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May 12, 2006

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Re: Comments on Proposed U.S.-Malaysia Free Trade Agreement

Dear Gloria Blue:

Essential Action is a public interest group with a focus on corporate accountability and global public health issues.

We are writing to urge that the U.S. exclude tobacco products from a U.S.-Malaysia Free Trade Agreement.

Our basic position is that there is no legitimate purpose for inclusion of tobacco products in trade agreements, which are designed to facilitate trade and remove tariff and non-tariff barriers to commercial transactions -- an inappropriate goal for tobacco products, consumption of which is harmful. This is a consensus view among the leading tobacco control groups in the United States.[1]

In these comments, we first very briefly review tobacco control efforts in Malaysia, and then explain why inclusion of tobacco products in the FTA would threaten such efforts.

Malaysia's Tobacco Control Efforts

As in the United States, smoking is a major public health issue in Malaysia. More than one in four Malaysia adults smoke -- nearly half of Malaysian adult, but

[1] See, for example, American Cancer Society, American Heart Association, American Lung Association, Action on Smoking and Health – Thailand, Action on Smoking and Health – USA, Campaign for Tobacco Free Kids, Essential Action, Thailand Health Promotion Institute, Letter to U.S. Trade Representative Robert Zoellick, December 9, 2003, available at <http://www.essentialaction.org/tobacco/trade/zoellick.pdf>

under 5 percent of women.[2] The Malaysian government says that nearly *half of the health ministry's budget* is spent on treating tobacco-related disease. It estimates 10,000 Malaysians die a year from smoking-related disease.

To address these major public health and fiscal problems, Malaysia has signed and ratified the Framework Convention on Tobacco Control, and is undertaking serious measures to reduce the toll of smoking on the health of its people.

It has instituted a prominent government-run counter-smoking campaign, raised tobacco taxes, and adopted appropriate regulatory policies, such as a planned move to larger and more graphic warning labels.[3]

The Malaysian public health efforts are unfortunately being undermined by the efforts of the leading multinational tobacco companies, Philip Morris and BAT. These companies have long skirted advertising restrictions by undertaking a panoply of brand-stretching and indirect advertising practices,[4] a problem the country has sought to address with a comprehensive ad ban adopted in 2003. Now the companies are working to undermine tobacco tax increases by offering discounts and adding cigarettes to the pack.[5]

As we discuss below, a U.S.-Malaysian Free Trade Agreement that includes the features commonly found in U.S. trade agreements and that applies to tobacco products will assist the tobacco multinationals in their efforts to undermine public health efforts to reduce smoking rates and diminish the toll of smoking-related death and disease.

FTA Rules and Tobacco Control

The standard model U.S. free trade agreement includes a rollback and elimination of tariffs on goods, and establishment of a range of rules covering non-tariff issues, including trade in services and intellectual property. Both tariff and non-tariff provisions in FTAs threaten important tobacco control objectives.[6] We focus here on the non-tariff issues.

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[2] Dr. Judith Mackay and Dr. Michael Eriksen, The Tobacco Atlas, Geneva: The World Health Organization, 2002, p. 98.

[3] "Soon, graphic warning labels for cigarette packets." The Star, April 16, 2006, available at <http://thestar.com.my/news/story.asp?file=/2006/4/15/nation/13969197>

[4] Mary Assunta and Simon Chapman, "The Tobacco Industry's Accounts of Refining Indirect Tobacco Advertising in Malaysia," Tobacco Control 2004;13:ii63-ii70.

[5] M. Krishnamoorthy, "Tak Nak effort being negated," The Star, November 8, 2005, Available at <http://thestar.com.my/news/story.asp?file=/2005/11/8/nation/12514878>.

[6] It is unclear in the Malaysian context, however, whether tariff reduction in a U.S.-Malaysian FTA would have significant impact, because the multinationals -- including Philip Morris, now the only significant U.S. exporter -- already elude tariffs via production in the Southeast Asian region. In general, however, opening domestic markets to tobacco product imports increases smoking rates and consumption. The market opening leads to enhanced price and product competition and intensified marketing efforts. "Reductions in the barriers to tobacco-related trade will likely lead to greater competition in the markets for tobacco and tobacco products [and] reductions in the

Over the last two decades, the tobacco companies have invoked a range of trade rules in an attempt to defeat sound tobacco control rules. Inclusion of tobacco products in a U.S.-Malaysian FTA would give them enhanced ability to do so in Malaysia.

Challenges Based on Intellectual Property Rules

The tobacco multinationals have relied especially on intellectual property rules to challenge sound tobacco control policy.

They have argued in Canada, Brazil, Thailand and elsewhere that plain packaging requirements for cigarette packaging or even large health warnings encumber their trademarks, and undermine the very purpose of trademarks, to provide easily determinable distinguishing marks for one company's product over another.[7]

A Canadian plain packaging proposal, argued former USTR Carla Hills in a memo written for the major tobacco companies, "would seriously diminish the integrity of the trademark and substantially degrade the value of the distinctive packaging, or trade dress, in which the companies have invested heavily over the years. Therefore the proposal would deny adequate and effective protection to basic trademark intellectual property rights in violation of NAFTA Article 1701."[8]

BAT, Imperial Tobacco and Japan Tobacco have similarly argued that European warning label requirements violate the companies' trademark rights, by encumbering their use of cigarette packaging to display trademarks and distinguish their products. The European Court of Justice rejected the companies'

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prices for tobacco products," according to a World Bank report. "As a result, the death and disease from tobacco use will also increase." (Allyn Taylor, Frank J. Chaloupka, Emmanuel Guindon and Michaelyn Corbett, "The Impact of Trade Liberalization on Tobacco Consumption," in Prabhat Jha and Frank Chaloupka, eds., Tobacco Control in Developing Countries, Washington, D.C.: World Bank, 2000., pp. 345-346.) The World Bank has concluded that removing tobacco tariffs raises smoking rates 10 percent. (World Bank, Curbing the Epidemic: Governments and the Economics of Tobacco Control, Washington, D.C.: World Bank: 1999, Chapter 1.)

[7] See Carla Hills, Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements," Mudge, Guthrie, Alexander and Ferdon Attorneys. Memo to RJ Reynolds and Philip Morris, May 3, 1994, pp. 1-2. ("It is important to note that in terms of providing for general exceptions from NAFTA obligations for reasons such as health and safety, as set out in NAFTA Article 101(1), Chapter 17 (Intellectual Property) was specifically excluded.")

[8] See Hills memo, p. 13.

intellectual property claims,[9] but specified that it was not governed by TRIPS in its determination.[10]

The companies have also claimed that efforts to ban the use of the terms "light" "mild" and "low" may infringe trademark rights, because those terms are incorporated into cigarette names. In late 2001, Canada proposed health regulations to prohibit the use of the terms "light" and "mild" on tobacco packaging. Canada proposed the regulation in response to a consensus among public health experts that the “mild” and “light” descriptors are fundamentally misleading. “Mild” and “light” cigarettes are not less hazardous to smokers’ health, in part because it has been determined that smokers compensate for reduced tar and nicotine by inhaling more deeply, covering the “vents” on filters and by other means.[11] In announcing the regulatory proposal, Canada’s health department cited survey data suggesting that more than a third of smokers of “light” or “mild” cigarettes choose these products for health reasons.[12] In comments produced in response to a U.S. announcement of the regulation -- after the Canadian notice and comment period had concluded -- Philip Morris disclaimed any health benefits for “light” or “ultralight” cigarettes, and agreed that “consumers should not be given the message that descriptors means that any brand of cigarettes has been shown to be less harmful than other brands.” But the company insisted it should still be able to use the terms, which it alleged communicate differences of taste to consumers. Barring use of the terms, Philip Morris argued, would violate Canada’s obligations under the WTO and NAFTA. "The proposed ban unquestionably would constitute a 'special requirement' that would encumber the use and function of valuable, well known tobacco trademarks. A ban would substantially impede the ability of manufacturers to distinguish regular, full flavor brands from their low yield counterparts."[13] The company claimed that the “descriptive terms such as ‘lights’ are an integral part of [its] registered trademarks” for products such as Benson & Hedges Lights and Rothmans Extra Light.[14]

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[9] The Queen v. Secretary of State for Health (ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd; supported by: Japan Tobacco Inc. and JT International SA), 2002, Case C-491/01, Paragraph 150.

[10] The Queen v. Secretary of State for Health, Paragraphs 154 and 257.

[11] See Donald Shopland, editor, " Risks Associated with Smoking Cigarettes with Low Tar Machine-Measured Yields of Tar and Nicotine," Washington, D.C.: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, 2001, <http://cancercontrol.cancer.gov/tcrb/monographs/13>; "Findings of the International Expert Panel on Cigarette Descriptors," p. 8. <http://www.hc-sc.gc.ca/english/pdf/media/cig_discrip_rep2.pdf>.

[12] "Findings of the International Expert Panel on Cigarette Descriptors," <http://www.hcsc.gc.ca/english/pdf/media/cig_discrip_rep2.pdf>.

[13] Submission by Philip Morris International Inc. in Response to the National Center for Standards and Certification Information Foreign Trade Notification No. G/TBT/N/CAN/22, (hereinafter "Philip Morris International submission") (undated), p. 9.

[14] Philip Morris International submission, p. 4.

The companies have also challenged efforts to mandate disclosure of cigarette ingredients as a violation of their trade agreement-protected trade secret rights, notably in Thailand.[15]

Other Areas of Concern

* Technical Barriers to Trade:

Philip Morris has argued that the Canadian ban on the use of the terms "mild" and "light" violates technical barriers to trade rules under NAFTA, on the grounds that they are not the least trade restrictive means to pursue the objective of ensuring consumers are not misled into believing there is a health benefit to products labeled "mild" or "light."[16]

The same arguments could be made about plain paper packaging or labeling requirements.

The least trade restrictive obligation might also prove a significant obstacle to efforts to regulate cigarette product content or other product regulations.

The Technical Barriers to Trade agreements' requirements to rely on international standards might also conflict with rules on measuring components of tobacco smoke and smokefree rules, both areas where standard-setting organizations[17] have been criticized by public health organizations, including in some cases for being too influenced by the tobacco industry.

* Services

Provisions in services agreements might be used to challenge national advertising bans or restrictions, particularly restrictions that apply to certain forms of advertising but not others.

They might also be used to challenge rules restricting distribution outlets for tobacco products, a not unlikely move as tobacco control measures are tightened

[15] R MacKenzie, J Collin, K Sriwongcharoen and M E Muggli, "'If we can just '"stall" new unfriendly legislations, the scoreboard is already in our favour:' transnational tobacco companies and ingredients disclosure in Thailand," Tobacco Control 2004;13:ii79-ii87.
[16] Philip Morris International submission, p. 10.
[17] The International Standards Organization sets standards for measuring tobacco smoke components. The American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) is a professional organization that sets voluntary standards for ventilation. These are typically adopted by the American National Standards Institute (ANSI), a voluntary standard-setting organization that might arguably be considered an international standard-setting organization.

worldwide. So too might restrictions on Internet sales of cigarettes be subjected to a services agreement challenge.[18]

* Investments

Applied in the context of the tobacco industry, investment protections are particularly worrisome. They give Philip Morris and other multinationals direct standing to invoke trade/investment agreements to challenge national law, overcoming the political reluctance of most governments to advocate aggressively on behalf of cigarette companies. The substantive provisions of the agreements provide considerable fodder for the industry.

Each of the potential intellectual property claims of the industry -- on warning labels, bans on "light," "mild" and "low," and ingredient disclosure -- can be recast as an expropriation. Carla Hills made such an argument concerning plain paper packaging in the RJR/Philip Morris memorandum.[19]

In its comments on Canada's proposal to ban the use of the terms "light" and "mild," Philip Morris alleged a two-fold infringement of Chapter 11 rules. First, it claimed that "banning these terms would destroy these valuable trademarks and the specific brands and goodwill they represent. Following a ban, the affected trademarks would simply disappear from the Canadian market."[20] This purported expropriation would be especially costly to the tobacco companies, Philip Morris contended, because they have "invested substantial sums to develop brand identity and consumer loyalty for these low yield products. Moreover, descriptors denote clear taste differences within brand families and have, over the decades, become markers for those taste differences."

Philip Morris also claimed that the Canadian ban on "light" and "mild" would violate Canada's obligation under Chapter 11 to provide "fair and equitable treatment" to foreign investors. "Government officials from Canada and the United States (as well as other members of the public health community) actively encouraged tobacco companies to develop and market low yield cigarettes. The Canadian government registered trademarks containing descriptive terms used to identify these products for consumers." Noting that regulations short of a ban were available to the Canadian government, Philip Morris argued that, "under these circumstances, banning the use of descriptive terms would be unfair and inequitable."[21] That Philip Morris might have influenced governments in these matters, or that the tobacco companies suppressed information known to them

[18] See especially World Trade Organization, "United States -- Measures Affecting the Cross-Border Supply of Gambling and Betting Services -- Report of the Appellate Body," WT/D285/AB/R April 7, 2005.
[19] Hills memo, pp. 20-21.
[20] Philip Morris International submission, p. 7.
[21] Philip Morris International submission, p. 8.

about the ineffectuality of low-tar and low-nicotine cigarettes, did not enter into Philip Morris's presentation.[22]

Conclusion: Public Health "Exceptions" Are *Not* An Answer

Given the overwhelming public policy interest in reducing smoking rates, there is no legitimate basis for including tobacco products in the U.S.-Malaysian FTA, or any other U.S. trade agreement. The risk of conflict with tobacco control measures is too high.

It is true that many U.S. trade agreements contain public health exceptions of various permutations. These exceptions, however, are no substitute for simple exclusion of tobacco products from FTAs.

The public health exceptions have traditionally been interpreted narrowly. The public health exception in the GATT Agreement, Article XX(b) remains the prototype for such exception clauses. As explicated by Carla Hills in her memo for the tobacco industry, "GATT Article XX(b) is intended to allow Contracting Parties to impose trade-restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals only to the extent that such inconsistencies are unavoidable. As Canada pointed out in recent GATT dispute settlement proceedings, the proponent of the public health exception has the burden of providing the imposed measure is "necessary" (emphasis in original)."[23] Subsequent decisions at the WTO have perhaps clarified that the necessity test can in some real-world cases be satisfied -- but it remains a high hurdle nonetheless.[24]

Moreover, certain chapters -- notably intellectual property and investment chapters -- in FTAs typically do not contain a public health exception (or contain only meaningless exceptions authorizing public health measures only so long gas they comply with the terms of the chapters). In response to criticism, USTR has negotiated side letters and annexes covering public health for these chapters. But these are inadequate.

In the case of intellectual property, the side letters suffer from not being part of the agreement -- and thus serve only as interpretive guides, subordinate to

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[22] See Martin Jarvis and Clive Bates, "Why Low-Tar Cigarettes Don't Work and How the Tobacco Industry Has Fooled the Smoking Public," London: Action on Smoking and Health UK, 1999, <http://www.ash.org.uk/html/regulation/html/big-one.html> (citing a 1975 Philip Morris study that found: "The smoker profile data reported earlier indicated that Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro smokers and Marlboro Lights smokers. In effect, the Marlboro 85 smokers in this study did not achieve any reduction in the smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.")

[23] Hills memo, p. 17 (footnotes in original omitted).

[24] See World Trade Organization, "European Communities -- Measures Affecting Asbestos and Asbestos-Containing Products," WT/DS135/AB/R, March 12, 2001.

contrary specific provisions in the agreements -- and import the "necessary" standard with its difficult burden. Most importantly, the side letters focus exclusively on the issue of access to medicines, and do not address tobacco or other health-related concerns.

In the case of investment protections, the annex and other provisions are similarly inadequate to address public health, and tobacco-specific concerns. First, the general and vague nature of these provisions is unlikely to provide much protection in the face of investment claims that cite more specific and direct provisions in the agreement. Second, in the case of expropriation, the language in, for example, the CAFTA annex continues to define expropriation in terms broader than U.S. jurisprudence.[25] Third, there is no reason to export even U.S. jurisprudence in this area, at least as regards tobacco products. That jurisprudence has invalidated, for example, a Massachusetts effort to require disclosure of cigarette ingredients.[26] Whatever the U.S. Constitution requires in the United States, there is no good reason for the United States to impose such standards on other countries in the case of tobacco products. Finally, the purported environment and public health improvements to CAFTA's investment chapter kept in place "the fair and equitable treatment" language that Philip Morris has invoked to challenge sound tobacco control policy.

Especially in the case of the investment chapters -- where there is a prospect of direct suit of governments by the tobacco companies, and risk of substantial governmental liability -- but generally in the area of FTAs, even the possibility of a trade challenge may chill health regulators considering tobacco control rules. Thus, even tobacco control rules that may be able to withstand formal challenge -- but against which a plausible case may be made -- may never be enacted.

This is unnecessary and -- given the public health stakes in curbing the tobacco epidemic in Malaysia and globally -- unacceptable.

The prospect of challenges to tobacco control rules can be eliminated by an explicit exclusion of tobacco products from the Malaysian and other FTAs. We urge USTR to work for such an exclusion.

Sincerely,

Robert Weissman,
Director

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[25] See William Butler, Rhoda H. Karpatkin, Daniel Magraw, Durwood Zaelke, "Separate Comments of TEPAC Members on the U.S.-Central American Free Trade Agreement (CAFTA), March 18, 2004, available at <www.ciel.org/Publications/TEPAC_CAFTA_18Mar04.pdf>.
[26] Philip Morris v. Reilly, 312 F.3d 24 (1st Cir. 2002).