proposed regulation would seem to not meet the requirements of the TBT Agreement.

2. The Plain Packaging Regulation Is a Violation of Obligations Under the Paris Convention

Article 10bis of the Paris Convention prohibits

“all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.”

The stated intention of the plain packaging regulation is to create such confusion, because it purposely eliminates differentiation between brands.

The Proposed Plain Packaging Regulation Reflects an Incomplete Understanding of the Importance and Value of Trademarks in an Economy

It is not a small thing to pass a law that sweeps aside the trademarks of a holder, regardless of what someone thinks of their products.

Protection of the branding of legal products goes beyond the specific product to protection of the image of the company itself. To quote economiesuisse:

Trademarks play a number of roles, including distinguishing one’s goods from those of another; symbolizing the quality, goodwill and reputation associated with the product and its manufacturer; promoting innovation by facilitating the introduction of new products within brand families; and informing, reassuring and protecting consumers. Proposed regulations that limit or prohibit the use of words, figurative elements, colors or other terms that are intended to differentiate one product from its competitors, obviously preclude the ability of the trademark to fulfill its main functions. Furthermore, they reduce manufacturer’s incentives to invest in quality and new products and lead to a price-based competition.

The proposed regulation would undermine consumer choice, restrain freedom of communication, cause confusion on the part of tobacco consumers, and hinder an effective and efficient marketplace.

Packaging communicates important information to consumers, such as whether or not the product is filtered, the taste or flavor characteristic of the product, and the level of quality to be expected within the package. In other words, it is much more likely that packaging affects existing smokers rather than potential smokers, who would be more subject to advertising than to packaging.

We must also comment on the *sheer expropriation of the immense economic value of trademarks and branding which would result from the proposed regulation*. It should be well-understood that companies expend significant capital over an extended period of years to build brand recognition. The value of such brands is significant, is listed as an asset on balance sheets and in corporate valuations, and must not be ignored by those who would propose a sweeping expropriation of the value of trademarks by government.

The Proposed Plain Packaging Regulation Sets a Harmful and Misguided Precedent Which Would Inevitably Be Extended to Other Types of Products

This is the “thin end of the wedge” or the slippery slope” argument—namely, that today it’s tobacco, but tomorrow it will be something else—other products deemed harmful to public health, or to public morals, or other products for other reasons.

Alcohol is also harmful to public health. It’s difficult to conclusively prove the impact of “secondhand” smoke, but it’s not difficult to identify the victims in a drunk driving accident. Shall we force alcohol products, perhaps produced in New Zealand, into plain packaging? We suspect Tui and Lion might have a problem with that.

How about high fat dairy products? Processed sugar? It’s even possible that these products have a more harmful impact on public health than tobacco, especially in light of the burden on the public health system imposed by Type II diabetes. Shall we take away the trademark rights of fast food products, candy and sodas such as Minties, Allens Jelly Sweets and L&P sodapop?

We simply mention these examples to demonstrate that, while tobacco is an easy target today, the very same logic could easily be applied to other products. There are better means of accomplishing social goals that are grounded in sound science and do not violate international agreements.

The Proposed Plain Packaging Regulation Will Inevitably Lead to an Increase in Counterfeit Tobacco Products Which by Their Very Nature Escape Regulatory Compliance

With the ability to protect and distinguish brands, comes the ability to differentiate by price. The proposed regulation eliminates a company’s incentive to promote and protect their brands, so it is logical to assume that companies will put less effort into protecting brands, resulting in easy to counterfeit commoditized products.

While New Zealand has thus far not experienced significant problems with illicit tobacco products, there is an enormous amount of counterfeiting in the cigarette marketplace generally, even with all of the proactive policing of counterfeits that is driven by brand holders. What is likely to happen to the level of counterfeiting of cigarettes when a) package design is simplified and mandated by government regulation, and b) the right to use color, logos and other branding elements is expropriated by the New Zealand government?

The answer is obviously that inferior counterfeit tobacco products will increase, and counterfeit products by their very nature ignore safety and other regulatory compliance issues. Counterfeiting is not only a crime, but it is also increasingly a source of income for highly organized crime syndicates.

Additionally, counterfeit cigarettes are generally sold with counterfeit tax stamps or other revenue documentation, meaning that counterfeits will deprive the New Zealand Government of expected tax revenue. Because governments derive significant revenues from tobacco sales, the revenue impact of increased counterfeiting in New Zealand could be significant.

Governments recognize that they do not have the resources to combat counterfeiting on their own, and often depend on the private efforts of brand holders. What incentive will brand holders have to fight counterfeiting under the proposed regulation? Certainly less than they do today.

Other Implications

Other implications of the proposed plain packaging regulation that concern IPI are a) whether a society that values free speech should be restricting the rights of companies that sell a legal product from communicating freely in the marketplace with their consumers; and b) the likelihood that resulting lower tobacco prices will actually result in more, rather than less, smoking. One of the best indications of a free society is whether or not the society trusts its ability to process information freely communicated within the marketplace. The proposed plain packaging regulation suggests that New Zealand does not trust companies and consumers to freely exchange information within a legal marketplace, which we would think would be offensive to freedom-loving New Zealanders.

Finally, our survey of the literature and research suggests that there is little or no evidence that the proposed plain packaging regulation will actually accomplish its goals of reducing smoking. We have focused our comments on the harm done to New Zealand's international obligations, and the likelihood of economic harm to consumers and producers. In light of the lack of evidence that the proposed regulation would actually accomplish its goal, these would seem to be high prices to pay for little or no benefit.

Conclusion

The Institute for Policy Innovation (IPI) appreciates the opportunity to share our views with you. Based on our comments, we urge the New Zealand Government to reject the proposed plain packaging regulation and find other methods and means for achieving the desired health outcomes that will not violate New Zealand's international obligations and agreements, and that will not encourage widespread counterfeiting of tobacco products. We would be delighted to work further with the New Zealand Government along these lines.

Sincerely,



Tom Giovanetti
President
Institute for Policy Innovation (IPI)