



fighting heart disease
and stroke
european heart network

EHN response to the EU consultation on investment protection and ISDS

July 2014

The European Heart Network (EHN) is a Brussels-based alliance of heart foundations and likeminded non-governmental organisations throughout Europe. EHN has member organisations in 25 countries.

EHN plays a leading role in the prevention and reduction of cardiovascular diseases, in particular heart disease and stroke, through advocacy, networking, capacity-building and patient support, so that they are no longer a major cause of premature death and disability throughout Europe.

Europe and the World suffer from a crushing burden of non-communicable chronic diseases and unprecedented high levels of child obesity. Based on the evidence that trade and investment agreements have potential implications for domestic health policies as well as global health governance, EHN has responded to the EU's public consultation on modalities for investment protection and investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP).

You will find our response to the specific questions below.

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?

The European Heart Network (EHN) agrees that investment protection '*is only granted in situations where investors have already committed substantial resources in the host state*'. This condition is a sine qua non – not a guarantee.

In addition to this condition, EHN would argue that an investment 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 BIT).

EHN would further argue that investments should support a positive development of the host country. Therefore, investments in activities that are broadly considered to have the potential to impact public health negatively should not expect to benefit from investment protection; such investments include in sectors producing tobacco, alcohol and unhealthy foods.

In conclusion, 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.

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.

EHN agrees that, *‘as a matter of principle, established investors should not be discriminated against...’*.

However, the words ‘as a matter of principle’ are crucial. For example, the right of governments to introduce measures that protect public health must be safeguarded, at the level decided by the host state, as it constitutes a necessary mechanism in meeting its ‘duty of care’ to its citizens. EHN suggests that the investment protection chapter states explicitly that investors make their investments in full recognition of the fact that regulatory interventions may be implemented and that such interventions may fall harder on foreign investors where there is a legitimate justification (for example the Methanex case where studies suggested that methanol-based fuel additives posed a greater risk to human health and the environment than ethanol-based products).

EHN supports the EU’s objective to clarify that the most-favoured nation (MFN) standard does not allow procedural or substantive provisions to be imported from other agreements.

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?

EHN welcomes the EU’s attempt to clarify what constitutes fair and equitable treatment and eliminate uncertainties.

Regarding **“legitimate expectations”**, measures to protect public health are frequently recommended in international treaties, declarations, strategies and/or action plans; or national strategies and/or action plans; or in documents from academics or organisations knowledgeable about public health in general or specific diseases. Investors cannot be considered to have legitimate expectations where investments are affected by measures adopted post-establishment but with reference to international treaties, published strategies, declarations, action plans and recommendations and similar.

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.

EHN suggests adding to Table3 Article X.X 4 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.

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?

EHN agrees that it is necessary to clarify what constitutes ‘*indirect expropriation*’ with the aim of avoiding claims against legitimate public policy measures. Particularly, EHN welcomes the clear statement in Table 4 Annex: Expropriation 3 that non-discriminatory measures to protect health, as a general rule, do not constitute indirect expropriation.

But, this general rule has an exception ‘...*except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive...*’. The wording ‘*the impact...is so severe*’ and ‘*manifestly excessive*’ beckons guidance to interpretation. When exactly is an impact ‘so severe’ as to appear ‘manifestly excessive’?

We raise this as two governments (Australia and Uruguay) have been sued before arbitration tribunals because of measures they have taken regarding the packaging of tobacco products to protect health. It should be noted that the measures taken are included in an international treaty – the Framework Convention on Tobacco Control – or its guidelines. If measures are recommended in international treaties, declarations, strategies and/or action plans or in national strategies and/or action plans or in documents from academics or organisations knowledgeable about public health in general or specific diseases, can they still be ‘manifestly excessive’? How hard would an investment have to be impacted before the impact is considered ‘severe’? If the impact can be considered severe but the measure cannot be considered ‘manifestly excessive’ does it imply that the measure falls into the general rule, i.e. it does not constitute an indirect expropriation?

EHN suggests including in Table 4 Annex: Expropriation 3 or elsewhere in the investment chapter, as guidance to interpretation, that international treaties, published strategies, declarations, action plans and recommendations and similar need to be taken into account, on a case-by-case basis, to determine if a decision is ‘manifestly excessive’ and consequently constitutes indirect expropriation.

We consider that such guidance might help to avoid claims against legitimate public policy measures 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.

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

EHN welcomes the EU’s intention to state explicitly the states’ right to regulate in the preamble to the chapter on investment protection and ISDS. EHN suggests that the right to regulate should also be included in a preamble to the TTIP.

EHN puts forward a couple of amendments to the preamble in Table 5:

Paragraph 2 - Current text

RECOGNISING the right of the Parties to take measures to achieve legitimate public policy objective on the basis of the level of protection that they deem appropriate,

Paragraph 2 - Proposed text

RECOGNISING the right of the Parties to take measures to achieve public policy objective on the basis of the level of protection that they deem appropriate, *including consumer protection and protection of public health and the environment*,

(The word ‘legitimate’ should be deleted. If a ‘Party’ deems a measure appropriate, there must be a presumption that it is legitimate.)

Paragraph 3 - Current text

DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements to which they are Parties,

Paragraph 3 - Proposed text

DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social, *health* and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental, *social, health* and labour protection and relevant internationally recognised standards and agreements to which they are Parties.

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.

EHN welcomes the EU’s aim to ensure transparency and openness in the ISDS system under TTIP.

EHN recommends that the TTIP rules on transparency, as set out in Table 6 Article x-33, define criteria for what constitutes ‘*confidential and protected information*’. It is important to avoid abuse of the right to designate documents as confidential.

In Table 6 Article x-33, there are three different way of referring to ‘*confidential and protected information*’:

Table 6 Article x-33.4:

...Canada or the European Union ...shall make publicly available in a timely manner relevant documents pursuant to paragraph, subject to redaction of confidential or protected information.

Table 6 Article x-33.5:

‘...Where the tribunal determines that there is a need to protect confidential or protected information, it shall....’

Table 6 Article x-33.6:

‘...The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.’

Question7: 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.

EHN supports EU’s approach which is to favour domestic courts. Preventing investors from simultaneously pursuing the same claim in front of domestic courts and an ISDS tribunal, as proposed, is indeed critical to make sure that investors are not doubly compensated.

As the EU favours, in principle, domestic courts, EHN would recommend that the admission of claims in front of an ISDS tribunal be conditional upon exhaustion of domestic remedies where such are available.

EHN has no comments on the usefulness of mediation as a means to settle disputes. Presumably this is always an option.

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?

EHN welcomes the EU’s objective to establish clear rules to ensure that arbitrators are independent and act ethically. EHN agrees that retired judges, who generally have experience in ruling on issues that touch upon both trade/investment and societal/public policy issues, are among those best qualified to undertake the tasks.

To achieve the objective of independence and to ensure that arbitrators’ qualifications are appropriate, EHN suggests the following text in Table 8 Article x-25.5:

Arbitrators appointed pursuant to this Section shall have expertise or experience in public international law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements, *as well as in societal and public policy matters.*

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.

EHN agrees that a double measure of clear rules to deal with frivolous claims (claims that are either without legal merit or legally unfounded) and imposing all costs on the losing party is essential.

To further discourage claims, EHN suggests the following amendment to Table 9 Article x-36.5:

Article x-36.5.2

Where the Tribunal has ruled that a claim is manifestly without legal merit pursuant to Article x-29 or unfounded as a matter of law pursuant to Article x-30, the Tribunal shall order the losing party to pay a punitive award. The punitive award shall be in addition to the award for costs of arbitration incurred by the other party.

Question 10: Allowing claims to proceed (filter)

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?

EHN suggests that filter mechanisms are warranted more broadly than for prudential rules for financial stability. EHN suggests that a filter mechanism should be also applied where measures are applied and designed to protect public welfare objectives, such as health, consumer safety and the environment. The text in Table 10 needs amending to reflect this.

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?

EHN considers that the inclusion of a process for binding joint interpretation in the TTIP as an additional safety-valve is useful.

There are concerns, though, as the final outcome is dependent on the other party. For this reason, EHN suggests also to consider *unilateral* instruments. Often in the absence of joint interpretations, unilateral documents or statements may provide guidance to arbitrators as supplementary means of treaty interpretation and this is compatible with international law.

Another tool that could help with the interpretations is providing the appropriate “context” and “object and purpose” in the preamble not only to the investment protection chapter but to the TTIP. If the preamble emphasises the protection of investments, tribunals may adopt an interpretation focusing primarily on investors’ interests. To prevent this, the TTIP text should stipulate that the treaty is a means to facilitate sustainable growth and that it does not impede upon the Parties’ right to regulate in the public interest.

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.

EHN agrees that it is necessary to provide measures to ensure consistency in the interpretation of TTIP and to correct errors. EHN welcomes the EU’s intention to create a bilateral appellate mechanism immediately through the TTIP agreement.

The provision establishing the appellate mechanism must be described in detail. EHN considers that it is essential that the mechanism is constituted of permanent members who are appointed by the Parties (EU and US) from a pool of the most reputable jurists, as this will help ensuring consistency of rulings. An additional likely benefit is that authoritative rulings by an appeal body could guide both the disputing parties (when assessing the strength of their respective cases) and arbitrators adjudicating disputes.

Question 13

What is your overall assessment of the proposed approach on substantive standards of protection and 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?

Considering the undesirable effects of the use that has been made of ISDS in existing BITs, the ISDS system needs a complete overhaul. The current international arbitration system is flawed. One flaw is the use of private commercial arbitration law principles and practices to decide on matters traditionally deliberated on the basis of public international law. Arbitrators are not held to the same standards as those of domestic judicial systems and speed and finality are placed above proper administration of justice. Claims for awards are often grossly exaggerated; this is because there is a greater chance that an arbitration tribunal will take demands for large awards seriously than there is in a national court, which is subject to more checks and balances. A particularly disturbing phenomenon in international arbitration is that of third-party funding whereby commercial companies offer to pay some or all of a claimant’s legal fees and expenses in exchange for payment of the claimant’s direct costs and a share of the sum recovered by the claimant in the arbitration (typically between 15% to 50%).

It is claimed that it is possible that investors will not be given effective access to justice, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy and that ISDS is necessary to allow legitimate claims to be pursued. EHN is not in a position to comment on this.

EHN acknowledges that the EU has accepted the criticism of the ISDS mechanism and has made an appreciable effort to counter it. Nevertheless, concerns remain about the “regulatory chill” effect and the risk of potentially large claims filed by investors under an ISDS mechanism.

Considering moreover that the vast majority of EU Member States do not have bilateral investment agreements with the US that include ISDS, EHN recommends that the EU negotiate a TTIP without ISDS.