EU and US pressed to drop dispute-settlement rule from trade deal

By Shawn Donnan in London

Faced with an increasingly vocal opposition to a landmark EU-US trade agreement, a growing number of backers of the deal are starting to ask a simple question: might the future of transatlantic trade be better served if one of its most controversial provisions was simply dropped?

Almost nine months after negotiations opened with great hope and fanfare, opponents of the mooted Transatlantic Trade and Investment Partnership, or TTIP, are rallying against a plan that would allow private investors to use the pact to sue governments if they felt local laws threatened their investment.

Environmentalists worry that it would allow big US oil companies to challenge France's anti-fracking laws and other environmental regulations, while consumer groups fret that it would open the EU's sacrosanct ban on genetically modified organisms to a challenge from American agribusiness.

The concerns in Europe over the inclusion of an "investor-state dispute settlement", or ISDS, mechanism grew so loud earlier this year that Karel De Gucht, the EU's trade commissioner, announced he would suspend negotiations on the relevant text to hold public consultations.

But in recent weeks, as both sides have been preparing for Monday's resumption of negotiations in Brussels, the opposition has spread beyond the traditional sceptics.

In a paper released last week, Daniel Ikenson, director of the trade programme at the conservative Cato Institute, argued that the investor protection measure had become too toxic. And that in order to defuse the growing opposition, negotiators should simply drop what seemed like a superfluous provision.

“ISDS is not even essential to the task of freeing trade. So why burden the effort by carrying needless baggage?” Mr Ikenson wrote in his paper, which called for the US to drop ISDS provisions from its push for a 12-country Pacific Rim deal, the Trans-Pacific Partnership, as well.

Dropping ISDS would “assuage thoughtful critics of the trade agenda, who do not oppose trade, but who believe trade agreements should be more modest and balanced”, he wrote. “Meanwhile, what now appears to be an angry mob protesting trade generally will be thinned out, exposing the unsubstantiated arguments of the professional protectionists who benefit by impeding Americans’ freedom to trade.”

Mr Ikenson is not alone. In a recent debate in the British parliament a number of MPs raised their own concerns over the inclusion of ISDS even as they offered their backing for the broader push for freer trade across the Atlantic.

“Why do we need these tribunals for a country where the rule of law is adhered to, more or less across the board?” asked Zac Goldsmith, a backbench MP from Prime Minister David Cameron’s ruling Conservative party.

ISDS mechanisms have been a feature of trade and investment treaties around the world since the 1950s and were originally intended to help protect investors from government expropriation or rogue judgments in countries with weak judicial systems.

The provisions have been largely uncontroversial for most of their history. But in recent years their use has soared as a way for companies to challenge national regulations.

According to Mr Ikenson, between 1959 and 2002 there were less than 100 known ISDS claims lodged worldwide. But between 2003 and 2012 investors lodged more than 400 such cases. In 2012 alone a record 58 cases were filed worldwide, he points out.

In many instances, critics charge, the cases amount to a cynical ploy to get around local regulations. The example they cite most often is the continuing challenge by Philip Morris International of Australia’s plain packaging rules for cigarettes via an investment treaty with Hong Kong.

Both the EU and the US remain eager to have the investor-state provision included in the TTIP agreement. And so too are business groups.

Trade officials contend that ISDS panels actually tend to issue commonsense rulings and that rogue cases rarely succeed. Moreover, the EU-US negotiations, European officials argue, present a rare opportunity to close loopholes and raise the bar to prevent frivolous cases.

As with many things in the EU-US negotiations, trade officials also argue it is an opportunity to set an ambitious example for other agreements.

“We cannot go on and negotiate an investor protection agreement with India, which clearly has big problems right now, if we don’t have a precedent from somewhere else,” says Alex Stubb, the Finnish trade minister.

Mr Ikenson, however, says those arguments miss the point. Trade negotiators have in recent years underestimated the depth of popular opposition to trade deals and they are miscalculating again, he says.

The current stand-off in the US Congress, where the Democratic party’s leadership is blocking the granting of so-called fast-track negotiating authority to the Obama administration, is driven in part by scepticism over ISDS, he points out. In Europe the scepticism is equally strong.

“This is something that is almost non-controversial between the European Commission and the US government and the business lobbies want it,” he says. “But they don’t need it.”

And, he adds: “If the trade agenda is shut down [by the opposition], which I suspect there is a very good chance of happening for [President Barack Obama], then the business community is going to have to prioritise what it needs.”