

November 15, 2017

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

Dear Ambassador Lighthizer:

Consumers Union¹ and Consumer Federation of America² are encouraged by reports that, in the renegotiation of the North American Free Trade Agreement, you are proposing to significantly curtail the availability of Investor-State Dispute Settlement (ISDS).

As outlined in our July 10 letter to you, we have a number of concerns regarding the risks that trade agreements could undermine important consumer protections and other fundamental interests of the broader American public. But among our foremost concerns has been the ability of foreign corporations to employ the ISDS procedure to bypass established U.S. laws, regulatory agencies, and courts, to demand compensation from our government in private arbitration tribunals, based on claims that enforcement of U.S. law is reducing foreign corporate profits.

As we have noted earlier, private ISDS arbitrators are largely drawn from the ranks of international business and their legal advisors, and their private tribunals are not subject to public accountability as are U.S. courts.

The extra-governmental ISDS procedure is a throwback to an earlier era, conceived of as a safeguard against a 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 government regulatory actions. ISDS thus gives foreign corporations undue leverage to undermine a government's sovereign authority to protect its citizens.

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,

¹ Consumers Union is the policy and mobilization division 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.

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.

While we thus continue to strongly question whether there is any legitimate place for ISDS in trade agreements, nonetheless, the current U.S. NAFTA proposal, as it has been reported, would go far in addressing concerns regarding the potential misuse of ISDS. In particular, you reportedly have proposed to make ISDS optional, and have indicated that the United States would opt out. And you also reportedly have proposed to limit ISDS claims, even for countries that opt in, to incidents involving actual government expropriation of property.

We are aware that word of your proposal has prompted vehement protest from international corporate interests. We urge you to stay resolute against this pressure as you go forward, and to insist on meaningful reform of the ISDS process along the lines of what has been reported, keeping the broader interests of the American public first and foremost.

Respectfully,



Jean Halloran
Director, Food Policy
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