eurocare
European Alcohol Policy Alliance

EUROCARE Consultation response to "Public consultation on modalities for investment protection and ISDS in TTIP"

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The European Alcohol Policy Alliance (EUROCARE)

The European Alcohol Policy Alliance (EUROCARE) is an alliance of non-governmental and public health organisations with 57 member organisations across 25 European countries advocating the prevention and reduction of alcohol related harm in Europe. Member organisations are involved in advocacy and research, as well as in the provision of information to the public; education and training; the provision of workplace programmes; counselling services and residential support.

The mission of Eurocare is to promote policies to prevent and reduce alcohol related harm, through advocacy in Europe. The message, in regard to alcohol consumption is “less is better”.

Q1. 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 Alcohol Policy Alliance (Eurocare) agrees with the attempt to limit the definition of investment and investor. Given the agreements to date, there is need to clearly define 'investment' for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty which has caused a prolonged controversy about the intended scope of the term.

Eurocare main concern is that the current investment protection rules may be abused to prevent countries from introduction of new alcohol policy interventions such as changes in labelling of alcoholic beverages (i.e. inclusions of calories and health information), fiscal measures, marketing restrictions etc.

European Commission (EC) should ensure that ISDS in its substantive investment protection provisions does not allow companies to bring claims against states' regulatory policies that positively impact health.

Q2. 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?

Eurocare considers that TTIP provisions should allow the right of government to introduce measures that protect public health and must be safeguarded at the level decided by the host state. Therefore, Eurocare agrees that *'as a matter of principle established investors should not be discriminated against'* however as mentioned above the host state should maintain and safeguard its right to introduce measures in areas of protection of standards of healthcare, consumer protection, public health prevention interventions, protection of employees and protection of environment.

Consequently, Eurocare strongly agrees with the proposition to include exceptions allowing Parties to take measures relating to the protection of health. However, it would strongly advise on elimination of wording *'necessary'* to achieve public policy objectives. Countries should have the ability to make interventions on grounds of public health without the needs to prove its necessity. As has been proven in the past cases such phrasing would lead to the judicial challenges by private companies of governments policy choices. Furthermore, this could mean that a Member State in questions would have to prove that no less trade restrictive alternative existed, placing the Member State in the unenviable position of proving a negative.

Q3. 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?

Eurocare agrees with the EC approach that fair and equitable treatment provisions cannot lead to the *'stabilisation obligation'* meaning that Member States would not be allowed to change their legislation in a way that might negatively affect investors.

As has been mentioned above, in the ISDS text the EU should safeguard its Member States right to regulate. Future individual EU Member States policies should not be freezed as a result of *'stabilisation obligation'*. As the EU does not have an exclusive competence in area of public health it should even more ensure that the provisions it is negotiating will not block the EU Member States from their individual future legislative measures in area of public health. Therefore, the EU should consider adding a provision that the investors recognise that the legislation in the host state will change, whether through amending existing legislation or introducing new legislation.

Q4. 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?

As stated by the EC it is necessary to clarify what constitutes '*indirect expropriation'* Eurocare agrees with the statement that non- discriminatory measures to protect public health, as a general rule, do not constitute indirect expropriation.

Eurocare is however concerned regarding the wording of exception to the rule stated above *'…except in the rare circumstances where the impact of the measure of series of measures is so severe in light of its purpose that it appears manifestly excessive..'*. The interpretation of the *'manifestly excessive'* measures should not be left to Arbitrators only. Eurocare would like to suggest establishing in the ISDS a principle that to guide the definition of the *'manifestly excessive'* measure, international treaties, strategies, declarations, action plans and recommendations of the United Nations and its agencies should be utilised.

Q5: 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?

Eurocare welcomes the EC attempts to enshrine the right to regulate in the ISDS, however it would like to highlight the need to specify the terms and ensure that public health and consumer protection measures will not be freezed by the ISDS.

Right to regulate should be better safeguarded, the usage of the term *'legitimate'* public policy objectives- implies that public policy objectives can be illegitimate and would place extra burden on governments trying to protect the well- being of their citizens through public interventions. The usage of the term 'legitimate' should be avoided in relation to public policy. Furthermore, greater clarity is needed so this is not interpreted as a 'necessity test' or 'proportionality test' that could be constructed as the least trade- restrictive measure to meet a regulatory objective.

Having mentioned the above points Eurocare would suggest the following amendments in the text:

Suggested text for Preamble, Paragraph 2:

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.

Suggested text for Paragraph 3

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.

Eurocare would strongly encourage the EC to ensure stronger safeguards to promote health and regulate in the public interest. There should be a wide public health exemption that would reaffirm the right to regulate in:

- Taxation, fiscal measures, and subsidies for public health purposes (such as a minimum unit price in alcohol or taxes on junk food)
- Health information labels on alcoholic beverages, as is the current case with tobacco
- Food labelling, with special attention being paid to the provisions in the possible annexes; so that the these annexes are not used to block public measure on labelling of alcoholic beverages such as possible future labelling changes (i.e. placing nutrient and ingredients requirements, health information messages)

Q6. 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?

Eurocare congratulate the EC on its commitment to making the system more transparent.

Eurocare would encourage making the documents and proceedings not only available but what is even more important making them easily available. This could be achieved by establishing a mechanism (better than the current TBT system hosted by DG ENTERPRISE) for

these documents to be easily accessible and distributed among relevant parties (i.e. MEPs, interested civil society organisations, national Parliaments etc.)

EC should ensure that the process is fully transparent, through easily accessible documents and hearings, allowing interested parties not only to submit to the hearing but ensuring that their submission will be considered. The interested parties (i.e. civil society) should be guaranteed the right to intervene.

Eurocare would like to draw to the EC attention that the transparency rules of the UNCITRAL, that it refers to in the consultation notice, could be improved. The *'comparably exceptional circumstances'* wording could give the Tribunal wide discretion for determining that a given document or hearing should not be public due to suspicion that it could interfere with the arbitral process. This for instance could classify public demonstration or any public voice of concern i.e. online petitions, strong interest from the press as '*exceptional circumstances'* leading to putting a veil of secrecy on the entire process.

Q7. 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?

Some ISDS in the past has posted a requirement to consult/ negotiate with the host state before bringing the claim to arbitration; however they rarely spell out consequences of an investor's failure to meet this obligation. There is no clear jurisprudence constant with regards to this type of treaty provision and this should be clearly defined in this agreement.

Some past agreements had provisions of judicial finality, requiring claimant first to exhaust all of the judicial remedies within the host State unless such recourse is *'obviously futile'*. The term '*obviously futile*', opens up this provision for unnecessary interpretation. Eurocare would strongly recommend not to include such wording and making it obligatory to require the claimant to exhaust host state judicial remedies. Eurocare fully supports the EC suggestion to favour domestic courts.

Eurocare would like to point out that nowhere in its consultation paper the EC mentions how the ECJ and its competence on the areas of safeguarding internal market will relate to the ISDS. The relation between the EU existing and future case law set by the ECJ should be related to in the TTIP in order to avoid legislative uncertainty.

Q8. 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?

Eurocare applauds the EC recognition of the need to improve the functioning of the ISDS Tribunals.

EC should ensure that preventing the conflicts of interest in arbitrators does not only limit itself to a code of conduct. Making a list of individuals (as suggested in the consultation notice) who can act as Arbitrators in a particular dispute is an improvement. However, it has to be recognised that it will not entirely eliminate the risk of conflict of interest. Due to the subject matter of the claims which in the last years has evolved around environment and health, social areas Eurocare would suggest ensuring that the Arbitrators above the knowledge and experience in investment and international trade agreements also have expertise on societal and public policy issues.

A mechanism should be considered that would eliminate the 'revolving doors' instances, as is the case with the EU Commission officials.

Q9. 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.

Eurocare would like to take opportunity to urge the EC to ensure clear definition of terms throughout the ISDS text.

As Arbitrators in the ISDS operate within a certain framework and have to apply to specific rules contained in the investment agreement. This means that decisions by Arbitrators are only as good as the rules they are asked to apply. Vague rules will, by definition, leave room for interpretation.

Eurocare would like to point out that *'frivolous'* claim needs to be clearly defined or replaced, as this is not a currently legally recognised term. Unless, visibly defined and detailed what would constitute a frivolous claim, it is open to too much interpretation. The language used needs to be sufficiently narrowed to avoid the emerging trend of investor challenges to public interest measures, which could lead to a 'regulatory chill' effect, where governments limit their prevention policies in the fear of possible legal challenges.

Q10. 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?

Eurocare considers that prudential measures should not only apply for financial sustainability but filter should also be applied for health sector, as not to prevent the Member States from regulating in the public interest (health, consumer safety and the environment)

Q11. 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?

Eurocare fully supports the inclusion of process for binding joint interpretations in the TTIP. Such joint interpretations would increase the role of the parties in interpreting the treaty in order to avoid legal interpretations that go against their intentions.

However, Eurocare considers that additional safe- guard could be included, such as usage of unilateral instruments i.e. ratification documents, declarations, and statements. Additionally, in the absence of joint interpretations unilateral documents could provide valuable guidance to Arbitrators for treaty interpretation; such practice would be compatible with international law.

As stated on several occasions, one of Eurocare primary concerns is that TTIP should not limit the Member States right to regulate in the public interest. Eurocare believes that inclusion of 'context' and 'object and purpose' in the preamble to ISDS chapter and the TTIP would assist in avoidance of problems with interpretations. The TTIP preamble should emphasise not solely protection of investment but also position TTIP as a means of achieving sustainable growth and well being.

Q12. 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.

Eurocare agrees with the EC approach of improving the consistency of rulings and appeal mechanism. The EC intention to create a bilateral appellate mechanism immediately through the TTIP is warmly welcomed.

However, Eurocare would like to underline that the functioning and binding nature of such mechanism needs to be clearly stated in the agreement. An Appellate Mechanism should be enshrined in ISDS mechanism, with detailed provisions for the role and requirements of its members. Eurocare would like to suggest that the appeal mechanism should be constituted of permanent members, appointed by EU and the U.S. from a pool of the most reputable and representative jurists, guided by a strict code of conduct.

Q13. 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?

Eurocare appreciates the EC efforts to counter the criticisms to the ISDS mechanism and the steps it has taken improve the transparency of the negotiation process. Nevertheless, from the public health perspective serious concerns remain about the 'regulatory chill' effect. International investment agreements need to ensure that the country hosting an investment maintains the right to take measures for the public good without the fear of being sued.

Eurocare is deeply concerned that the provisions in the TTIP and the protection ISDS offers to private companies will lead to large claims filed by alcohol companies (under the ISDS mechanism) that will effectively stop governments from introduction of new alcohol policies i.e. labelling, marketing restrictions, fiscal measures etc.

Over the last years an unusually high number of cases (almost half of the total) were filled against developed States, most of theses the Member States of the European Union. In 2013 the greatest numbers of cases were brought against countries in Europe (26 cases, of which two are against countries not member of the EU).

In 2013, there were at least two instances where a measure or a set of related measures, gave rise to more than one claim. More specifically, the same change in energy regulations in the Czech Republic resulted in seven separate claims against it. Similarly, Spain faced 6 separate cases in which investors challenge the same government regulations that adversely affected solar energy producers.
This raises a question whether the ISDS mechanism is truly serving its original purpose or whether it has become a mechanism for companies to attempt stop public policies which they deem inconvenient.

As was pointed out in answers to the questions above, there remain serious concerns regarding the Arbitrators in the ISDS system. They are not held to the same standards as

those of Member States judicial systems, the national courts in the instance of both the EU and the US have more checks and balances in place.

Compared to the EU and US judicial systems, ISDS mechanism appears not well established and constructed in a manner not designed for agreement of the scale of TTIP.

This poses a fundamental question why does the EC consider that ISDS mechanism between two highly developed blocks with complex and well established judicial system is necessary?

The EU and U.S. as well developed democracies with high standards of legitimacy and transparency should not subject themselves to a flawed system of corporate arbitration.

Eurocare would strongly recommend for the exclusion of ISDS from the TTIP agreement.