



THE PACIFIC CIGAR CO. (AUSTRALIA) PTY LTD.

UNIT 17, 23 BOWDEN STREET, ALEXANDRIA, NSW 2015, AUSTRALIA.
PO BOX 302, ALEXANDRIA, NSW 1435, AUSTRALIA

The Pacific Cigar Company (Aust) Pty Ltd

**SUBMISSION TO THE SENATE STANDING
COMMITTEES on LEGAL and CONSTITUTIONAL
AFFAIRS:**

Legal and Constitutional Affairs Legislation Committee

**Trade Marks Amendment (Tobacco Plain Packaging) Bill
2011 [Provisions]**

Angelo Giannakopoulos
General Manager
The Pacific Cigar Company (Aust) Pty Ltd



EXCLUSIVE DISTRIBUTOR
FOR
ALL HAVANA CIGAR BRANDS

www.pacificcigar.com

www.sigloaccessory.com

www.habanos.com



THE PACIFIC CIGAR CO. (AUSTRALIA) PTY LTD.

UNIT 17, 23 BOWDEN STREET, ALEXANDRIA, NSW 2015, AUSTRALIA.
PO BOX 302, ALEXANDRIA, NSW 1435, AUSTRALIA

2 September 2011

Ms. Julie Dennett

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms. Dennett,

Re: Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 [Provisions]

I am pleased to provide, on behalf of The Pacific Cigar Company (Aust) Pty Ltd the following submission to the Inquiry into the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 [Provisions] by the Senate Legal and Constitutional Affairs Legislation Committee.

This submission addresses the implications of the Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 and the Tobacco Plain Packaging Bill 2011 for the hand rolled long filler Cuban cigar market in Australia under the new Legislation.

The Pacific Cigar Company understands that the Committee may be hearing evidence as well as considering written submissions and formally requests to be considered to appear and to give evidence before the Committee.

Please do not hesitate to contact me should you have any queries or require any additional information.

Thank you.

Yours sincerely,

Angelo Giannakopoulos
General Manager
The Pacific Cigar Company (Aust) Pty Ltd



EXCLUSIVE DISTRIBUTOR
FOR
ALL HAVANA CIGAR BRANDS

www.pacificcigar.com

www.sigloaccessory.com

www.habanos.com

Executive Summary

- The Pacific Cigar Company (Aust) Pty Ltd (Pacific Cigars) is the exclusive distributor to Australia of hand rolled long filler Cuban Havana (*Habanos*) cigars (Cuban cigars), such as *Cohiba*, *Trinidad*, *Montecristo*, *Partagas*, *Romeo y Julieta*, *Punch*, *H. Upmann*, *Hoyo de Monterrey*, *La Flor de Cano*, *Quintero*, *San Luis Rey*, *Bolivar*, *Vegas Robaina* and *Vegueros*.
- The debate in both Houses of Parliament in relation to the Tobacco Plain Packaging Bill (2011) and the Trade Marks Amendment (Plain Packaging) Bill (2011) has focused on Big Tobacco, the impact of cigarette consumption on Australians' health, and how plain packaging of cigarette packets will remove the last advertising platform available to cigarette companies in Australia.
- The Legislation is flawed because of the unintended impact it has on the packaging of Cuban Cigars - a sui generis product.
- The requirements under the Legislation place an impossible burden of compliance on The Pacific Cigar Company (Aust) Pty Ltd and also on the Government of the Republic of Cuba, which is the manufacturer of these products.
- If the Legislation is passed, all trademarks and seals of the Government of the Republic of Cuba will need to be removed in order for their product to comply.
- Compliance of this nature would compromise the quality and interfere with the integrity of the very product itself.
- The Government of the Republic of Cuba has made clear that they are unable to change the production of Cuban cigars to comply with the Legislation¹
- Thus unintentionally, under the Legislation, Cuban cigars will not be able to be sold legally in Australia.

¹ HE Pedro Monzon, Ambassador, Republic of Cuba to The Pacific Cigar Company (Aust) Pty Ltd, 24 August 2011 (Appendix 1)

- The consumers of Cuban cigars are not the target of the desired public health outcomes of the Legislation.
 - Cuban cigars are not comparable to mass market cigarettes, being a mere 0.004% of total tobacco consumption per annum in Australia.
 - The consumers of Cuban cigars are invariably male and over 45 years of age.
 - 50% of these consumers are very occasional purchasers who are marking a special life cycle event or milestone; 5% are purchasing vintage cigars or cigars to age as an investment; 45% are regular Cuban cigar smokers, consuming on average 2 cigars a week.
- If the Legislation as it stands, is wildly successful and reduces smoking levels by 10%, 20,000,000,000 cigarettes will still be consumed every year in Australia while Cuban cigars will be prohibited.
- While cigarettes are manufactured in Australia, no cigars are made in Australia. Cuban's cigar industry is a vital part of the Cuban economy. Cigars are Cuba's third largest export and Cuba's major export to Australia.
- The Government of the Republic of Cuba has, in international fora and over many decades, consistently pursued its right to safeguard both the quality and the integrity of their tobacco product, with the result that Cuba's track and trace measures are of the highest possible standard. The Legislation would mandate the removal and destruction of Cuba's track and trace measures; an outcome to which the Cuban Government may take umbrage.
- The Government of the Republic of Cuba's regulations that govern the protected appellations of origin for Habanos (hand rolled, long filler Cuban Cigars) notes that this appellation type "belongs to the so-called social or historical Appellations of Origin, and does not correspond to a concrete geographical location or specific toponymic name"². Thus, unlike cigarettes and other tobacco products, the issue of their removal for compliance goes beyond simple trademark regulation and may also be applicable to Cuban cigar containers

² Chapter IV, Article 20; Resolution No 201/2009; Regulations of the Habanos Protected Appellation of Origin and of the Rest of the Cuban Tobacco Appellations of Origin (Official Cuban Government translation to English)

- The Senate Legal and Constitutional Affairs Legislation Committee may wish to also consider the compatibility of the Australian Government’s Legislation with International Agreements relevant to Cuban cigars:
 - The WHO Framework Convention on Tobacco Control: Article 11 Implementation Guidelines (2011 Edition) defines tobacco packaging “inserts” and “onserts” as “communications”. The Legislation’s definition includes anything that is not the tobacco product itself (other than the lining). The Australian Government’s definition prohibits items intrinsic to Cuban cigars;
 - TRIPS Agreement Article 20: The infringement of trademark rights in cigarette packaging may be “justified”. This is, on balance, the ends, (health outcomes), outweighing the means – the destruction of trademark rights. The nature of the Cuban cigar product, its use and number of consumers, indicate that the level for “justification” for the removal and destruction of Cuba’s trademarks, seals, etc. should be much higher. Cuban cigars do not make the required “material contribution” to the outcomes of the Legislation;
 - General Agreement on Tariffs and Trade (GATT) 1994 Articles XX (B) and XIV (b): The Australian Government has not, in the case of Cuban cigars, considered “alternative measures” to achieve its objectives. Additionally, the contribution to the objectives the Government seeks must not be “marginal or insignificant”;
 - TRIPS Agreement Article 22 and Article 24: The Articles referred to assume that it would not be a foreign government mandating the removal of foreign GIs. The Australian Government’s vigorous protection and continual expansion in international forums of hundreds of Australian alcohol GIs is not consistent with mandating their removal for Cuban cigars;
 - WHO FCTC Article 15: The Legislation mandates the required and highly desirable Cuban cigars’ sophisticated tracking and tracing mechanisms embedded in its Government seals be removed and destroyed, unintentionally encouraging counterfeiting;
 - Anti-Counterfeiting Trade Agreement (ACTA) Article 33: The potential that before 2013 the removal and destruction of the Government of the Republic of Cuba’s sophisticated tracking and tracing mechanisms under the Legislation, undermines and is quite inconsistent with the undertaking for international cooperation; exchange of data, information of best practices etc under this Agreement.
- There is a precedent in existing tobacco packaging requirements for the Government taking into account the nature of Cuban cigars whilst still ensuring consumers are protected and better health outcomes are sought. The

Government can extend the same practical approach with respect to the new Legislation if there is a will to do so.

- The Government's public health outcomes through plain packaging can be achieved, without the Cuban Government's trace and track measures, trademarks, GIs, seals and warranties being destroyed and the intrinsic, protective internal packaging of Cuban cigars not being removed, if Cuban cigars are offered for sale with plain packaged outer surfaces and the necessary health warnings etc applied.

Hand rolled long filler Cuban Cigars: A Sui Generis Product and Consumer

Cuban hand rolled, long filler cigars (Cuban cigars) are sui generis. Historically they have always been recognized as a unique product and recognized as such by international bodies such as the United Nations World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) where they have GI and Designation of Origin (DOP) status.

Cuban cigars are rolled by hand using 100% natural tobacco utilizing methods that have been in practice for two hundred years. The definition of a "hand made" cigar is a cigar made by hand exclusively from 100% natural tobacco leaves and vegetal gum using the following implements only: cutting boards, hand held tobacco knives, hand operated guillotines and bunching devices, length and girth templates, glue pots and size moulds.

These products are internationally renowned as of the highest quality, not only because they are hand rolled using traditional methods, but also because 100% natural tobacco long leaves are used to make the filler, the binder and also the wrapper.

These Cuban cigars are separate, distinct and distinguishable from machine-made cigars which some manufacturers may describe as being "hand made" but which may in fact have been machine made, using machine chopped tobacco leaf filler and then wrapped by hand using a single long leaf wrapper or even a wrapper made from pulped tobacco.

Mass-market cigarettes are reported to contain over 4,000 chemicals, including 43 known cancer-causing compounds and 400 other toxins. These include acetone, methanol, naphthylamine, pyrene, cadmium, vinyl chloride, cyanhydric acid, ammoniac, urethane, toluene, arsenic, dibenzacridine and dichlorodiphenyltrichloroethane.

Under WTO Framework Convention on Tobacco Control (FCTC), Article 10, signatory countries undertake to adopt measures for public disclosure of information about the

toxic constituents of tobacco products. Should Australia institute this undertaking, Cuban cigars alone among tobacco products would have no additional information to include on the packaging.

The consumers of this unique product fall into one or more of three categories; the regular smoker; the special occasion purchaser and the investment purchaser.

The regular Cuban hand rolled long filler cigar smoker in Australia consumes on average 2 cigars per week. They do not necessarily buy by the box but are more likely to buy 2 containers each containing 3 cigars, which would last them three weeks.

This type of consumer is male, over 45 years of age, earns in excess of \$150,000 per annum, and typically lives in metropolitan Sydney, Melbourne, Brisbane and Perth in upper socio-economic post-codes. Typically these consumers are senior professionals; business leaders (CEOs), lawyers, accountants, journalists and doctors³.

The price differentiation of Cuban cigars (a single stick can cost on average A\$29.00 up to A\$150.00) and the rest of the tobacco market, predominantly mass market cigarettes, is one of the reasons why young Australians do not smoke these cigars. Another is that the product is not part of Australia's Youth culture. Cigar smoking is something middle-aged men do. It is not "alternative". It is not counter culture; most often it is seen as a mark of an older "establishment" male, not something that young people aspire to be a part of, or identify with.

The second group of purchasers of Cuban cigars is the very occasional celebratory cigar purchaser; typically male and coming from all walks of life. He may purchase one of these cigars as part of a rite of passage or a milestone event, such as getting married, becoming a grandfather or for the successful conclusion of a very important business negotiation; the very types of occasion from which we get the saying, "give the man a cigar". Additionally, "giving the man a cigar" does not necessarily mean 'the man' will necessarily smoke it, but may well rather keep it as a treasured keepsake of a momentous occasion.

³ Based on data generated by the 420 retail outlets of handmade long filler Cuban cigars in Australia

Women occasionally make a one-off purchase of a Cuban cigar for the same reason, to give as a gift to a partner or close relative, or for a special celebration.

The third group of consumers are those customers interested in purchasing vintage hand rolled, long filler Cuban cigars, or cigars for the purpose of ageing them to vintage. For this group, even more than in the case of the occasional or one-off purchaser, the purpose is not to smoke the product. Rather, this consumer is making an investment decision in the same way that they might invest in Fine Art or in particular wine vintage, such as a Penfolds Grange of a specific year.

The purchaser of these Cuban cigar products has disposable income, is cultured about cigars and knowledgeable about investing, and investing in the vintage cigar market in particular and, will be aware of the long time frames required to realise the potential of this type of investment.

This kind of buyer is making an informed decision on the product they are purchasing, rather than a cigarette smoker purchasing a product as part of a sustained habit giving rise to the significant social and health consequences the Commonwealth Government is aiming to curb.

Although vintage or aged Cuban cigars are sold by specialist retail stores in Australia they can also be purchased privately and, at international auctions in much the same way as investors are able to purchase premium investment wines internationally.

Critical to maintaining the value of these investment products, beyond the obvious in terms of cigar type; Government of the Republic of Cuba Warranty Seal; trademarks and other marks of authenticity, is the correct storage conditions of these products and, most importantly in terms of resale value, the requirement that these products remain sealed, intact, unopened and unused. As such the desired public health outcomes of the plain packaging measures are irrelevant to the purchasers of these particular products.

Cuban hand rolled long filler cigars should be treated as a special product by the Legislation, which, although it is really aimed at cigarettes, seeks to be unilaterally applied to a product that manifestly does not fit the model. We believe it should be possible to allow for some nuance in the Legislation so that Pacific Cigars is able to

comply with the requirements of the Legislation without rendering their product unfit for sale.

Unintended Consequence: The Banning of Cuban Cigars in Australia

As has been discussed in this submission and in our previous submissions, to the Department of Health and Ageing on the Draft Exposure Bill and to the House Standing Committee on Health and Ageing for their Inquiry into the Legislation, the goal of the Legislation is a reduction of massive public health consequences as a result of tobacco consumption through the plain packaging of cigarette packets.

As the Legislation stands, it is the smallest group, the most well informed cohort, that make up Cuban cigar consumers; the older male demographic, the least tobacco dependant and addicted consumer, that is most affected by the new measures which impose a level of compliance which cannot be met by the producers or importers of this sui generis tobacco product.

The Government of the Republic of Cuba and Pacific Cigars are cognisant that the Australian Government has not intentionally sought that Cuban cigars would be unable to comply with the Legislation but, nevertheless it is their cigar industry which will be most impacted by the new measures given that the unintended consequence of the Legislation as it now stands will be that Cuban cigars, while still able to be imported will be prohibited from sale in Australia unless the product is destroyed or degraded in the act of compliance.

It is the unique characteristics of the packaging required for these products, rather than the tobacco product itself, that gives rise to an ironic situation because packaging for these cigars, perfected over hundreds of years, which protects and safeguards the integrity of the product and ensures it is fit for purpose after purchase is not used to promote the product.

Packaged for Protection not Promotion

There are more than 350 different variations of packaging for Cuban hand rolled long filler cigars. The packaging can be made solely from, or from a combination of, wood,

aluminium, plastic, leather, ceramic, porcelain, glass, cardboard and paper. The various types of internal packaging for Cuban cigars are designed specifically to safeguard the product following exportation from Cuba until reaching the end user, who will either consume the product immediately or store it in the required manner following purchase. This includes the ribbons which hold the cigars in place, the tissue paper which prevents damage to the cigars from rubbing against the packaging, the sheet of cedar wood which absorbs moisture to ensure the product does not deteriorate and the insert of advice as to the recommended humidity and temperature to store the cigars.

The external and internal packaging of Cuban cigars is unique with respect to its protective qualities; the manner in which the product must be stored prior to and after sale is also different, reflecting the sole characteristics of the product. If these products are stored under the correct conditions, the product has no shelf life or use by date, the product does not deteriorate. However, as soon as the product is exposed or stored incorrectly, it immediately begins to degrade.

In order to ensure these products are sold to consumers in pristine condition, they must be kept inside sealed humidors in store. We note that the majority of Cuban cigars are sold individually rather than by box. Thus for the consumer who is making a one-off purchase for immediate consumption, or keeping the item as a memento of a special occasion correct storage is not an issue. In either case, risk of the packaging being a promotional tool for the product, is non-existent.

Given that a regular smoker, smokes on average 2 Cuban cigars per week, the opportunity for packaging to be on public display is minimal. Sticks that have not been purchased for immediate consumption need to be stored in a humidor. At this point the packaging, particularly the internal packaging as already described, becomes irrelevant, it's purpose, which is to protect the product has been fulfilled.

Under the Legislation compliance requires that hand rolled, long filler Cuban cigars are imported in premium condition, but then, order to be compliant, the product must be decanted, and so degraded or destroyed, authenticity of origin compromised and only then anonymously repackaged before being offered for sale.

The Legislation does not recognise that all the seals and marks of authenticity for Cuban cigars are State owned trademarks, the property of a sovereign government; the trademarks themselves have a high intrinsic commercial value and also designate a highly valuable product.

Pacific Cigars is aware of numerous examples of vintage or aged Cuban cigars being sold for high price at auction. In a private sale in Australia, 18 months ago, a box of 1981 – 1982 Cuban *Dunhill* cigars sold for AUD\$20,000. We believe this box would have originally been purchased for around AUD\$1,000.

The most expensive sale of vintage cigars at The Pacific Cigar Company (Aust) Pty Ltd retail store in Melbourne, within the last 5 year was to the value of AUD\$7,800 for a limited edition humidor containing *Cohiba*, *Montecristo*, *Hoyo De Monterrey*, *Partagas* and *Romeo y Julieta* cigars. The original value of this item was AUD\$2,685 and the current estimated value for such an item, based on US prices, is between AUD\$10,000 and AUD\$15,000.

Cuban Cigars are internationally acknowledged as unique, but are indistinguishable without packaging and trademarks. Only with the original packaging may the purchaser have surety that the product is genuine and pristine.

Cigarettes have 2 forms of packaging – the packet and the carton – as compared to 350 plus containers sizes for hand rolled long filler Cuban cigars. Big tobacco can complain and rail loudly against the Legislation, but in the end, it will be able to comply without compromising its product.

The Legislation, which is proscriptive with respect to cigarette packaging erroneously consigns non cigarettes all together in an after thought as “other tobacco products”. The model for plain packaging of cigarettes cannot be applied to this sui generis product and The Pacific Cigar Company (Aust) Pty Ltd seeks special accommodation so that they can comply with the Legislation and continue to sell their products in Australia.

Guidelines for the Implementation of Article 11 of the WHO Framework Convention on Tobacco Control

As one would expect, the WHO Guidelines deal with the external packaging of the tobacco product, i.e. ensuring that the consumer does not experience the outside of the product without health warnings and messages.

The issue of “inserts” and “onserts”, which are defined as “communications” i.e. marketing materials “miniature brochures”⁴, is dealt with in the Guidelines so as to ensure that consumers do not experience the marketing of tobacco products either inside or outside the product without appropriate health warnings.

In contrast the Australian Government in the Legislation defines inserts as anything inside a package that is not a tobacco product other than the lining of the package. This means that many objects intrinsic to the manufacture and integrity of Cuban cigars (described in the previous section), which are not inserts as the WHO has defined them, are not permitted subject to regulations.

The Australian Government defines onserts as anything attached to the packaging, in contrast to the WHO Guidelines definition of onserts as communications “such as a miniature brochure beneath the outer cellophane wrapping or glued to the outside of the cigarette package”⁵. In the case of Cuban cigars, the diversity of packaging for different sizes of cigar, individually packaged cigars, which can then be packaged again in 3’s or 5’s and for packaged cigars in boxes of 10, 25, 50, 100 all effectively “retail packaging” renders the idea of eliminating onserts, as the Australian Government defines them, impossible.

In an attempt to circumvent any unforeseen promotion of tobacco products, especially cigarettes, the Australian Government has extended the WHO’s definition of packaging and inserts and onserts to a broad brush stroke. However, when considering the letter and spirit of the WHO Guidelines, with common sense,

⁴ Guidelines for the implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and labeling of tobacco products) 2011 Edition, page 52

⁵Ibid. page 52

particularly as it applies to hand rolled, long filler Cuban cigars, it is clear that compliance that was sensible and workable has become impractical and impossible.

TRIPS Agreement Article 20

Many of those who spoke on this Legislation in the House raised TRIPS Article 20 as a possible impediment to the Government's plain packaging Legislation, in restricting trademark rights. The argument that such infringement must be "justified" by the public health outcomes has also been raised by cigarette companies.

The total consumption of all handmade cigars in Australia represents 2% of all cigars consumed in Australia. Cuban hand rolled long filler cigars represent 1.6% of that 2%⁶ with a regular smoker of these Cuban cigars consuming on average 2 per week. Contrast this with the average Australian consumer of cigarettes, who smokes 14 cigarettes per day⁷. On this basis, total average weekly cigarette consumption in Australia is 98 sticks per week, compared with 2 Cuban cigars.

Projected, on an annual basis, the total average annual cigarette consumption in Australia is 5096 cigarette sticks, compared with 104 Cuban cigars.

Is the infringement of trademarks in the interests of public health "justifiable" in the case of Cuban cigars, given the consumption rates? The Australian Government has not attempted to gauge the level of influence the packaging on Cuban cigar consumers. The Government's evidence that all the research strongly suggests that tobacco packaging has the greatest influence on young consumers, it would be reasonable to infer that the level of influence decreases with the age of the consumer.

Where the infringement of trademarks, national indications of source, appellations of origin and geographical indications is being mandated for a sui generis product amounting to 0.004% of the tobacco market and the stated target cohort and outcomes do not correlate, the Australian Government does need to show that their measures are likely to achieve its stated legitimate objective.

⁶ PriceWaterhouseCoopers 2010

⁷ Smoking Study, Galaxy Research March 2009

In their submission to the recent House Standing Committee on Health and Ageing Inquiry into the Legislation, Assoc. Prof. Andrew Mitchell and Assoc. Prof Tania Voon of the Melbourne Law School (University of Melbourne) state that the public health objectives “could” be justifiable under the TRIPS Agreement. In their submission they note that the Australian Government would be required to demonstrate that the Legislation (in this case as it impacts on hand rolled, long filler Cuban cigars) makes a material contribution to the achievement of the Government’s health objective, as well as providing qualitative or quantitative evidence of the extent of that contribution⁸.

The quantification of the public health outcome that this measure has, leading to the destruction of the product or the unintentional banning of the product is not proportional to the health outcome the Government seeks. The Senate Legal and Constitutional Affairs Legislation Committee should take into consideration the impact and justification for this one size fits all Legislation on a very distinct segment of the market.

General Agreement on Tariffs and Trade 1994 (GATT) Articles XX (b) and XIV (b)

In relation to sui generis Cuban cigars Article XX (b)⁹ and the corresponding provision in the General Agreement on Trade in Services (GATT), and Article XIV (b), the Committee may wish to consider the relevance of the position that “The extent of the contribution to the achievement of the measure’s objective and its trade restrictions...by comparing the measure with possible alternatives”.

While this consideration is part of any potential dispute resolution, the thrust of the approach is consistent with this submission’s, which emphasizes that fact that Pacific Cigars seeks the ability to comply with the Legislation without destruction of the product and to avoid an unintentional ban of the product.

⁸ Mitchell and Voon: Submission No 30, Plain Packaging Bill (25/7/2011); <http://www.aph.gov.au/house/committee/haa/billtobaccopackage/subs.htm>

⁹ General Agreement on Tariffs and Trade 1994 (GATT 1994)

Furthermore, the GATT provisions relating to “bringing about a material contribution to the objective “as opposed to a “marginal or insignificant contribution” are to be assessed “either in quantitative or qualitative terms” and can include “scientific sources”.

The minute segment of the tobacco market that is Cuban cigars, in the light of these framework considerations, would underscore the Legislation’s complete lack of gradation of means to ends. This submission urges serious consideration of a compromise accommodation whereby the Legislation’s outcomes can be achieved and the Republic of the Government of Cuba’s primary export to Australia is able to continue.

Further to this point at the June 2011 TBT Committee Meeting¹⁰ in relation to Thailand’s proposal on pictorial health warnings on alcoholic beverages, Australia joined the EU, Mexico, the US, Chile, Argentina, New Zealand and others in raising concerns that Thailand did not have scientific evidence to justify the measures being proposed and also, that Thailand did not appear to consider less trade restrictive, less costly, and less burdensome alternatives. The Australian Government has not applied the same standards to its own Legislation as it impacts on hand rolled long filler Cuban cigars.

Trips Agreement Article 22, Article 24: Geographical Indications

The Committee may also wish to consider the relevance of TRIPS Article 22, which refers to the Geographical Indications (GIs) which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.

Australia has several hundred GIs for wine and spirits and has vigorously pursued international avenues to further protect its GIs commercial interests – which may also be seen as having public health impacts, impacts not dissimilar and perhaps

¹⁰ http://www.wto.org/english/news_e/news11_e/tbt_15jun11_e.htm

analogous to Cuban cigars, in so far as Australian wines may not be pivotal to alcohol public health concerns but are tangentially relevant.

Furthermore, we note that TRIPS Article 24, relating to Exceptions to GIs, is framed on the assumption that it would not be a Member that would be mandating the removal of another Member's GIs. This may be evidenced by the fact that there is no obligation for a Member to protect GIs which are not protected in their country of origin but that a GIs protection is not diminished prior to the date of entry into force of the WTO Agreements.

Australia is at the forefront of protecting its wine GIs. In the Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on GIs (1999), the Australian Government notes that foreign and domestic parties alleging misuses of a given GI have a range of options available to pursue their claims and further states:

*"the Australian regime is underpinned by the need to ensure effective protection against unfair competition, as provided and defined under Article 10bis of the Paris Convention (1967), and explicitly referred to in Article 22.2 (b) of the TRIPS Agreement...The system is not dependant on the ability of an interested party to point to the appearance of the geographical indication on any official list of register...Whichever of the available provisions the party chooses to use, the decision making process will be based on an assessment, as provided under the TRIPS Agreement, of whether the circumstances of the alleged misuse either mislead the public as the geographical origin of the good, or amount to an act of unfair competition...The desirability of the Australian system lies in its efficiency and flexibility and direct orientation towards ensuring that the rights of parties with legitimate claims to geographical indications are protected."*¹¹.

In ensuring that the rights of parties with legitimate claims to GIs are protected, the Australian Government cites in this document, Legislation relevant to the protection of GIs, which is applicable equally to Australia and foreign GIs; Trade Practices Act (1974) (Cth); Australian Food Standards Code Spirit Standard and State and Territory Fair Trade Acts and goes on to note, *"for goods other than wine and services, there is no provision under any of the cited legislation which restricts the right of foreign nations to take action under these Acts to enforce protection of geographical*

¹¹ WTO: Council for Trade-Related Aspects of Intellectual Property Rights 9 July 1999, Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications; Checklist of Questions; Responses from Australia; Addendum

indications”¹². The Australian response also suggests that other possible breaches may be relevant to the ACCC. While this Australian Government document refers specifically to Australian alcohol GIs it is an indication of the standards with respect to GIs the Australian Government sees as applying to itself and equally to the way this country would expect to be treated internationally in relation to its GIs. Nevertheless, the Australian Government is mandating the removal of a foreign nation's GIs. Should Australian GI wine exports be required on arrival to be decanted into plain tetra-pak cartons so as to ensure that consumers or potential consumers would not be influenced by labeling, or be able to see what they were purchasing or even from whence it came, there could be no doubt the Government would pursue every avenue to uphold the protection of the Australian product.

Dispute resolution mechanisms are available within the WTO TRIPS Agreement. The Government of the Republic of Cuba presentation at the 2007 International Symposium of GIs jointly organised by the World Intellectual Property Organisation (WIPO) and the State Administration for Industry and Commerce (of the People’s Republic of China), stated clearly that Cuba sees indication of source, GIs and appellation of origin as all being equal (all of which must be removed under the Legislation).

The WHO Framework Convention on Tobacco Control: Article 15

The Senate Legal and Constitutional Affairs Legislation Committee may wish to also consider the relevance of Article 15 of the WHO Framework Convention on Tobacco Control (FCTC), dealing with illicit trade in tobacco control. Article 15.2 states:

“Each Party shall adopt and implement effective legislative, executive, administrative or other measures to ensure that all unit packets and packages of tobacco products and any outside packaging of such products are marked to assist Parties in determining the origin of tobacco products, and in accordance with national law and relevant bilateral or multilateral agreements, assist Parties in determining the point of diversion and monitor, document and control the movement of tobacco products and their legal status...”

¹² WTO: Council for Trade-Related Aspects of Intellectual Property Rights 9 July 1999, Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications; Checklist of Questions; Responses from Australia; Addendum

The Government of the Republic of Cuba has instituted a number of sophisticated measures to identify its tobacco product, over and above the traditional, iconic labeling, as a means to curb the counterfeiting of products and to firmly establish the integrity of the Cuban manufacturing processes. Measures include the Cuban Government Warranty Seal, first introduced in 1889, which includes a red serial number visible only under ultra-violet light. The Warranty Seal is printed on highly adhesive synthetic paper that is destroyed on removal, it features an holographic band with two and three dimensional bicolour text, a security dot only visible through a laser-beam scanner, is scan and photocopy protected and features optically changing elements. Each Seal also features an unique barcode. This barcode information is stored in a database making it possible not only to identify a particular container anywhere in the world, to know to whom it was sold as well as the invoice number, among other details.

The Cuban Government stipulates that its Warranty Seal may not be broken outside Cuba (unless by Customs Officials). A company such as Pacific Cigars is only authorised to break the Seal for the purposes of quality control. It should be noted that where cigar containers are opened by non Cuban Customs officials, these products are frequently unable to be sold as purchasers see the breaking of the Seal as a breach of the assured quality of the hand rolled long filler Cuban cigars.

The Government of the Republic of Cuba has a state of the art track and trace system. In its present form the Legislation mandates that the Republic of Cuba's trademarks, seals, indications of source and appellations of origin be removed before being offered for retail sale, which at best undermines the capacity of the Australian Government to determine the legal status of these tobacco products, and at worst destroys the exemplary tracking and tracing regime instituted by the Government of the Republic of Cuba.

The Australian Government's Legislation is mandating the removal of what is required and highly desirable under WHO FCTC Articles 15.2 and 15.2 (b)¹³.

The threat posed by tampering, fraud and counterfeiting activities, which are increasingly connected to international organised crime, is real and is acknowledged not only by the Government of the Republic of Cuba and Australia but internationally.

Counterfeiting of such luxury products as handmade long filler "Cuban" cigars continues to rise and the impact of counterfeiting for the Republic of Cuba's economy is very serious, given the importance to their economy of cigar products and also because it raises obvious concerns, including health issues, for the consumers of these products.

The 2008 Report from the OECD Project on Counterfeiting and Piracy¹⁴ notes that in the United States, law enforcement officials uncovered an operation in which legally imported, but unbranded cigars were falsely packaged and resold as premium, branded cigar products. The scale of the operation was significant, as enough genuine cigar bands, boxes, cellophane and other materials were found to have repackaged between 30 and 50 million "Cuban" cigars.

Cuban cigars are an illegal import in the United States (for other reasons), but as the example noted in the OECD Report illustrates, the ease and potential for these products to be counterfeited in Australia increases under the new Legislation, particularly given the potential financial rewards that accrue from such a high value product.

¹³ Article 15.2 (b): "Each Party shall consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade".

Article 15.3: "Each Party shall require that the packaging information or marking specified in paragraph 2 of this Article shall be presented in legible form and/or appear in its principal language or languages."

¹⁴ OECD The Economic Impact of Counterfeiting and Piracy (2008), Chap 3.4, p80, http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html

This incident alone underscores the importance of the Government of the Republic of Cuba's seals and marks of authenticity and is an example of why the Cuban Government will not allow these trademarks to in any way be compromised.

Also worthy of note, is the "Indonesia: IPR Enforcement Report 2009"¹⁵ from the European Trade Commission which estimates that up to 20% of "premium" cigars sold in Indonesia are counterfeit.

These incidents raise another potential unintended consequence of the Legislation; latent criminal activity in Australia in the future focusing on counterfeiting "Cuban" cigars in this country.

Under the Legislation, it would be easy for black market operators pass imported, inferior, compliant cigars off as hand rolled long filler Cubans by repackaging them as "Cuban" cigars using also legally imported, or supplied here, genuine or facsimile bands, boxes, cellophane and other "authentic" packaging materials to achieve the counterfeit product, which could then be sold for a premium. Inferior cigars, having been plain packaged as the Legislation requires after importation, could also be sold to unwary retail consumers as "Cuban" cigars.

If the Government of the Republic of Cuba's trademarks, seals and other marks of authenticity are missing it becomes easy to defraud the public given that it is very difficult for consumers, particularly those who are occasional purchasers rather than aficionados, to detect what is the genuine, hand rolled, long filler Cuban cigar product and what is not. There are also health implications for people buying an inferior, cheaply made product, probably containing chopped filler and a wrapper made of pulped tobacco, rather than the genuine product, which has been painstakingly manufactured under stringent conditions from 100% natural long tobacco leaf.

Anti-Counterfeiting Trade Agreement (ACTA) 2010¹⁶

On a practical level Chapter IV, Article 33 of ACTA concerning International Cooperation expands international law on civil enforcement, digital enforcements,

¹⁵ http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143740.pdf

¹⁶ Anti-Counterfeiting Trade Agreement (ACTA) 3 December 2010; <http://www.dfat.gov.au/trade/acta/>

border measures and criminal enforcement of IP law. It increases international cooperation over increased enforcement of IP rights. The Committee might want to consider the implications should the Republic of Cuba ratify the ACTA before 2013.

Cuba, as a WTO Member may also become a signatory to this Agreement. What might the implications be for Australia mandating the removal and destruction not just of trademarks, GIs, Appellations of Origin and DOPs, and in so doing potentially encouraging offshore counterfeiting and import of “Cuban” cigars as well as onshore counterfeiting of “Cuban” cigars, but also the significance of these being another nation’s trademarks, GIs, DOPs, especially in the Agreement’s context of international cooperation where the exchange of statistical data, information on best practices, legislative and regulatory measures as well as “other information as appropriate...”¹⁷ are the purpose of international cooperation under the Agreement.

Cuba in the International Environment

Cuba has been subject to a US economic, financial and trade embargo since 1962 and this is subject of a Resolution each year in the United National General Assembly. In 2009, President Obama announced the easing of remittances that Americans with relatives in Cuba can send back. He also ended a number of restrictions on US citizens visiting Cuba. Regulations around US agricultural exports to Cuba have also been eased. Furthermore, President Obama recently announced that US international airports will be accepting flights from Cuba. These initiatives are the first step towards a possible rapprochement between the US and Cuba.

Since 1996, Australia has voted in favour of Cuba’s resolution in the United Nations General Assembly calling for an end to the US embargo. As the Australian Department of Foreign Affairs notes, ‘Australia believes that confrontation and isolation are not productive policies in relation to Cuba’¹⁸.

¹⁷Anti-Counterfeiting Trade Agreement (ACTA) 3 December 2010; <http://www.dfat.gov.au/trade/acta/>

¹⁸ Commonwealth Department of Foreign Affairs and Trade: Cuba- Fact Sheet
http://www.dfat.gov.au/geo/cuba/cuba_country_brief.html

In 2010, the major Australian import from Cuba was manufactured tobacco – cigars (A\$5million)¹⁹. Cuba’s exports to Australia are 0.2 per cent of its total global trade. Clearly, Australia is a small market for Cuba, and at this stage there is much more at stake for Australians’ enjoyment of iconic life events if Cuban cigars are no longer able to be sold in Australia than there is for Cuba.

The Pacific Cigar Company (Aust) Pty Ltd urges the Senate Legal and Constitutional Affairs Legislation Committee to examine these matters before the Legislation’s overly broad scope engulfs Cuban hand rolled long filler cigars.

We urge the Australian Government to acknowledge that Cuban cigars are a major export of a small emerging economy (UN Data 2008 reports Cuba’s per Capita GDP at US\$5,596; The World Bank in 2008 reports Cuba’s Per Capita GDP at US\$5,596). Ironically, in a country which can ill afford a heavy blow to a primary, labour intensive, artisan industry, cigar making, the hand crafting of many of the containers, packages and exportation of these products will be the most impacted by the Legislation, albeit unintentionally, as a result of attempting to solve a problem in a single legislative stroke.

The Government of the Republic of Cuba has raised (document G/TBT/N/AUS/67) a number of concerns relating other to Intellectual Property rights as they impact on Cuban cigars encompassing cigar containers, many of which are typically handmade and are within the broadest definition of Appellation of Origin (enshrined within Cuban Law²⁰) as also pertaining to “so-called social or historical Appellations of Origin, and does not correspond to a concrete geographical location or specific toponymic name”²¹.

In their submission to the House Standing Committee on Health and Ageing Mitchell and Voon note that under Articles 2.1 and 2.2 of TRIPS, Australia, as a party to the Paris Convention, is obliged to comply with the Convention “...as a matter of international law with respect to other Paris Convention parties...” Article 6 *quinquies* (B) of the Paris Convention states that

¹⁹ Commonwealth Department of Foreign Affairs and Trade: Cuba- Fact Sheet

²⁰ Chapter IV; Article 20; Resolution No 201/2009; Regulations of the Habanos Protected Appellation of Origin and of the Rest of the Cuban Tobacco Appellations of Origin (Official Cuban Government translation to English)

²¹ Ibid.

“Trademarks covered by this Article may be neither denied registration nor invalidated except...when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production...”²²

While Mitchell and Voon have proposed that “Tobacco trademarks in the abstract world would not fall under the first or second paragraphs of Article 6quinquies (B)”²³ this is not the case for this sui generis product. The trademarks of the Government of the Republic of Cuba are acknowledged GIs and social and historical Appellations of Origin. The Committee may consider that in the case of this particular product the situation goes well beyond the Legislation not adhering to the spirit of the Paris Convention.

The Broader International Context

It is not clear whether the Bills are consistent with Australia’s position of lifting embargos against The Republic of Cuba. It is clear however, that while the import of hand rolled long filler Cuban cigars is a small issue for Australia, for Cuba it would be a huge economic blow to a labour intensive industry and its large workforce.

Included in Cuban Law²⁴ in relation to Appellation of Origin, Article 1.2 in definitions states “This concept assimilates the use of social or traditional Appellations of Origin that do not constitute a geographical name”. Article 18 (d) further elaborates this;

“The human factor: This factor is the “know-how” of the Habano, considered as such, not only for the cultural attention by the agricultural producer, but also by the pre-industrial and industrial worker (cigar roller). It includes the traditional knowledge transmitted from one generation to the other by all those who make up the agro-industrial chain. Without the experience accumulated for centuries not only in the tobacco cultivation but also in the making of the cigars or puros, even the best variety cultivated in the best zone of Cuba would not ensure what is finally a Habano.”²⁵

²² Article 6quinquies; Paris Convention for the Protection of Industrial Property (1979)

²³ Mitchell and Voon; Submission No 30, Plain Packaging Bill (25/7/2011)

²⁴ Chapter I, Article 1.2; Resolution No 201/2009; Regulations of the Habanos Protected Appellation of Origin and of the Rest of the Cuban Tobacco Appellations of Origin (Official Cuban Government translation to English)

²⁵ Chapter IV, Article 18 (d); Resolution No 201/2009; Regulations of the Habanos Protected Appellation of Origin and of the Rest of the Cuban Tobacco Appellations of Origin (Official Cuban Government translation to English)

The Government of the Republic of Cuba has been at the vanguard of efforts by developing countries to protect their GIs in the context of TRIPS²⁶ (in particular Article 27.3 (b)) and the developed world's (led by the US and Australia) push to secure GI rights through patent²⁷.

The impact of the difference in the approaches is salient to the issue at hand. Cuba's and the developing world's position is that many innovations in the developing world depend on local and community traditions. It is not just the *in situ* but the *ex situ* – derived products and the intangible components of the derived products - that need to be taken into account. The pertinence to the Committee examining the plain packaging Legislation is the existential fact that hand rolled, long filler Cuban cigars are not cigarettes nor can they be lumped together in a category of “other tobacco products”, nor are they in international forums where broader issues are involved.

²⁶ Strengthening Research and Policy-Making Capacity on Trade and Environment in Developing Countries: Second Workshop: Los Banos, Philippines, November 1999: Cuban Experiences in the Development of a Sui Generis System for the Protection of Plant Varieties; Vasquez, Llorente, Guma and Diaz

²⁷ Ibid. Vasquez, Llorente, Guma and Diaz

Conclusion

- Under the Legislation Cuban cigars will no longer be able to be imported into Australia.
- The Legislation is impossible for the Government of the Republic of Cuba to comply with.
- The Government of the Republic of Cuba will not allow importers of their cigars to tamper with their product in order to comply with the Legislation.
- The Government of the Republic of Cuba will not permit its track and trace measures, seals, trademarks, GIs and other marks of authenticity to be removed and can refer to International Agreements to justify this.
- The Pacific Cigar Company (Aust) Pty Ltd submits that the Australian Government cannot justify the contravention of International Agreements on Trade on the grounds of health outcomes with reference to Cuban cigars.
- Cuba would lose its largest export to Australia.
- The Legislation would deprive Australian consumers of freedom of choice to purchase and enjoy Cuban cigars. This deprivation of the freedom of choice is not Government policy but the unfortunate consequence of unsophisticated legislation.

The Australian Government's current regime of tobacco packaging regulations does not unfairly affect the Cuban cigar industry.

The current regime recognizes the unusual nature of the product and in particular the impossibility of applying a one size fits all approach.

There are five different, cigar tailored health warnings, graphic images, warning messages and explanatory messages. Information messages are not required on cigar products. Labels are applied after import and before the product is offered for retail sale, while cigarette warnings are imprinted on the packaging. The sizes of the various health and warning labels for cigars are different from those produced on cigarette packets or cartons.

There is a precedent and the capacity to do so in future plain packaging, if there is the will to do so.

The Australian Government achieved its desired objectives in terms of protecting consumers via health warnings and the industry was willing and able to comply.

Pacific Cigars urges the Committee to consider the consequences of the Legislation being passed as it stands. We urge the Committee to advise the Senate of the ways in which the objectives of the Legislation can be achieved without destroying the Cuban cigar industry in Australia.



Embassy of Cuba

Canberra 24 August 2011

Angelo Giannakopoulos

General Manager

The Pacific Cigar Company (Aust) Pty Ltd

PO Box 302

Alexandria NSW 1435

Unit 17, 23 Bowden Street

Alexandria NSW 2015

Dear Mr Giannakopoulos,

It is with concern that the Government of the Republic of Cuba notes that the Tobacco Plain Packaging Bill (2011) and the Trade Marks Amendments (Tobacco Plain Packaging) Bill (2011) introduced to Parliament on 6 July require the plain packaging of all tobacco products.

We urge the Australian Government to make the required modifications to the Legislation and regulations as we are unable to alter or adjust our packaging to meet the requirements of the Legislation as it now stands.

Additionally, the Government of the Republic of Cuba is unable to permit The Pacific Cigar Company (Aust) Pty Ltd, to alter the packaging by opening boxes and removing bands, to remove or hide Cuban Government warranty seals with its various authenticity and anti-counterfeiting marks that are found on both the outside and the inside of the many forms of packaging, remove D.O.P (Protected Denomination of Origin) seals and modify the packaging in such a way that will inevitably impact on the quality and authenticity of our cigar products.

In effect the Tobacco Plain Packaging Bill (2011) and the Trade Marks Amendments (Tobacco Plain Packaging) Bill (2011) will unintentionally result in the prohibition of the sale of Cuban hand rolled, long filler cigars in Australia, strongly affecting one of our most important industries as well as Australia's trade relations with the Republic of Cuba.

We urge you to impress upon the Government of Australia the importance of amending the relevant parts of these Bills, or implementing the necessary and appropriate regulations, so as to ensure that in the future our products will still be able to be legally sold in Australia.

Kind regards

Pedro Monzon
Ambassador
Republic of Cuba



Embassy of Cuba, 1 Gerogery Place O'Malley ACT 2606, Australia