

September 4, 2014

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

Submitted electronically via correspondence@ustr.eop.gov, STATA@USTR.eop.gov

Dear Ambassador Froman:

Thank you for your recent letter regarding our concerns about the impact that the Trans-Pacific Partnership Agreement (TPP) would have on Medicare, Medicaid, 340B of the Public Health Services Act and other public programs that millions of Americans count on for their health security. We appreciate the ongoing dialogue with your staff regarding these concerns.

Recently, many of our organizations met with Daniel Bahar and other USTR staff to discuss investor-state dispute settlement (ISDS) and the impact it would have on government administered health programs if it were included in TPP and the Transatlantic Trade and Investment Partnership (T-TIP). We appreciate the fact that several staff participated in this discussion and it certainly helped to inform our understanding of ISDS.

As stated in that meeting, we have deep concerns about ISDS because it would allow global pharmaceutical firms to challenge mechanisms that state legislatures, the Congress and public agencies use to manage pharmaceutical costs in public programs. For example, a pharmaceutical company could challenge a state's Medicaid preferred drug list or drug utilization management rules that limit access to a certain drug under specific circumstances. Reimbursement policies for medicines under Medicare Part B could be challenged. If adopted, the President's own proposal to establish rebates under the Medicare Part D program for low-income beneficiaries could be subject to an ISDS challenge. Simply stated, ISDS would impose an unnecessary risk to government administered health programs by limiting what policy makers can do to keep these programs affordable for taxpayers and beneficiaries.

We appreciate that the USTR seeks to ensure that U.S. companies abroad are afforded legal protections similar to U.S. standards. But ISDS arbitrators are not required to track U.S. law or even abide by the U.S. Constitution when making decisions that impact U.S. citizens or companies. Trade tribunals are not required to meet the same transparency standards and their decisions cannot be appealed in court to correct errors of law. ISDS is exempt from the checks and balances of the U.S. legal system. U.S. corporations engaged in commerce abroad have access to strong domestic court systems and protections for property rights among the TPP and T-TIP partners. Where there is risk, companies may obtain insurance against financial loss and also seek redress through state-to-state dispute settlement.

We understand that the USTR negotiates carefully in order to protect the U.S. against policy challenges and that the U.S. has not lost an ISDS challenge. But, there have been successful state-to-state challenges against the U.S., including challenges to a ban on clove cigarettes and a ban on internet gambling. As these cases show, the USTR will not always get it right despite its best efforts.

We are also concerned by the more aggressive use of ISDS to challenge government policies in recent years. Only 50 ISDS claims were filed during the first 50 years of investor-state dispute resolution. But

the number of cases filed each year has grown significantly in recent years. In 2012, 58 new cases were initiated, the most known cases ever filed in a single year.ⁱ In addition to the explosion in the number of cases, researchers report that the ISDS process tends to protect corporate interests rather than the public interest.ⁱⁱ Among concluded cases, 31% ended with an award in favor of the investor while in another 27% of cases, countries settled with the investor before arbitration was completed.ⁱⁱⁱ Biased outcomes, large compensation awards and the potential for forcing policy changes appear to be driving an unprecedented number of challenges by global corporations. We cannot risk the financial stability of Medicaid, Medicare and other public programs to challenges by pharmaceutical companies with little to lose and much to gain.

While an ISDS decision cannot compel the U.S. government or a state or local government to change laws or regulations, the burden of compensation imposed by a trade tribunal could force changes in policy in order to minimize penalties. Our trade partner to the north, Canada, has been forced to do just that, most notably in the withdrawal of its proposed plain packaging legislation for tobacco.^{iv} In the case of pharmaceutical reimbursement policies, a compensation award would nullify savings achieved through the challenged law or regulation. Moreover, the threat of an ISDS claim will have a chilling effect on the adoption of future policies that could impact corporate profits.

Health care policy making must be the product of a democratic process that balances the interests of all stakeholders. State legislatures and Congress are the appropriate venues for this decision-making and U.S. courts, with judges selected through a democratic process, are the appropriate venue for adjudicating disputes. ISDS trumps these democratic processes and elevates the interests of global pharmaceutical companies over the interests of taxpayers, seniors, low-income families and people with disabilities.

It would be irresponsible to risk the health security of millions of Americans by subjecting health programs to ISDS challenges. We urge you to protect Medicare, Medicaid, 340B and all other government administered health programs by excluding them from the investment chapter in TPP and T-TIP.

Sincerely,

AARP
AFL-CIO
Alliance for a Just Society
American Federation of State, County and Municipal Employees
Alliance for Retired Americans
Center for Medicare Advocacy, Inc.
Center on Budget and Policy Priorities
Community Catalyst
Consumers Union
Main Street Alliance
Medicare Rights Center
National Committee to Preserve Social Security and Medicare
National Senior Citizens Law Center
Service Employees International Union

ⁱ United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS), Updated for the Multilateral Dialogue on Investment, 28-29 May 2013*, (May 2013), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

ⁱⁱ Van Harten, G., "Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern," *Investment Treaty News* (April 13, 2012), available at <http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/>

ⁱⁱⁱ United Nations Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, (May 2013).

^{iv} Shaffer, E.R., Brenner, J.E., and T.P. Houston, "International Trade Agreements: A Threat to Tobacco Control Policy," *Tobacco Control* (2005) available at http://tobaccocontrol.bmj.com/content/14/suppl_2/ii19.full.pdf+html