



Response on investor-state arbitration in TTIP

(Transatlantic Trade and Investment Partnership)

Question 13

What is your overall assessment of the proposed approach on substantive standards of protection and investor-state dispute settlement (ISDS) as a basis for investment negotiations between the EU and US? Do you see other ways for the EU to improve the investment system? Are there any other issues related to the topics covered by the questionnaire that you would like to address?

The UK Health Forum and the six supporting signatory organisations to this response which are listed at the end of this section, are concerned about the impacts of trade on the risk of non-communicable diseases which include heart disease, stroke, diabetes, obesity, cancer and dementia. We are particularly concerned about trade and investments related to tobacco, alcohol and unhealthy food products which are high in fat, salt and sugar. Our response to this consultation is therefore focused on ensuring the TTIP and any ISDS mechanism supports the protection of public health. We wish to endorse the observations made by Watt, Van Harten, Muchlinski and Schepel (2014), the European Heart Network and Van Harten (2014) in their responses to this consultation and strongly support the recommendation that ISDS is excluded from the TTIP for the reasons outlined below.

The EU's consultation document fully recognises the flaws in the investment treaty arbitration regimes, which include:

- Widespread expansive interpretations of most of the provisions found in investment treaties to the detriment of the interests of states and the general public
- Failure to adequately police itself in matters of ethics, independence, competence, impartiality, conflicts of interest and the public interest
- Arbitrators are unaccountable to society at large.

A number of international treaties, declarations, strategies and/or action plans include measures to protect public health and the environment. We are concerned that efforts by states (Parties) to implement some of these measures and regulate in the public interest have been challenged through ISDS. Examples of international measures to protect health and the environment include:

- Framework Convention on Tobacco Control
- UN Political Declaration on non-communicable diseases
- WHO Global Action Plan on non-communicable diseases
- Organisation for Economic Co-operation Development health policies
- UN Framework Convention on Climate Change and Kyoto Protocol
- UN sustainable development goals

ISDS mechanisms were originally established to protect foreign investments in host countries where there were weak legal and judicial systems. However, this is not relevant within the context of the EU and US. As part of the rationale for ISDS, the consultation document states that the EU is concerned that the rights each party grants to its own citizens and companies 'are not always guaranteed to foreigners and foreign investors.' There are other ways of not discriminating against foreign investors, such as the incorporation in TTIP of a norm of non discriminatory legal protection and equal access to domestic courts to address the problem (as proposed by Watt and colleagues).

While the EU's efforts to 're-do' investment law, make the system 'more transparent and impartial' and 'close these legal loopholes once and for all' are laudable, Watt and colleagues who have expertise in the area of investment law have highlighted a number of serious failings in the proposed text, which specifically:

- Fails to exclude acquisitions of sovereign debt instruments from the scope of Treaty;
- Allows anyone with a substantial business activity in the home state who holds *any* 'interest' in an enterprise in the host state to bring a claim;
- Fails to spell out legal duties of investors in host states;
- Fails to exclude contract claims;
- Fails to protect the 'right to regulate' as a general right of states alongside the many elaborate rights and protections of foreign investors, let alone as a component of the FET and Expropriation standards;
- Allows enormous discretion for arbitration tribunals in various 'necessity' tests;
- Fails to further the stated principle of favouring domestic court proceedings;
- Fails to regulate conflicts of interest in the adjudicative process;
- Fails to formulate a policy on appellate mechanisms with any precision;
- Fails to formulate a policy on avoiding 'Treaty shopping' with any precision; and
- Fails to formulate a policy on third party submissions with any precision.

Furthermore, as Watt and colleagues point out, ISDS raises a number of political issues. The system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions. It delivers undue structural advantages to foreign investors and risks distorting the marketplace at the expense of domestically-owned companies. The benefits to foreign investors include:

- Their exclusive right of access to a special adjudicative forum
- Their ability to present facts and arguments in the absence of other parties whose rights and interests are affected
- Their exceptional role in determining the make-up of tribunals
- Their ability to enforce awards against states as sovereigns
- The role of appointing bodies accountable directly to investors or major capital-exporting states

- The absence of institutional safeguards of judicial independence that otherwise insulate adjudicators in asymmetrical adjudication from financial dependence on prospective claimants
- Further bargaining advantages that the above confer.

In light of the above issues and challenges, we strongly recommend that the EU exclude ISDS from the TTIP.

References

Public consultation on investor-state arbitration in TTIP – Comment. 2014. Horatia Muir Watt, Sciences Po Law School, Paris; Gus Van Harten, Osgoode Hall Law School of York University, Toronto; Peter Muchlinski, School of Law, SOAS, London; Contact: Harm Schepel, Kent Law School and Brussels School of International Studies, University of Kent. Email: hjcs@kent.ac.uk

Gus Van Harten. WHY ARBITRATORS NOT JUDGES? Comments on the European Commission’s approach to investor-state arbitration in TTIP and CETA. Summary. 3 July 2014. Osgoode Hall Law School of York University Email: gvanharten@osgoode.yorku.ca

This response is supported by the following organisations:

UK Health Forum

Cancer Research UK

Heart of Mersey

Institute of Alcohol Studies

Medact

South Asian Health Foundation

World Obesity Federation

Question 1: Scope of the substantive investment protection provisions

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?

We support the observations made by the European Heart Network that the scope of protection needs to be narrowly defined and to exclude any expectations on behalf of the investor that even substantial investments are automatically protected. In particular, the following conditions should apply to investments:

- Investments must have been made in good faith and not merely as a means of creating a legal right under the TTIP (for example, Philip Morris shifted ownership of PM Limited (Australia) to Hong Kong to bring a claim under the Australian – Hong Kong Bilateral Investment Treaty).
- Investments in activities that have the potential to impact public health negatively must not benefit from investment protection. These investments include those in sectors producing tobacco, alcohol and unhealthy foods which are high in fat, sugar and/or salt.

We support Watt, Van Harten, Muchlinski and Schepel's recommendation that the reference that investments are made 'in accordance with applicable law' should include the following clarifications as a minimum:

- Investors respect the law of the host country *for the duration* of the investment
- An absolute obligation to respect human rights as reflected in the law of the host country and in international law
- Prohibition of any form of bribery.

In addition, we support Watt and colleague's call to clearly and unequivocally exclude acquisitions of sovereign debt from the definition of 'investment.' The sovereign debt crisis has brought social misery and hardship to many European citizens, with detrimental impacts on health. Speculative investors, for example, in Greek government bonds must not be allowed to seek damages before investment arbitration Tribunals for losses which result from efforts imposed on or undertaken by states in their attempts to solve the crisis.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 2: Non-discriminatory treatment for investors

Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non-discrimination in relation to the TTIP? Please explain.

The investment protection chapters in the treaty should safeguard the right of states to regulate in the interests of protecting health, the environment and consumers by including a clear and unequivocal statement of this right within the text. Investors should accept that state duties to regulate business activity in support of public occupational and environmental health and safety should constitute a normal and legitimate commercial risk.

The text should also explicitly state that foreign investors may be disproportionately impacted by regulatory interventions where there is a legitimate justification (for example the Methanex case where studies suggested that methanol-based fuel additives posed greater risk to human health and the environment than ethanol-based products).

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 3: Fair and equitable treatment

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

We support the recommendations of the European Heart Network regarding “legitimate expectations.” Measures to protect public health are frequently recommended in international treaties, declarations, strategies and/or action plans – such as the Framework Convention on Tobacco Control, UN Political Declaration on non-communicable diseases, WHO Global Action Plan on non-communicable diseases, Organisation for Economic Co-operation Development health policies, UN sustainable development goals and the UN Framework Convention on Climate Change and Kyoto Protocol. They are also recommended in national strategies and/or action plans; and in documents from academic institutions and research organisations knowledgeable about public health or specific diseases.

Investors cannot be considered to have legitimate expectations where investments are affected by current or future measures which are adopted to protect public health and fulfil international treaties, published strategies, declarations, action plans and recommendations and similar as described above.

In democracies, such as the US and the EU, investors have ample opportunity to make their arguments during the legislative process. Investment protection must not provide an opportunity for investors to “escape” regulatory measures which are otherwise generally applicable.

We support the proposal by the European Heart Network to add to Table 3 that investors can have no legitimate expectations that the legislation of the host state will not change, whether through amending existing legislation or introducing new legislation.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 4: Expropriation

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP?

The consultation document rightly notes that ‘indirect expropriation has been a source of concern in certain cases where regulatory measures taken for legitimate purposes have been subject to investor

claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment.'

The cases of Australia and Uruguay which have been sued before arbitration tribunals because of measures they have taken on the packaging of tobacco products to protect health are examples. These measures are included in an international treaty – the Framework Convention on Tobacco Control.

We recommend that the text on Expropriation is amended to reflect the fact that non-discriminatory measures taken in support of a state's regulatory powers aimed at protecting health and welfare, do not constitute indirect protection. The text 'as a general rule' and accompanying exception which has been open to abuse, should be deleted in order to avoid claims against legitimate public policy measures such as those highlighted above, and also to avoid a 'regulatory chill' effect where governments may postpone a decision to adopt a certain measure until a dispute between other parties has been settled.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 5: Ensuring the right to regulate and investment protection

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

We recommend the inclusion of a clear, unequivocal statement within the text of the state's right to regulate. Investors should accept that state duties to regulate business activity in support of public, occupational and environmental health and safety should constitute a normal and legitimate commercial risk. Our primary position is that inclusion of the ISDS mechanism is both unnecessary and potentially unsafe. However, if an ISDS mechanism is included, a statement on the state's right to regulate should be included both in the ISDS section, as well as the main text of the TTIP.

We also support the changes to the text proposed by the European Heart Network:

Paragraph 2

- Include consumer protection and protection of public health and the environment within legitimate public policy measures Parties can take
- Take out the reference to 'legitimate' public policy. If a Party deems a measure appropriate, there must be a presumption that it is legitimate.

Paragraph 3

- Include social and health dimensions within the list of protections.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 6: Transparency in ISDS

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have.

We welcome the EU's aim to ensure transparency and openness in the ISDS system under TTIP. We support the recommendations made by the European Heart Network and submission by Watt, Van Harten, Muchlinski and Schepel that:

- Tribunals should be required to provide a written account of their reasoning.
- Any settlement of a threatened claim should be made public.
- The rules on transparency set out in Table 6 define criteria for what constitutes 'confidential and protected information.'

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 7: Multiple claims and relationship to domestic courts

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP. Please indicate any further steps that can be taken. Please provide comments on the usefulness of mediation as a means to settle disputes.

We wish to endorse the following proposals by Watt, Van Harten, Muchlinski and Schepel:

Domestic proceedings

We support the EU's approach which is to favour domestic courts, and recommend that the text is strengthened to oblige and provide clear incentives for investors to seek redress in domestic courts. To support this, we recommend that the admission of claims in front of an ISDS tribunal be conditional upon exhaustion of domestic remedies, and where investors have made the case that domestic proceedings do not offer justice or are not reasonably available.

Treaty shopping

The proposal to prevent investors from simultaneously pursuing the same claim in front of domestic courts and an ISDS tribunal is critical to making sure that investors are not compensated multiple times. To support this, we urge the EU to clarify what is expected of tribunals to 'otherwise ensure' that parallel proceedings are 'taken into account.'

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 8: Arbitrator ethics, conduct and qualifications

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these procedures and in particular on the Code of Conduct and the requirements for the qualifications for arbitrators in relation to the TTIP agreement. Do they improve the existing system and can further improvements be envisaged?

We welcome the EU's objective to establish clear rules to ensure that arbitrators are independent and act ethically. We note the Organisation of Economic Cooperation and Development's 2012/13 Working Paper "Investor-state dispute settlement: A scoping paper for the investment policy community" which concluded that 95% of dissenting opinions in ISDS are written by the arbitrator nominated by the losing party. Thus the requirement that "*arbitrators shall be independent of... any disputing party*" does not appear to be an adequate mechanism to preclude bias.

Van Harten (2014) summarised the safeguards of judicial independence that are present in domestic and international courts, but which are absent from investor-state arbitration:

- a) provision for secure tenure for the adjudicator instead of case-by-case appointment,
- b) set remuneration for the adjudicator instead of for-profit case-by-case remuneration,
- c) an objective method of case assignment instead of executive discretion over case-by-case appointment.

We support the proposals by Van Harten (2014) and Watt, Van Harten, Muchlinski and Schepel to strengthen the rules. These include:

- The treaty should adopt basic institutional safeguards of judicial independence, including the stipulation that no one who stands to profit in any way from the income generated by the representation of parties to investment disputes acts as an arbitrator.
- Arbitrators appointed in cases under the present Treaty may not be simultaneously involved in any capacity other than as an adjudicator in any other investment arbitration, nor have any professional association with anyone who is involved as counsel or party-appointed expert in any investment arbitration. A few arbitrators self-impose this rule, and other arbitration systems have versions of it.

We also support the recommendation made by Action on Smoking and Health that in cases involving environmental, social or public health regulations, arbitrators are required to have specific expertise or the tribunals should be advised by independent experts in the relevant policy areas.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 9: Reducing the risk of frivolous and unfounded cases

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

We agree that clear rules are needed to deal with frivolous claims, and support the European Heart Network's recommendations on this. Imposing all costs to the losing party will be essential, and as such the punitive award to the losing party should be in addition to an award for the costs of arbitration incurred by the other party.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 10:

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?

We support the proposal made by the European Heart Network that filter mechanisms, which decide whether or not claims can proceed, are warranted more broadly than for prudential rules for financial stability. The filter mechanism should also be applied where measures are applied and designed to protect public welfare objectives such as health, consumer safety and the environment. Moreover, it should not serve as a substitute for a clear unequivocal statement of the state's right to regulate.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 11: Guidance by the Parties (The EU and the US) on the interpretation of the agreement

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance? Are these elements desirable, and if so, do you consider them to be sufficient?

The inclusion of a process of binding joint interpretation in the TTIP as an additional safety valve could be useful, but also has potential drawbacks if the final outcome is dependent on another party. Thus the option of unilateral instruments should also be considered in the absence of joint interpretations.

We recommend that the TTIP text should stipulate that the treaty is a means to facilitate sustainable growth and that this does not impede upon the right of states to regulate in the public interest.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.

Question 12: Appellate Mechanism and consistency of rulings

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

We support the EU's intention to introduce a bilateral appellate mechanism to ensure consistency in the interpretation of the TTIP and to correct errors. We support the recommendation by Watt, Van Harten, Muchlinski and Schepel that the power of review is assigned to financially-independent judges (as opposed to for-profit arbitrators) in order to protect against conflicts of interest. We also support Van Harten's recommendation that judges should replace arbitrators throughout the decision making process and not just at the appeals stage.

We also wish to reiterate our conclusion (in question 13) that the ISDS should be excluded from the TTIP. It has numerous flaws and has the potential to jeopardise public policy intended to protect and promote public health.