EuropeanVoice

European Commission makes its case for EU-US investment deal

By Andrew Gardner

Karel De Gucht, the European commissioner for trade, has said that a trade deal with the United States may be possible only if it explicitly addresses the terms on which companies can take states to court.

De Gucht was speaking on Thursday (27 March), at the start of a three- month public consultation launched by the European Commission in an attempt to defuse what has emerged as one of the most controversial aspects of the transatlantic trade and investment partnership (TTIP) now under negotiation with the US.

The Commission has portrayed the consultation as an attempt to increase transparency in an effort to ensure the deal's success. But the decision also raised the possibility that the issue of an 'investor-state dispute settlement' (ISDS) mechanism might be left out of an initial deal, to be addressed later – if at all – under the terms of the 'living agreement' that will be part of TTIP.

De Gucht made clear his belief that the US will press for ISDS to be in the agreement, as investment-protection clauses are now "normal practice" in trade deals. "What it would mean is that the US would have to withdraw from its normal practice and there is no over-riding reason to do that," he said of a TTIP without an investment-protection system.

Testing times

Investment treaties are nothing new and, according to De Gucht, 1,400 of the 3,000 or so investment agreements in force globally involve EU member states. Companies are, though, increasingly willing to test those agreements in court. In a paper published on 4 March, Daniel Ikenson of the Cato Institute, a right-wing US think-tank, noted a record 58 ISDS cases across the globe in 2012.

European criticism of the ISDS concept, much of it in the German media, has suggested that American companies could use investment-protection provisions to undermine EU and national rules on the environment and health, and to pursue the privatisation of public services – such as water management – through the back door. National policies in the US and the EU vary sharply on issues such as fracking and GMOs. In 2011, Philip Morris lit up the issue of investor protections when it sued the Australian government for its plain-packaging rules for cigarettes. The challenge failed, but the case has contributed to the US's continuing difficulties completing a Trans-Pacific Partnership with 11 countries in the Asia-Pacific.

EU officials rebut the criticisms, arguing that companies would not be able to overturn national law, and could sue a state on only three grounds – for discrimination, unequitable treatment and

the expropriation of assets. One official said that companies would struggle to challenge states for costs imposed for a breach of environmental law. “The investor would have to prove that the way that this has been done was arbitrary,” he said, “and I doubt very much that it would be able to prove that.”

De Gucht argues that the EU is promoting “a new and improved system of ISDS” that would eliminate loopholes identified in existing national treaties, including a “tremendous loophole” used by Philip Morris.

The US company's challenge to Australia was through the Hong Kong courts, based on a 1993 Australia-Hong Kong agreement. De Gucht said that the Commission was trying to close off such a route by stipulating that a company could launch a challenge only from a country where it had “substantial activity”.

The Commission also says that it would seek to make the arbitration process more transparent, by obliging the two parties to choose one adjudicator from a pre- selected list of approved arbitrators, and to strengthen the appeals process. According to EU officials, investment issues have been talked about in each of the four full rounds of TTIP negotiations, but no text has been discussed.