

# EPHA contribution

## Public Health Concerns on ISDS in TTIP

### Investor Protection (ISDS and State to State Dispute Settlement)

- **TTIP shall not include investment protection in the form of ISDS as the risks for public health policy from ISDS are greater than its potential benefits. There are alternative solutions (e.g. bilateral contracts, national courts, state-to-state arbitration, investment insurance and political risks that deter countries from arbitrary expropriation) providing sufficient protection for foreign investors.**

Investor State Dispute Settlement (ISDS) is a mechanism that **allows foreign investors to sue national governments** for actions that they perceive to be threatening their investments. In the area of **health** there have been three well-known cases brought against governments in recent times:

1. Phillip Morris vs **Australia** for plain packaging of tobacco products (**ongoing case**)
2. Phillip Morris vs **Uruguay** for large health warnings on tobacco products (**ongoing case**)
3. Achmea vs **Slovakia** for the renationalisation of **health insurance services**<sup>1, 2</sup>

**Protection against misuse or abuse of governmental powers** is a standard feature of domestic law. Certainly in advanced legal systems, the standard would generally not fall below what is offered in international investment law. **Both the EU and the US** must be considered to have **advanced legal systems** and there are sufficiently strong legal mechanisms already in place both in the US and EU to reassure foreign investors. Moreover, as ISDS is only a tool for foreign investors, there is the question of **discrimination to national investor companies**.

As there is a **lack of empirical evidence that Free Trade Agreements containing ISDS increase foreign investment**<sup>3</sup>, the Commission applies the so-called **'ensurance policy'** by encouraging foreign investments to include ISDS in Trade agreements. However, **there are far more important determinants** to promote Foreign and Domestic Investment (FDI) **than ISDS and it is unlikely** that a TTIP without an ISDS mechanism will have a major negative impact on foreign investment. The agreement between Australia and the US does not contain ISDS and this has not harmed foreign investment in Australia.

While no sovereign state, in principle, can lose its right to regulate in the public interest under any trade or investment agreement, **the fear of being sued** before an arbitration tribunal may lead to a so-called **'regulatory chill'**, i.e. a decision by governments not to introduce a measure to protect public health, such as plain packaging for tobacco, because the financial risks involved in ISDS – in terms of both arbitration costs and the amount of damages awarded – are significant.<sup>4</sup> As a recent **regulatory chill example**, New Zealand already announced that it would wait for the outcomes of the Australia case before introducing its plain packaging law. There has been some improvement in the Canada-EU Trade Agreement (**CETA**), but the solutions proposed by the negotiators still present a lot of flaws as they **do not satisfy basic standards of judicial independence and fair process**.

<sup>1</sup> <http://www.italaw.com/sites/default/files/case-documents/italaw3207.pdf>

<sup>2</sup> In this case the Slovakian state won but they had to pay 200,000 euros upfront plus legal fees first and expend a lot of time and energy on the case

<sup>3</sup> <http://www.epha.org/spip.php?article6113>

<sup>4</sup> [http://www.ehnheart.org/index.php?option=com\\_downloads&id=1949](http://www.ehnheart.org/index.php?option=com_downloads&id=1949)