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TPP Countries Will Consult Internally On Tobacco Proposals, Official Says

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BANDAR SERI BEGAWAN, Brunei -- The United States and Malaysia simultaneously tabled competing proposals at a chief negotiators' meeting during the 19th round of Trans-Pacific Partnership (TPP) talks here that aim, with varying degrees, to give countries greater flexibility to put in place tobacco control measures.

TPP countries intend to discuss these proposals internally before holding further talks on them, a U.S. trade official said in an Aug. 28 interview with Inside U.S. Trade.

They are expected to resume discussion on the proposals at the technical level during a meeting of the negotiating group on legal issues slated to take place in Washington during the second week of September, sources said.

The Malaysian proposal would completely carve out tobacco control measures from any TPP obligations, thereby precluding state-to-state or investor-state challenges against such measures under the deal. An informed source said it would also exclude tobacco products from tariff reductions on TPP.

This would go far beyond the U.S. proposal, which has come under fire domestically from business groups who oppose it and public health organizations who think it does not go far enough. Both these stakeholder groups are pressing TPP countries to back their respective demands (see related story).

The U.S. proposal would simply reaffirm that tobacco control measures would fall within the scope of an already existing general exception for measures necessary to protect human life or health.

Malaysia's language also goes farther than the "safe harbor" from dispute settlement for tobacco regulations that the U.S. had considered last year, but ultimately scaled back in favor of the proposal tabled at the 19th round. The "safe harbor" would have only applied to tobacco control regulations -- not legislation -- and would not have protected governments from investor-state challenges, only state-to-state dispute settlement cases.

The Malaysian government was under pressure to table a tobacco

carveout from the Malaysian Council for Tobacco Control (MCTC), which had as one of its goals to ensure that nothing in the TPP would prevent countries from implementing the World Health Organization Framework Convention on Tobacco Control (FCTC). All TPP countries have ratified the FCTC except for the United States, which has signed the deal but not ratified it.

The FCTC requires parties to adopt and maintain price and tax measures to reduce the demand for tobacco, as well as non-price measures such as regulation of the contents of tobacco products as well as packaging and labeling requirements.

Public health advocates point out that the FCTC is the world's first and only global public health treaty, reflecting the unique status of tobacco as the world's single most deadly product. This is one reason why these groups believe that tobacco should be treated differently than other products in trade agreements.

The U.S. trade official did not respond directly when asked whether the U.S. would maintain its position in light of the stronger Malaysian proposal. "We are going to reflect on the proposals that we got and then decide how we're going to proceed," the official said.

In an interview, MCTC President Molly Cheah said there was "broad support" for the Malaysian proposal among the countries she spoke to during the 19th round here. But she conceded that some said they needed to take the proposal back to their governments and legal experts for further consultations.

One informed source said even Japan expressed support for the proposal, despite the fact that the Japanese government owns a minority stake in the Japan Tobacco company. Japan has indicated that its stake in the company has no bearing on its position on this issue, this source said. Vietnam also has a state-owned tobacco company.

At the same time, this source said several TPP countries expressed worries about the implications the Malaysian proposal might have on market access negotiations, although they did not elaborate.

This source speculated that some TPP countries may feel that a move to exclude their tobacco tariffs from elimination could affect the balance of their market access negotiations. For instance, if one TPP member is facing pressure to lower tobacco tariffs from the United States or another TPP country, but opts not to do so, it may be forced to make concessions to that country on other tariff lines, this source said.

Cheah welcomed her government's proposal. "To me, that proposal that was put up by Malaysia just completely satisfies us, because that is what we wanted all along," she said. "I'm just overwhelmed; to me, it's a milestone for tobacco control globally."

During the course of the TPP negotiations, anti-tobacco groups have met with all participants except Japan to discuss the possibility of including specific language protecting tobacco regulation, and none of these countries has been "hostile" to that idea, one source said.

Anti-tobacco groups do not expect Australia to lead the charge on including tobacco-related language in TPP due to the fact that its plain cigarette packaging law is currently being challenged both in the World Trade Organization and in an investor-state case brought by tobacco giant Phillip Morris under the Hong Kong-Australia bilateral investment treaty.

Australia fears that advocating for new language in TPP to protect anti-tobacco regulations would give the impression that current trade rules are insufficient to protect a country's right to regulate tobacco, sources said. This could undermine its legal argument that the plain packaging law is consistent with WTO rules, they said.

Malaysia had already decided to move forward with its tobacco proposal when the U.S. announced on Aug. 21 that it intended to unveil its tobacco-specific language at the Brunei round, according to an informed source. Malaysian public health groups were worried that if the U.S. tabled its proposal first, it would become the basis for negotiations and Malaysia would get squeezed out of the discussion, this source said.

The groups urged the Malaysian government to table its proposal first, but ultimately the chief negotiators from both countries worked out an arrangement where they would table the two proposals at the same time, sources said.

The Malaysian proposal originated in the Ministry of Health, which also drafted its legal language, according to one informed source. The Malaysian Ministry of International Trade and Industry (MITI) deferred to the health ministry on the tobacco carveout, the source said.

"The carveout means that the tobacco industry will not be able to use any provisions in the TPP to sue governments or to threaten governments, and that's what they have been doing," Cheah, head of the Malaysian tobacco control group, said in an interview here.

She pointed to the investor-state challenge and WTO dispute against Australia's plain packaging law, among other cases. "We want to ensure that the proposal is broad enough not to allow loopholes ... for the tobacco industry to take advantage of," she added.

The Malaysian proposal has already garnered the support of several U.S. public health groups, as well as an explicit endorsement by The New York Times in an Aug. 31 editorial. Nine U.S. groups, including Action on Smoking and Health and the Center for Policy Analysis on Trade and Health, endorsed the Malaysian proposal in an Aug. 27 joint press release, while the Campaign for Tobacco-Free Kids praised it in a separate Aug. 26 statement.

"Now that Malaysia has offered this proposal, we urge the United States to work with Malaysia and others to support a proposal that will provide real protection for tobacco control measures, rather than press for its own language," Susan Liss, executive director of the Campaign for Tobacco-Free Kids, said in the Aug. 26 statement.

In an earlier statement e-mailed to Inside U.S. Trade on Aug. 25, Liss said her group would also press other TPP countries to strengthen the "weaker" U.S. proposal, although this secondary goal was not mentioned in the group's Aug. 26 statement. -- Matthew Schewel

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