

**For discussion on
28 February 2017**

Legislative Council Panel on Health Services

**Proposal to Amend Health Warnings on
Tobacco Product Packets and Retail Containers**

PURPOSE

This paper provides supplementary information on the issues raised by Members and the deputations in the previous discussions concerning the Government's proposal to amend health warnings on tobacco product packets and retail containers ("the proposal").

BACKGROUND

2. Health warning is a cost-effective health communication intervention because of their unparalleled reach among smokers. Article 11 of the World Health Organization ("WHO") Framework Convention on Tobacco Control ("FCTC")¹ requires FCTC Parties to adopt and implement effective measures including requirements for the display of a rotated series of health warnings². Graphic health warnings and messages are likely to be more effective if they generate negative emotional associations with tobacco use and when the information is personalised to make the health warnings and messages more

¹ In the notification dated 11 October 2005 of the People's Republic of China to the Secretary General of the United Nations, it is stated that FCTC has been made applicable to Hong Kong.

² Article 11(b) (Packaging and labelling of tobacco products) of FCTC provides that:

"1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

...

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

(i) shall be approved by the competent national authority,

(ii) shall be rotating,

(iii) shall be large, clear, visible and legible,

(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,

(v) may be in the form of or include pictures or pictograms."

believable and personally relevant. Health warnings and messages are particularly effective when combined with information designed to increase motivation and confidence in tobacco users in their ability to quit. International experience and evidence demonstrate that the effectiveness of graphic health warnings increases with their prominence. In many countries, more smokers report getting information about the health risks of smoking from health warnings than most other means³. Studies carried out after the implementation of graphic health warnings in Brazil, Canada, Singapore and Thailand consistently showed that health warnings significantly increase people's awareness or knowledge of the harms of tobacco use⁴. The Guidelines for Implementation ("the Guidelines") of Article 11 of FCTC advises FCTC Parties to aim to cover as much of the principal display areas as possible⁵. The Guidelines are measures agreed to by FCTC Parties drawn from best available research-based evidence, best practices and experiences of FCTC Parties in implementing FCTC.

3. Over the years, the Government has been taking a progressive and multi-pronged approach in tobacco control, comprising legislation, taxation, publicity, education and law enforcement to advise the public of the health hazards of smoking, discourage them from smoking, encourage smokers to quit or reduce smoking as early as possible, and protect the public from the adverse impact of second-hand smoke to the extent possible. The declining smoking prevalence from 14.0% in 2005 to 10.5% in 2015 is an indicator of the effectiveness of the progressive and multi-pronged tobacco control strategy.

³ Hammond, D.; Fong, G. T.; McNeill, A.; Borland, R.; Cummings, K. M. Effectiveness of cigarette warning labels in informing smokers about the risks of smoking: findings from the International Tobacco Control (ITC) Four Country Survey. *Tobacco Control*; Jun 2006 Supplement 3, Vol. 15, pii19. http://tobaccocontrol.bmj.com/content/tobaccocontrol/15/suppl_3/iii19.full.pdf (accessed on 16 February 2017)

⁴ World Health Organization. World No Tobacco Day 2009 brochure. <http://www.who.int/tobacco/resources/publications/wntd/2009/materials/brochure/en/> (accessed on 17 February 2017).

⁵ Paragraph 12 of the Guidelines of Article 11 of FCTC states that:

"Article 11.1(b)(iv) of the Convention specifies that health warnings and messages on tobacco product packaging and labelling should be 50% or more, but no less than 30%, of the principal display areas. Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility."

The Proposal

4. The existing six graphic health warnings have been in use without any enhancement since 2007. In May 2015, the Government proposed to amend the prescribed forms (including specifications) of the health warnings, the size and number of the health warnings and messages for the packet or retail container of cigarettes and tobacco products under the Smoking (Public Health) (Notices) Order as follows –

- (a) 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 the retail container;
- (b) the number of forms of health warning will increase from six to twelve;
- (c) the following health warning message is to be included in the existing statement “HKSAR GOVERNMENT WARNING” / “香港特區政府忠告市民” –
 - “QUIT SMOKING FOR FUTURE GENERATIONS” /
 - “請為你的下一代戒煙”; and
 - “QUITLINE: 1833 183” / “戒煙熱線：1833 183”;
- (d) the indication of tar and nicotine yields should be printed on a side adjacent to a typical flip-top lid of a cigarette packet, excluding the portion which forms part of the lid and the two largest surfaces, presented in a conspicuous place of such side of the packet.

5. According to the Guidelines of Article 5.3 of FCTC on protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, the interests of tobacco industry are in direct conflict with the goals of public health; the tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies⁶. Since the design of the health warnings should align with the Government’s tobacco control policies and directives, we consider that there

⁶ Paragraph 21 of the Guidelines of Article 5.3 of FCTC states that “[t]he tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies, given that its interests are in direct conflict with the goals of public health.” http://www.who.int/fctc/guidelines/article_5_3.pdf. (Accessed on 20 February 2017).

would be a conflict of interest for tobacco companies to design health warnings. This is also in line with our policy to ban sponsorships by tobacco companies.

ISSUES RAISED

Local statistics supporting the proposal

6. Some Members enquired whether there are any local statistics supporting our proposal. With a smoking prevalence rate as low as 10.5%, the main goals of our tobacco control regime are to encourage existing smokers to quit and prevent non-smokers, particularly youngsters, from picking up smoking. According to the Thematic Household Survey (“THS”) of 2015 published by the Census and Statistics Department of Hong Kong⁷, some 197 400 (30.8%) daily smokers had tried to quit but failed, and another 39 700 (6.2%) daily smokers had never tried but wanted to quit. The survey also found that 37.2% of ex-daily smokers gave up smoking because they wanted to “prevent health from being harmed”. These figures reflected the need to provide smokers with information related to smoking cessation, reinforce their will in quitting smoking and remind them of the health hazard which smoking may bring about, against the background of a strong scientific consensus as to the lethal effects of tobacco⁸. The containers and packets of cigarettes and tobacco products, of which daily smokers access on average 13 times a day⁹, would naturally be the most direct means of communicating such information. Experience of other countries indicated that well-designed health warnings on tobacco product packages will not only increase the awareness of the health effects of tobacco use but also smokers’ motivation to quit smoking, thus increasing the number of quit attempts¹⁰.

⁷ Census and Statistics Department, HKSAR. Thematic Household Survey Report No. 59. <http://www.statistics.gov.hk/pub/B11302592016XXXXB0100.pdf> (accessed on 9 February 2017).

⁸ In the recent case *Philip Morris v. Uruguay* mentioned in paragraph 22 below, which involved a complaint against the a tobacco packaging measure adopted by Uruguay referred to as the 80 / 80 Regulation, the arbitral tribunal took the view that the case “concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco”: see the *Philip Morris v. Uruguay* Award mentioned in footnote 28 below, at paragraph 418.

⁹ Thematic Household Survey Report No. 59 found that daily cigarette smokers on average consumed 13.1 cigarettes in a day.

¹⁰ Hammond, D.; Fong, G. T.; McNeill, A.; Borland, R.; Cummings, K. M. Effectiveness of cigarette warning labels in informing smokers about the risks of smoking: findings from the International Tobacco Control (ITC) Four Country Survey. *Tobacco Control*; Jun 2006 Supplement 3, Vol. 15, pii19. http://tobaccocontrol.bmj.com/content/tobaccocontrol/15/suppl_3/iii19.full.pdf (accessed on 16 February 2017)

7. The THS of 2015 also found that 31.1% of ex-daily smokers gave up smoking because of objection from family members or friends or concern about exposing family members and friends to second-hand smoke. In this connection, we note the WHO's advice that graphic health warnings can persuade smokers to protect the health of non-smokers by smoking less at home and avoiding smoking near children¹¹. According to the School-based Survey 2014-15 conducted by the University of Hong Kong, nearly one in four students (24.2% of primary 4 – 6 students and 22.1% secondary school students) reported second-hand smoke exposure at home in the past seven days. About 1 in 4 Primary 4 – 6 students saw parents smoking (24.9%), and around 1 in 5 saw parents' cigarette packs at home (20.0%) and parents buying cigarettes (19.3%) in the past 3 months. It would be important to educate the public, particularly children and youngsters, on the harm of smoking, so that they may help encourage their family members who smoke at home to smoke less or quit.

8. On the front of preventing non-smokers from picking up the smoking habit, we consider it very important to impose deterrent effect against smoking with the appropriate media. The same school-based survey also explored which enhanced tobacco control measures the students would choose for implementation in Hong Kong. Among various choices of tobacco control measures, a sizeable proportion (about 32%) of secondary school students chose showing health warning texts and pictures on at least 75% of the cigarette packet surface area and banning trademarks¹². The results indicated that secondary school students find health warnings a meaningful way to communicate the risks of smoking. The health warnings of containers and packets of cigarettes and tobacco products would provide the first hand source of information to alert children and youngsters on the various harmful effects of smoking, as well as deter them from taking the first puff. Studies carried out among youth on enlarging graphic health warnings in Canada¹³ and Thailand¹⁴ revealed that expanded graphic warnings significantly increase youth's awareness of the harm of tobacco use and confidence in staying away from smoking.

¹¹ Hammond D. Health warning messages on tobacco products: a review. *Tob Cont.* (2011); 20(5): 327-337 (accessed on 18 February 2017).

¹² The most popular choices are "ban smoking at transport waiting area" (53.5%), "step up efforts in combating illicit cigarettes" (45.7%), "increase tobacco tax" (43.4%).

¹³ Les Études De Marche Createc. Quantitative Study of Canadian Youth Smokers and Vulnerable Non Smokers: Effects of Modified Packaging Through Increasing the Size of Warnings on Cigarette Packages. Prepared for Health Canada. 2008. <http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/health/2008/254-07-e/report.pdf> (accessed on 18 February 2017)

¹⁴ Information provided by the Action on Smoking and Health Foundation Thailand.

9. The Hong Kong Council on Smoking and Health's Tobacco Control Policy-related Survey of 2015¹⁵ revealed that despite it was already eight years since the adoption of the current set of graphic health warnings, 80.2% of current smokers had noticed the health warnings, and about one-fourth (25.6%) had considered quitting because of the health warnings in the past 30 days. Furthermore, about one-fifth (18.7%) of smokers who were ready to quit and 6.7% of smokers who were not ready to quit had experienced stopping smoking because of the health warnings when they were about to light a cigarette. About half (49.6%) of the current smokers and 73.5% of ex-smokers supported that the health warnings about the smoking-induced diseases on cigarette package should be made more clearly and more threatening.

International Trend on Health Warning Requirement

10. At present, the health warning only covers 50% of the surface area of the two largest surfaces of cigarette and tobacco product packets and containers. Since May 2016, the WHO has been advocating for plain packaging of tobacco products¹⁶. The pioneer, the Australian Government, has already introduced plain packaging, in conjunction with new and expanded graphic health warnings in 2012 and has prevailed in various legal challenges. Three years after implementation of plain packaging and expanded health warnings, a study revealed that, after excluding the effects of other concurrent tobacco control measures, including the increase of excise tax in April 2010, December 2013 and September 2014, Australia saw a 0.55% point drop of the daily smoking prevalence of people aged 14 years or older, amounting to 108 228 fewer smokers¹⁷. Some members of the European Union such as France and the United Kingdom have followed the same path and implemented the plain packaging policy in May 2016, with Hungary and Ireland having passed the relevant laws. New Zealand has also passed the plain packaging legislation and is already preparing for implementation of the newly passed laws. Canada is

¹⁵ Hong Kong Council on Smoking and Health. Tobacco Control Policy-related Survey 2015 - Public Support for Strengthening the Health Warnings on Cigarette Packaging. http://www.smokefree.hk/UserFiles/resources/about_us/cosh_reports/COSHRN_E19.pdf (accessed on 9 February 2017).

¹⁶ According to paragraph 46 of the Guidelines of Article 11 of FCTC, "plain packaging" is defined as "measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style".

¹⁷ Department of Health, Australia. <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain-packaging-evaluation> (accessed 28 November 2016).

preparing for launching a plain packaging legislation. We consider that the proposed requirement of expanding the size of health warning to cover 85% of the two largest surfaces of the container and packet of cigarettes and tobacco products is moderate and appropriate for the local context. It is also in line with our progressive tobacco control strategy.

11. There is an enquiry about why the Government does not follow the practice of Germany, which only requires the health warning to cover 65% of the two largest surfaces of the packets or the retail containers of cigarettes and tobacco products. First of all, there already are jurisdictions that require greater coverage of health warnings than 65%. More importantly, tobacco control is a progressive process. According to the WHO, countries should consider implementing tobacco control policies with regard to the local situation. Germany has a daily smoking prevalence rate at 20.9% in 2013. The country has not banned outdoor advertising on tobacco products nor event sponsorship, and has not fully introduced public transport and indoor smoking ban^{18and19}. In Hong Kong, since 2006, the Government has introduced smoking ban in all indoor areas in workplaces and public places and some outdoor areas, full ban on advertising of tobacco products, as well as the health warning requirement that covers 50% of the two largest surfaces of tobacco product packets and containers. In view of the progress of Hong Kong on the global tobacco control road map, we consider it appropriate to expand the health warning size to 85%.

Legal issues raised by the trade

12. The tobacco trade has instructed legal firms to forward their submissions to the Legislative Council Panel on Health Services (“HS Panel”) for the meetings with deputations and to the Food and Health Bureau, including legal firm like Herbert Smith Freehills (representing British American Tobacco Company Hong Kong Limited) and trade representative like the Coalition on Tobacco Affairs Limited. The Government’s overall response to the issues raised is set out in the ensuing paragraphs.

¹⁸ World Health Organization. WHO report on the global tobacco epidemic, 2015. http://www.who.int/tobacco/surveillance/policy/country_profile/deu.pdf?ua=1 (accessed on 16 February 2017).

¹⁹ Campaign for Tobacco-Free Kids. <http://www.tobaccocontrolaws.org/legislation/country/germany/summary> (accessed on 16 February 2017).

Legitimate objective

13. The Guidelines of Article 11 of FCTC clearly state that well-designed health warnings and messages are a key component of a comprehensive integrated approach to tobacco control and an effective measure to communicate health risks and to reduce tobacco use. Rotation of health warnings and messages, and changes in their layout and design are important to maintain saliency and enhance impact. Enlarging the health warnings makes the health warnings more visible. Parties are to consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The Government's duty is to act in the broader public interest through protection of public health. Implementing health warnings is one of the Government's multi-pronged measures to safeguard public health by discouraging smoking, containing the proliferation of tobacco use and minimising the impact of passive smoking on the public. The evidence as to the effectiveness of larger health warnings establishes a rational connection between Government's requirement for enlarging warnings and its objectives of reducing the prevalence of smoking and of the diseases and deaths it causes.

Protection of property rights

14. The trade expressed concerns over a series of legal issues arising from the proposal. They raised that the restriction on the use of trade marks on packet and retail container of cigarettes and relevant tobacco products possibly brought about by the proposal is manifestly disproportionate. They further alleged that the proposal amounts to deprivation of property and requires the payment of compensation under the Basic Law. The Government's overall response to the issues raised is set out in the ensuing paragraphs.

15. Article 6 of Basic Law ("BL 6") reads "the Government shall protect the right of private ownership of property in accordance with law". Article 105 of Basic Law ("BL 105") reads "the Government 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”. While BL 105 permits the Government to restrict property rights or deprive properties “in accordance with law” through legislation as and when necessary, the restrictions cannot be arbitrarily imposed and real value compensation still has to be provided for lawful deprivation.

The relevant trade mark rights

16. The trade has raised concerns over the restriction on the use of trade marks on packet and retail container of cigarettes and relevant tobacco products possibly brought about by the proposal. The Government recognises that a trade mark essentially serves to distinguish the goods or services of one undertaking from those of other undertakings. In Hong Kong, the rights of a trade mark owner are protected by the Trade Marks Ordinance (Cap. 559) (“TMO”) and in common law. Where a trade mark is registered, the registration does not confer on the trade mark owner an absolute right to use the mark without any statutory restrictions or boundary. What registration does is to give the trade mark owner the right to stop others from using a confusingly similar sign in relation to identical or similar goods or services²⁰. The owner of an unregistered trade mark on the other hand would have recourse in the common law of passing off in appropriate cases²¹.

Deprivation under Article 105 of the Basic Law

17. While the proposal will reduce the space on tobacco product packets and retail containers for the display of a tobacco trader’s trade mark, the proposal would however only affect the *two largest surfaces* of the packet or retail container. A tobacco trader could still display his trade mark, though with adaptation or re-sizing in some cases, on the remaining areas (i.e. 15% of the two largest surfaces), as well as the lateral surfaces, of the packet or retail container in a way that does not alter the distinctive character of the trade mark. Insofar as the distinctive character of the registered trade mark can be preserved and is recognisable after adjustment under the proposal, there would be no deprivation

²⁰ See sections 14 and 18 of the TMO. Such negative rights in respect of a trade mark conferred by registration were held to have remained enforceable despite the introduction of legislative restrictions on the use of the mark, see UK Court of Appeal’s decision in *R. (on the application of British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182.

²¹ If goodwill or reputation has been acquired or established in relation to a trade mark, the trade mark owner can have recourse for passing off under the common law so long as the use of the mark in question by the defendant constitutes a misrepresentation by the defendant to the public (whether intentional or not) leading or likely to lead the public to believe that the goods or services offered by him are those of the trade mark owner and which causes damage to the trade mark owner.

of property. Subject to the above, a tobacco trader's right to prevent others from using a sign confusingly similar to his trade mark remains intact. Furthermore, tobacco traders would remain capable of licensing others to use their trade marks, assigning and/or selling their trade marks (together with goodwill in them, if any) to others.

18. With reference to case laws in other jurisdictions, interferences with the value of commercial goodwill are generally characterised as controls of use rather than deprivations. Hence, the proposal has not deprived their business goodwill requiring payment of real value compensation under BL 105.

Proportionality

19. In non-deprivation cases, it is relevant to consider whether the proposal satisfies the "proportionality test" under which any interference with property rights will need to strike a balance between the general interest of society and protection of the individual's rights. In the recent Court of Final Appeal's judgment in *Hysan Development Co. Ltd v. Town Planning Board* (2016) 19 HKCFAR 372, it is decided that in relation to the cases engaging BL 6 and BL 105, which make no express provision regarding the permissible restrictions, a proportionality analysis of such restrictions is required.²²

20. Having taken into consideration that the aim of the proposal is to promote and protect public health in which the rights enjoyed by trade mark owners in respect of the marks would not be prejudiced or impeded by the proposal, we consider that the implementation of larger health warnings on tobacco product packets and retail containers is a proportionate means to achieve the aim pursued.

²² Such a proportionality assessment involves a four-step process of asking (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; (iii) whether the measure is no more than necessary for advancing that aim; and (iv) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual. At step (iii), two main standards have been applied, namely, "no more than necessary" and "manifestly without reasonable foundation". The difference between the two standards is one of degree. The choice of the standard in a case would depend on the context of the appropriate margin of discretion.

Hong Kong's obligations under international trade agreements and international investment agreements

21. We note that the trade has raised its concern on the potential implication the proposal may have on Hong Kong's obligations under international trade agreements and international investment agreements. We are of the view that the proposal would not constitute any breach of the Agreement on Technical Barriers to Trade (“TBT Agreement”) because our proposal is a measure necessary for the fulfilment of the legitimate objective of the Government in safeguarding public health (namely, educating the public, particularly children and youngsters, on the harm of smoking and making cigarette packets and retail containers an immediate source of anti-smoking information, thus reminding smokers of the health hazard which smoking may bring about and reinforcing their will to quit smoking), taking into account the grave public health risks such as tobacco-related deaths and diseases posed by smoking prevalence and consumption.

22. As elaborated in the paragraphs above as well as in our earlier submissions to the HS Panel in relation to the proposal, both overseas and local statistics also indicated that the expansion of health warning is effective in lowering smoking prevalence. Health warning messages on tobacco products are vital and are the most direct channel for educating the public the substantiated harmful effects of smoking. In *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7)* (“*Philip Morris v. Uruguay*”), which involved a complaint against the 80 / 80 Regulation²³ on tobacco packaging promulgated by Uruguay, WHO and FCTC Secretariat stated that there existed a considerable body of experimental and survey evidence suggesting that larger warnings are more legible and noticeable and, therefore, better at informing smokers and non-smokers of risk²⁴.

23. According to WTO jurisprudence, the WTO Member alleging a violation of Article 2.2 of the TBT Agreement by another WTO Member bears the burden to present a *prima facie* case that the relevant technical regulation is

²³ Under Uruguay's 80/80 Regulation, the size of the health warnings on cigarette packages were increased from 50 to 80 per cent of the lower part of each of the main sides of every cigarette package and, as a result, the tobacco companies had to limit their branding to the remaining 20% of the front and back of the packaging.

²⁴ Paragraphs of 25 – 27 of the amicus curiae brief dated 28 January 2015 of the WHO and FCTC Secretariat for *Philip Morris v. Uruguay*.

more trade restrictive than necessary and, as a step in establishing the *prima facie* case, must identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available²⁵. Our assessment is that the “alternatives” identified by the trade²⁶ are not reasonably available alternatives to our proposal which make an equivalent contribution to our intended public health protection objective. While such “alternatives” identified by the trade may be considered as complementary to our comprehensive integrated approach to tobacco control, it has been clarified in WTO jurisprudence that measures which form one element of a comprehensive policy, and are thus merely “complementary”, should not be considered alternatives to the measure at issue²⁷.

24. Article 2.4 of the TBT Agreement provides that where technical regulations are required and relevant international standards exist, WTO Members shall use them, or the relevant parts of them, as a basis for their technical regulations. Further, Article 2.5 of the TBT Agreement provides that whenever a technical regulation is prepared, adopted or applied for the protection of human health, and is in accordance with the relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. In this relation, our proposal is essentially based on the WHO Guidelines of Article 11 of FCTC, which represent an international standard relevant to the proposed tobacco packaging measure.

25. In view of the above analysis, our proposal is an appropriate, balanced and necessary means to achieve the desired level of protection for public health, in accordance with TBT Agreement. We will ensure compliance with the notification requirements and other transparency obligations under the TBT Agreement and other relevant trade agreements.

26. We notice that the trade has also raised concerns on the impact of the increased size of graphic health warnings on foreign investments (including goodwill and intellectual property). In particular, the trade has raised concerns

²⁵ Paragraphs 5.208 and 5.213 of the Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements (Article 21.5 – Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW (18 May 2015)

²⁶ We note that the trade proposed some “alternatives” such as rigorous enforcement of existing laws forbidding retailers to sell to minors, creation of an offence of youth purchase, implementation of more targeted youth education programmes and adoption of tax policy that discourages youth uptake of smoking and disincentivises adult consumers from purchasing illicit tobacco.

²⁷ Paragraph 172 of the Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (December 3, 2007).

as whether our proposal would result in a breach of the fair and equitable treatment provision and expropriation provision that are commonly found in the Investment Promotion and Protection Agreements entered into by Hong Kong (“IPAs”).

27. As regards the trade’s concern on expropriation, it is worth noting that the ownership of a trade mark does not confer an absolute inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use. With the Paris Convention for the Protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights being applicable to Hong Kong, the Government would like to point out that, according to the legal advice obtained, the trade mark holder does not enjoy an absolute right of use that is free of regulation but only an exclusive right to exclude third parties from using the trademark, subject to the local regulatory power.

28. In *Philip Morris v. Uruguay*, the arbitral tribunal decided that the 80 / 80 Regulation promulgated by the Uruguayan Government did not constitute indirect expropriation on the grounds that the brand and other distinctive elements continued to appear on cigarette packs in Uruguay in a recognisable manner and that a limitation to 20% of the space available to such purpose could not have a substantial effect on the business of the claimant since it consisted only in a limitation imposed by the law on the modalities of use of the relevant trade marks²⁸.

29. Further, the arbitral tribunal considered that the 80 / 80 Regulation was a valid exercise by Uruguay of its police powers for the protection of public health because it was taken with a view to protecting public health in fulfilment of its international obligations (including FCTC) and that such measure was adopted in good faith, non-discriminatory and proportionate to the objective they meant to achieve²⁹. The proposal of the Government is also a valid exercise of the regulatory power to fulfill the obligation under Article 11 of FCTC and a non-discriminatory and proportionate measure adopted in good faith for the protection of public health. In light of the foregoing, our proposal would not violate the provisions on expropriation under the IPAs.

²⁸ Paragraph 276, the Award dated 8 July 2016 for *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7)* (“*Philip Morris v. Uruguay Award*”).

²⁹ Paragraphs 306 – 307 of *Philip Morris v. Uruguay Award*.

30. As regards the trade's concern on whether there is a breach of the fair and equitable treatment provisions under the IPPAs, we consider that our proposal is a reasonable measure and would not frustrate the legitimate expectation that is reasonably held by foreign investors in Hong Kong. Firstly, there are local statistics showing the need for more prominent health warning on tobacco packaging. Secondly, as in the case of the 80 / 80 Regulation promulgated by Uruguay, our proposal is for giving effect to the obligations under Article 11 of FCTC and the Guidelines of Article 11 of FCTC.

31. In *Philip Morris v. Uruguay*, the arbitral tribunal was of the view that, in respect of the claim on fair and equitable treatment, whether a specific percentage for the size of the public health warning in fact set was entirely lacking in justification or wholly disproportionate, with due account being taken of the legitimate underlying aim (namely, to make utterly clear to consumers the serious risks of smoking, and how a government requires the acknowledged health risks of products, such as tobacco, to be communicated to the persons at risk), is a matter of public policy, to be left to the appreciation of the regulatory authority³⁰. In light of this decision, the setting of the percentage at 85% in our proposal fully complies with the fair and equitable treatment provisions under the IPPAs.

32. Our proposal would also not frustrate the legitimate expectation of foreign investors. It should be emphasized that the Government has not previously made any specific assurance or commitments to any party or the public that the packaging requirements will not be increased or to at least 85%. The Government, on the contrary, has been reiterating that our multi-pronged tobacco control policy is progressive and will be adjusted continuously to reduce smoking prevalence. Further, the arbitral tribunal in *Philip Morris v. Uruguay* was of the view that in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products³¹.

³⁰ Paragraph 419 of *Philip Morris v. Uruguay* Award.

³¹ Paragraph 430 of *Philip Morris v. Uruguay* Award.

Freedom of expression

33. Some members of the trade argued that freedom of commercial speech would be restricted by the proposed increase in the size of graphic health warnings under the proposal. The Government would like to point out that while the right to freedom of expression protects commercial expression, commercial expression generally enjoys a lower level of protection than other types of expression (e.g. political or artistic expression), particularly with regard to pure commercial speech which aims for the achievement of price and sales-volume targets. Restrictions on commercial speech will generally be subject to less strict judicial scrutiny on the basis that what is being served is a private, rather than a public interest. Thus a wide margin of discretion will be extended where the speech interfered with is found to have an essentially competitive purpose. Moreover, the right to freedom of expression is not absolute and may be subject to restrictions that are provided by law and are necessary for the respect of the rights of others or the protection of public health. Freedom of commercial expression has to be balanced against the right to health of the general public. The Government has an obligation to protect members of the public from the risks of smoking and second-hand smoke exposure. Given that the right to freedom of expression requires a balance to be struck and the proposed measure involves commercial expression and questions of public health policy, the executive and the legislature have a wide margin of discretion in assessing the need for such measure.

Regulatory Impact Assessment

34. The trade queried whether the Government has conducted a regulatory impact assessment on the proposal. In terms of public administration, there is a need to strengthen tobacco control measures from time to time to ensure effectiveness. The Government has been closely monitoring the smoking prevalence and cessation trends, as well as effectiveness of the existing measures. We have considered the local statistics, overseas experience and the development of Hong Kong. The proposal would provide an enhanced first hand means for the public to learn about the harmful effects of smoking, which may lead to increase in cessation rates, deter uptake and relapse, ultimately reduce smoking prevalence. With lower smoking prevalence, the hazard of second-hand smoke to members of the community is reduced as well as the costs of the public health system for smoking-related diseases. While the trade

would have to make adjustment to comply with the new regulation, we consider that the trade also has its corporate social responsibility to ensure compliance with regulatory measures that would enhance public health. Our proposal is also in line with our progressive tobacco control measures. We will keep in view the effectiveness of the measure and consider the next step ahead.

Concern on Intensifying Illicit Trade

35. The tobacco trade expressed concern that the increase in the health warning size would lead to intensification of illicit cigarette trade. However, studies showed that graphic health warnings do not increase illicit trade. A document of the European Parliament³² revealed that there is no indication that implementation of graphic health warnings increases illicit cigarette trade. More than 60 countries now require graphic health warnings on cigarette packets, and there is no research evidence of increased levels of illicit cigarette trade due to these new regulations. The same document also pointed out that the United Kingdom, with one of the highest tobacco taxes in Europe, saw a drop of the illicit cigarette share of the cigarette market from 12% in 2008/2009 to 9% in 2012/2013 after implementation of graphic health warnings in 2008, according to the estimates by its Her Majesty's Revenue and Customs Department. Besides, a survey of 1 024 smokers in Belgium revealed no significant purchases of cheap cigarettes from friends and illicit cigarettes from street vendors after the country's implementation of graphic health warnings in 2007³³.

36. A recent Australian study also shows no evidence in Australia of increased use, before versus after the introduction of plain packaging, of two important categories of contraband cigarettes. Furthermore, prevalence of any level of use of unbranded tobacco did not change and purchasing unbranded tobacco in the past month declined following the implementation of plain packaging³⁴. Apart from overseas statistical reports, although the health warning has yet been expanded in Hong Kong, the Customs and Excise

³² European Parliament. Proceedings of the Workshop on "Cigarette Smuggling", 2014. <http://www.europarl.europa.eu/document/activities/cont/201401/20140116ATT77675/20140116ATT77675EN.pdf> (accessed on 16 February 2017).

³³ European Parliament. Proceedings of the Workshop on "Cigarette Smuggling", 2014. <http://www.europarl.europa.eu/document/activities/cont/201401/20140116ATT77675/20140116ATT77675EN.pdf> (accessed on 16 February 2017).

³⁴ Scollo M, et al. Use of illicit tobacco following introduction of standardised packaging of tobacco products in Australia: results from a national cross-sectional survey. *Tob Control* 2015; **24**:ii76-ii81.

Department has been undertaking stringent enforcement against illicit cigarette activities and there has been no evidence that illicit cigarettes have been intensified.

Legislative means

37. By way of background, the Smoking (Public Health) Ordinance (Cap. 371) was substantially revised and enhanced in the amendment exercise in 2005-06, which proposed extensive amendments to the original provisions in the principal legislation to implement the statutory indoor smoking ban. In view of the major revamping exercise, the Government consolidated the amendments required arising from the various measures which sought to enhance the tobacco control regime and had the amendments submitted to the Legislative Council for scrutiny in the form of an amendment bill in one go. Under the existing section 18 of Cap. 371, the Secretary for Food and Health may by order in the Gazette prescribe the matters in relation to health warning and indication of tar and nicotine yields and the manner in which such matters are to be displayed and table the amendments for negative vetting.

Collection of Stakeholders' Views

38. The Government consulted members of the HS Panel in May 2015 and attended a special meeting with around 100 deputations on 6 July 2015. There were more than 100 submissions made by healthcare professionals, students, smoker groups, the trade, etc. Majority of the views supported the proposal of increasing the size of the health warnings to cover 85% of two largest surfaces of the packet or retail container of cigarettes and tobacco products. In May 2016, the Government issued a letter to the trade setting out the detailed specifications of the proposal. With a view to facilitating the trade's understanding, the Government organised a briefing on the technical issues relating to the implementation of the proposals in November 2016. The Government reported the progress at the HS Panel meeting on 19 December 2016 and attended another meeting with the deputations on 17 January 2017. Over 70 parties attended the January meeting with over 170 submissions made. Majority of the views supported the proposal.

ADJUSTMENTS TO THE PROPOSAL

39. Having duly considered the views of HS Panel Members and operational concerns expressed by the trade, we would make the following adjustments to the proposal -

(a) Relaxing the technical requirement in relation to the tar and nicotine yield indication

40. We understand that the trade is concerned about the display of the tar and nicotine yield indication, which is to be printed on a white background with black characters, letters and numbers. Under the adjusted proposal, there would be no restriction on the background colour of the tar and nicotine indication. Characters, letters and numbers, as long as being reasonably visible, could be printed in black or white. An illustration is at [Annex A](#).

41. The Government noted the WHO's recommendation related to the indication of tobacco constituents and emissions on the packet of tobacco products. Given our progressive approach, we consider it necessary to retain the indication of tar and nicotine yields to make the public aware of the existence of such substances that are harmful to health.

(b) Exempting the expanded health warning requirement on the lid of a drum shape container

42. In our original proposal, if a packet or retail container is in the form of a drum, the Chinese version of the health warning shall be displayed on the curved surface of the drum covering 85% of the area of the curved surface and the English version of the same health warning shall cover 85% of the surface area of the lid. Under the adjusted proposal, the English version of the same health warning would remain covering 50% of the surface area of the lid. An illustration is at [Annex B](#).

(c) Adjusting the requirements for retail container of cigar (except for the ones containing one cigar)

43. We note that the cigar trade has expressed difficulty in affixing the authenticity seals and other necessary labels/seals under the original proposal.

Under the adjusted proposal, with a view to providing greater flexibility, the health warning will cover 100% of one of the two largest surfaces and 70% of the other largest surface of the cigar box. An illustration is at [Annex C](#).

(d) Extension of the adaptation period

44. To allow more time for the trade to prepare for the implementation of the proposal, we propose to extend the adaptation period from 6 months to 12 months upon gazettal of the amendment order.

Seals for Soft Pack Cigarette Packets

45. There are concerns that the seal on soft pack cigarette packets would cover the brand name of the product. At present, there is a requirement that the top side of the health warning shall be no more than 12 millimeters from the top edge of cigarette packet. We propose to remove that requirement and allow the health warning to be positioned at the lower part of the packet. There will be space available on the top of the two largest surfaces and the sides for accommodating the trade mark and the brand name. Under paragraph (3)(7) of the Smoking (Public Health)(Notices) Order (Cap. 371B), it is stipulated that *“No health warning and indication of tar and nicotine yields shall appear in such a manner that it is obscured by any affixture to the packet or retail container, the wrapping of the packet or retail container or any affixture to the wrapping of the packet or retail container”*. There is no specific requirement concerning the colour and design of the seal, provided that the relevant legal provisions are compiled with. We notice that some brands have already been using transparent seals on soft pack cigarette packets. The trade may also consider making the seal blend in with the design of the space for displaying the brand name. The illustrations are at [Annex D](#).

Facilitating The Trade’s Preparation and Implementation

46. To facilitate the trade in preparing for the implementation of the proposal, the Government will provide the tobacco trade with a standardised electronic archive version of graphic health warnings once the Amendment Order is gazetted. The Tobacco Control Office of the Department of Health will provide the necessary guidance and support.

WAY FORWARD

47. The Government aims at tabling the proposed Amendment Order at LegCo in the first half of 2017.

Food and Health Bureau

Department of Health

February 2017

Illustration of Adjusted Requirement of Tar and Nicotine Yield Indication



No restriction on the background colour of the tar and nicotine indication. Characters, letters and numbers, as long as being reasonably visible, could be printed in black or white.



Examples of the display of the tar and nicotine yield indication on cigarette packet and retail container

Illustration of Adjusted Requirement of Drum Shaped Retail Containers

Existing Requirement

Health Warning covers 50% of the curved surface and the lid.



Original Proposal

Health warning to cover 85% of surface area of curved surface and lid.

Adjusted Proposal

Health warning to cover 85% of curved surface area and 50% of the lid.



Illustration of Adjusted Requirement of Cigar Boxes and Retail Containers



70% on one of the largest surfaces and 100% on the other largest surface of the cigar box or container



Authenticity seals

Illustrations of Seal for Soft Pack Cigarette Packets



Existing example of transparent seal



Seal blends in with the design of the space for displaying the brand