Cecilia Malmstrom, European Commissioner for Trade

Brussels, Belgium

Dear Ms. Commissioner:

As you represent the European Union in negotiations with the United States over the Transatlantic Trade and Investment Partnership (TTIP), I have become concerned with how the addition of Investor-State Dispute Settlements (ISDSes) to the agreement may spell great concern for investment in Europe, and for future free trade agreements involving the European Union. My first concern is with what American firms may attempt once the TTIP has been approved by the European Commission. Under this agreement, a foreign firm which thinks that a change in the law or regulatory rules of a member-state may cause them business harm can sue that state through an International Court of Arbitration. ISDSes have been established in other ratified free trade agreements, most notably the North America Free Trade Agreement (NAFTA). The United States Trade Representative has taken a stance in favor of having these courts of arbitration, relying on specificity of the agreement to ensure that foreign firms cannot sue the U.S. government for changes in policy, and likewise for other parties in the treaty. While I commend their attempt to simultaneously encourage foreign investment in the U.S. as well as secure the government’s right to alter the law based on public opinion, I worry that their recommended text may be giving too much favor to multinational.

We are seeing ISDSes used today to try and punish governments for changes in policy. After the Fukushima disaster of 2011, the German government enacted new laws shutting down its nuclear power industry. In response, a Swedish nuclear plant operator, Vattenfall, is currently seeking arbitration against the German government. Considering this lawsuit involves German law, it would stand to reason that this should be resolved in German courts. However, the Swedish firm is bypassing Germany’s legal system and is instead asking foreign judges to decide whether Germany caused undo harm to Vattenfall. This goes against the sovereignty of member-states, and could cause American firms to bypass European laws, especially in areas such as sustainability and workers’ rights, where principles differ significantly.

In order to combat the potential dangers of these ISDSes, there are several things your negotiating team should undertake as you finalize the TTIP. First, you should oppose ISDSes as a stipulation in the agreement, and seek to remove mention of them. This should be replaced with some agreement between the United States and the European Union on respecting each other’s laws, and ensuring that disputes between firms and national governments should be handled through either domestic legal systems or previously agreed to trade agreements. This ensures that the existing legal framework of trade still exists, without giving further power to private firms in influencing domestic economic policy. Second, your negotiating team should make clear to the Office of the U.S. Trade Representative that ISDSes will lead to negative lawsuits for both parties, whether Airbus decides to sue over America’s treatment of Boeing, to Wall Street firms suing over securities regulations in France, to name a few potential cases.

Best,

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