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September 18, 2020

Mr. Willem Alexander
State Secretary for Health, Welfare and Sport
Netherlands

Re: INTA's comments on "Tobacco and Smoking Products Decree"

Dear State Secretary Alexander:

The International Trademark Association ("INTA") would like to thank the Netherlands Government for the opportunity to provide its views and comments on the "Tobacco and Smoking Products Decree".

The International Trademark Association (INTA) is a global association of brand owners and professionals dedicated to supporting trademarks and related intellectual property (IP) to foster consumer trust, economic growth, and innovation. Members include nearly 6,500 organizations representing more than 34,350 individuals (trademark owners, professionals, and academics) from 185 countries, including 81 organizations representing 388 individuals in the Netherlands, who benefit from the Association's global trademark resources, policy development, education and training, and international network. Founded in 1878, INTA is headquartered in New York City, with offices in Brussels, Santiago, Shanghai, Singapore, and Washington, D.C., and a representative in New Delhi. For more information, visit inta.org.

In compliance with its strategic direction, INTA monitors legislative trends and initiatives that threaten brand owner property rights and the ability of consumers to make informed purchasing decisions. These include brand restrictions to certain products, services and advertising, proposed by health regulators and purporting to have the goal of reducing the use of, and exposure to, products and services conventionally deemed unhealthy. However, some proponents omit the use of brand restrictions for products that are presently consumed, and which could have the same or similar health effects.

Brands provide tremendous value to national economies by exponentially adding jobs and entrepreneurial opportunities that drive gross domestic product and also international trade as demonstrated in the milestone studies by the U.S. Department of Commerce and the European Commission, as well as studies performed by the International Trademark Association on the value of trademarks in Latin America and Asia-Pacific.

The International Trademark Association views with great concern measures by governments that seek to prohibit, misappropriate or significantly restrict the use of branding symbols for lawful products and services in that such measures are detrimental to consumers, trademark owners and competition, and unreasonably expropriate valuable personal property rights.

Brand restrictions now impact or threaten to impact statutory and common law protection regarding the use of word marks, logos, packaging, product shape, colors and other source-identifying mechanisms (including sounds, smells, three-dimensional marks and other non-traditional marks) that constitute the totality of a brand's image;

Restrictions on branding jeopardize consumer choice, impede market competition, benefit counterfeiting and other illegal trade activity, erode brand value, and restrict freedom of expression.

Such restrictions are being imposed or considered without adequate marketplace impact assessments and credible evidence to reasonably demonstrate that such measures will effectively achieve their intended results.

Restrictions on brand symbols are being imposed or considered without due consideration even though there are other, less drastic, means of providing equal or greater protection to public health and safety without the need to restrict the rights of brand owners.

It is the position of the International Trademark Association that trademarks are intangible personal private property rights (positive rights), not merely the right to exclude others from using confusingly similar marks (negative rights), and should be protected to the same extent and degree as all other forms of personal private property, both by law and treaty.

Therefore, any measure, or measures imposed by a government restricting the means or manner in which a brand symbol can be used or displayed on a product or in association with services (including prohibiting the use of the brand symbol, or the capitalization, font, size, location and color of elements of the brand symbol), should prima facie not be valid unless the government can establish that each such measure:

- a. Is based upon a compelling public interest that outweighs the brand owner's property right and economic investment in the brand symbol and the benefits to the public associated with exercise of that right, such as fostering consumer choice, protecting fair competition, preventing counterfeiting and other illegal activity, and encouraging freedom of expression; and
- b. Is both (1) proportional to the alleged harm which exploitation of the owner's intangible personal private property right is alleged to cause, and (2) on a balance of probabilities and based on

compelling and credible quantifiable evidence, no more restrictive on economic value and use of the brand symbol than is necessary for the relevant governmental authority to achieve its legitimate public health or safety objectives.

In conclusion, restrictions on the use of brands and the inherent symbols and markings of protected trademarks are to be considered within the same limits as measures restricting other private property rights, specifically, the limits of proportionality and efficacy. Therefore, wherever practicable, the government should use the least drastic alternatives available to address public health and safety goals, such as public educational campaigns, which unlike brand restrictions do not violate international and national law, curb freedom of expression, and expropriate valuable personal private property rights in brand symbols.

INTA appreciates the opportunity to provide these comments. Should you wish to further discuss any of the points we have raised or additional issues, please contact José Luis Londoño, Chief Representative Officer-Latin America at jlondono@inta.org and Hélène Nicora, INTA Chief Representative Officer -Europe at hnicora@inta.org.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "José Luis Londoño", with a stylized flourish at the end.

CEO

International Trademark Association