

tCrpu

The University of Hong Kong
5/F William MW Mong Block
21 Sassoon Road, Hong Kong
Tel : (852) 2819 9280
Fax : (852) 2855 9528
Email : commed@hkucc.hku.hk



TOBACCO CONTROL RESEARCH AND POLICY UNIT

控煙研究及政策組

香港大學社會醫學系

Executive Director: Marcus Yu (余衍深)
Telephone no : 2819 2824 Fax no.: 2855 9528
Email: mysyu@hkucc.hku.hk

Chairman: Anthony J Hedley (賀達理)

Tobacco Control Policy	Ref: ww/ajh/2006-7.7/cheng-a4/mc
Tobacco Industry Politics	June 16, 2006
Tobacco Documents Research	The Hon Andrew Cheng Kar-foo Chairman, Legislative Council Bills Committee Legislative Council Building 8 Jackson Rod Central, Hong Kong
Public Health Legislation	
Litigation	By Fax: 2537 1851, 2696 9088
Tobacco Litigation	Dear Mr Cheng,
Tobacco Induced Disease	Prohibition of Misleading Words on Packaging of Tobacco Products
Marketing Studies	We have noted with disappointment the Government's views on the prohibition of using misleading words on cigarette packs, that were transpired to the Bills Committee at its meeting held on 15 June 2006.
Maternal and Child Health	Below are some quick comments (in italics) by Mr Eric Legresley, our legal adviser based in Canada who has special interest in tobacco control legislation:-
Second Hand Smoke and Passive Smoking	<i>I find it a bit odd that government solicitors would apparently base their reluctance to proceed with removing descriptors based on the Paris Convention and the TRIPS Agreement. Both of these are comparatively easy to dispense with -- a matter I will be speaking on in Washington in a discussion on the international legality of plain packaging. Usually more of the focus is on a related agreements dealing with investments (the TRIMS Agreement) or technical barriers to trade (TBT Agreement)</i>
Health Care Impact and Economic Analysis	<i>Since its already at the top of my mind as I prepare my WCTOH talk, I'll give just a few brief words about the Paris Convention and the TRIPS Agreement, with the caveat that I haven't seen the precise form of argument they raised with respect to both of those treaties. The arguments are set out with the following divisions in order to rebut likely specific industry arguments, which in turn track with and use specific provisions within the treaties.</i>
Treatment of Tobacco Dependence and Smoking Cessation	
Education and Training	
Evaluation of Tobacco Control Activities	

Consulting Group:

Professor Anthony J Hedley (Director)
Professor Lam Tai-hing (Head of Department)
Dr Richard Fielding (Head of Behavioural Sciences Group)
Dr Sarah M McGhee
Dr Gabriel M Leung
Dr Wong Chi-ming
Dr Mary Schooling
Dr GN Thomas
Dr Daniel SY Ho

Advisers:

Dr Carol Betson-Goldstein PhD (United States)
Professor CQ Jiang MD (Guangzhou)
Professor Helen Lapsley BA Meecon (Australia)
Mr Eric Legresley MSc LLM (Canada)
Dr Judith Mackay MBE MB FRCP FFPH (Hong Kong)
Mr James Repace MSc (United States)
Dr David Scott PhD (Canada)
Mr David Simpson OBE Hon MFPH (United Kingdom)
Professor Alastair Woodward PhD MMedSci MFPH (UK) FAFPHM (New Zealand)
Ms Cecilia Yeung BA (Hong Kong)

It might be contended that a prohibition on descriptor use on the package amounts to INADEQUATE PROTECTION of trademarks in violation of these treaties. These two treaties, however, deal primarily with registration (Paris Conv. Art. 6quinquies; TRIPS Art. 15(1)) and exclusivity of use (TRIPS Art. 16(1)). There are public health exceptions, of which I will speak later, but the far better approach on this narrower issue is to simply permit continued registration of the trademarks using descriptors and permit the use of those descriptors in locations off the package (internal company correspondence etc.) in a manner sufficient to retain the registration. Of course, maintaining registration would permit the trademark owner to stop others from using a mark that is inappropriately similar (Non-use of a trademark may be a reason for cancelling its registration, but usually non-use arising due to matters beyond the control of the trademark owner is not justification for cancellation, but that will be a matter of domestic HK law.)

More likely the industry will argue that the policy constitutes an UNJUSTIFIABLE ENCUMBRANCE on the trademark in breach of TRIPS Art. 20. That provision is seemingly written in fairly absolute terms ('use of trademark shall not be unjustifiably encumbered... in a manner detrimental to its capability to distinguish goods'). Note first, however, that the standard is fairly low, 'justifiability' rather than a necessity based standard. Moreover, and in fuller explanation of what is justifiable Art 20 must be read in conjunction with TRIPS Art. 17 which says that there can be limitations on the trademark rights conferred by TRIPS provided in doing so the legitimate interests of the trademark owner AND OF THIRD PARTIES are taken into account. The protection of the health of the general public is clearly a legitimate interest of a third party. The onus is, however, on the government to show probably all of the following: the policy objective is significant and pressing, a descriptor ban is rationally connected to the objective, and the ban would have a positive effect.

The industry will likely argue that a descriptor ban amounts to a DISGUISED RESTRICTION to international trade in violation of TRIPS not so much because it is pertinent, but because successfully identifying a measure as a disguised restriction removes the main health exemptions applicable in trade law, particularly the GATT's Art. XX(b) exemption. If raised one need only remark that a descriptor ban, equally applicable to foreign and domestic producers, confers no benefit on the domestic producer. The hallmark of a disguised restriction is that it benefits domestic producers over foreign

A potential industry argument on CREATION OF CONFUSION (Paris Conv. Art 10bis(3); TRIPS Art. 16(1)) likely is so weak as to not warrant discussion in this quick note. It's more a matter I deal with respecting plain packaging.

The arguments based on these treaties are not all defensive. The Paris Conv. Art. 10bis obligation to prevent UNFAIR COMPETITION can be used to argue that the government would be in breach of this obligation if it grandfathered in Mild Seven (or other currently filed trademarks with descriptors) and prevented new ones. I would, however, hold this argument in reserve until the gov't seems intent on proceeding for the other way of preventing unfair competition is to drop the plan entirely.

But as it should be, let the final word rest with the tobacco industry through their internal documents. The last slide I will show in Washington is a 1994 quote from a legal opinion by John Clutterbuck, a lawyer then with Rothmans International. What he says about plain packaging is evermore true for the less invasive policy of banning descriptors. After reviewing the relevant treaties, and noting with glee the opportunities they will give to object to the plain packaging policies Clutterbuck concludes.

"In summary, the international trade argument by itself will not however be sufficient to ward off the threat of plain packs."


This is a BAT document Bates No. 50292651-655 titled "The International Trade Aspects of Labelling"

Given how rapidly your committee is moving, this note was written quite quickly, so my apologies for any errors of typing or form. I'd be happy to help out more with this.

Eric

I hope the above can help the Bills Committee in its deliberation of the issue at the coming meeting.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Marcus Yu', with a stylized flourish at the end.

Marcus Yu
Executive Director