

August 22, 2013

Hon. Michael Froman
United States Trade Representative
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Froman:

We welcome your commitment, through the Trans-Pacific Partnership (TPP), to advance a 21st century trade and investment framework that will boost competitiveness and support the creation and retention of U.S. jobs.

For that reason, we were very troubled to learn just days ago that the United States intends to propose text in the TPP negotiations that would include a product-specific reference under the application of Article XX(b) of the General Agreement on Tariffs and Trade. We write to express our strong opposition to the last-minute inclusion of a product-specific reference to tobacco or any other product and to related additional language pertaining to dispute settlement.

We believe this text will undercut longstanding U.S. insistence that regulatory measures be based on evidence, including sound science, and encourage other countries to propose additional product-specific references. Given these serious concerns and the broad potential impact of a product-specific reference on U.S. trade policy, the TPP and the larger trading system, we urge the Administration not to table this proposal in Brunei.

As you well know, GATT Article XX(b) recognizes the right of WTO members to adopt or enforce measures necessary to protect human, animal or plant life or health. Article XX requires that such measures do not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail, and that such measures do not constitute a disguised restriction on international trade.

Measures that are necessary to protect human, animal or plant life or health are thus already encompassed by the Article XX(b) exception. Further clarification is unwarranted; in fact, to include any product-specific reference, whether to tobacco or to any other product, creates unwanted uncertainty rather than clarity. Further underscoring our concerns, the Administration has not provided any examples of how U.S. laws are impeded on evidence or science grounds by U.S. trade agreements. Nor, for that matter, has the Administration identified measures necessary to protect human, animal or plant life or health, whether adopted by the United States or any other country, that would run afoul of TPP or other trade agreement obligations but for inclusion of the language at issue. In short, there is no basis to doubt the scope of the exception that warrants the insertion of the language being contemplated.

An expression of agreement among TPP governments to interpret Article XX(b) as accommodating measures with respect to tobacco or any other product would suggest that other interpretations are possible, and that, as a result, the proposed “clarification” is needed as a

matter of law to ensure that a dispute panel will recognize that such measures fall under the exception.

Such a reading invites similar efforts by other countries to include additional product-specific references under the application of Article XX(b) out of concern that the absence of such a product-specific reference would render such regulation vulnerable in a challenge under the TPP. Thus, not only is a product-specific reference inappropriate as a legal matter as noted above; it also risks diminishing the very exception for human, animal or plant life or health that it arguably is intended to advance. Moreover, the proposed text is also not like the clarifications of GATT Articles XX(b) and XX(g) (and GATS Article XIV(b)) that have appeared in all of the post-NAFTA trade agreements concluded by the United States. These latter clarifications were made given certain ambiguities that were addressed in GATT and WTO dispute settlement which were then codified.

Purporting to “clarify” language as to which there is absolutely no doubt will likely have the consequence of putting a thumb on the scales in future dispute settlement in cases regarding tobacco and other products. Dispute settlement panels may assume that the TPP drafters intended to do something more than just re-state the obvious and that the express reference, therefore, was meant to create a sort of presumption of consistency with TPP obligations in the case of relevant measures. Such a consequence would undercut the long-standing U.S. insistence that measures implemented as exceptions to the rules be based in evidence, including sound science, to demonstrate their necessity to achieve legitimate regulatory objectives without being more trade-restrictive than necessary.

This then leads to another major point of concern. We understand the proposal includes special provisions for a regulator-to-regulator consultation phase in dispute settlement proceedings. We are told the purpose of such consultations would be to consider whether a contested measure is “appropriate.” Thus, the proposal could allow a subjective assessment of “appropriateness” to prevail over the standards that ordinarily apply to an argument that a departure from ordinary trade rules should be allowed in order to achieve a particular regulatory objective. Again, this departure from longstanding U.S. trade-policy practice is a cause for yet more concern. In any case, nothing impedes governments from determining the degree to which various ministries should be involved in trade policymaking, so we remain unconvinced of the merits of this aspect of the proposal.

In sum, either the existing exception language incorporated in trade agreements stretching back to 1947 already provides an exception for measures that are necessary to protect human, animal or plant life or health or it does not. We believe that it does, and therefore oppose any effort to introduce any further qualification, clarification, or understanding with respect to tobacco or any other product in the TPP given the adverse implications.

Because of our aforementioned concerns regarding fundamental tenets of U.S. trade policy, as well as the very brief amount of time that has been allowed for consultation on this very important issue, we respectfully request that the Administration not table its proposal at the upcoming round of negotiations in Brunei. We further request the opportunity of a meeting to discuss our concerns with you in further detail.

We are available to meet at your convenience and look forward to the favor of your response.

Sincerely,

American Farm Bureau Federation
American Meat Institute
Biotechnology Industry Organization
Council of the Americas
Distilled Spirits Council of the U.S., Inc.
Emergency Committee for American Trade
Grocery Manufacturers Association
National Association of Manufacturers
National Foreign Trade Council
National Pork Producers Council
National Oilseed Processors Association
National Turkey Federation
North American Export Grain Association
U.S.-ASEAN Business Council
U.S. Chamber of Commerce
United States Council for International Business

cc:

Secretary John Kerry
Secretary Jacob Lew
Secretary Penny Pritzker
Secretary Tom Vilsack