



September 6, 2016

Dear Senator:

Consumers Union<sup>1</sup> and Consumer Federation of America<sup>2</sup> urge you not to support approval of the Trans-Pacific Partnership (TPP) trade agreement if presented to you this year, or if presented at any time in its current form. While we recognize the benefits that can flow to consumers from international commerce, we are concerned that the TPP as currently negotiated would unduly risk undermining important safety, health, and other interests of consumers.

The TPP goes 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 TPP addresses a wide range of so-called “non-tariff trade barriers,” implicating important government regulatory policies that have only an incidental, and often unintended, effect on international trade. Speaking of these regulatory policies as “barriers” inherently skews the focus to the costs they impose on industry, to the exclusion of the benefits they provide consumers and the public. And using international agreements to reduce or remove these supposed “barriers” in the name of facilitating international trade makes them susceptible to undue influence from industry interests seeking to relax regulatory compliance requirements.

This is particularly the case when industry interests are given such significant access and voice during a negotiation process that is largely kept confidential from the public. Even the

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<sup>1</sup> Consumers Union is the policy and mobilization arm of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of food and product safety, telecommunications reform, health reform, financial reform, and other areas. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

<sup>2</sup> Consumer Federation of America is an association of more than 250 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

advisory committee system Congress created 40 years ago to provide for outside public input has come to be dominated by industry, with only one consumer representative out of roughly 600 advisors. Subjecting fundamental regulatory objectives to the rubric of reducing “barriers” to international trade risks setting them up for a one-sided industry-driven effort to weaken them. Ensuring that a proper balance is kept warrants a far more open, publicly transparent process than has taken place with the TPP.

To cite just a few examples: The TPP includes provisions, not found in past trade pacts, that allow international food shippers to challenge food safety inspection procedures at the border. Other TPP provisions could enable pharmaceutical companies to challenge Medicare drug listing decisions and Medicaid reimbursements, as well as to constrain future U.S. policy reforms aimed at reducing healthcare costs.

The risk that the TPP will become a vehicle for undermining important consumer protections is further exacerbated by the inclusion of the Investor-State Dispute Settlement procedure, or ISDS. This procedure allows industry to bypass the established regulatory agencies and courts, and to demand compensation from governments in private arbitration tribunals based on claims that consumer protection rules are reducing foreign corporate profits.

We have recently seen how a World Trade Organization case brought by Mexico and Canada against U.S. Country of Origin labeling requirements – requirements supported by more than 90 percent of American consumers, passed three times by Congress, and upheld by the U.S. Courts – resulted in severe penalties that would be imposed on the United States unless those requirements were eliminated. Congress, under threat, obliged and abolished Country of Origin Labels for beef and pork imported from Canada and Mexico. We are concerned that the TPP will lead to more industry-driven challenges to consumer protections, and that ISDS will provide an open avenue for doing so.

We recognize that the TPP attempts to address more clearly some of the specific concerns that have arisen regarding use of ISDS procedures in previous trade agreements. But there remain serious concerns about the potential for misuse of these procedures here, as well as serious questions about the need to include these procedures in the first place.

ISDS enlists private arbitrators, largely drawn from the ranks of the international business community and their legal advisors, who are likely to have less affinity for the public policy interests that governments are responsible for promoting and protecting. These private judges do not undergo the same scrutiny and oversight that apply to the U.S. federal judiciary. Furthermore, this private 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 entertain

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. federal courts and in the courts of other nations.

These extra-governmental ISDS procedures were originally conceived, in an earlier era, to be a safeguard against the perceived risk of patently arbitrary foreign government actions to confiscate an investing company's property. In recent years, however, ISDS has begun to be employed as a basis for challenging a broader range of government regulatory actions.

In the present-day era, it is simply not a realistic concern that one of the countries signing the TPP would move to arbitrarily nationalize the assets of a foreign corporation, or take other arbitrary action that amounts to expropriation, when they are trying to increase trade with us. The far more realistic concern is that corporations will use ISDS mechanisms to overwhelm the host government, by bypassing established legal and regulatory processes, or by threatening to do so as a means of intimidating the host government and extracting more lenient treatment, at the expense of public safety or other important consumer and public interests.

This risk is particularly pronounced in the many situations where the regulatory decision contains some element of site-specific or issue-specific discretion, where the black-letter statute or rule in question unavoidably requires interpretation by the national, state, or local government decisionmaker. The risk is also particularly high where the host government does not possess the financial resources for sustained litigation against a powerful multinational corporation; but even the United States might potentially be dissuaded from devoting the resources to pursue and defend strong regulatory policies as vigorously as it should.

In the unlikely event of an actual arbitrary expropriation, there are other government-to-government mechanisms for responding. Moreover, corporations can, if they wish, obtain insurance coverage that adequately guards against loss from the remote prospect of expropriation. While having a specially paved private pathway to bypass the host government entirely might conceivably help marginally reduce the expense of that insurance coverage, that is not sufficient justification for undermining host government regulatory sovereignty.

Notably, there was sensitivity during the TPP negotiations to this potential for ISDS to undermine effective regulation, as to one industry in particular – tobacco products. And the TPP accordingly excludes tobacco regulation from ISDS. We completely understand and fully support efforts to ensure that tobacco companies continue to be fully accountable under each country's laws and regulations. But these same considerations apply to a wide range of regulatory policies, including important policies that relate to public health and consumer safety,

that would be similarly vulnerable under ISDS. The door remains open for other industries to bring challenges to these other important policies.

In short, there is no actual need, and therefore no justification, for including ISDS in this agreement. And there is considerable risk of significant harm to the public. ISDS does not belong in the TPP, and its inclusion is a fatal flaw.

For the reasons set forth above, we urge you not to approve the TPP now, or at any time in its current form. Trade agreements need to be sensitive to and protective of the interests of consumers, and not driven by, or predominantly shaped by, the interests of industry in overcoming, evading, or weakening legitimate regulatory requirements they face in the United States and around the world.

Respectfully,

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