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

**Comments on the Trans-Atlantic Trade and Investment Partnership (TTIP):
Concerns of State and Local Governments
Provided by Maine Representative Sharon Anglin Treat
Federal Register Docket Number USTR–2013–0019
<https://federalregister.gov/a/2013-07430>**

Thank you for the opportunity to provide written comments on the proposed Transatlantic Trade and Investment Partnership (TTIP). I am a legislator serving my 11th term in the Maine Legislature, currently in the Maine House of Representatives, having also served in the Maine Senate. I co-chair the Maine Citizen Trade Policy Commission, and am House Chair of the Legislature's Joint Standing Committee on Insurance & Financial Services Committee. I am also a cleared advisor representing Maine on the Intergovernmental Policy Advisory Committee to the U.S. Trade Representative.

While these written comments are provided in my individual capacity, the positions taken herein reflect policy that has been previously adopted by the Maine Citizen Trade Advisory Council (CTPC) and communicated to the USTR as well as our Congressional delegation. These comments on the TTIP draw extensively from the position papers and letters of the CTPC, as well as Joint Resolutions adopted by the Maine Legislature, which are posted on our website, addressing issues including procurement, tobacco regulation, pharmaceutical reimbursement and pricing, investment policies and dispute resolution, as well as insurance, consumer and environmental regulation, and trade promotion authority.

I intend to present oral testimony at the hearing scheduled for May 29-30, and at that time may be presenting on behalf of the Maine Citizen Trade Policy Commission, following consultation with the full Commission at its regularly scheduled meeting later this month.

Background. The Citizen Trade Policy Commission (CTPC) provides an ongoing state-level mechanism to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment and working conditions. It was established in 2003 by PL

2003, Chapter 699. The 22 member Commission includes six legislators, an Attorney General designee, five non-voting agency officials representing the Department of Labor, the Department of Health and Human Services, the Department of Environmental Protection, The Maine International Trade Center, the Department of Agriculture, Food and Rural Resources, and 10 public members representing business, labor, health, farming, government and environmental interests.

The CTPC's statutory mandate was amended by PL 2007, Chapter 266 to require that the Commission hold regular meetings, gather information from the public through hearings, submit an annual report on its activities, and conduct a biennial assessment on the impacts of international trade agreements on Maine. All of the CTPC's annual assessments, reports, letters, press releases and meeting agendas, as well as related legislation, are posted on its website, and may be accessed here: <http://www.maine.gov/legis/opla/citpolassessments.htm>.

Comments on specific issues or potential chapters of the TTIP:

PROCUREMENT

The Maine CTPC has consistently endorsed the position that coverage of U.S. states as sub-central entities should be *explicitly excluded* from any procurement provisions in trade agreements. The CTPC was established by statute as a direct consequence of legislation addressing state procurement of "sweat free" products and concern about labor standards in our trading partners. Maine has comprehensive rules governing its own procurement policies, including recycled content standards for various products to promote reuse and recycling, and the state has adopted a Purchasing Code of Conduct requiring certification of "sweat free" labor practices for suppliers of apparel, textiles and footwear, pursuant to 5 MRSA Section 1825-O.

In order to assure that these Maine-specific rules are in fact complied with, the State has also enacted a law governing the authority and procedure that must be followed in order to bind the State of Maine to any procurement rules adopted in any trade agreement. Since 2009, the Governor may not unilaterally bind the state to any trade agreement, but must consult with the CTPC and the Maine International Trade Center, and the Legislature must pass a law authorizing the Governor to enter into the trade agreement, see Public Law, Chapter 385 H.P. 876 - L.D. 1257, "An Act To Require Legislative Consultation and Approval Prior to Committing the State to Binding International Trade Agreements" which reads as follows:

"Sec. 1. 10 MRSA §13 is enacted to read:

§ 13. Legislative approval of trade agreements

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Commission" means the Citizen Trade Policy Commission established in Title 5, section 12004- I, subsection 79-A.

B. "Trade agreement" means an agreement reached between the United States Government and any other country, countries or other international political entity or entities that proposes to regulate trade, procurement, services or investment among the parties to the agreement. "Trade agreement" includes, but is not limited to, any agreements under the auspices of the World Trade Organization, all regional free trade agreements, including the North American Free Trade Agreement and the Central America Free Trade Agreement and all bilateral agreements entered into by the United States, as well as requests for binding agreement received from the United States Trade Representative.

2. State official prohibited from binding the State. If the United States Government provides the State with the opportunity to consent to or reject binding the State to a trade agreement, or a provision within a trade agreement, then an official of the State, including but not limited to the Governor, may not bind the State or give consent to the United States Government to bind the State in those circumstances, except as provided in this section.

3. Receipt of request for trade agreement. When a communication from the United States Trade Representative concerning a trade agreement provision is received by the State, the Governor shall submit a copy of the communication and the proposed trade agreement, or relevant provisions of the trade agreement, to the chairs of the commission, the President of the Senate, the Speaker of the House of Representatives, the Maine International Trade Center and the joint standing committees of the Legislature having jurisdiction over state and local government matters and business, research and economic development matters.

4. Review by commission. The commission, in consultation with the Maine International Trade Center, shall review and analyze the trade agreement and issue a report on the potential impact on the State of agreeing to be bound by the trade agreement, including any necessary implementing legislation, to the Legislature and the Governor.

5. Legislative approval of trade agreement required. Unless the Legislature by proper enactment of a law authorizes the Governor or another official of the State to enter into the specific proposed trade agreement, the State may not be bound by that trade agreement."

By letter to USTR dated August 1, 2012, the Maine CTPC has also stated support for permitting "Buy America" provisions in state and federal laws and regulations (see letter posted here: <http://www.maine.gov/legis/opla/CTPCprocurementtradeletter.pdf>). The letter states in pertinent part that the CTPC and State of Maine favor a policy that leaves to the U.S. states the decision whether and to what extent to be subject to the procurement provisions of trade agreements. Maine also commissioned a study of potential procurement impacts on the State from trade agreements broadly and the TPP specifically (see pages 27-34 of the CTPC's 2012 Trade Assessment, posted at: <http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf>).

Procurement provisions in any trade agreement, including the proposed TTIP, must not bind states without their explicit approval (opt-in) so that state "Buy American," "sweat free" and other procurement rules continue to be enforceable.

INVESTMENT

An investment chapter in the TTIP would provide both substantive investor protections and a process for investor-state dispute settlement. EU countries have entered into about 1,200 investment treaties, and the United States about 60 (counting treaties and investment chapters of FTAs). Most of these are with developing countries; they give a legal advantage to the EU or U.S. investor to challenge laws in a developing country. That one-sided advantage disappears in an investment agreement between the EU and the United States. In virtually all sectors, corporations are invested in subsidiaries on both sides of the Atlantic (valued at \$US 3.7 trillion). Thus, if TTIP includes an investment chapter, corporations would have standing to challenge whichever side of the Atlantic is more progressive (less favorable to investors).

The goal set by the TTIP High-Level Working Group is to harmonize differences between U.S. and EU investor protections in favor of the most investor-friendly side of the Atlantic. This

would have the effect of canceling a decade of incremental reform in U.S. trade and investment agreements, for which the Maine CTPC has been a consistent advocate. These reforms include:

- **Expropriation** – an annex to clarify that except in rare circumstances, regulations that serve a public welfare objective do not constitute an indirect expropriation.
- **Fair and equitable treatment** – a clarification that FET is limited to the standard of treatment that is required by Customary International Law (CIL), which means that governments must only compensate investors when there is a state practice of doing so out of a sense of legal obligation.

Even with these reforms, the investor rights are unnecessarily vague. Yet the EU's investment treaties are worse; they give more power to arbitrators to ignore state practice and compensate investors based on doctrines developed by arbitrators. By favoring the most investor-friendly version, the goals of TTIP flatly ignore the limited progress that the United States has made to clarify the scope of foreign investor rights.

Investment rules and the investor-state dispute resolution system have been justified on the grounds that they protect foreign investors from the discriminatory or capricious actions of the host government, or protect investors from poorly performing or inefficient domestic courts. Independent, capable, and fair judicial systems are well-established in the both the U.S. and the EU. There is simply no reasonable justification for including an investment chapter in the TTIP.

Considering that the rule of law and judicial systems are well-developed on both sides of TTIP negotiations, there is no place for an investment chapter in the TTIP.

SERVICES AND REGULATORY COHERENCE

On a number of occasions, the Maine CTPC has commended USTR for paying close attention to WTO negotiations on services and for opposing proposals from other countries that would limit the regulatory authority of state and local governments. This is especially important with respect to essential services that are regulated by states and provided by local governments (e.g., insurance, health care facilities, licensing of professionals, waste management, distribution of energy, etc.). In the Trans-Pacific negotiations, some of the WTO proposals have resurfaced in a new chapter on “regulatory coherence.” For example, the chapter promotes use of regulatory impact assessments that apply cost-benefit analysis in ways that are not consistent with state-level regulation of public utilities and other service providers.

The chapters on services and regulatory coherence are highly sensitive in light of our federal system and principles of dual sovereignty. U.S. negotiators risk ruining years of good will if they proceed to negotiate these chapters in the TTIP with the lack of transparency demonstrated in the Trans-Pacific process.

INSURANCE

Particularly with respect to regulation of services relating to insurance, the State of Maine has taken a strong position that trade and investment agreements must not limit state authority. Insurance regulation is primarily, and almost exclusively, a state-level activity. Maine has a strong interest in preserving its role as the primary regulator of the insurance industry providing services in the states, and in maintaining authority to set reserve standards to assure solvency of the industry and consumer protections, to perform market conduct exams, to require disclosure

of insurance policy terms, to seek redress through enforcement actions, and to exclude insurance policies and insurers from the market that do not meet these state standards.

The Maine Citizen Trade Policy Commission opposed the creation of a federal insurance office with powers to declare state insurance laws preempted by trade agreements, both pending and ratified (see letter of April 16, 2010 to Senator Christopher Dodd, posted here: <http://www.maine.gov/legis/opla/citpoltradedocs.htm>). Maine's Insurance Superintendent testified before Congress on these issues, and our Attorney General wrote to oppose the provisions. States throughout the country opposed these federal trade preemption provisions through the testimony of the National Association of Insurance Commissioners. That proposal was defeated, and the Federal Insurance Office that was established in the Dodd-Frank Act is purely advisory. TTIP should not include any provisions that subvert this state-federal regulatory balance.

The USTR should not include in any trade agreement, including the proposed TTIP, any provisions that limit or remove from U.S. state regulation insurance and other financial products and services currently regulated by the states.

TOBACCO CONTROL

Maine has some of the strongest tobacco control laws in the country, including tobacco taxes intended to reduce tobacco use and encourage and assist cessation. Maine was one of the 46 states and 5 territories that sued the tobacco industry and entered into a global settlement with the defendants. That settlement not only provides ongoing funding to the state's tobacco cessation and prevention efforts, it also established the regulatory framework codified in federal law. Since 1997 to 2005, rates for adults who smoke decreased from 30% to 21%, and the rate among high school students plunged nearly 60%. Maine has received national recognition for its impressive outcomes in tobacco prevention in schools, workplaces, communities and retail stores.

The continued success of these efforts is incredibly important to Maine policymakers, the medical and public health community and the parents of our youth. It is vital that tobacco be treated as a special case by our trade rules, and that the proposed TTIP include tobacco exception language that is clear, broad in scope, and effective. It must not preclude new policies in response to changes in our understanding of not only the science of addiction and health impacts, but also of marketing and psychology. It must be able to respond to the ever-evolving strategies and products of the tobacco industry as that global industry adapts to changing regulations and understanding.

For these reasons, and the actions of Philip Morris International (PMI) challenging tobacco regulations adopted in Uruguay and Australia using investor-state arbitration provisions, the Maine Citizen Trade Policy Commission wrote to the U.S. Trade Representative in a letter dated November 19, 2010 calling "for tobacco be carved out of TPP and any future trade agreement."

Unless there is a clear carve-out, a TTIP investment chapter would give PMI standing to challenge tobacco-control measures in the EU, as it would give British American Tobacco (BAT) standing to challenge measures in the United States.

One goal of TTIP is to eliminate tariffs, including tariffs on tobacco products. U.S. tariffs on cigarettes are 41.7 cents/kg + 0.9% (bound and applied rates); EU tariffs are 10% ad valorem (bound and applied rates). (WTO, Tariff Analysis Online)

U.S. trade negotiators have a history of negotiating tariff reductions in order to promote market access on behalf of tobacco companies. For many years, the U.S. Congress has adopted the Durbin and Doggett Amendments to appropriations acts; they prohibit federal agencies from promoting “the sale or export of tobacco or tobacco products” or seeking “the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type.” President Clinton issued Executive Order 13193 in 2001 to make clear that the prohibition applies to all executive agencies and “the implementation of international trade policy.”

It is hard to avoid the conclusion that the purpose of eliminating tobacco tariffs is to promote tobacco trade or to provide tobacco companies with a windfall. For U.S. negotiators to do so in the TTIP would violate the Doggett Amendment and the Clinton Executive Order. Eliminating tariffs will also reduce the cost of tobacco products generally and undermine the efforts of Maine and other states to reduce tobacco use through steep taxes, a policy with proven effectiveness, particularly in reducing youth smoking.

USTR has vetted (but not yet proposed) an exception in the Trans-Pacific negotiations for regulations that restrict tobacco trade. The exception would apply only to regulations issued by health authorities, not to legislation; it would not apply to regulations adopted by tax, custom, or licensing authorities such as those at the state level. In short, the U.S. proposal is so narrow it would protect only the U.S. Food and Drug Administration, but not the states; and it would require a scientific burden of proof that exceeds the burden in the WTO health exception under GATT and GATS.

The Maine Citizen Trade Policy Commission has taken the position that it is more effective to simply exclude tobacco-control measures from all future trade agreements, including the TTIP. Whereas an exception requires extensive litigation to work as a defense, an exclusion (also called a carve-out) limits litigation to the preliminary question of whether a measure is covered.

ENVIRONMENTAL PROTECTIONS

To the extent the TTIP seeks to harmonize regulations, it is essential that regulations are harmonized upward. Further, governments – including U.S. state governments that in our federalist system share environmental regulatory authority with the federal government – must have the flexibility to develop more ambitious environmental policies in the future.

Of great concern with respect to the TTIP is the fact that the inclusion of so-called “national treatment for trade in gas” would remove the ability of the U.S. Department of Energy to review, condition, or deny exports of US liquid natural gas (LNG) to EU countries. Automatic exports of U.S. LNG to the EU, a significant importer of natural gas, would likely expand hydraulic fracturing (fracking), across the country and lead to higher domestic electricity prices, affecting consumers, U.S. manufacturing, and U.S. jobs.

The potential for “investor-state” provisions in the TTP raises particular concerns for the ability of states to protect the environment and natural resources. We know from the implementation of the North American Free Trade Agreement (NAFTA), and its investor-state dispute provisions, that corporate challenges under the investment chapter are frequently focused on environmental regulations and policies. Past and current WTO and NAFTA cases against Canadian provinces and U.S. states have included challenges to fracking moratoria, zoning and regulation of mining, renewable energy policy including local content requirements, regulating toxics in groundwater, and water pollution permitting – all subjects over which state governments have jurisdiction.

The current trade negotiation process is neither transparent nor inclusive, with negotiations taking place behind closed doors and confidential texts shared with very few state policymakers or advocates for public health and the environment. Currently, state and local officials have limited access to vital information about trade policy decisions, and no meaningful role in forming U.S. positions for trade negotiations - even though they are required to conform their democratically-enacted domestic policies to the constraints and priorities set in trade and investment pacts such as the TTIP.

The CTPC, a state government authority, has experienced over many years great difficulty even in scheduling timely briefings on USTR policies and activities, and there are limited opportunities for the Commission to influence the U.S. trade agenda and specific negotiations.

The TTIP should not override state authority to regulate environmental concerns when those state policies meet the legal standards in the U.S. Constitution.

ACCESS TO HEALTHCARE

State officials, including the Maine CTPC, have repeatedly warned the USTR over the past several years about the harm to U.S. health programs that will follow from the use of trade policy to restrict foreign and domestic medicine pricing programs. These concerns have been raised with respect to the Australia-US FTA, the Korea-US FTA and the Trans-Pacific Partnership Agreement.¹

The Maine Citizen Trade Policy Commission recently commissioned a statutorily required biennial Assessment of the potential impact of trade policy on Maine’s citizens, economy, laws and policies. The Assessment concluded that the impact of proposed provisions in the TPPA on pharmaceutical pricing in Maine, and on access to healthcare, could be significant. The analysis was based on the leaked June 2011 TPPA healthcare transparency text as well as intellectual property provisions under consideration in the TPPA negotiations.

¹ See eg, letter from Vermont Governor Peter Shumlin dated June 1, 2011 to U.S. Trade Representative Kirk and President Obama to oppose the inclusion of a pharmaceutical or healthcare annex in the TPPA. The letter is posted here: <http://freepdfhosting.com/6ee2e21e4c.pdf>. Prior letters and resolutions have been written by officials or commissions in states including California, Vermont, Maine, Washington State, Connecticut, Arizona, West Virginia, Massachusetts, Alaska, Hawaii, and New Hampshire. Some of these letters and resolutions are posted here: <http://www.wcl.american.edu/pijip/go/trade-statedocs>.

On August 1, 2012, the Maine CTPC wrote to Ambassador Ron Kirk reiterating its concerns about the healthcare technologies text and referring to the Assessment. The letter is posted online here: <http://www.maine.gov/legis/opla/CTPCpharmaceuticalstradeletter.pdf>. The letter reasserts the Commission's support for the positions adopted in previous communications on this issue, in particular its February 12, 2010 letter to USTR. The Commission particularly noted the following:

- Its **support** for evidence-based reimbursement policies to restrain pharmaceutical prices;
- Its **endorsement** of the continued use of preferred drug lists to reduce pharmaceutical prices;
- Its **opposition** to “*any promotion of international restrictions on domestic pharmaceutical prices*”; and
- Its **support** for “*the inclusion of a footnote in the TPPA and other trade agreements which “carves out” federal reimbursement programs such as Medicaid, 340 B and Medicare Part B*”.

The Maine Citizen Trade Policy Commission has taken a strong position against inclusion of restrictive healthcare pricing and intellectual property provisions in any future trade agreement, including the TTIP. The Commission adopted the following strong statement on its position opposing the restrictive pricing language such as that proposed in leaked TPPA healthcare technologies text: “***The CTPC voted unanimously to support provisions in the TPPA and other international trade agreements which emphasize, allow for and encourage the overall affordability of pharmaceuticals in each affected country.***”

SUMMARY

The State of Maine has expressed many concerns about past U.S. trade and investment agreements, as well as the process used to negotiate and approve of these treaties. Through the Maine Citizen Trade Policy Commission, the state has conducted a thorough review of the impacts of these treaties on the state's sovereignty and its authority to protect the public health, safety and welfare.

As the USTR enters into negotiations for a Transatlantic Trade and Investment Partnership, it is imperative that the resultant treaty respects the sovereignty of U.S. states under the federalism provisions of the U.S. Constitution, and that negotiators consult in a meaningful way with state policymakers so that the TTIP does not undermine environmental and public health protections, access to healthcare, procurement standards, and regulation of services such as insurance, which have been reserved to the states. Thank you for your consideration.

Respectfully submitted,



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