December 17, 2014

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

Dear Ambassador Froman:

We are concerned that the Trans-Pacific Partnership (TPP) could make it harder for Congress and regulatory agencies to prevent future financial crises. With millions of families still struggling to recover from the last financial crisis and the Great Recession that followed, we cannot afford a trade deal that undermines the government's ability to protect the American economy.

Our concerns relate to three specific provisions that could be part of the TPP:

Investor-State Dispute Settlement

The investor-state dispute settlement process permits foreign companies to bypass American courts and challenge U.S. government policies before a panel of private attorneys that sits outside any domestic legal system. If the foreign company prevails, the panel can order compensation from American taxpayers without any review by American courts. The investor-state dispute settlement process thus gives foreign companies a greater right to challenge U.S. government policies than their American counterparts. And because the investor-state process is available only to investors, it gives investors a far greater ability to challenge state practices than it gives labor unions, environmental groups, or any other non-investor with an interest in a trade deal.

Past trade deals have included terms that allowed foreign firms to use the investor-state dispute settlement process to challenge a wide range of government financial policy decisions. For example, in 2006, an investor-state dispute settlement panel ordered a government to pay a foreign company $236 million because the government had not bailed out a private bank in which the foreign company owned a stake.[1]

Similar provisions in the TPP would be troubling enough because they would expose a broad array of critical American financial regulations to challenge by many additional foreign companies. Yet at a recent congressional briefing, a representative from your office stated that U.S. negotiators hoped to include an even broader provision in the TPP—one that would guarantee foreign

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[1] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, Ad hoc—UNCITRAL Arbitration Rules (2006), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf; *see also* Luke Eric Peterson, "Czech Republic to Pay Dutch Firm Slauka $188 Million (US), Plus 55 Million Interest; Contractual Counter-Claim Withdrawn," *Investment Arbitration Reporter* (July 1, 2008), *at* http://www.iareporter.com/articles/20091001_72.

companies a "minimum standard of treatment" with respect to U.S. financial regulations. No prior U.S. trade deal has exposed U.S. financial policies to that vague obligation. The "minimum standard of treatment" provision has been the basis for the majority of successful investor-state claims to date under U.S. deals, and if it is extended to financial policies in the TPP, it could expose American financial regulations to challenge on the basis that they frustrated a foreign company's expectations.

We believe that the TPP should not include an investor-state dispute settlement process. Including such provisions in the TPP could expose American taxpayers to billions of dollars in losses and dissuade the government from establishing or enforcing financial rules that impact foreign banks. The consequence would be to strip our regulators of the tools they need to prevent the next crisis.

Market Access

We are also concerned about including provisions in the TPP that would commit the American financial sector to "market access" rules similar to those stipulated by the World Trade Organization. Such rules could be interpreted by international panels to prohibit basic, non-discriminatory restrictions on predatory or toxic financial products—such as particularly risky forms of derivatives—because those restrictions deny access to the U.S. financial markets. Such rules could also be interpreted to prohibit or curtail certain limitations on the size or the operations of financial firms, such as regulations to shield depositors' money from high-risk trading.

To protect consumers and to address sources of systemic financial risk, Congress must maintain the flexibility to impose restrictions on harmful financial products and on the conduct or structure of financial firms. We would oppose including provisions in the TPP that would limit that flexibility.

Capital Controls

We also would oppose the inclusion of terms in the TPP that could limit the ability of the government to use capital controls. The International Monetary Fund and leading economists have endorsed capital controls as legitimate policy tools for preventing and mitigating financial crises. If the TPP were to include provisions from past pacts that required unrestricted capital transfers, it could limit Congress' prerogative to enact not only capital controls, but basic reform measures like a financial transactions tax. The TPP should not take these options off the table.

Accordingly, we request that you answer the following questions by January 6, 2015:

1. What is USTR's position on the inclusion of each of these provisions in the TPP?

2. If the USTR supports the inclusion of any of these provisions in the TPP, why does USTR believe that these provisions will help Congress and regulatory agencies prevent future financial crises?

In addition, we request that you provide us with all U.S. proposals and bracketed negotiating texts relating to the three provisions discussed in this letter. This includes, but is not limited to, the bracketed negotiating text for the TPP's chapters on investment, financial services, dispute settlement, and exceptions, and any related U.S. proposals. Since leaders of TPP negotiating countries recently stated that TPP negotiations are nearing their conclusion, we request that you provide these materials by January 6, 2015.

We look forward to working with you on these critical issues.

Sincerely,

Edward J. Markey