

July 10, 2017

The Honorable Robert E. Lighthizer
United States Trade Representative
600 17th St., N.W.
Washington, DC 20508

Dear Ambassador Lighthizer:

Consumers Union, the policy and mobilization arm of Consumer Reports, and Consumer Federation of America, an association of over 250 nonprofit consumer organizations in the United States, look forward to working with you as you undertake a re-examination of our international trade policy and our trade agreements. We have worked, along with others over the years, to better ensure that trade agreements promote a trade system that broadly benefits all Americans. We are encouraged that this goal, strongly embraced by Americans across the country, is also reflected in statements by the Administration.

As explained further in the attached, we recommend three guiding principles for negotiating trade agreements that work for all Americans:

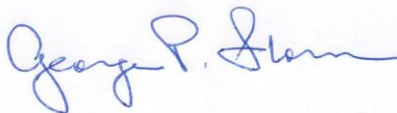
- Don't negotiate away sovereign U.S. government authority.
- Don't allow foreign corporations to bypass established U.S. government legal processes.
- Bring broader public input, with greater transparency, into trade negotiations.

Americans have rightly come to feel that trade agreements have not benefitted them. As you undertake to re-examine our trade policy and trade agreements, we stand ready to work to help make future trade agreements ones that deserve broad support.

Respectfully,

A handwritten signature in black ink that reads "Jean Halloran".

Jean Halloran
Director, Food Policy
Initiatives
Consumers Union

A handwritten signature in blue ink that reads "George P. Slover".

George P. Slover
Senior Policy Counsel
Consumers Union

A handwritten signature in black ink that reads "Susan Grant".

Susan Grant
Director of Consumer
Protection and Privacy
Consumer Federation of
America

Consumers Union and Consumer Federation of America Recommendations For Negotiating Trade Agreements That Work For All Americans July 10, 2017

Consumers Union¹ and Consumer Federation of America² have worked, along with others over the years, to promote a trade system that broadly benefits all Americans. International trade can benefit the United States, and the world economy, if the rules are fair, focused, and effectively enforced.

Based on our experience, we recommend three guiding principles for negotiating trade agreements that work for all Americans. As other governments around the world should rightly want to pursue similar objectives for their own citizens, we believe these three principles are a key part of a solid foundation for effective negotiations.

1. Don't negotiate away sovereign U.S. government authority.

Trade agreements in recent years have ventured increasingly far beyond what are traditional mechanisms for facilitating trade – reducing tariffs, lifting or relaxing quotas, and promoting non-discriminatory treatment of goods and services. The recent Trans-Pacific Partnership, for example, addressed a wide range of so-called “non-tariff trade barriers,” implicating important government regulatory policies that are essential for protecting consumers against unsafe foods and products, fraudulent and abusive financial practices, and other harms, but that have only at most an incidental, and often unintended, effect on international trade.

We support efforts to promote sound and effective regulatory policies around the world. And to the extent that lax regulatory policies in foreign countries may give foreign-based companies an unfair trade advantage, amounting to a subsidy at the expense of important regulatory protections, those policies can be an appropriate subject in trade negotiations.

However, in a negotiating process where global industry input dominates, and there is little if any input from the American public, regulatory policies are too often spoken of disparagingly, as “barriers” to trade. Allowing international agreements to reduce or remove

¹ Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

² Consumer Federation of America is an association of over 250 non-profit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

these supposed “barriers” in the name of facilitating international trade undermines our sovereignty in making our own decisions about how best to ensure safety, health, and other fundamental interests of American citizens.

The important goal of promoting international convergence around sound and effective regulatory protections is better pursued in other forums, where the regulatory agency experts are at the forefront and accountable. In the context of negotiating trade agreements, addressing regulatory issues should be focused on ensuring that foreign governments cannot obtain an unfair advantage for their companies by undercutting regulatory requirements that should be protecting their own citizens, or by permitting exceptions to those requirements for products and services they export to the United States. Trade negotiations should not be an instrument for relaxing these protections in the name of increasing the flow of international commerce.

2. Don’t allow foreign corporations to bypass established U.S. government legal processes.

The risk that trade agreements will undermine important consumer protections is further heightened by including an Investor-State Dispute Settlement procedure, or ISDS, as has occurred in recent agreements including NAFTA and the TPP. ISDS allows a foreign corporation to bypass our established laws, regulatory agencies, and courts, and to demand compensation from our government in private arbitration tribunals, based on claims that enforcement of the law is reducing foreign corporate profits.

There are fundamental concerns about the potential for misuse of these ISDS procedures, and serious questions about any need for them.

The private ISDS arbitrators, largely drawn from the ranks of international business and their legal advisors, are naturally inclined to put less emphasis on the broader public interests that governments are responsible for promoting and protecting. These private arbitrators also do not undergo the kind of scrutiny in their selection that judges do, and neither they nor their decisions are subject to any similar kind of accountability.

Furthermore, the private ISDS process is much less open to meaningful input from members of the public who may be substantially affected. While a private ISDS tribunal may elect to accept an amicus brief from a non-corporate or non-governmental entity, for example, it is not required to do so, and there is no right for even directly affected parties to intervene, as there is in U.S. courts and in the courts of other nations.

These extra-governmental ISDS procedures are a throwback to an earlier era, when they were a safeguard against the perceived risk of arbitrary actions by some rogue foreign leader to confiscate an investing company’s property. In recent years, however, ISDS has been used as a basis for challenging and interfering with a broader range of more commonplace government regulatory actions.

In the present-day era, it is simply not a realistic concern that a country with which the United States is entering into a trade agreement would move to arbitrarily nationalize the assets of a foreign corporation, or take other arbitrary action that amounts to expropriation, when it is

trying to maintain and increase trade with us. The far more realistic likelihood is that foreign corporations will use ISDS mechanisms to overwhelm the sovereign government, by bypassing established legal and regulatory processes, or by threatening to do so as a means of intimidating the government and extracting more lenient treatment, at the expense of public safety or other important consumer and public interests. Even a country as strong as the United States could be dissuaded from devoting the resources needed to pursue and defend its regulatory protections against a powerful foreign multinational corporation in a privately run ISDS tribunal.

In the unlikely event of an actual arbitrary expropriation, there are other government-to-government mechanisms for effectively responding. Moreover, corporations can, if they wish, obtain insurance coverage that adequately guards against loss from the remote prospect of expropriation. In short, there is no need, and therefore no justification, for creating this private pathway to bypass a sovereign government's laws and legal processes. And there is considerable risk of significant harm to the public, including in the United States.

3. Bring in broader public input, with greater transparency.

The Trade Advisory Committee system, established by Congress in 1974 to provide broad outside input into the development of trade policy and the negotiation of trade agreements, is overwhelmingly dominated by industry representatives, including multinational corporate interests. There is only one single consumer representative, but more than 500 industry representatives.³ Even if it were more balanced, however, the secrecy rules under which it operates are too constraining. Advisors are under strict confidentiality restrictions that could potentially subject them to criminal prosecution in the event of disclosure, which could constrain them, outside the secret process, from advocating as forcefully on the important issues at stake. Such secrecy is fundamentally unwarranted, and simply adjusting the scope and contours of the Trade Advisory Committee system is not a solution.

Instead, we need greater transparency in trade negotiations, to enable the broader public to follow the negotiations and provide meaningful and timely input as a trade agreement is taking shape. Americans need and deserve more of a voice in determining how an agreement could either support or undermine their basic quality of life. The current practice of negotiating these agreements behind closed doors, and unwrapping them for public view only after they have been finalized, has predictably heightened public suspicion and opposition. This was a critical flaw in negotiating the TPP, and a major factor in what we believe was the correct decision to withdraw from that agreement as negotiated and presented. It was also a major concern with regard to the Transatlantic Trade and Investment Partnership negotiations.

U.S. trade negotiators have in the past said they need confidentiality to forge consensus among the parties. But public input is a key hallmark of a democratic system, where the people are in charge, not the special interests.

And importantly, the current secret process is not equally secret as to all. Industry representatives, including multinational corporate interests, have more than 500 members on the various Trade Advisory Committees, each of whom has access to many – to potentially all – of

³ <https://ustr.gov/about-us/advisory-committees>; <http://trade.gov/itac/committees/index.asp>.

the confidential negotiating documents. While these advisory committee members are prohibited from sharing this confidential information outside the advisory committees, their sheer numbers ensure that the interests they represent have effectively full opportunity to monitor, coordinate, collaborate, and heavily influence the negotiations in real time. Everyday Americans, on the other hand, have almost no voice in the process.

As a start, we propose two changes to the current system to make the negotiating process more open.

First, the actual U.S. texts being prepared for each round of negotiations should be made public simultaneously with being shared with any advisory committee member, or anyone outside the federal government, and well before they are used in any negotiating round. The consolidated draft texts reflecting the results of each round should also promptly be made public. There should be no advantage, in terms of access to this basic, essential information, to being an insider on a Trade Advisory Committee. The European Union has begun making its negotiating texts available immediately. The United States should do likewise.

Second, the “fast track” process for congressional consideration of trade agreements should be discontinued. The congressional input that takes place under fast track is too selective, as it is sought and conveyed in confidential consultations focused on a handful of specialized committees, where the same corporate interests who already have predominant representation in the advisory committees are more likely to have disproportionate influence. All Members of Congress should have equal opportunity to review and evaluate the details of a trade agreement as it is taking shape, and to take into account any concerns expressed by members of the public who have likewise been able to review and evaluate those details.

If this kind of more open process lengthens the time it takes to finalize an agreement, those “difficulties” are simply an inherent byproduct of providing a healthy opportunity for wider public review and input.

Conclusion

Trade agreements need to be sensitive to, and protect, the interests of all Americans. They should not be in the control of global corporate interests that may be seeking to avoid or weaken legitimate legal requirements they face in the United States and around the world. As you undertake to re-examine our trade policy and trade agreements, we stand ready to help make this goal a reality.