**Memorandum**

**To**: Cecilia Malmström, European Commissioner for Trade

**From**: Grant Oxer

**Subject**: Investor-State Dispute Settlements in the TTIP

**Date**: April 27, 2015

**Summary**

The United States of American and the European Union are currently working on the Transatlantic Trade and Investment Partnership (TTIP), a major free-trade agreement that will reduce many trade barriers between two of the world’s largest economic forces. However, the inclusion of Investor-State Dispute Settlements (ISDSes) may endanger the legal sovereignty of the US and EU members, and may lead to abuse by multinational businesses against national governments. I propose two possible ways to convince United States negotiators that ISDSes should be removed from the final agreement.

**The Problem**

**Background on the TTIP**

The Transatlantic Trade and Investment Partnership (TTIP) is a potential trade deal between most nations of the European Union and the United States of America. While there are already trade agreements between the EU and US, the negotiations on this particular partnership started in early 2013. Then-European Commission President Jose Barroso said this deal “between the world’s two most important economic powers will be a game-changer”[[1]](#footnote-1), with the broad goal of significantly reducing or eliminating many of the trade barriers between the two sides. However, there is significant controversy about the implementation of these goals.

The economic benefits of a free-trade deal of this scale are staggering. The United Kingdom alone could see an additional 10 billion pounds ($15 billion) worth of growth per year from this deal.[[2]](#footnote-2) In total, the trade deal would be worth 455 billion euros ($613 billion) per year.[[3]](#footnote-3) There is incredible incentive for politicians to sign on to this deal and for citizens of these nations to be on board. This deal would also significantly improve the European Union’s economic standing worldwide. With continued worry about possible exits by Greece or the UK, and the difficulty which some EU members have in paying their debts, a trade deal like this could help keep the continent competitive with Asian economic powerhouses China and Japan.

However, there are reservations on behalf of several politicians. European farmers are wary of giving up protections against American agriculture, and existing government subsidies to airplane manufacturers Boeing and Airbus could remain in place. Although, the European Union has expressed interest in having certain safety and protection standards be the same in both economies, allowing a product manufactured in one to be sent to the other without a second inspection.[[4]](#footnote-4)

**Issues with ISDSes**

A significant concern for EU governments is with what American firms may attempt once the TTIP has been put into force across the continent. 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. These courts would have three judges, whose decisions would be final, and could not be appealed by either the firm or the state being sued. [[5]](#footnote-5) 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, hoping to “ensure that Americans investing abroad are provided the same…legal protections [as in] the United States.”[[6]](#footnote-6) While I commend their attempt to simultaneously encourage foreign investment in the U.S. and 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 corporations.

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 worth $4.7 billion.[[7]](#footnote-7) 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 violates 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.

**The Proposal**

**Alternatives to ISDSes**

In order to combat the potential dangers of these ISDSes, there are several things the European Commission should undertake to remove them from the final version of the TTIP. First, it should support alternative methods for resolving disputes. The United States and the European Union, both at multiple levels of government, have existing court systems that allow for foreign investors to sue the government for mistreatment from improper regulation or violation of a corporate entity’s rights. There are many cases on both sides of the Atlantic of the courts finding fault with the government’s handling of the law, and these court systems will certainly punish their own government again if it incorrectly enforces its own laws or agreements. This trade deal is very large, and allowing it to exist within the existing legal framework will allow for faster acceptance, and will ensure that the EU and its members keep their sovereignty in the matter of law.

Critics will refer to my point earlier how several existing US and EU trade agreements include provisions on ISDSes. The U.S. Trade Representative sees these arbitration courts as a way of promoting the rule of law, and “every [trade] bill presented in [Congress] includes an ISDS.”[[8]](#footnote-8) However, these cases can be costly, and rarely do the investors win. According to Jeronim Capaldo of Tufts University, “UN data shows that…investors prevailed in only one third of all cases.”[[9]](#footnote-9) There is no reason to believe that these cases could not have been handled by existing national courts, and states are clearly not excessively abusing their powers against foreign corporations. That paper also found that a majority of ISDS cases worldwide were brought against developing nations, so these independent courts would not even be settling disputes frequently, casting doubt on their existence in the first place. The US and European countries each have the existing judicial infrastructure to deal with disputes between corporations and governments, especially when a majority of the cases will result in a country’s laws remaining unchanged.

**The US Political Landscape**

Another policy avenue for the European Union to take is to appeal to domestic US influences against the bill. Many environmental groups oppose the TTIP in its current form. The Sierra Club is concerned that environmental protection policies could be construed as non-tariff barriers to trade.[[10]](#footnote-10) The Sierra Club’s environmental message has supporters in both the European and national parliaments, and the Club can bring Americans’ attention to the environmental dangers of the TTIP in its current form.

These efforts are ultimately to convince the United States Senate to reject the TTIP in its current form. While the treaty will be signed by the U.S. President, it ultimately needs to be ratified by two-thirds of the Senate in order to be ratified. There is already opposition within the upper chamber to ISDSes. A growing star of the Democratic Party, Elizabeth Warren, wrote an opinion piece about the dangers of ISDSes in the Trans-Pacific Partnership (TPP), an agreement similar to the TTIP being considered by Pacific Rim countries. Her scathing look at the possibility of ISDSes is primarily focused on the dangers multinational corporations would pose to the U.S. legal system. Her argument is gaining traction with other Senate Democrats. While the Republican Party controls the Senate, they do not have a two-thirds majority, necessitating Democratic support of the agreement. Despite Barack Obama being the de facto leader of the Democratic Party, there has been considerable disagreement between him and Democratic leaders in the past, and it is likely that these disagreements will continue as Senators near elections and Obama leaves the White House. As such, reaching out directly to Senators, mostly Democrats, and encouraging them to oppose ISDSes will provide resistance to the President, encouraging him to renegotiate the clause. Critics may be concerned that this will be viewed as foiling in domestic politics, but this is instead a dialog with the policymakers ultimately responsible for ratification of the agreement. It does the Commission no good to have a signature without Senate approval.

**Conclusion**

The solutions in this letter focus on the existing legal system and U.S. political landscape. While neither of these are directly controlled by the European Commission, it should certainly take them into consideration and consider its ability to cooperate and influence them. Ultimately, the United States needs an environment hostile to acceptance of ISDSes in the TTIP in order to remove these dangerous clauses. It is in the best interest of European governments and citizens to oppose these arbitration courts, and it will serve the Commission well to put pressure on the Trade Representative to oppose these policies.

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1. BBC, 2013 [↑](#footnote-ref-1)
2. Clarke, 2013 [↑](#footnote-ref-2)
3. BBC, 2015 [↑](#footnote-ref-3)
4. European Commission, 2014 [↑](#footnote-ref-4)
5. Schiessl, 2015 [↑](#footnote-ref-5)
6. Office of the United States Trade Representative, 2014 [↑](#footnote-ref-6)
7. The Economist, 2014 [↑](#footnote-ref-7)
8. Capaldo, 2014 [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Sierra Club, 2013 [↑](#footnote-ref-10)