



218 D Street SE, 1st Floor - Washington, DC 20003

SENT VIA FACSIMILE

May 14, 2015

The Honorable Mitch McConnell
Majority Leader
The United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Senate Democratic Leader
The United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable John Boehner
Speaker
United States House of Representatives
H-232 The Capitol
Washington D.C. 20515

The Honorable Nancy Pelosi
Democratic Leader
United States House of Representatives
233 Cannon House Office Building
Washington, D.C. 20515-0512

Re: Trade Promotion Authority (Fast Track)

Dear Majority Leader McConnell, Speaker Boehner, Senate Democratic Leader Reid, and House Democratic Leader Pelosi:

As elected members of our state legislatures from across the United States, we write to urge you to reject the “Fast Track” version of trade promotion authority legislation as currently drafted and instead support a new process that is transparent, democratic, and accountable.

In July, we wrote to the Senate Finance Committee with suggested changes to the Fast Track legislation as introduced. We stated then, and reiterate now, the need for a new trade authority to provide significant and substantive opportunities for Congress to hold executive branch negotiators accountable. We remain eager to work with you to develop a process that can achieve the level of review and oversight intended by the U.S. Constitution. We believe such oversight to be absolutely necessary for modern international agreements with the breadth and reach of a Trans-Pacific Partnership (TPP) or Trans-Atlantic Trade and Investment Agreement (TTIP).

The lack of transparency – indeed, extreme secrecy – of the trade negotiation process, coupled with the failure of negotiators to meaningfully consult on the far-reaching impact of these agreements on state and local laws, even when binding on our states, is of grave concern to us. As state legislators, we are not at the table. Of the more than 600 cleared advisors to the U.S. Trade Representative, two state legislators have been invited to participate. Thus, we depend on Congress to create a new mechanism that provides for Congress to conduct the in-depth review and oversight these powerful international agreements require. When Congress abdicates much of its authority, as it does in the Fast Track process, our democracy suffers.

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Moreover, requirements for “regulatory coherence” and “minimum standard of treatment” provisions included in these trade agreements, and the investor-state system of private justice that can be invoked by investors to challenge federal, state and local laws and regulations, threatens the U.S. system of federalism enshrined in our Constitution. Our federalist system reserves significant authority to state legislators to regulate to ensure a level playing field for workers and businesses and to implement meaningful human rights, labor and environmental standards – authority that is threatened by these trade pact provisions.

The Investor-State Dispute Settlement (ISDS) procedures included in recent and pending trade agreements, including the recently leaked TPP investment chapter, are of particular concern. ISDS allows foreign investors the right to sue governments directly in offshore private investment tribunals, bypassing the courts or allowing a "second bite" if the investors do not like the results of domestic court decisions. Although the investor-state tribunal has no power to directly nullify U.S. federal, state, and local laws, in practice, when a country loses to an investor, it will change the offending law, or pay damages, or both. Moreover, a country need not even lose an ISDS case for the chilling effect of a case merely being threatened or filed to impact its future policy making deliberations.

Indeed, in our own experience as state legislators, we have directly experienced that chilling effect. It is not uncommon for investors and foreign governments alike to seek to chill non-discriminatory state legislative action on matters of public health, safety and welfare, with threats of legal challenges based on international trade agreements. State legislative examples we are aware of include electronic waste producer responsibility laws, regulation of water extraction, tax haven restrictions, GMO labeling, and regulation of toxics in consumer products. Current ISDS litigation includes many challenges to environmental regulation, including oversight of hydraulic fracturing and mining.

State legislators have a longstanding and clear position opposing investor-state dispute settlement clauses in trade agreements, memorialized in the policy of the National Conference of State Legislatures (NCSL), which represents all 50 states and the District of Columbia: “...NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors’ previous expectations.” [Readopted August 2013: <http://www.ncsl.org/ncsl-in-dc/task-forces/policies-labor-and-economic-development.aspx#trade>]

The undersigned state legislators strongly endorse this position, and urge you in your oversight capacity to remove any investor-state dispute settlement clause from inclusion in the TPP, TTIP or other international trade or investment agreement that may be negotiated in the future.

Many of the undersigned legislators serve on the environment and natural resources committees of our legislatures and have leadership roles advancing environmental protections in our states. We are deeply concerned about public reports of potential provisions in both the TPP and TTIP agreements that would undermine these protections, including provisions on or related to investment and energy exports. With respect to TTIP, we are troubled by reports that the European Union is seeking binding provisions that would facilitate expanded exports of both liquefied natural gas and crude oil. With respect to the TPP, we are very concerned that the U.S. Department of Energy would lose its ability to even review whether exports of natural gas are in the interest of the public, should that agreement include national treatment for trade in gas.

The trade negotiation process is deeply flawed, and it appears to be resulting in deeply flawed trade agreements, namely the TPP and TTIP. Congress has the ultimate responsibility to oversee these agreements and put a stop to overreaching provisions that usurp the legitimate, non-discriminatory exercise of legislative authority to protect the public health and welfare. The pending Fast Track/Trade Promotion Authority legislation undermines this Congressional responsibility. We urge you to reject this approach and instead engage in robust, transparent and inclusive oversight of both the negotiation process and the agreements themselves.

Sincerely,



Senator Virginia Lyons
Vermont Senate
241 White Birch Lane
Williston, VT 05495
Phone: 802-828-3616
Email: vlyons@leg.state.vt.us



Representative Charles Isenhardt
Iowa House of Representatives
P.O. Box 3353
Dubuque, Iowa, 52004
Phone: 563-599-8839
Email: charles.isenhardt@legis.iowa.gov

Representative Geran Tarr
Alaska

Representative Mat Erpelding
Idaho

Representative David Whitaker
Arkansas

Representative Marti Anderson
Iowa

Senator Katie Hobbs
Arizona

Senator William Dotzler
Iowa

Senator Matt Jones
Colorado

Representative John Forbes
Iowa

Representative Mary Mushinsky
Connecticut

Representative Bruce Hunter
Iowa

Senator Dwight Bullard
Florida

Representative Jerry Kearns
Iowa

Senator Nan Orrock
Georgia

Representative Dan Kelley
Iowa

Representative Roy Takumi
Hawaii

Representative Charlie McConkey
Iowa

Representative Cynthia Thielen
Hawaii

Representative Art Staed
Iowa

Representative Annie Kuether
Kansas

Representative Denise Harlow
Maine

Representative Tom Burch
Kentucky

Representative Chuck Kruger
Maine

Representative Denise Provost
Massachusetts

Representative Matt Moonen
Maine

Representative Chris Walsh
Massachusetts

Representative William Noon
Maine

Delegate Al Carr
Maryland

Representative Deane Rykerson
Maine

Delegate Barbara Frush
Maryland

Representative Robert Saucier
Maine

Former Delegate James Hubbard
Maryland

Representative Ryan Tipping-Spitz
Maine

Delegate David Moon
Maryland

Former Senator Glenn Anderson
Michigan

Delegate Joseline Pena-Melnyk
Maryland

Representative Derek Miller
Michigan

Delegate Jimmy Tarlau
Maryland

Senator Rebekah Warren
Michigan

Former Representative Seth Berry
Maine

Representative David Bly
Minnesota

Representative Ben Chipman
Maine

Representative Karen Clark
Minnesota

Representative Beth Cooper
Maine

Representative Raymond Dehn
Minnesota

Representative Mick Devin
Maine

Representative Peter Fischer
Minnesota

Senator James Dill
Maine

Representative Mike Freiberg
Minnesota

Representative Gay Grant
Maine

Representative Rick Hansen
Minnesota

Senator Jeff Hayden
Minnesota

Senator Ken Haar
Nebraska

Representative Alice Hausman
Minnesota

Representative Cynthia Chase
New Hampshire

Representative Tina Liebling
Minnesota

Representative Renny Cushing
New Hampshire

Representative Diane Loeffler
Minnesota

Former Senator Rick Russman
New Hampshire

Representative Tim Mahoney
Minnesota

Senator Bob Smith
New Jersey

Senator John Marty
Minnesota

Representative Gail Chasey
New Mexico

Representative Sandra Masin
Minnesota

Senator Cisco McSorley
New Mexico

Representative Joe Mullery
Minnesota

Senator Mimi Stewart
New Mexico

Senator Sandra Pappas
Minnesota

Representative Christine Trujillo
New Mexico

Representative Jean Wagenius
Minnesota

Senator Brad Hoylman
New York

Representative Clem Smith
Missouri

Assemblymember Ellen Jaffee
New York

Representative Ed Lieser
Montana

Assemblywoman Barbara Lifton
New York

Representative Margie MacDonald
Montana

Assemblywoman Michelle Schimel
New York

Representative Andrea Olsen
Montana

Representative Nickie J. Antonio
Ohio

Representative Pricey Harrison
North Carolina

Former Representative Mike Foley
Ohio

Senator Tim Mathern
North Dakota

Senator Michael Skindell
Ohio

Representative Seneca Scott
Oklahoma

Representative Amy Sheldon
Vermont

Senator Michael Dembrow
Oregon

Representative Mary Sullivan
Vermont

Representative John Edwards
Rhode Island

Representative Michael Yantachka
Vermont

Representative Rebecca Houck
Utah

Senator Karen Keiser
Washington

Senator Jani Iwamoto
Utah

Representative Chris Reykdahl
Washington

Representative Justin Miller
Utah

Representative Derek Stanford
Washington

Senator Adam Ebbin
Virginia

Representative Terese Berceau
Wisconsin

Delegate Patrick Hope
Virginia

Representative Gary Hebl
Wisconsin

Delegate Kaye Kory
Virginia

Senator Chris Larson
Wisconsin

Representative Steven Berry
Vermont

Representative Corey Mason
Wisconsin

Representative David Deen
Vermont

Representative Melissa Sargent
Wisconsin

Representative Patsy French
Vermont

Representative Tim Manchin
West Virginia

Representative Helen Head
Vermont

Representative Warren F. Kitzmiller
Vermont

cc: Members of the United State Senate
Members of the United States House of Representatives
Ambassador Michael Froman, U.S. Trade Representative