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STATE OF MAINE

Citizen Trade Policy Commission

August 22, 2013

Ambassador Michael Froman
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Froman:

The Maine Citizen Trade Policy Commission (CTPC) is authorized by Maine State law [10 MRSA §11(3)]"… to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." In carrying out its statutory mission, the CTPC has closely been following various developments relating to the proposed Transpacific Partnership Agreement (TPPA).

As chairs of the CTPC, we write to inform you of our deep concern about the new text concerning tobacco and public health measures under consideration by the USTR for tabling in the TPPA negotiations currently underway. This proposal is a major retreat from the policy that was drafted and widely shared in great detail by USTR in 2012, which would have created a "safe harbor" for some tobacco control regulations, and which the USTR itself stated would "explicitly recognize the unique status of tobacco products from a health and regulatory perspective".

Based on our most recent understanding, the current USTR proposal on tobacco as it relates to the TPPA is to reaffirm that existing language in the General Agreement on Tariffs and Trade (GATT) which establishes a nation's right to enact health and safety measures includes tobacco measures. While the Maine CTPC had reservations about the earlier USTR proposal, which failed to recognize and protect the central role of U.S. state governments in enacting and enforcing tobacco control regulations and which contained numerous loopholes, the new proposal is so weak that it fails to be legally significant.

First, USTR's proposal is not legally significant because it simply states the obvious. As the WTO dispute panel noted in the Indonesia clove cigarettes dispute, "It is self-evident that measures to reduce youth smoking are aimed the protection of human health …" Second, it is not legally significant because as a general exception, it does not cover the investment chapter – where the greatest litigation threat to tobacco-control measures is posed, as litigation against Uruguay and Australia demonstrates. Also, assuming that TPPA drafters follow the KORUS model, general exceptions do not apply to the chapter on intellectual property and perhaps other new chapters such as those on regulatory coherence and state-owned enterprises.

We want to particularly emphasize our grave concern that the current USTR proposal on tobacco for the TPPA leaves the door wide open for the future use of Investor-State Dispute Resolution (ISDR) mechanisms by large international corporations to challenge and overturn federal, state and local laws and regulations which govern tobacco control measures. It is our strongly held view that the tenants of the proposed TPPA should not be used by the tobacco industry to circumvent existing or evolving public health law – either in the United States or in other TPPA member nations. We note that tobacco control measures are a firmly established tenant of current U.S. law and continue to receive the broad support of elected officials on every level regardless of political affiliation.

Further, we are not impressed with the consultation provision proposed by USTR as we understand it. This provision has no teeth in that even if the consulting parties agree, consultation cannot block a challenge to a tobacco regulation. In any event, this consultation is irrelevant to an investor-state challenge, wherein lies the greatest threat to chill or prevent regulation. In addition, from a U.S. state perspective, this provision is useless in that state health or other sub-federal tobacco regulatory authorities are not included in any consultation.

Under the circumstances, it would be better to not offer this text at all than to give the false impression that the United States is serious about protecting government authority within the TPPA to regulate tobacco to protect health.

In a previous letter dated August 1, 2012, the CTPC wrote to your predecessor Ambassador Ron Kirk, regarding our strongly held convictions about how tobacco should be treated in the TPPA. Among other things, we stated the following:

- The CTPC favors a complete "carve out" of tobacco from the trade provisions of the TPPA; in other words, we would prefer that any regulations or laws pertaining to tobacco be completely excluded from the TPPA. The CTPC believes strongly that the efforts of individual nations to control tobacco and combat its adverse health effects should not be interfered or impeded in any way by provisions of the TPPA or any other international trade agreement;
- Absent a complete "carve out" of tobacco from the TPPA, the CTPC favors an approach which modifies the purported compromise proposal being made by the USTR; more specifically, the CTPC favors an approach which ensures that all federal and state laws and regulations pertaining to tobacco regulation are not subject to jurisdiction under the TPPA and further that any tobacco-related provisions of the TPPA embrace an approach which minimizes potential litigation be it through local, state or federal court and the possible use of 'investor-state" dispute settlement systems; and

- Finally, the CTPC requests that the USTR develop a clear public statement on the specifics on the specific elements of a tobacco-related provision, as they are proposed by the USTR for consideration as a part of the TPPA.

In speaking for the CTPC, we can safely say that our position has not changed and that we are concerned that the current alternative being proposed by the USTR is woefully inadequate and may in fact be counterproductive towards achieving the goal of protecting the public health and welfare through our federal, state and local laws and regulations which govern tobacco control measures. Given the about-face represented by the USTR's current tobacco proposal, we urge you to consult widely before tabling any text on this topic, and suggest that a public hearing on the treatment of tobacco in the TPPA would be an effective way to convene the relevant parties and gather the information needed to draft an effective proposal that truly protects public health and in particular, the health of our youth.

In closing, at the very least, we favor returning to the earlier USTR "safe harbor" proposal as at least a starting point for further negotiations, although we would prefer a more comprehensive approach which goes further to exempt or "carve out" tobacco control measures from the proposed TPPA.

Please feel free to call on either of us for further information regarding our position on this vitally important public policy issue.

Sincerely,

Senator Troy Jackson, Chair

Representative Sharon Anglin Treat, Chair

c.c. President Barack Obama
Senator Susan Collins
Senator Angus King
Representative Michael Michaud
Representative Chellie Pingree
Maine Attorney General Janet Mills
David Agnew, Deputy Assistant to the President and Director of Intergovernmental Affairs