

LC Paper No. CB(2)584/16-17(35)

The Chairman
Panel on Health Services
Legislative Council
Legislative Council Complex 1
Legislative Council Road Central
Hong Kong

4 January 2017

Dear Sir,

85% Graphic Health Warnings on Tobacco Packs ("the Proposal")

We refer to the upcoming meeting and special meeting of the Panel on Health Services on 16 and 17 January 2017, and the government's discussion paper of CB(2) 386/16-17(05).

We note the government has received more than 100 submissions from the public, the majority of which allegedly support the Proposal, and it is the government's intention to submit the Proposal to the Legislative Council in the first quarter of 2017. We are writing to express our deep regret of the government's proposed action.

With respect, the government has over-simplified the support it has allegedly received. We understand there is widespread discontent over the Proposal and over 70% of the commercial stakeholders who provided submissions for the Proposal are against it for a wide range of legitimate reasons. We, as brand owner with only a small market share in Hong Kong, are particularly affected by the Proposal. With 85% graphic health warnings, we will not be able to properly brand cigarette packages which will prevent us from communicating our product information and features to the consumers. All in all, the Proposal favours those with larger market shares and is anti-competitive in nature.

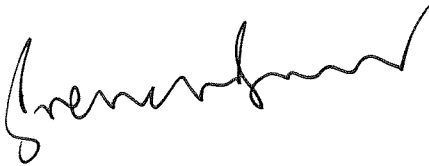
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We have voiced the above concerns in our detailed submission to the Legislative Council dated 23 June 2015 and our submission letter to Dr. Ko Wing-Man, Secretary for Food and Health, dated 28 July 2016. Regrettably, we have not received any written or verbal response from the government to-date. Although, the government did invite us to attend the briefing session on 23 November 2016 on the technical issues, the very short notice did not allow us sufficient time to attend the same. We understand the government has also refused to provide another briefing session to the stakeholders who were not invited. We feel the government has no genuine intention to consult those stakeholders who will be adversely affected by the Proposal. The government's misconceived reliance on Article 5.3 of the Framework Convention on Tobacco Control to exclude the industry provides further support to our belief.

Given the government's intention to submit the Proposal to the Legislative Council in the first quarter of 2017, we are now at the very last stage of the regulatory process. It is with much regret that the government still refuses to conduct a proper study to assess the impact of the Proposal, or at the very least, reply to our concerns raised in our said submission. As such, we urge the government to consider our concerns raised and respond to our said submission formally. For the ease of your reference, we once again attach our said submission.

Yours faithfully,



Brendan Brady
General Manager
CTBAT International Co. Limited



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28 July 2016

Your ref.: FH CR 3/3231/15

Dr. KO Wing-Man, BBS, JP
Secretary for Food and Health,
Food and Health Bureau
18/F, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Sir,

Re: Health Warnings on Tobacco Products Packets and Retail Containers

I am writing on behalf of CTBAT International Co. Limited which is a joint venture company between British American Tobacco and China National Tobacco Corporation.

We refer to your letter dated 31 May 2016 seeking our views on the Government's proposal regarding the captioned matter. We refer further to our written submission dated 23 June 2015 to the Legislative Council Panel on Health Services in respect of the Government's proposal to increase the size of the graphic health warnings for packets and retail containers of cigarette to 85% (the "Written Submission"), a copy of which is now enclosed in this letter.

We are very disappointed that the Government, without going through any proper public consultation or due process, suggest to implement the proposal with an adaptation period of 6 months from the date of publication of the legislative order. This is contrary to what the Special Meeting held on 6 July 2015 by the Legislative Council Panel on Health Services called for – the Government should revert to the Panel on how it would take forward the legislative proposals after communicating with the tobacco industry and the relevant stakeholders having regard to their concerns over the legislative proposals.

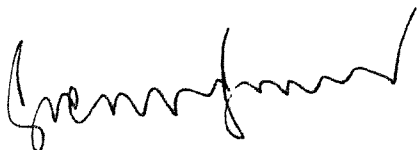
In response to your letter dated 31 May 2016, we reiterate our position and concerns as stated in our Written Submission, and request that our concerns and those raised by the tobacco industry be properly and fairly addressed by the Government. With regard to the operational impracticalities on the adaptation period and the technical issues under the Government's proposal, we understand that the Tobacco Association of Hong Kong and our distributor in Hong Kong (i.e. British American Tobacco Company (Hong Kong) Limited) have respectively made a very thorough submission pointing out the issues involved, seeking clarifications and making counter-proposals. Hence, we rely on their submissions rather than repeat the same views in this letter.

Last but not least, we have to emphasize that

- (1) we strongly oppose Government's proposal to increase the size of the graphic health warnings from 50% to 85%; and
- (2) if the Government were to implement the proposal, the 6-month adaptation period proposed by the Government is extremely inadequate and unreasonable. We counter-propose an adaptation period of not less than 12 months to implement any legislative proposal only after the concerns and issues of the tobacco industry have been appropriately tackled.

We look forward to hearing from you.

Yours faithfully,



Brendan Brady
General Manager
CTBAT International Co. Limited



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Your ref

Date
23 June 2015

By email

Dear Sirs,

Special Meeting on 6 July 2015 - Legislative proposals to strengthen tobacco control

We represent CTBAT International Co. Limited ("CTBAT").

We enclose a Written Submission together with an appendix in respect of the captioned meeting on behalf of CTBAT.

Please do not hesitate to contact us should you have any queries.

Yours faithfully,

Herbert Smith Freehills
Encl.

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**SUBMISSION OF CTBAT INTERNATIONAL CO. LIMITED IN RESPONSE TO THE
GOVERNMENT'S PROPOSAL TO INCREASE THE SIZE OF THE GRAPHIC HEALTH
WARNINGS FOR PACKETS AND RETAIL CONTAINERS OF CIGARETTES TO 85%**

23 JUNE 2015

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Appendix 1: *Ceylon Tobacco Company PLC v MoH & ors* (C.A. no. 336/2012) (13 May 2014)

1. INTRODUCTION

- 1.1 CTBAT International Co. Limited ("**CTBAT**"), makes this submission (the "**Submission**") in response to the proposal by the Hong Kong Government to amend the area of the graphic health warnings and messages for packets and retail containers of cigarettes under the Smoking (Public Health) (Notices) Order (Cap 371B) (the "**Order**"). The Order requires that the area of the graphic health warning shall be of a size that covers at least 85% of two largest surfaces of the packet or of the retail container (the "**Proposal**"). CTBAT submits that the effect of the Proposal will be to increase the size of graphic health warnings for packets and retail containers of cigarettes from 50% as it currently stands, to 85% which is beyond what is necessary or permissible.
- 1.2 CTBAT is a joint venture of the subsidiaries of China National Tobacco Corporation and British American Tobacco. CTBAT is incorporated in Hong Kong and has been operational since August 2013. It owns and manages the worldwide international cigarette trademarks for the cigarette brand State Express 555 as well as the worldwide rights (outside of China) for the cigarette brand Shuang Xi. CTBAT has appointed British American Tobacco Company (Hong Kong) Limited as distributor to sell the Shuang Xi and SE555 products in Hong Kong. CTBAT is relatively new to the Hong Kong market with a small share of approximately 0.8% of the market (0.7% of which is attributable to Shuang Xi and 0.1% to State Express 555).
- 1.3 As explained in detail in this Submission, CTBAT is strongly opposed to the Proposal, especially as a brand owner with only a small share in the Hong Kong market. With 85% graphic health warnings it will not be possible to properly brand cigarette packages in Hong Kong which will prevent CTBAT from increasing the brand awareness and market share of its products relative to those of the competition with greater market share and brand awareness. The Government has not provided any analysis to show that it is necessary to increase the size of the current warnings which already occupy 50% of the front and back of cigarette product packaging, or to demonstrate that the proposed 85% graphic health would be more effective in contributing to the protection of public health.
- 1.4 As explained in this Submission, the Proposal is unlawful. The Proposal would deprive CTBAT of its property rights and the right to use its trademarks as protected under the Basic Law in Hong Kong. The Proposal would also virtually extinguish the last means of CTBAT to identify and differentiate its products from the competition. As such, the Proposal is especially discriminatory towards brands that have only a small market share such that CTBAT's brands would be placed at a considerable disadvantage relative to firms with existing high market shares that enjoy strong brand awareness in Hong Kong.
- 1.5 The Proposal is also fundamentally flawed in that it is not necessary and would not achieve its stated objectives. Evidence demonstrates that increasing the size of the warnings

would not be more effective in increasing awareness (which is already effectively universal) or reducing smoking.

- 1.6 It is clear that a measure, which cannot be shown to be effective, but that would virtually extinguish this last means of communication for a lawfully available product, while resulting in adverse consequences in respect of competition, pricing, the illicit market and public health, cannot be justified or proportionate.
- 1.7 Furthermore, the Proposal is neither required by nor authorised under the WHO Framework Convention on Tobacco Control ("**FCTC**") and would place the Hong Kong Government in breach of its international obligations.

2. **A PROPER IMPACT ASSESSMENT SHOULD BE UNDERTAKEN BEFORE PROCEEDING WITH THE PROPOSAL**

- 2.1 A regulatory impact assessment ("**RIA**") that undertakes a thorough analysis of the Proposal, including whether it is necessary and whether there are less burdensome means of achieving the regulatory objective, ought to be undertaken to enable the Legislative Council to properly scrutinise the Proposal under the negative vetting procedure. The lack of any impact analysis disregards the recommendation made in the RIA undertaken in 2001 in respect of proposed amendments to the Existing Smoking Legislation (the "**2001 RIA**").¹ The 2001 RIA recommended introducing an enabling provision to allow for health warnings to contain pictorial and graphic content, but stated: "*any future requirements for pictorial and graphic contents take into account the likely financial and economic costs of implementation and that these be weighed against the likely health and economic benefits likely to arise.*"² The Legislative Council paper on Progress of Tobacco Control Measures No. CB(2)1456/14-15(07) (the "Paper") doesn't address these issues at all.
- 2.2 An RIA is also the cornerstone of internationally accepted principles of Better Regulation, such as those defined by the Organization for Economic Co-operation and Development and the Asia-Pacific Economic Cooperation of which Hong Kong is a member. The APEC paper *Supporting the TBT Agreement with Good Regulatory Practices*³ states: "*it is impossible to regulate well if the consequences of government action are not understood in advance. Understanding consequences of various options for action more clearly is the main purpose of RIA*".
- 2.3 The failure to undertake a proper evidence based RIA violates these principles and also means that the measure cannot be shown to comply with the obligations under World Trade Organization ("**WTO**") Agreements such as the Agreement on Technical Barriers to Trade ("**TBT Agreement**") or the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**") which mandates that requirements do not constitute an "unnecessary obstacle to trade" or a violation of internationally protected intellectual property rights.⁴

¹ Regulatory Impact Assessment, *Proposed Amendments to the Existing Smoking Legislation*, December 2001, L C Paper No. CB(2)1/02-03(04), available at <http://www.legco.gov.hk/yr02-03/english/panels/hs/papers/hs1025cb2-1-4e.pdf>

² Ibid at p107.

³ *Supporting the TBT Agreement with Good Regulatory Practices*, APEC, March 2012 http://publications.apec.org/publication-detail.php?pub_id=1266

⁴ WTO Members that failed to undertake such impact assessments have been heavily criticized for failing to conduct the necessary impact assessment, including an examination of less trade-restrictive alternatives. For example, the EU questioned Brazil over whether it had properly conducted an impact

- 2.4 The Paper does not include the necessary evidence or analysis to support the implementation of the Proposal. It has not shown that the proposed increase in graphic health warnings from 50% to 85% is necessary, appropriate or proportionate. For example:
- 2.4.1 The Paper does not identify a problem with the existing 50% graphic health warnings or provide any evidence to demonstrate that increasing the size of graphic health warnings from the current 50% to 85% is necessary. As explained at section 5 of this Submission, the increase in the size of the graphic health warnings from the current 50% to 85% is neither necessary, including because there is already universal awareness of the risks of smoking, nor adequate as a public health measure. The proposed size of 85% graphic health warnings in the Paper is purely arbitrary and has no evidential basis at all.
- 2.4.2 The Paper doesn't address whether the Proposal is lawful. As explained in section 4 of this Submission, the Proposal violates Articles 6 and 105 of the Basic Law and is therefore inconsistent with the Basic Law. CTBAT as a brand owner with a small market share in Hong Kong is particularly prejudiced by the Proposal, which would prevent its ability to increase brand awareness (and therefore market share at the expense of its competitors) and compete in Hong Kong. The Paper is therefore neither a sufficient nor rational basis on which to introduce the proposed increase of graphic health warnings to 85%.
- 2.4.3 The Paper does not provide any analysis or evidence on the impact of the proposed increase in the size of graphic health warnings from 50% to 85%. The Paper fails to consider the costs of the Proposal and in particular the impact on trademarks, or consider alternative policies.
- 2.5 Accordingly, a proper RIA should be carried out before proceeding further with the Proposal.

3. THE PROPOSAL WOULD RENDER TRADEMARKS INEFFECTIVE

3.1 The primary role of a trademark is to enable a firm to identify and distinguish its goods from similar products. Trademarks are essential for product differentiation and thus for competition in the market. They are an important tool to permit market penetration and facilitate local and international trade. Trademarks can only perform these functions if they can be effectively used as they were registered.

3.2 Trademarks are often the most valuable asset that a firm possesses and are at the center of the global economy, as recognized by a recent report of the World Intellectual Property Organization World Intellectual Property Report 2013: Brands – Reputation and Image in the Global Marketplace.⁵ According to this report, the "public good" of trademarks exists in their functional use as a communication tool. The report notes that "*the trademark system provides the legal framework underpinning [consumer] confidence*", and "*trademarks play an important role in preventing market failure*". It concludes that "*society is bound to be worse off without the "market-enabling role of trademarks"* as, without protected trademarks, consumers can no longer gain access to the product reputation mechanism to guide their purchases and producers have a reduced incentive to invest in product differentiation, thus undermining product quality and diversity. This would gravely damage the interests of consumers in general.

3.3 A recent decision of the Court of Appeal of Sri Lanka confirmed the right of tobacco firms to use their trademarks and the requirement to allow sufficient space on packaging for trademarks. The court there held that 80% graphic health warnings on cigarette packages would not allow sufficient space to display trademarks and directed that the size of the graphic health warnings should only occupy a space of 50% to 60% of the pack. The Court stated:

"Having considered the size of the packs and other relevant facts, I am of the view that 20% of the space is not reasonably sufficient to present and exhibit a trademark. 20% of the space is not exclusively left for the trademark. It may carry other information as well. In such a space, the presentation of the trademark necessarily becomes comparatively very small. The owner of a trademark cannot reach the consumers with his mark which is hidden in the health warning. The consumers will also not be able to see and identify the trademark properly and consequently the source of the respective goods. They have to make extra efforts to see or identify the trademark, when they buy the goods. Such a situation will unreasonably interfere with the statutory right of the owner of the trademark to use it frustrating the whole purpose of a trademark and of the trademark law"; and

"This court observes that a balance need [sic] to be maintained, having considered the case of either party. Health of each and every citizen of our country and all those living in

⁵ Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf.

Sri Lanka permanently or in a temporary capacity is paramount and need to be protected. On the other hand a legally established business/industry cannot be denied its legitimate rights, flowing from the laws of our country. If 80% of the space is covered by health warnings the remaining space would not be sufficient to display the manufacturers' trade mark." A copy of the decision of the Court of Appeal of Sri Lanka is submitted with this Submission (see Appendix 1).

- 3.4 Trademarks perform valuable functions for both consumers and the firms that own them. Trademarks allow firms to identify, and distinguish their products from those of their competitors, and enables consumers to recognise and identify different brands based on factors such as source, origin or other characteristics they prefer. Trademarks symbolize a product's quality and features, and guarantee that the goods or services measure up to expectation. The use of trademarks on packaging is also a very important tool in allowing market penetration as they allow firms to build brand awareness. Trademarks are therefore essential to fostering fair market competition. This is particularly critical to CTBAT as a relatively new entrant to the Hong Kong tobacco market with a small market share relative to the competition.
- 3.5 In Hong Kong, where there is already a broad ban on advertising and sponsorship of cigarettes, the limited space available on cigarette packs for trademarks is the only tool firms have to identify and differentiate their products from competitive offerings. The result of increasing the size of the graphic health warnings from 50% to 85% is to effectively do away with the distinguishing role of trademarks and branding by making it nearly impossible for firms to properly use their trademarks, logos and other intellectual property. The trademarks will therefore be unsuccessful in fulfilling their essential function of differentiating products, which will in turn result in a loss of the value of the intellectual property together with the loss of investment in that intellectual property – including the trademarks and the good will associated with the brand.
- 3.6 As a new entrant to the Hong Kong tobacco market with a small market share, CTBAT is reliant upon the strength of its trademarks to establish a presence and compete in Hong Kong. As discussed above, the increase in size of the graphic health warnings from 50% to 85% will effectively make it impossible for CTBAT to use the branding, logos and other intellectual property associated with the State Express 555 and Shuang Xi brands to distinguish those brands from competitors' brands. This will not only make it impossible for CTBAT to increase brand awareness, it will also result in the value of the intellectual property associated with the State Express 555 and Shuang Xi brands, as well as the investment in the brand in Hong Kong being significantly diminished. The images below demonstrate how the use of CTBAT's trademarks will be affected by the Proposal.

香港特區政府忠告市民



吸煙引致末梢血管疾病

焦油：6 毫克 尼古丁：0.8 毫克



BLEND NO. 555
GOLD PEARL

戒煙熱線：1833 183



吸煙帶來痛苦
生不如死

BLEND NO. 555
GOLD PEARL

香港特區政府忠告市民



吸煙可加速皮膚老化

焦油：12 毫克 尼古丁：1.1 毫克

雙喜牌香烟



經典双喜
CLASSIC DOUBLE HAPPINESS CIGARETTES

戒煙熱線：1833 183



吸煙帶來痛苦
生不如死

經典双喜
CLASSIC DOUBLE HAPPINESS CIGARETTES

HKSAR GOVERNMENT WARNING



SMOKING CAN ACCELERATE
AGEING OF SKIN

TAR : 11 mg NICOTINE : 1.1 mg



BLEND NO. 555
ORIGINAL

戒煙熱線：1833 183



吸煙帶來痛苦
生不如死

BLEND NO. 555
ORIGINAL

4. THE PROPOSAL IS UNLAWFUL

4.1 The right to property is enshrined as a fundamental right under the Basic Law. It extends to rights associated with intellectual property, including trademark rights and associated business goodwill. The Proposal to increase the area of the graphic health warnings on tobacco packaging in Hong Kong to cover at least 85% of two largest surfaces of the packaging would prevent CTBAT from meaningfully using its intellectual property rights and would thereby contravene the fundamental right to property guaranteed under Basic Law.

4.2 The Basic Law expressly protects property rights under the following provisions:

Article 6

The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

Article 105

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.

4.3 That both tangible and intangible rights are protected under the concept of property rights in Hong Kong is clear from the decision in *Michael Reid Scott v The Government of HKSAR* (HCAL 188/2002), where the court found that that property (for the purposes of Article 105) is a very wide concept and requires a "wide and purposive interpretation". Following from this, it is clear that intangible rights including intellectual property and business goodwill and reputation rights are protected under Article 105 of the Basic Law. Section 10(1) of the Trade Mark Ordinance (Cap. 559) also provides that a "*registered trade mark is a property right obtained by the registration of the trade mark under this Ordinance*" and section 27(1) provides that a "*registered trademark is personal property*".

4.4 The concept of "use" of a trademark involves use on or in relation to goods to distinguish them from competitors' goods. The Proposal would make it impossible to use a number of trademarks consisting of logos and other devices placed at certain positions on the pack (including, but not limited to, position marks and entire pack marks). The right to use these trademarks is eliminated. The following are some examples of device, logos, label and full pack trademarks that are registered or currently pending registration in Hong Kong for CTBAT brand products sold in Hong Kong that will be impacted by the Proposal.



SHUANGXI

SHAUNGXI



STATE EXPRESS



- 4.5 In addition, the proposed 85% graphic health warnings have such a severe impact on the use of other trademarks that they would effectively deprive owners of the 'use' right. In addition to trademark rights, the goodwill associated with the packaging of CTBAT's products and used in connection with their sale would also be adversely affected. Generally, the longer a trade dress has been in use, the more valuable it will be as a tool to help visually distinguish the product from those manufactured or marketed by competitors. This is all the more important given that the effect of the Proposal will be to allow a maximum of only 15% of cigarette packaging to bear the relevant trademark, logo and reflect the trade dress.
- 4.6 In *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, the Court of Appeal in Hong Kong considered Article 105 of the Basic Law and held that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances properly be described as deprivation. The Court held that "*deprivation*" in this context contemplates the removal or denial of all meaningful use, or all economically viable use, of the property.
- 4.7 The following special features of the tobacco products further exacerbate the vulnerability of tobacco firms in Hong Kong to deprivation of their property rights:
- 4.7.1 All advertising of tobacco products has already been banned in Hong Kong, such that the use of trademarks on packaging is the last remaining means of communication between the firms and the consumer;
- 4.7.2 The physical size of the product packaging is small;
- 4.7.3 The likely manner of purchase of cigarette products at point of sale where a whole host of different brands are grouped and displayed together (which is unique to cigarette sale), make it imperative for a packet to be readily recognisable not only by its brand name but by the display of the trade dress in a reasonably sufficient space on the packaging.
- 4.8 Although there may still be room left for applying some word and device trademarks, the space left for displaying the trademarks being a maximum of 15% of the two largest surfaces of the packet and retail container, is patently insufficient to effectively differentiate the product from the competition. This leaves the trademark without its function as an identification of the commercial origin and the quality of the underlying product. In order to serve as a source-identifier, a sign must be easily identifiable and widely visible on the pack space. Where only 15% of the packet is left for the display of trademarks and the package is dominated by oversized graphic health warnings, this requirement cannot be fulfilled. The decision of the Court of Appeal of Sri Lanka, discussed in section 3 above, demonstrates that when graphic health warnings become too large, as would be the case with 85% graphic health warnings, trademarks can no longer serve their essential functions

and the right to use is infringed.

- 4.9 The Proposal will therefore remove or deny all meaningful use or all economically viable use of the trademarks and thereby constitutes a deprivation of the property of the trademark owners. In addition to stripping CTBAT of its rights to use its trademarks and depriving it of the associated intellectual property, the Proposal would place firms with existing brands with a relatively small market share (such as CTBAT) at a considerable disadvantage relative to large incumbent brands with existing high brand awareness. For CTBAT to compete and increase its market share relative to its competitors in circumstances where it cannot use its trademarks, branding or packaging appropriately will be next to impossible.
- 4.10 The practical sterilization of CTBAT's property, by reason of the requirement to print warnings covering over 85% of the surfaces in the packing amounts to a deprivation of intellectual property rights and the associated goodwill that CTBAT has cultivated over years of investment, which rights are protected under the Basic Law.

5. THE PROPOSAL IS DISPROPORTIONATE

5.1 As has been discussed above, the Government has not shown how the Proposal is either necessary to or will be effective in the protection of public health, especially in the context where there already is a current legal requirement that graphic health warnings occupy 50% of the front and back sides of cigarette packets.

5.2 As laid down in the Hong Kong Court of Appeal decision in *Mok Charles v Tam Wai Ho*⁶, the principles of proportionality require administrative acts to meet the following three-pronged test:

5.2.1 The restrictions or limitation must pursue a legitimate aim;

5.2.2 The restrictions or limitations must also be rationally connected to that legitimate aim;

5.2.3 The restrictions or limitations must also be no more than is necessary to accomplish that legitimate aim.

5.3 The Government has the burden of showing that the Proposal meets the above requirements. As noted above the Government has not prepared an RIA in relation to the Proposal. Absent this analysis, it cannot be demonstrated that the above requirements have been met.

5.4 The Proposal must also be considered in the context that the current graphic health warnings already occupy 50% of the front and back sides of cigarette packs. The Government has not adduced any evidence to show either (a) that the current size of graphic health warnings are inadequate or insufficient to achieve their intended purpose, namely to inform the public of the health risks associated with smoking, or (b) that the incremental increase in the size of the graphic health warnings from 50% to 85% will more effectively achieve that purpose than the current size of 50%.

(A) THERE IS NO LEGITIMATE PURPOSE THAT REQUIRES THE PROPOSAL

5.5 As laid out in *Mok Charles v Tam Wai Ho*, the first limb of the three prong test to be satisfied in determining whether the principle of proportionality has been met is to identify and establish whether the measure has a legitimate aim and is geared to solving a specific problem. The Government must be able to identify a specific and addressable problem before it can show why the proposed increase in warnings size from 50% to 85% is required and how it will address the problem identified.

5.6 In the instant case, there is no underlying problem the requires further increasing the warnings size from 50% to 85% because:

⁶ (2010) 13 HKCFAR 762.

- 5.6.1 Public awareness in Hong Kong about the risks of smoking cigarettes is effectively universal, with widespread exposure of the public to anti-smoking messages as well as the current requirement to display large 50% graphic health warnings on tobacco product packaging. This high level of awareness includes youth, as demonstrated by the independent 2009 Global Youth Tobacco Survey (GYTS) data for Hong Kong which found that 95.4% of respondents answered 'Definitely Yes' (89.8%) or 'Probably Yes' (5.6%) to the question 'Do you think cigarette smoking is harmful to your health?'. The use of education and media campaigns has ensured that youth are well aware of the risks of smoking.
- 5.6.2 This high level of awareness is also indicative of the fact that the current cigarette packets, which already have graphic health warnings occupying 50% of the front and back of the packets, do not mislead customers and that the current warnings are more than adequate for communicating the risks of smoking.
- 5.6.3 Furthermore, existing laws are sufficient to meet any demonstrable concerns regarding deceptive packaging. The existing protections against false or misleading trade descriptions on goods including tobacco products under sections 6 and 7 of the Trade Descriptions Ordinance (Cap.362), in addition to the extensive restrictions on sale, advertising and giving of tobacco products under the Smoking (Public Health) Ordinance (Cap.371), are sufficient to address any allegedly misleading elements of packaging, while also respecting the choices and rights of adults who choose to use tobacco products and allowing tobacco firms, as a part of a legal industry, to communicate with consumers
- 5.6.4 The use of trademarks on packaging is also not a driver of smoking behaviours. The true drivers of smoking initiation have been identified through a number of studies and by leading public health authorities as a wide variety of psychosocial risks factors, including low socioeconomic status, tobacco accessibility, sibling use, peer use, normative expectations, academic achievement, social support, problem behaviours, expected utility, self-esteem and self-image, personality factors, and psychological well-being⁷.

⁷ See, e.g., US Department of Health and Human Services. "Preventing tobacco use among young people: A report of the Surgeon General" (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use). See also US Department of Health and Human Services, "Preventing tobacco use among youth and young adults: A report of the Surgeon General" (2012), at Ch. 4 (reinforcing findings of 1994 Surgeon General's report with added emphasis on individual cognitive processes).

- 5.7 Given the absence of any problem requiring the increase in graphic health warnings, the Proposal to increase the size of graphic health warnings must be disproportionate as it cannot be necessary to serve a legitimate objective.
- (B) THERE IS NO RATIONAL NEXUS BETWEEN AN INCREASE IN THE SIZE OF GRAPHIC HEALTH WARNINGS FROM 50% TO 85% AND THEIR EFFECTIVENESS AS A PUBLIC HEALTH MEASURE.

Increasing the size of graphic health warnings to 85% would not reduce smoking.

- 5.8 A proper evidence-based analysis demonstrates that graphic health warnings do not reduce smoking prevalence. The Government has not cited any existing studies or commissioned any studies to support its assertion that increasing the size of graphic health warnings from the current 50% to 85% will reduce smoking prevalence.
- 5.9 There is no evidence demonstrating that simply increasing the size of a warning to convey risk information that people are already aware of and they can ascertain from existing warnings, would change their smoking behaviour. If the Government is genuinely concerned about the levels of awareness and feel that the current warnings are not adequate (which is not demonstrated), the proper solution would be to change the content of the warnings so that they are more relevant to consumers as opposed to increasing the size of the warning which serves no beneficial purpose.
- 5.10 The Government has also failed to consider the experience from other jurisdictions in analysing the effectiveness of an increase in the size of graphic health warnings. In particular, and in contrast to the Government's lack of any impact assessment, analyses undertaken by the U.S. Food and Drug Administration ("**U.S. FDA**") on the effectiveness of graphic health warnings in 2010 and 2011, which is the most comprehensive analysis undertaken by any country to date, failed to find any impact of graphic on smoking prevalence.
- 5.11 The U.S. FDA undertook two types of studies to test the effectiveness of proposed 50% graphic health warnings. The first line of inquiry consisted of statistical analyses of the effect of graphic health warnings on smoking prevalence rates. The other approach was a large scale experimental study of the effect of different types of graphic health warnings. Neither study indicated that there would be an effect of graphic health warnings on smoking behaviour.
- 5.12 The statistical analyses analysed the expected benefits of proposed graphic health warnings on smoking behaviours in the United States by comparing the impact of similar warnings introduced in Canada in 2000. Based on this comparison, the U.S. FDA estimated that the proposed graphic health warnings would only reduce U.S. smoking rates by 0.088%, a number that the U.S. FDA conceded is "*in general not statistically*

distinguishable from zero".⁸ The U.S. FDA acknowledged that "*we therefore cannot reject, in a statistical sense, the possibility that the rule [introducing graphic health warnings] will not change the U.S. smoking rate*".⁹

- 5.13 As a second level of analysis, the U.S. FDA commissioned a survey to measure consumer attitudes, beliefs, perceptions, and intended behaviours related to cigarette smoking in response to selected 50% graphic warning labels (the "**FDA Study**"). The FDA Study included approximately 18,000 participants and is the largest study of consumer responses to cigarette GHWs ever conducted. This study tested the relative efficacy of 50% graphic warnings relative to a control of a text warning statement only. The control group viewed a pack of cigarettes with just a text warning statement presented on the side of the packet in accordance with the current standard warning on cigarette packets in the US. The treatment groups (exposed to warning images) viewed a hypothetical pack of cigarettes that included the graphic warning label. The FDA Study failed to find a consistent pattern of significant effects on risk beliefs for a wide variety of possible graphic health warnings. Notably, the authors concede that "*[t]he graphic cigarette warning labels did not elicit strong responses in terms of intentions related to cessation or initiation.*"¹⁰
- 5.14 Putting aside the methodological limitations of this study, it is clear from the data that the proposed warning labels were ineffective at increasing smokers' stated intentions to quit. The study considered nine different cigarette warnings for which the study examined an average of four different graphics approaches for each warning. The consistent result was that, irrespective of the warning or the graphic illustration accompanying it, there was no evident effect on quit intentions or other smoking-related behaviours for any of the sample groups.
- 5.15 It is telling that the U.S. FDA analysis failed to find any benefit of graphic health warnings above the current text warnings on the side of cigarette packets in the U.S. It must therefore be even more unlikely that merely increasing the size of existing graphic health warnings, as in the case of the Proposal, would have any benefit. This is particularly so when the existing warnings are clearly visible to consumers and the public are well informed about the risks of smoking.
- 5.16 Notwithstanding that the U.S. FDA's own analysis and study did not find any support for the effectiveness of proposed GHWs, the U.S. FDA proceeded to introduce the warnings.

⁸ U.S. Dept. of Health and Human Services, Food and Drug Administration, Required Warnings for Cigarette Packages and Advertisements, Federal Register, Vol. 75, No. 218, Nov. 12, 2010, p. 69546.

⁹ *Ibid.*

¹⁰ Nonnemaker, J., et al., Experimental Study of Graphic Cigarette Warning Labels: Final Results Report Prepared for Center for Tobacco Products, Food and Drug Administration, Contract No. HHSF-223-2009-10135G

However, the U.S. courts overturned this regulation in 2012, finding that the proposed GHWs were unconstitutional. The U.S. Court of Appeals for the D.C. Circuit concluded that there is a lack of evidence to establish the efficacy of GHWs. The Court stated:

"FDA has not provided a shred of evidence—much less the “substantial evidence” required by the APA [Administrative Procedures Act]—showing that the graphic warnings will “directly advance” its interest in reducing the number of Americans who smoke.

...

FDA's Regulatory Impact Analysis (“RIA”) essentially concedes the agency lacks any evidence showing that the graphic warnings are likely to reduce smoking rates.... In light of the number of foreign jurisdictions that have enacted large graphic warning labels, the dearth of data reflecting decreased smoking rates in these countries is somewhat surprising, and strongly implies that such warnings are not very effective at promoting cessation and discouraging initiation.”¹¹

- 5.17 It must be considered that if the Government had undertaken a proper evidence-based analysis it would have reached a similar outcome to the U.S. FDA, namely that increasing the size of the existing warnings would not be effective in reducing smoking prevalence, particularly given the existing awareness of the current warnings and of the health risks of smoking. There is no sound evidence to show that larger graphic health warnings are more effective in increasing levels of awareness or in modifying smoking behaviour.

Further increasing the size of graphic health warnings from 50% to 85% would distort competition, drive down prices which would lead to an increase in consumption

- 5.18 As has been discussed at Section 4, where graphic health warnings are increased to 85%, the ability of firms to differentiate their products on the basis of branding and trademarks will be lost and price will be the sole remaining competitive factor. This would place firms with existing brands with a relatively small market share (such as CTBAT) at a considerable disadvantage relative to large incumbent brands with existing high brand awareness. For CTBAT to compete and increase its market share relative to the competition in circumstances where it cannot use its trademarks, branding or packaging appropriately will be next to impossible.
- 5.19 Commoditization of a market and movement to pure price competition will also lead to price reductions as firms attempt to compete. A natural corollary of such reduced prices will be an increase in consumption as tobacco becomes more affordable to lower income groups and to the youth. This would undermine the apparent objective of the proposed measure.

¹¹ (2012) R.J.Reynolds Tobacco Company, et al., Appellees v FDA, et al., Appellants, No. 11-5332, Appeals from the United States District Court for the District of Columbia (No. 1:11-cv-01482).

Further increasing the size of graphic health warnings from 50% to 85% would incentivise illicit trade

5.20 Further increasing the size of graphic health warnings to 85% would also exacerbate an already significant illicit trade in tobacco products in the following ways:

5.20.1 Removing the incentive to pay premiums for products that no longer look or feel premium would drive prices down across all cigarette market segments, conferring a competitive advantage to those able to supply the lowest cost product – i.e. the illicit trader. As a Morgan Stanley research note on tobacco and illicit trade points out:

"...to the extent that brand equity is degraded over time, it could result in lower tobacco prices than would otherwise have been the case (presumably resulting in higher tobacco consumption), and a potential substantial increase in illicit volumes."¹²

5.20.2 The market in illicit fully branded products would grow in response to demand from those consumers who would rather continue using the fully branded product they are used to. This is likely to be sourced either through illegal supply from other countries where the use of trademarks are legitimately protected, or by suppliers of counterfeit branded product.

5.21 Not only would this increase in illicit trade severely undermine the public health objectives – i.e., the proliferation of cheap legal and illicit products would stimulate demand for tobacco products rather than reduce it – but, it would also have a significant impact on government revenues and society in general through increased criminal activity, and would further undermine public health by:

5.21.1 increasing youth access to tobacco products; and

5.21.2 exposing consumers to unregulated products with no controls on hygiene standards and ingredients, or compliance with other product regulation including ceilings on tar, carbon monoxide and nicotine levels.

(C) FURTHER INCREASING THE SIZE OF GRAPHIC HEALTH WARNINGS FROM 50% TO 85% WOULD NOT BE PROPORTIONATE

5.22 The interference resulting from the Proposal goes to the very essence of the fundamental rights of property and so the requisite thresholds for justification and proportionality are at their highest. The burden imposed by the 85% graphic health warning requirement would

¹² Tobacco – Legitimate Manufacturers or Illicit Trade? A Stark Choice", Morgan Stanley Research, July 2, 2012.

manifestly outweigh any possible benefit. This is of course clear from the fact that the benefits are illusory, as set out above.

5.23 As explained above, the Proposal would also deprive CTBAT of its extremely valuable intellectual property rights; namely, its trademark rights together with the goodwill arising in its brands. Given the commercial value of CTBAT's trademarks and valuable goodwill, the loss caused by the Proposal would clearly be very substantial.

5.24 The increase in the size of graphic health warnings to 85% would be particularly damaging for CTBAT which is a relatively new entrant to the Hong Kong market, with a very small market share. The loss of use of intellectual property rights for CTBAT would mean, in addition to the financial loss associated with the property rights, an inability to communicate with customers to create brand awareness in order to compete for market share.

5.25 The Proposal is also disproportionate for the following further reasons.

85% graphic health warnings go beyond what is necessary to effectively warn consumers

5.26 Large graphic health warnings that effectively rebrand cigarette packs, such as the 85% graphic health warnings proposed, are also unnecessary for the purpose of effectively conveying warnings to consumers. There is no evidence that consumers are unable to comprehend the current warnings which already occupy 50% of the front and back of the pack.

5.27 Furthermore, concerns that the current 50% warnings are worn out and that there are lower levels of awareness of specific illnesses—evidence of which the Government has not identified—can be met by changing the current warning content and do not require increasing the size of the warnings. Accordingly, 85% graphic health warnings would go beyond what is necessary to effectively warn consumers.

There are a number of more effective and less intrusive measures

5.28 Additional regulatory measures should:

5.28.1 Allow firms and retailers to communicate products and prices effectively to consumers;

5.28.2 Permit effective competition between firms and allow new products and new entrants into the market; and

5.28.3 Avoid, or at least minimise as far as possible, adverse unintended consequences, particularly the potential for increased consumption and illicit trade.

5.29 Existing laws that prevent false or misleading trade descriptions of goods are sufficient to meet any demonstrable concerns while also respecting the choices and rights of adults who choose to use tobacco products and allowing tobacco firms, as a part of a legal

industry, to communicate with consumers. Enforcement of these laws should be undertaken, if required, before introducing more unnecessary regulation.

5.30 Further, the existing 50% graphic health warnings are sufficient for the purpose of informing consumers about the hazards of tobacco use. Such warnings comply with the obligations under the FCTC, while minimising the violation of the rights of firms and obligations under other international agreements.

5.31 There are also a number of alternative regulations that are more effectively targeted to reducing youth smoking. For example:

5.31.1 Reducing youth access to tobacco products, by for example:

- (A) Rigorous enforcement of existing laws forbidding retailers to sell to minors and/or the implementation of additional age verification measures.
- (B) Creating an offence of proxy purchase. Such a measure would target directly against minors' access to cigarettes and would close off a significant avenue by which minors get cigarettes.
- (C) Creating an offence of youth purchase. As in the case of a proxy purchasing offence, criminalising purchases by minors is a targeted measure. The risk of criminal prosecution may also act as a deterrent for minors. Similar measures have been adopted in relation to the purchase of alcohol, and evidence suggests that such measures are effective in reducing sales.
- (D) Creating an offence of smoking by minors in public. Again, such a prohibition is targeted, may have a deterrent effect on minors, and has the potential to limit "out of home" smoking by them.

5.31.2 Implementing more targeted youth education programmes aimed at preventing young people from taking up smoking. A significant body of research, including research by the Nobel prize-winning economist James Heckman, establishes that early childhood interventions that affect personality traits and cognitive skills supportive of health can be effective policy tools in preventing unhealthy behaviour, such as smoking.¹³

5.31.3 Implementing a consistent tax policy that discourages youth uptake of smoking while disincentivising adult consumers from purchasing illicit products;

¹³ Heckman J. "Skill formation and the economics of investing in disadvantaged children" *Science*, 312(5782), 1900-1902 (2006); Feeny T. "The case for investing in early childhood. A snapshot of research by Professor James Heckman (University of Chicago, USA) and Dr. Richard Tremblay (University of Montreal, Canada)", (April 2006).

- 5.31.4 Increasing measures to prevent the trade of illicit tobacco;
- 5.31.5 Using targeted warnings to address any perceived information deficits. To the extent that the Government is concerned about any specific information deficits about the health risks of smoking (despite the well-established nature of the public's awareness of these risks), it can remedy these concerns through focussed warning messages that would provide the appropriate, purportedly "unknown" information to targeted populations.

6. **THE PROPOSAL IS NEITHER REQUIRED NOR AUTHORISED BY THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL**

- 6.1 The Paper relies on WHO Guidelines to the FCTC as the basis for the Proposal. However, the FCTC neither requires nor authorises the increase in the size of graphic health warnings to 85%. Hong Kong's existing graphic health warnings of not less than 50% are already over and above the FCTC requirements. Paragraph 15 of the Paper is incorrect.
- 6.2 Article 11 of the FCTC requires that a Party shall "*adopt and implement, in accordance with its national law, effective measures to ensure that*" tobacco product packaging carries health warnings in the form of text warnings covering "*no less than 30% of the principal display areas*" of packages. The FCTC only suggests that such warnings "should" (not "shall") cover 50% or more of the principal display areas and "may" (not "shall") be in the form of or include pictures or pictograms.
- 6.3 Furthermore, the guidelines to Article 11 of the FCTC which call for parties to consider warnings that cover no less than 50% and to use pictures, do not impose any binding obligations. The guidelines are only "*intended to assist Parties in meeting their obligations*" under the FCTC and do not create legally binding obligations.
- 6.4 Accordingly, in order to comply with its binding legal obligations under the FCTC, a Party must issue a notification or law, consistent with national law, so as to adopt and implement "effective" textual warning labels on tobacco packaging covering not less than 30% of the principal display area. Hong Kong's existing graphic health warnings of not less than 50% are already over and above the FCTC requirements. Accordingly, there is nothing in the FCTC that requires increasing the size of graphic health warnings to 85%.
- 6.5 Importantly, the FCTC does not authorise Parties to implement or issue measures that breach national law-making criteria or procedures, which is the case with the graphic health warnings of not less than 85% required under the Proposal. Article 11 of the FCTC expressly states that the implementation of measures shall be: "*in accordance with [a Party's] national laws*". Article 5(2) of the FCTC, which sets out the general obligations of parties, similarly acknowledges that the implementation of tobacco control measures must be in "*accordance with [Parties'] capabilities*". Therefore, the FCTC cannot be relied on as a basis for issuing the Proposal.
- 6.6 Article 2.1 of the FCTC also confirms Parties' obligations to comply with international laws in respect of the implementation of any measures that exceed a party's obligations under the FCTC. It provides that: "*nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law*" (emphasis added). Thus, the graphic health warnings of not less than 85% required under the Proposal, which go far beyond the requirement in the

FCTC to impose a textual warnings covering 30%, must be "in accordance with international law." However, as explained above, the 85% graphic health warnings required under the Proposal violate Hong Kong's international obligations under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights and the Paris Convention.

- 6.7 The Paper incorrectly relies on the FCTC to justify the increase in graphic health warnings from 50% to 85% when in fact the FCTC only obliges Hong Kong to maintain 30% textual warnings and the existing graphic health warnings of not less than 50% are already over and above the FCTC requirement. Accordingly, the Proposal is not necessary to meet the requirements of FCTC.

7. THE PROPOSAL WOULD VIOLATE HONG KONG'S INTERNATIONAL OBLIGATIONS.

World Trade Organization Agreements

- 7.1 The increase in size of graphic health warnings to 85% of pack surfaces is entirely inconsistent with Hong Kong's obligations under the WTO Agreements, namely: (i) the TRIPS Agreement (and the related Paris Convention for the Protection of Industrial Property ("**Paris Convention**")), and (ii) the TBT Agreement.
- 7.2 The proposed 85% graphic health warnings would undermine intellectual property rights by adversely affecting the use of trademarks on the packaging of tobacco products and the enforcement of trademark rights. As a result of their impact on internationally protected trademark rights, the graphic health warnings must be analysed under the provisions of the TRIPS Agreement. In particular, the 85% graphic health warnings would impose special requirements that encumber the use of trademarks, including preventing the use of certain validly registered trademarks, thus violating Articles 15, 16, and 20 of the TRIPS Agreement and several trademark-related provisions of the Paris Convention, such as Articles 6*quinquies* and 10*bis*.
- 7.3 Article 20 of the TRIPS Agreement provides that use of trademarks in the course of trade shall not be "*unjustifiably encumbered by special requirements, such as ... 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*".
- 7.4 The proposed increase to 85% graphic health warnings would constitute a "special requirement" because it would be mandatory; and the requirement is specifically limited to certain tobacco products and the position and size of the graphic health warnings on the tobacco packaging is specifically regulated (thus constituting "special" requirements).
- 7.5 The 85% graphic health warnings would encumber the use of trademarks by requiring their use in a manner that is detrimental to the capability of the trademarks to distinguish products. The 85% graphic health warnings would prevent the use of trademarks registered for the entire pack and impair trademarks' identification and distinguishing functions. The Proposal also prescribes the use of trademarks in a special form as those limited trademarks which could still be used have to be adapted to fit the limited remaining space on the pack.
- 7.6 Article 20 of TRIPS confirms that a measure that requires use in a special form or use in a manner that is detrimental to the capability of the trademarks to distinguish products is *ipso facto* an "*unjustifiable*" encumbrance. This means that the Proposal cannot be justified under TRIPS. However, even if the measure could be justified, the absence of any contribution to the reduction of smoking rates, let alone a material reduction, and the availability of less trademark-restrictive alternative measures that are equally or more

effective, confirms that the encumbrances resulting from the 85% graphic health warnings are not "necessary" and thus certainly not "justifiable" under Article 20 of TRIPS.

7.7 The proposed 85% graphic health warnings would also violate the basic principles that protect the function of trademarks and the minimum guaranteed rights that are reflected in Articles 15 and 16 of the TRIPS Agreement:

7.7.1 Article 15.1 provides that "*[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark*". The ordinary meaning of a "trademark" is a sign used to distinguish products. Article 15.1 thus requires Members to allow "any distinctive sign" to be capable of constituting a "trademark" irrespective of the form or category of the sign. Where graphic health warnings are of such a size that they make the use of a specific sign (e.g., logo or combination marks) impossible (as would be the result from increasing the size of graphic health warnings to 85%), these signs would no longer be capable of constituting a trademark as properly defined under the TRIPS agreement.

7.7.2 Article 15.4 provides that "*[t]he nature of the goods or service to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark*". Article 15.4 confirms therefore that the nature of the product cannot be an obstacle to registration. It also confirms that trademarks are intellectual property rights that must be examined and protected independently of the product or service to which they are applied.

7.7.3 Article 16.1 of the TRIPS Agreement provides an exclusive right to the owner of a trademark to prevent others from using identical or similar signs on identical or similar goods, when such use is likely to cause confusion. Article 16.3 provides additional protection to owners of well-known marks from unauthorized use of similar signs even on dissimilar goods, if such use indicates a connection and is likely to cause damage to the interests of the trademark owner. A mark obtains and maintains this well-known status as a result of frequent and widespread use in the relevant market. The more intensive use of the mark, the stronger the mark becomes and the greater scope of protection it enjoys because of an increased likelihood of confusion between marks. Increasing the size of graphic health warnings to 85% would prevent or impair trademarks from being used on the product packaging, thereby undermining the ability of registered trademark owners to maintain the distinctiveness and associations between the trademark and the product that are required to exercise these rights effectively and to establish "confusion" in any infringement proceeding. A well-known mark that

can no longer be properly used will lose its special status and extended scope of protection under Article 16.3. Increasing the size of graphic health warnings to 85% would therefore violate the obligation to guarantee a minimum level of protection for registered trademarks and well-known marks under Articles 16.1 and 16.3 of the TRIPS Agreement.

- 7.8 Furthermore, increasing the size of graphic health warnings to 85% would not only violate the provisions of the TRIPS Agreement discussed above but also violate Articles 10*bis* and 6*quinquies* of the Paris Convention because they mandate confusion that causes unfair competition and fail to ensure protection of the trademark "as is" registered and protected in other countries that are parties to the Paris Convention. As opposed to protecting against unfair competition and prohibiting acts that create confusion, 85% graphic health warnings would allow for the kind of confusion and unfair competition that a WTO Member is under an obligation to prevent. Such confusion and unfair competition are, in effect, mandated because the 85% graphic health warnings would make all cigarette packs look almost identical and will suggest that all products are essentially the same in terms of their characteristics. Accordingly, by requiring the confusion that it was obligated to prevent under Article 10*bis*, increasing the size of graphic health warnings to 85% would violate Hong Kong's obligation under Article 10*bis* of the Paris Convention.
- 7.9 Furthermore, increasing the size of graphic health warnings to 85% would be inconsistent with Article 2.2 of the TBT Agreement as it would create an unnecessary obstacle to trade because it would:
- 7.9.1 significantly limit market entry for imported tobacco products;
 - 7.9.2 reduce product differentiation and lower the value of imported products; and
 - 7.9.3 strongly disincentives exports to Hong Kong because of the required adaptation costs and the potential risk of penalties for non-compliance.
- 7.10 The trade restrictive nature of the proposed increase in the size of graphic health warnings to 85% cannot be justified. This is because first, as discussed below, there is no evidence to suggest that increasing the size of graphic health warnings would make a material contribution to the achievement of their legitimate public health objective (given the evidence that graphic health warnings do not actually reduce smoking prevalence). In light of this, there is no need to consider if less trade restrictive alternative measures are available. However, there are a number of alternative measures (such as controlled increases in tobacco excise tax) which would be more effective than increasing the size of graphic health warnings to 85%.

Bilateral Investment Treaties

- 7.11 Increasing the size of graphic health warnings to 85% could also expose the Hong Kong State to claims from foreign investors under Bilateral Investment Treaties (BITs). Invariably, intellectual property is specifically included in the definition of investments protected by such treaties and increasing the size of graphic health warnings to 85% would inevitably breach several of the usual protections afforded by BITs including those prohibiting expropriation of investments (including goodwill and intellectual property) without the payment of compensation, as well as those requiring fair and equitable treatment.

8. CONCLUSION

8.1 For the reasons set out above, CTBAT strongly urges the Government to not proceed with the Proposal. In summary, those reasons include:

8.1.1 The Proposal is proceeding without any analysis or evidence demonstrating that the current size of graphic health warnings are insufficient to inform the public of the health risks associated with smoking; or that the incremental increase in the size of the graphic health warnings from 50% to 85% would be more effective.

8.1.2 The Government has not undertaken a regulatory impact assessment in order to properly consider the impacts, costs and benefits of the Proposal. It must also be considered that if the Government had undertaken a proper evidence-based analysis it would have reached a similar outcome to the U.S. FDA, namely that increasing the size of the existing warnings would not be effective in reducing smoking prevalence.

8.1.3 The Proposal is unlawful. The Proposal would deny all meaningful use or all economically viable use of trademarks and thereby deprive CTBAT of its extremely valuable intellectual property rights (namely, its trademark rights together with the goodwill arising in their brands) as protected under the Basic Law. The Proposal would also have a number of significant adverse unintended consequences such as distorting competition and lowering prices and thereby increasing smoking, and would exacerbate an already significant illicit trade problem in Hong Kong.

8.1.4 The increase in the size of graphic health warnings to 85% would be particularly damaging for CTBAT which is a relatively new entrant to the Hong Kong market, with a very small market share. The loss of use of intellectual property rights for CTBAT would mean, in addition to the financial loss associated with the property rights, an inability to communicate with customers to create brand awareness in order to compete for market share.

8.1.5 There are also a number of alternative evidence-based options that are proportionate and can achieve public health objectives.

8.1.6 In addition, the Proposal is neither required nor authorised by FCTC and would violate Hong Kong's international obligations such as the TRIPS Agreement and Bilateral Investment Treaties.

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Ceylon Tobacco Company PLC
No. 178, Srimath Ramanathan
Mawatha, Colombo 15.

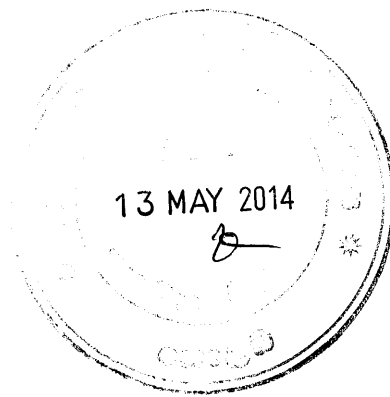
PETITIONER

Vs.

C.A 336/2012 (Writ)

1. Hon. Maithripala Sirisena
Minister of Health
Ministry of Health.
"Suwasiripaya",
Colombo 10.
2. Dr. Nihal Jayathilaka
Secretary,
Ministry of Health.
"Suwasiripaya",
Colombo 10.
3. National Authority on Tobacco and
Alcohol
"Suwasiripaya",
Colombo 10.

RESPONDENTS



BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Faiz Musthapha P.C., with Ali Shabry P.C. and C.Wijesinghe,
Faizer Marker, M. Bandara M. Careem, R. Cooray
and Mohamed Imthiyas instructed by Sudath Perera
Associates for the Petitioner

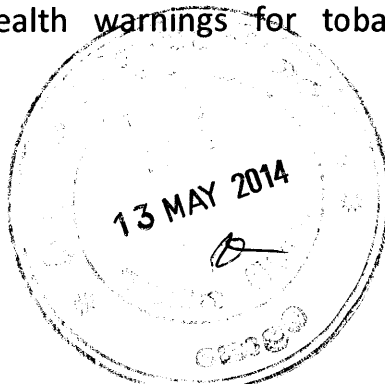
~~Janak de Silva D.S.G., with Suranga Wimalasena S.C.
for the Respondents~~

ARGUED ON: 03.02.2014 & 07.02.2014

DECIDED ON: 12.05.2014

GOONERANTNE J.

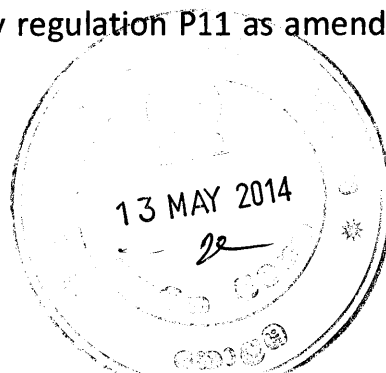
The Petitioner in this Writ Application is the Ceylon Tobacco Company PLC. A Writ of Certiorari is sought to quash the tobacco products (labeling and packaging) Regulation No. 1 of 2012, published in Gazette Notification marked P11 of 8.8.2012. A mandate in the nature of Writ of prohibition is also sought against the three Respondents, proceeding to make regulation prescribing health warnings for tobacco products containing



pictorials, graphics, images or any other non-textual content under Section 30 read with Section 34 of the National Authority on Tobacco and Alcohol Act No. 27 of 2006. Petitioner in terms of sub para (d) of the prayer to the petition has sought an interim order staying the operation of the above regulation referred to in Gazette marked P11. The learned President's Counsel for the Petitioner on 20.2.2013 supported this application for the issuance of interim relief. However the then Hon. President of this court by his order dated 22.2.2013 refused to grant and issue an interim order as prayed for in the prayer to the petition.

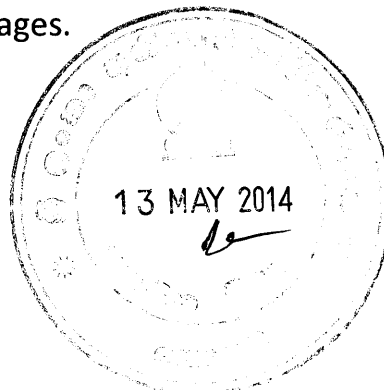
Petitioner Company sought Special Leave to Appeal from the order of the Court of Appeal dated 22.2.2013. However on a perusal of the record, I find that the state, at an early stage of the above leave to appeal application gave an undertaking to the Supreme Court that the impugned regulation will not be operationalised, and as such undertaking had been extended from time to time, and on 1.4.2013 Supreme Court ordered the status quo to be maintained. Such an order pronounced by the Supreme Court to maintain the status quo also had been extended periodically.

The Petitioner in this application is challenging the vires of regulation P11 as amended. More particularly regulation P11 as amended are ultra vires



of the powers of the Minister, of the National Authority on tobacco and Alcohol Act No. 27 of 2006 (hereinafter called NATA Act) and that Section 34(1) does not provide for pictorial health warnings. The Respondents with objections have filed Gazette Notification marked R3 and R15. Perusal of R3 and R15 it appears that regulation (P11) shall come into operation on 1st March 2013 and regulation No. 1 of 2012 (P11) is further amended according to R15 and regulation Nos. 5, 6 & 7 amended and a new regulation 11, added to regulation (P11). As such the Petitioner Company submits that the impugned regulations seek to:

- (i) Introduce mandatory pictorial health warnings to be displayed on packets of cigarettes covering 80% of the total area of a pack.
- (ii) Impose a descriptor ban (use of descriptions 'light' 'low' and 'mild').
- (iii) Print date of production on every cigarette stick.
- (iv) Print of information on the relevant constituents and emissions of tobacco products, including formaldehyde and other toxic contents if any
- (v) Print health warnings and other information in a font size of not less than 10 and in all 3 languages.



The learned President's Counsel for Petitioner raised numerous points and objections to favour the case of the Petitioner. The main argument advanced by the learned President's Counsel for the Petitioner and referred to inter alia, the following matters to demonstrate that the impugned subordinate legislation should be rejected since it is:

-
- (a) Unreasonable and disproportionate to the main statute.
 - (b) Impossibility of compliance (time factor) and the insertion of multiple labels and the failure to prescribe dimensions of health warnings. The submission of impossibility of compliance was an argument advanced when supporting for interim relief. Petitioner did not hesitate to put forward this submissions also when the substantive matter was argued.
 - (c) To require the printing of constituents and emissions. Regulations is ambiguous resulting in varying interpretations
-
- (d) A requirement to print the date of production and date of expiry on cigarette sticks. It is practically impossible to comply. Further Section 34(1) requires only a single label.
 - (e) To prescribe pictorial health warnings to cover 80% of the front and back surface areas, has by subsidiary legislation illegally subverted the statutory right of Petitioner to effectively use its intellectual property rights, recognized under the Intellectual Property Act.
 - (f) Petitioner not heard before publication of impugned regulations. Breach of natural justice.

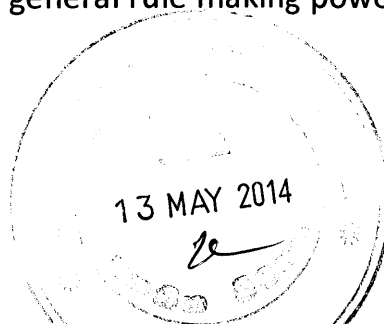


(g) Exclusion of the Beedi, cigars and white illicit whites from the application of the impugned regulations.

It is the position of the Petitioner that (a) to (F) above would make Regulation Nos. 5, 6, 7 and 8 and the added Regulation No. 11, ultra vires the provision of the NATA Act.

Learned President's Counsel was also critical of the Respondents stance of reading Section 34 of the NATA Act (an Act itself is to give effect to who Framework Convention on Tobacco Control (FCTC)) in harmony with FCTC obligations. FCTC does not require 80% pictorial warnings (Article 11 of FCTC) FCTC require only 50% or more. Further FCTC do not use pictorial, do not impose a binding obligation to use pictures.

Another argument advanced, was that the NATA Act does not empower the Minister to make regulation generally for carrying out the intention/purpose/principles in enacting the NATA Act. The Minister is only empowered to make regulations required to be prescribed or in which regulations are authorized or required by the Act. Minister cannot make regulations generally of any matter for carrying out the intention/purpose/principles in enacting the NATA Act. Attention of this court was drawn to several other statutes where a Minister is generally permitted, a general rule making power on all matters by the



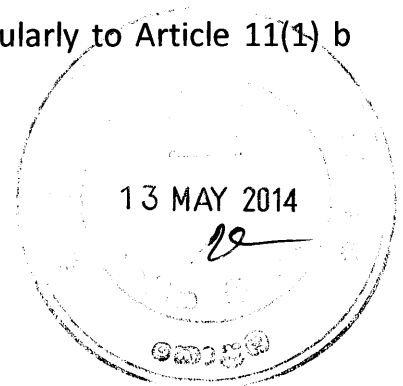
use of legislative language e.g. Condominium Property Act, Employees Provident Fund Act, Employees Trust Fund Act, Inland Revenue Act, etc. Petitioner argues that the Minister does not have the power to grant a blanket rule making power.

President's counsel for Petitioner submitted that regulation Nos. 2 & 3 are not authorized by Section 34 of the NATA Act. As such the regulation is ultra vires. The Consumer Authority Act No. 9 of 2003, already regulates on conduct that is misleading or deceptive. He referred to Section 30 of the Act No. 9 of 2003. As such Minister has no power to make regulations 2 & 3. It was also submitted that under Section 34 the required label shall contain a statement of the tar and nicotine content of the product and a health warning. The printing of information relating to other constituent and emissions is not required or prescribed. As such requirement of printing information relating to constituent and emissions in regulation 6 is ultra vires. the phrase 'including its nicotine and tar cannot be read as only tar and nicotine in background of having 5,600 identified chemicals in cigarette smoke. Section 34 already contains provisions on same. As such there is no need for delegated regulations. NATA Act does not require the date of manufacture and or the expiry date to be printed thereon and regulation 7 is also ultra vires . Further printing in a font size of 10 in all 3 languages clearly renders the regulations practically impossible to perform.



The learned Deputy Solicitor General on behalf of the Respondents submitted in his oral submissions, at the very outset to the evidence of harmful effects of tobacco smoking and invited court to, document R8, (pg. v) mainly to the material contained in the foreword. He also referred to the preamble of the WHO Framework Convention on Tobacco Control more particularly to 3rd para which state about the serious concern about increase in the worldwide consumption and production of cigarettes. Article 8 (pg. 8 of R8) refer to scientific evidence has unequivocally established that tobacco smoke cause death, decease and disability. He also invited us to R6, the S.C. Determination 13-22/05 on National authority on Tobacco & alcohol Bill especially Clause 34 which have the objective of enhancing health and the quality of life. The objectives cannot be reconciled with the harmful effects of tobacco and alcohol products and the objectives of the bill are not inconsistent with the Constitution. Learned Deputy Solicitor General referred to document R11 (pg. 5) to emphasis on the death rate as a consequence of smoking cigarettes. (inclusive of passive smoking) R12 on regional situation of tobacco control in the South East Asia Region and the figures of deaths and decease.

Learned Deputy Solicitor General in his address to court referred to packaging and labeling of tobacco products, more particularly to Article 11(1) b



11(1) (iv) of R8 to emphasis on international standards that Sri Lanka, is bound to adopt and follow in its national legislation, since our country was a signatory to the Who Framework Convention on Tobacco Control. Reference was also made to R4 cigarette package health warnings (pg. 7) i.e effectiveness of warnings, increase with larger size, and use of pictures. R10 (para 14) refer to use of pictorials. Para 15 of R10 gives details of evidence when compared with text only health warnings and messages those with pictures.

- Are more likely to be noticed;
- Are rated more effective by tobacco users;
- Are more likely to remain salient over time;
- Better communicate the health risks of tobacco use;
- Provoke more thought about the health risks of tobacco use and about cessation
- Increase motivation and intention to quit; and
- Are associated with more attempts to quit.

By a gradual process the learned Deputy Solicitor General drew the attention of this court to the preamble of the National Authority on Tobacco and Alcohol Act No. 27 of 2006. It was the position of the Respondents that the above act of Parliament envisage a variety of matters to protect public health. He drew the attention of this court to letter R9 by the Chairman of the National Authority on Tobacco and Alcohol to the Minister of Health. We have noted the contents of

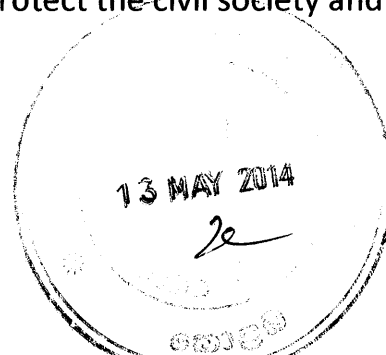


R9, along with Section 15 (J) of the Act. section 15(J) reads thus (clearly explains adherence to International Treaties).

To recommend adherence to such International Treaties and Conventions dealing with Tobacco and Alcohol as the Government may ratify and accede to;

It was the contention of the learned Deputy Solicitor General that reading Section 30 and 34 of the above Act, should not be construed in the absence of International Treaties and Conventions which had been ratified and signed by Sri Lanka. Section 30 is the enabling section to frame regulations and Section 34 impose a prohibition on sale of tobacco products without health warnings etc. We were also invited on behalf of the Respondents to consider a purposive construction and referred to several rules of interpretation/constructions relevant to the National Authority on Tobacco and Alcohol Act No. 27 of 2006, especially as regards Section 30 and 34 of the Act.

The Petitioner Company is one of the oldest business establishments engaged in the manufacture, export and distribution of cigarettes in our country. There is no total prohibition placed on the tobacco industry, but it is and has to be subject to certain restrictions and controls imposed by statute. It is so all over the world. The Respondents in this application as well as the Government of the day and any successive governments are duty bound to protect the civil society and its



citizens from all possible health hazards, caused due to cigarette smoking, and tobacco products. Scientific evidence prove and establish that smoking of cigarettes and use of tobacco cause death, illness and disability. Even the Petitioner does not dispute this aspect which cause all bad health effects to the people and its consumers.

The subject matter of this Writ Application cannot be considered in isolation of data and material gathered from other jurisdictions. Though the challenge before court is more or less focused on subordinate legislation, all necessary and relevant background facts need to be ascertained not only from within our country, but from also a global point of view since pictorial warnings on cigarette packs are accepted displayed and adopted all over the world, both in developed and developing countries as well as in 3rd world countries. The prime necessity all over the world being to protect all from health hazard, death, decease and disabilities. As such I do consider it essential to examine initially whatever available research, studies around the world and the attitudes of the authorities concerned with reference to case law in favour and against tobacco packaging warning messages and pictorial/graphic warnings, before giving my mind to the vires of the regulations (P11) framed under NATA Act.



I would include the following in this judgment, an excerpt of a report from the University of Waterloo, Canada : (though it is somewhat prolex)

*Health warnings on tobacco packages:
Summary of evidence and legal challenges*

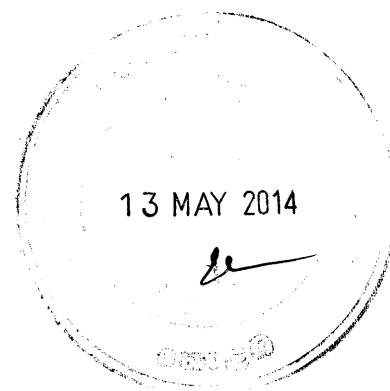
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January 2008*

www.global.tobaccofreekinds.org
Website visited on 2nd May 2014

To date, more than 17 countries have passed legislation requiring large pictorial health warnings on cigarette package: Dozens of other jurisdictions are currently preparing similar legislation in response to the international labeling regulations under Article 11 of the World Health Organization Framework Convention on Tobacco Control. The evidence on effective packaging and labeling practices has grown rapidly over the past decade to keep pace with these regulatory developments. A consistent pattern of findings has emerged from this body of research:

- Package health warnings are among the most prominent and cost-effective health communications available
- Health warnings have high awareness and visibility among non-smokers and youth.
- Obscure text warnings have little impact



- Large, pictorial warnings can increase health knowledge, motivation to quit, and cessation behavior.
- Pictorial warnings are especially important for reaching low-literacy smokers and children
- Messages that depict health risks in a vivid and emotionally arousing manner are most effective.
- “Graphic” information should be accompanied by supportive cessation information.
- There are no adverse effects in response to pictorial warnings.
- Large pictorial warnings are credible and have high levels of public support.

This report also includes a review of legal challenges to health warning regulations in Canada and the European Union. In both jurisdictions, national courts have ruled against tobacco manufacturers and have upheld comprehensive labeling regulations including requirements for large pictorial health warnings on packages.

Background: Tobacco Packaging

Packaging is an important component in the overall marketing strategy of consumer goods. Packaging helps to establish brand identity in competitive markets and serves as an effective form of promotion both at the point of purchase and while the product is being used. Packaging is particularly important for consumer products such as cigarettes, which have a high degree of social visibility. Unlike many other consumer products, Cigarette packages are displayed each time the product is used and are often left in public view between uses. Cigarette packages also serve as an important link to other forms of tobacco advertising. Package designs help to reinforce brand imagery that is communicated through other media, and play a central role in point of purchase marketing, which now accounts for a majority of the industry’s promotional spending in Canada and the US.



Health warnings: Evidence

This section provides a review of the scientific literature and research on health warning labels. The section begins with a review of general evidence on health communications, followed by evidence specifically related to tobacco warning labels on packages.

2.1 The use of pictorial information in health communications

A wide variety of research has clearly demonstrated the effectiveness of using pictures and imagery in health communications.

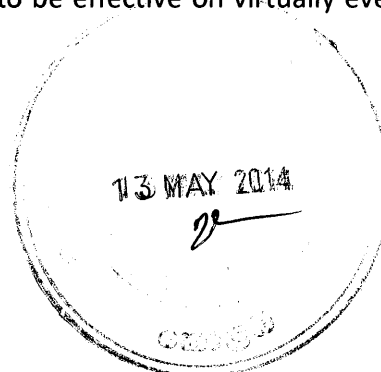
- Warnings with pictures are significantly more likely to draw attention and result in greater information processing.
- Pictures improve memory for the accompanying text and encourage individuals to imagine health consequences.
- Health warnings with pictures are also more likely to be accessed when an individual is making relevant judgments and decisions.

Experimental Research

Experimental research on cigarette warnings has also found that picture-based warnings are more likely to be rated as effective versus text-only warnings both as a deterrent for new smokers and a means to increase cessation among current smokers.

Populations-surveys and impact evaluation

A series of population-based surveys have compared the effectiveness between text and pictorial warnings. To date, surveys have been conducted in Brazil, Thailand, Singapore, Uruguay, Mexico, Canada, New Zealand, Australia, the United Kingdom and the United States. These findings are consistent with both the experimental and government commissioned research: graphic warnings are more likely to be effective on virtually every



outcome that has been evaluated. The following provides a brief summary of the evidence key area.

Pictorial warnings are more likely to be noticed and read than text-only warnings including by non-smokers

- Health warnings on cigarette packages are among the most prominent sources of health information: more smokers report getting information about the risks of smoking from packages than any other source except television.
- Findings from Thailand and elsewhere, indicate that considerable proportions of non-smokers also report awareness and knowledge of package health warnings.
- Picture help to minimize the “wear-out’ of health warnings over time.

Picture warnings increase awareness and recall of the health effects from tobacco use

- The impact of warnings on health knowledge depends upon the prominence of warnings: obscure text warnings have little effect, large pictures warnings have the greatest effect.
- Pictorial warnings increase how often smokers think about the health effects.

Health warnings promote cessation behavior

- Significant proportions of adult and youth smokers report that large comprehensive warnings have reduced their consumption levels increased their motivation to quit and increase the likelihood of remaining abstinent following a quit attempt.

Prominent health warnings increase in the use of cessation services.



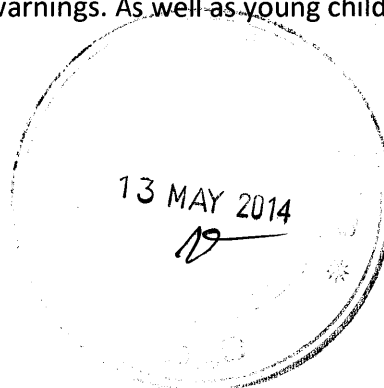
Research conducted in Brazil, the UK, the Netherlands, and Australia has examined changes in the usage of national telephone “helplines” after contract information was in package health warnings. Each of these studies reports significant increases in call volumes. For example calls to the tollfree smoking cessation helpline in the Netherlands increased more than 3.5 times after the number was printed on the back of one of 14 package warnings. Therefore while it is not possible to precisely quantify the impact of health warnings on smoking prevalence or behavior, all of the evidence conducted to date suggests that health warnings can promote cessation behavior and that larger pictorial warnings are most effective in doing so.

Picture warnings appear to be especially effective among youth

- More than 90% of Canadian youth agree that picture warnings on Canadian packages have provided them with important information about the health effects of smoking cigarette, are accurate, and make smoking seem less attractive. Other national surveys of Canadian youth suggest similar levels of support and self reported impact.
- A recent study with Australian school children found that students were more likely to read , attend to think about, and talk about health warnings after the pictorial warnings were implemented in 2006. Experimental and established smokers were more likely to think about quitting and to forgo a cigarette, while intention to smoke was lower among those students who had talked about the warning labels and had forgone cigarettes.

Pictorial health warnings are essential in countries with low literacy and multiple languages

- Text-only health warnings have little or no effect among those who cannot read. This includes illiterate individuals, individuals who may be literate but only in a language other than that used for text warnings. As well as young children.

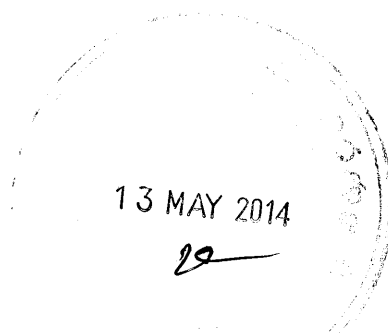


- Text-only health warnings, therefore, can increase health disparities across socio-economic groups
- The most effective way to reach low-literacy smokers is to include pictures,, which can be universally understood,, including by young children.
- Preliminary evidence suggests that countries with pictorial warnings demonstrate fewer disparities in health knowledge across educational levels.

Prominent health warnings have the potential to undermine brand appeal and the impact of package displays at retail outlets

- A Quebec Supreme Court Judge in Canada remarked upon this phenomenon in a ruling regarding the industry's challenge to pictorial warnings in Canada:
"Warnings are effective and undermine tobacco companies' efforts to use cigarette packages as badges associated with a life style.

In the United States in the year 2009 the congress passed the Family Smoking and Tobacco Control Act (Tobacco Control Act) 21 USCA. In that Act among many powers delegated to the Food and Drug Administration (FDA), the congress mandated the FDA to adopt a Rule requiring new graphic warnings on cigarette packages and advertisements. In June 2011 the FDA Rule required that coloured graphic warnings cover fifty percent (50%) of the front and back of each cigarette package sold in the U.S. This regulation is consistent with required warning label on cigarette packages in a number of other countries including



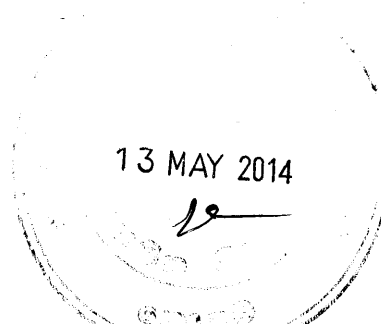
Canada, Australia, Brazil and Thailand. In consequence of publishing these regulations by the FDA, tobacco companies filed the following cases where courts expressed different views

On August 31, 2009, five tobacco manufacturers and one retailer filed suit in U.S District Court for the Western District of Kentucky to challenge several provisions of the Tobacco Control Act. This case, Discount Tobacco City & Lottery v. Food and Drug Administration (Discount Tobacco) upheld the graphic warning requirements. This decision was upheld on appeal to the U.S. Court of Appeals for the Sixth Circuit. On August 16, 2011, five tobacco manufacturers filed suit in the U.S. District Court for the District of Columbia to challenge the FDA's final regulation governing graphic warning labels for cigarettes. In this case, R.J. Reynolds Tobacco Co. v. Food and Drug Administration (R.J. Reynolds), the court found that the graphic warning rule unconstitutionally limited the tobacco companies' right to freedom of speech. On appeal, the U.S. Court of Appeals for the D.C. Circuit upheld the district court's finding that the graphic warning requirement was unconstitutional. The federal government has decided not to appeal this decision to the U.S. Supreme Court.

Overview of the above two cases

Discount Tobacco

In Discount Tobacco, the Sixth Circuit upheld the provisions of the Tobacco Control Act that authorized and directed the FDA to issue a rule requiring large, graphic warnings to be placed on cigarette packages and advertisements. The Act requires color pictorial images showing the health effects of smoking to appear on the top half of all cigarette packs, and twenty percent (20%) of the upper portion of cigarette advertisements, along with new textual warnings. The companies argued that these provisions were overly restrictive and infringed upon their free speech rights under the First Amendment.

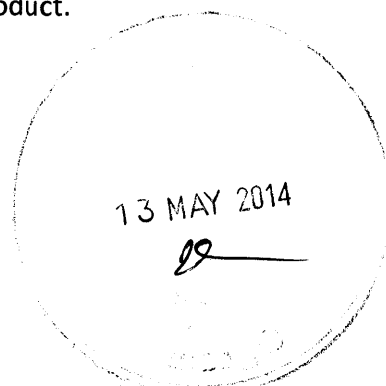


In January 2010, Judge Joseph H. McKinley, Jr. of the U.S. District Court for the Western District of Kentucky upheld the graphic warning label requirements, along with other key provisions of the Tobacco Control Act. Judge McKinley found that the “content and format” of the warning labels were justified in light of evidence that consumers do not pay attention to current warnings, and ruled that the warnings were not too burdensome because the companies retain half of the space on the cigarette packs and eighty percent (80%) of cigarette advertisements for their own speech. The tobacco companies appealed this ruling to the U.S. Court of Appeals for the Sixth Circuit. In March 2012, a three-judge panel upheld Judge McKinley’s ruling on the graphic warning label requirements. The appeals court ruled that the graphic warnings do not “impose any restrictions on the (tobacco companies’) dissemination of speech, nor do they touch upon plaintiff’s core speech.” The court also held that the textual warnings mandated by the Tobacco Control Act were “reasonably tailored to overcoming the informational deficit regarding tobacco.

R.J Reynolds

In contrast, the U.S. Court of Appeals for the D.C. Circuit found in R.J. Reynolds that the graphic warning rule created by the FDA pursuant to the Tobacco Control Act did violate the tobacco companies’ First Amendment rights.

In June 2011, the FDA issued its final rule mandating graphic warning labels on cigarette packages and advertisements. Nine graphic warning images were selected by the FDA, and the tobacco companies were required to display these warnings on a rotating basis. Among these images were a man smoking through a hole in his throat, and a cadaver with chest staples. Two months after the rule was issued, five major tobacco companies filed suit, challenging the FDA’s graphic warning label rule arguing that it forced them to convey the government’s message about smoking and advocate against their own product.



In February 2012, U.S District Judge Richard J. Leon held that the FDA's graphic warning label rule violated the tobacco companies' First Amendment rights. The court took issue with the size of the mandated warning labels and concluded that the government has other means of discouraging smoking at its disposal. The FDA appealed this decision to the U.S. Court of Appeals for the D.C. Circuit. In a split ruling, the appeals court found that the rule violated the First Amendment. Two members of the panel ruled that the warning labels exceeded the proper scope of government authority to "force the manufacturer of a product to go beyond making purely factual and accurate commercial disclosures and undermine its own economic interest." The majority also ruled that the FDA failed to prove that the labels would "directly cause" a decrease in smoking rates in the United States.

(The above material obtained – Tobacco Control Legal Consortium 875 Summit Avenue, Saint Paul, MN 55105.3076 www.publichealthlawcenter.org 651.290.7506 Website visited on 2nd May 2014)

Apart from the above material included in this judgment which demonstrate contrary decisions of the US courts, the research undertaken by those authorities and the initiatives taken by very many countries to protect health of all persons by taking a step to include pictorial, health warnings/graphics in cigarette packets, I am unable to gather from the material made available, whether in our local scene the National Authority on Tobacco and Alcohol, on its own took the trouble to conduct research programmes prior to enacting Act No. 27 of 2006? As a passing comment I would also like to observe, as to whether the authorities concerned in the same way as "Tobacco" thought it fit to apply the same standards for 'Alcohol' and endeavored to prescribe



regulations for 'Alcohol' also since both tobacco and alcohol are injurious to health and the resulting consequences are very much the same?

The relevant sections of the statute in question are Sections 30 & 34.

Section 30 reads Thus:

(1) The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized or required by this Act to be made.

(2) without prejudice to the generality of the powers conferred by subsection (1), the Minister may make regulations –

- (a) identifying the tobacco products that are harmful or injurious to human health;
- (b) specifying the types or categories of tobacco products which do not generate smoke.

(3) Every regulation made by the Minister shall be published in the Gazette, and shall come into operation on the date of such publication or on such later date as may be specified in such regulation.

(4) Every regulation made by the Minister shall after thirty days of its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(5) Notification of the date on which any regulation made by the Minister is deemed to be rescinded shall be published in the Gazette



Section 34 reads thus:

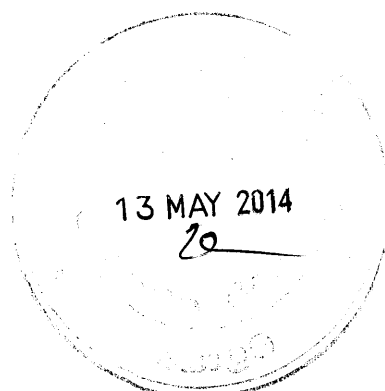
- (1) A manufacturer of a tobacco product shall cause to be displayed, conspicuously and in easily legible print, on every packet containing tobacco products manufactured by such manufacturer, a label of such dimensions as may be prescribed containing a statement of the tar and nicotine content in each tobacco product in such packet and such health warnings as may be prescribed. Different dimensions may be prescribed in respect of packets of different sizes.
- (2) A person shall not sell or offer for sale, a packet containing tobacco products unless there is displayed on such packet, a label of the prescribed dimensions containing a statement of the tar and nicotine content in each tobacco product in such packet and the prescribed health warning.
- (3) Any person who contravenes the provisions of subsection (1) or subsection (2) shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding two thousand rupees or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.

I observe that the Minister could in terms of the enabling Section 30, of the NATA Act make regulations on matters required by the Act to be prescribed. That would be the 1st limb that surface from Section 30(1). If one looks at Section 34(1) and 34(2) the matters and material that need to be prescribed could be understood and identified. Then the other limb of Section 30(1), contemplate of making regulations by the Minister, where the Act authorize or require to be done under the Act. Even Section 33(1) connects the



word 'prescribed'. Then subsection (2) of Section 30 seems to bestore on the Minister something more and an additional power from what is given in Section 30(1). As such I do agree with the learned Deputy Solicitor General that if by a narrow interpretation pictorial health warnings are ousted or ruled out, by resorting to Section 30(2) (a) the Minister may make regulations identifying the tobacco products that are harmful or injurious and thereby inclusion of pictorial health warnings could be permitted by regulations. Further I observe that Sections 30(1) and 30(2) are somewhat inter connected by the use of the words "without prejudice to the generality of the powers conferred by sub Section (1)". As such I could safely conclude based on the above interpretation that the regulation in question (P11 as amended by R3 & R15) could be presented by the Minister, subject to views expressed by this court. In the instant case, the regulations have been presented by the Minister in terms of Section 30 read with Section 34 of the NATA Act.

The basic and general rule of interpretation is that it must be construed in the ordinary and natural meaning of the word and sentence. However this rule is subject to well accepted exceptions. Having this in mind, when I peruse Section 34 of the above Act in its entirety it appears to me that the



choice is between two interpretations. Section 34(1) envisage a prohibition on sale of tobacco products without health warnings and the tar and nicotine content. There is no specific reference to 'pictorial' health warnings in Section 34 of the Act. Petitioner puts more emphasis on the words 'easily legible print. Learned President's Counsel also relies on the Sinhala version and Section 44 of the Act. It was strongly argued that it is nothing but written letters or words and the health warning could be described accordingly in letters or words. On a plain reading of the Section it appears to be so. However I cannot in the instant case give a narrow meaning and it is the duty of court to give an interpretation in keeping with the intention of the legislature.

A 'health warning' in the context of the statute and applicable to the subject matter of the Writ Application before us, cannot be given a narrow restricted meaning. The term health warning cannot be narrowly interpreted since a warning in today's context and society could be expressed by words, texts, pictures or even by use of symbols. The use of symbols in health communication could attract attention of the consumers. E.g. uses of skull and crossbones as the universal symbol for toxic substances. As such a health warning could attract a variety of meanings inclusive of pictorial health



warnings. It would never have been the intention of Parliament to exclude pictorial health warning since such a pictorial warning need to reach all category of persons. i.e the poor, rich, middle class, literate and illiterate, disabled and as well as children. Petitioner attempts to interpret the above terms differently by referring to various documentation and material, but I am compelled to reject and dismiss such views, since the intention of Parliament gathered from all the material placed before court by the Respondents and the Hansard favour the view that health warning referred to in Section 34 could be very comfortably extended to pictorial health warnings.

In the Sinhala version of Section 34 of the words clearly readable. (පහසුවෙන් කියවිය හැකි අකුරින්) would also have to be construed and applied to both the health warnings and statement of nicotine and tar contents. I do agree by perusing extracts from the Malalasekera English-Sinhala Dictionary (5th Ed 2007) produced as A11 & A12 and the Gunasena Maha Sinhala Shabdakoshaya (2008) produced as A13 the word 'letter' to include certain forms of pictures. Even the Sinhala version should be read in the context of words which state නිකොටින් හා තාර ප්‍රමාණය දැක්වෙන හා සෞඛ්‍යයට හානිකර බවට අනතුරු ඇගවීමක් ඇතුළත් කියම කරනු ලැබිය හැකි ආකාරයෙන් වූ හා It is understood as a health warning in the prescribed manner. As such



the same interpretation stated above need to be adopted and applied since the primary purpose of statutes is to purpose justice and avoid absurd unacceptable interpretations. Statutory language is not read in isolation, but in its context. This court has been invited to peruse the following extract from Bindra Interpretation of Statutes – 10th Ed pg. 275-6

“It is a well known principle of interpretation of statutes that a construction should not be put upon a statutory provision which would lead to manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly. To avoid absurdity or incongruity grammatical and ordinary sense of the words can, in certain circumstances, be avoided. There is no obligation on a court of law to construe a clause as would lead to a clear absurdity which would not possibly be regarded as contemplated by the legislating authority or agency. Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice, it would seem that the effect of the statute should be of primary concern. If this is so, the effect of a suggested construction is an important consideration and one which the court should never neglect. As a result, the court should strive avoid a construction which would tend to make the statute unjust, oppressive, unreasonable, absurd, mischievous or contrary to public interest. One should avoid construction which would result in absurdity and give a harmonious construction so as to avoid making one provision of the Act conflict with the other.”

At this point in this judgment I would prefer to refer to some rules of interpretation of Statutes which fortify my views and which enabled me to express the above observations.



Construction ut res magis valeat quam pereat

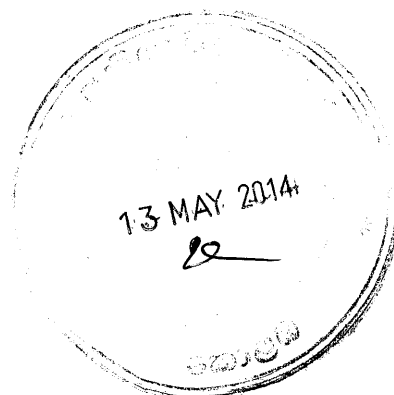
“If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result”, “Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.”

Maxwell on The Interpretation of Statutes 12th Ed. Pg. 45

CONSTRUCTION MOST AGREEABLE TO JUSTICE AND REASON

At pg. 199.....

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. “An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.” Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” we must “do some violence to the words” and so achieve that obvious intention and produce a rational construction. The question of inconvenience or unreasonableness must be looked at in the light of the state of affairs at the date of the passing of the statute, not in the light of subsequent events.



MODE OF ASCERTAINING MEANING IF OBSCURE

Pgs. 94/95..

CRAIES ON STATUTE LAW

If (as is often the case) the meaning of an enactment, whether from the phraseology used or otherwise, is obscure, or if the enactment is, as Brett L.J. said in *The R. L. Alston*, “unfortunately expressed in such language that it leaves it quite as much open, with regard to its form of expression, to the one interpretation as to the other,” the question arise, “What is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction.” And if it appears that one of these constructions will do injustice, and the other will avoid that injustice, “it is the bounden duty of the court to adopt the second, and not to adopt the first, of those constructions.” However “difficult, not to say impossible,” it may be to put a perfectly logical construction upon a statute, a court of justice “is bound to construe, it, and, as far as it can, to make it available for carrying out the objects of the legislature, and for doing justice between parties.”

Bindra, Interpretation of Statutes, 10th Ed., pg. 277

“When there is doubt or a patent absurdity and the grammatical construction fails to give effect to the plain intention of the Act, as gathered from the preamble, then the courts are competent to and should rewrite the section in such a way so as to give effect to the Act”.

As observed above adherence to such International Treaties and conventions is provided in terms of Section 15(J) of the NATA Act. Having perused R8 (WHO Framework Convention on Tobacco Control – referred to as FCTC) refer to inclusion of pictures or pictograms, in Article 11. It considers the harmful effect of tobacco and promote health warnings to be included in packaging and labeling. Space to be occupied within a ratio of 50% or more but not less than 30%.



13 MAY 2014

According to rule of construction of statutes, legislature is presumed not to enact rules contravening international law or common law of realm.

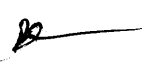
The Judges may not pronounce an Act ultra vires as contravening international law, but may recoil, in case of ambiguity, from a construction which would involve a breach of the ascertained and accepted rules of international law. (Bindra Interpretation of Statutes. 10th Ed. Pg. 204.

Our Supreme Court in decided cases emphasized the need to interpret domestic law in harmony with Sri Lanka's international commitments even in cases where no specific domestic law had been enacted to give effect to its international obligations.

In Weerawansa Vs. A.G 2000 (1) SLR 387 at 409

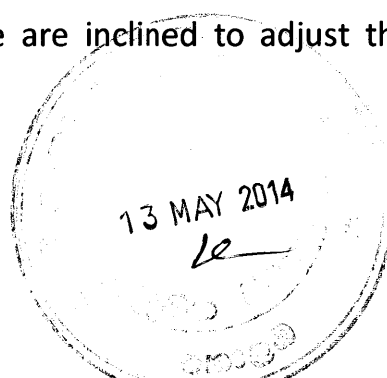
“Should this court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to “endeavor to foster respect for international law and treaty obligations in dealings among nations”. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford them the benefit of the safeguards which international law recognizes.

In the background it would be wrong to attribute to Parliament an intention to disregard those safeguards. The PTA cannot be interpreted as dispensing, by implication or inference, with the safeguard of prompt production before a judicial officer under and in terms of Article 13(2) “.

13 MAY 2000


Having read FCTC (R8) and the guidelines for implementing of Article 11 (R10) of the FCTC there cannot be any prohibition to convey the message by pictorial health warnings. As such apart from the matters stated in this judgment as regards inclusion and interpreting health warning to cater to pictorial health warning more support is lent, to do so from documents R8 and R10. Our courts recognize international commitments and articles 27(15) of the Constitution, endeavor to foster respect for international law and treaty obligation. As such I reject the argument that Section 34(1) of the NATA Act provide only for textual warnings. Health warnings in the context of said section and the NATA act need to be interpreted in a meaningful and purposive way and not so narrowly as the Petitioner argues. It may be essential to do some violence to the words to achieve the intention of the legislature. It is so because the message need to reach all category of persons in our country inclusive of children as observed above. Words of a section of a statute should be interpreted harmoniously to avoid conflict, friction, absurdity and inconvenience.

On behalf of the Petitioner Company, we also had the benefit to hear the submissions of Mr. Ali Sabry, President's Counsel, on the aspect of Petitioner's Intellectual Property Rights. We find some substance in those submissions of learned President's Counsel. As such we are inclined to adjust the 20% space



allocated to the Petitioner Company in a more reasonable and a meaningful way for the following reasons.

In view of Sections 121(1) and 121(2), of the Intellectual Property Act the rights of the registered owner of a trademark take both positive and negative forms in the sense that section 121(1) allows the registered owner to use the trademark, assign or transmit the mark and conclude licence agreements in respect of the trademark and 121(2) allows the registered owner to preclude third parties from using the trademark or a sign misleadingly similar to the trademark. (S.N. Silve J. in *Leelananda v. Earnest de Silve* (1990 (2) Sri LR 237-240-241).

These rights are subject to the limitations recognized under section 122 of the IP Act. These limitations restrict the right of the registered owner to preclude third parties from using the mark in certain specified circumstances. They do not restrict the positive rights of the registered owner – the right to use the trademark etc.

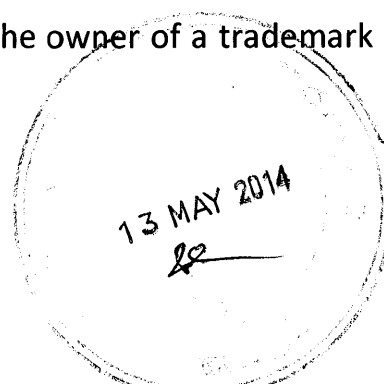
Even section 35(1)(a) of NATA Act recognizes the right of the registered owner to use the trademark. Section 35(1) of NATA Act prohibits the advertisements involving tobacco but section 35(1)(a) expressly permits the use of trademarks in respect of tobacco.



These statutory provisions clearly indicate that the registered owner of a trademark has the right to use the trademark. A trademark is used in trade and commerce. The use is intended to achieve the owner's reasonable business objectives – to reach the consumers and promote the commercialization of the concerned goods.

Consequently, the petitioners should have a reasonable opportunity to exercise the rights attached to their registered trademarks such as the use of the trademarks to reach the consumers and promote the commercialization of their goods. It is noted that the law does not prohibit the sale of tobacco. The petitioners can sell etc. tobacco subject to the lawful restrictions. They have the right to sell tobacco using their trademarks.

Where 80% of the pack is covered with the health warning, the practical issue that arises is whether the remaining 20% is reasonably sufficient to present and exhibit the mark or in other words to use the mark. Having considered the size of the packs and other relevant facts, I am of the view that 20% of the space is not reasonably sufficient to present and exhibit a trademark 20% of the space is not exclusively left for the trademark. It may carry other information as well. In such a space, the presentation of the trademark necessarily becomes comparatively very small. The owner of a trademark cannot



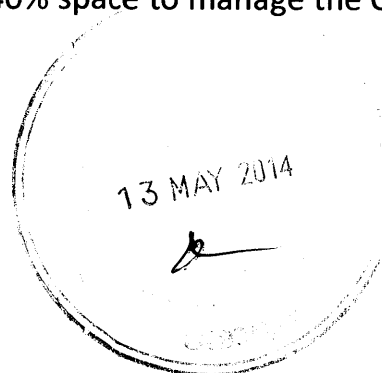
reach the consumers with his mark which is hidden in the health warning. The consumers will also not be able to see and identify the trademark properly and consequently the source of the respective goods. They have to make extra efforts to see or identify the trademark, when they buy the goods. Such a situation will unreasonably interfere with the statutory right of the owner of the trademark to use it frustrating the whole purpose of a trademark and of the trademark law.

Moreover, the Trademark Law, while protecting the rights of the owners of the registered trademarks, attempts to safeguard the interests of the consumers as well. In a market where there are several brands or trademarks in respect of same or similar goods the protected trademarks enable the consumers to make their choice. The consumers can identify the goods and the source of the goods that they actually want to buy through trademarks and brands without being misled to purchase the goods of wrong sources and wrong quality. Where only 20% of the space is available for the presentation of the trademark and other information, the consumers will not be able to see the trademark properly and make their choice properly and effectively. The packs of each manufacturer may look the same where 80% of the space is covered with the health warning. When the trademarks are not obviously and clearly presented, the unscrupulous traders



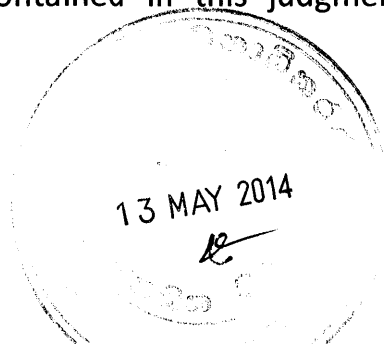
may even misuse such situation to mislead the consumers by selling products from wrong sources rather than selling what actually the consumer wants to buy.

This court observes that a balance need to be maintained, having considered the case of either party. Health of each and every citizen of our country and all those living in Sri Lanka permanently or in a temporary capacity is paramount and need to be protected. On the other hand a legally established business/industry cannot be denied its legitimate rights, flowing from the laws of our country. If 80% of the space is covered by health warnings the remaining space would not be sufficient to display the manufacturers trade mark. At the oral hearing of this application, the learned Deputy Solicitor General very correctly conveyed to this court that the authorities concerned would be agreeable and willing to allocate 75% of the space for health warnings. However at that point of time of the hearing the learned President's Counsel for the Petitioner Company was not prepared to act on the above ratio of 75%, as he may have thought that to accept the suggestion of learned Deputy Solicitor General would not be in the best interest of his client. However it is the view of this court that warnings/pictorial health warning should cover a space between 50% to 60%. Thus giving the Petitioner Company at least 40% space to manage the Companies



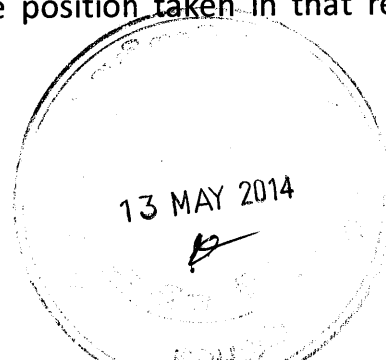
Trade Mark rights, within that space. The authorities concerned are directed to suitably amend the regulation to allocate a ratio anything between 50% to 60% for health/pictorial warnings.

We have also noted the contents of motion dated 14th March 2014, filed by the registered Attorney-at-Law for the Respondents. The said motion indicates that regulations marked P11, R3 & R15 had been placed before Parliament and same had been approved by Parliament on 19.2.2014. Section 30(4) of the NATA Act requires the regulations to be placed before Parliament after 30 days of its publication in the Gazette for approval. Regulations not so approved deemed to be rescinded. As such after a lapse of the 30 day period, as stated in section 30(4) the regulation, need to be placed before Parliament. I cannot see a prohibition as regards the provisions conferred in Section 30(4) to place the regulations before Parliament at any time after 30 days of publication in the Gazette. Now that regulation P11, R3 & R15 are approved by Parliament as subordinate legislation it remains valid for all purposes which has a quasi – Parliamentary validity subject to the views expressed by this court, as regards regulation No. 5 of P11 as amended by regulation R15. The space to be occupied for pictorial health warnings should only occupy a space in the ratio anything between 50% to 60% for the reasons contained in this judgment. The 1st



Respondent is directed to suitably amend the above regulation in keeping with the direction given by this court. The above requirement in the circumstances of this case would not offend the principle of proportionality. The attempt to introduce pictorial health warnings is only to minimize the harmful health consequences of smoking cigarettes. There is no total prohibition or ban on the Tobacco Industry or to engage in its business by the Petitioner Company. The regulations only attempt to impose a valid restriction or exercise some control for the benefit of safeguarding health of our people and as such the principles of proportionality cannot be offended.

In all the facts and circumstances of this Writ Application, we are of the view as stated in this Judgment and subject to the view expressed by this court as regards regulation No. 5 of P11 as amended by regulation R15, challenge to the regulation in question by the Petitioner on the several grounds urged by the Petitioner is a futile attempt. The regulation in question is not ultra vires the statute. However having regard to the Petitioner's rights flowing from Intellectual Property Act as regards the rights of the registered owner of a trade mark the positive rights of the registered owner, the right to use the trade mark, and the recognition given in terms of Section 35(1) (a) of the NATA Act, this court is mindful of same and as such accepts the position taken in that regard by the

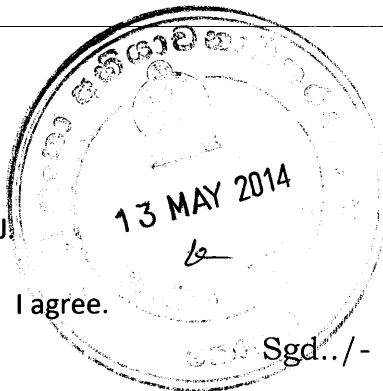


Petitioner. On that account we direct the 1st Respondent to adjust the particular regulation referred to above, accordingly.

The remedy sought by the Petitioner Company are the prerogative Writs of Certiorari and Prohibition which are discretionary remedies of court. The granting of a Writ is a matter for the discretion of court, and court is bound to take into consideration the consequences which by the issue of the writs sought will entail. A Petitioner seeking a prerogative writ is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. In the circumstances, subject to the views expressed by this court application of the Petitioner is refused and dismissed without costs.

Application dismissed.

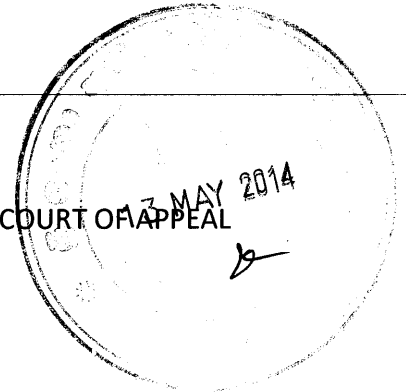
W.M.M. Malinie Gunaratne J



I agree.

Sgd../-

Sgd../
JUDGE OF THE COURT OF APPEAL



JUDGE OF THE COURT OF APPEAL

I do hereby certify that the foregoing is a true copy of the Judgment dated 12.05.2014 filed of record in C.A. No. 336/2012.(Writ).

Typed by: *[Signature]*

Comp'd with : *[Signature]*.....

[Signature]

Chief Clerk of the Court of Appeal

Chief Clerk of the Court of Appeal

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2014/05/12