

# Striking the balance: protecting health, protecting investments

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european public health alliance







# Striking the balance: protecting health, protecting investments

## EPHA position on investment protection in TTIP and Trade Agreements: Response to the European Commission proposal for an Investment Court System to replace Investor-to-State Dispute Settlement (ISDS)

EPHA welcomes the European Commission's decision to move away from the proposed Investor-to-State Dispute (ISDS) mechanism proposed in the Trans-Atlantic Trade and Investment Partnership (TTIP). This recognises concerns raised by civil society and the public that private ISDS arbitration is prone to conflict of interests, lacks transparency and could compromise sovereign governments' right to regulate and provoke 'regulatory chill'.

It is clear that the new Investment Court System (ICS) proposal of the European Commission has not been drafted for TTIP but rather in the context of future Trade and Investment agreements with non-OECD emerging economies, notably China.

In the context of international trade agreements between partners with mature and stable democracies and Court systems, notably TTIP, an Investment Court System or ISDS clause is not necessary. The public health community expects safeguards to ensure the EU and national governments are guaranteed the right in law and in practice to make policies and laws to protect and improve health. The mature and stable legal and political structures in the EU and US offer entirely adequate assurances to investors and are the only means of ensuring the continued sovereign right to regulate.

## How to strike the balance between Protecting Health and Protecting Investments in TTIP and other Trade agreements

1. Defining and implementing policy and legislation to protect and improve public health must remain the sovereign right of domestic governments and take primacy over trade objectives. This right must not be compromised in practice by trade agreements.
2. Any form of Investor-to-State Dispute Settlement (ISDS) or parallel Investment Court System (ICS) is *not necessary* between trading blocs with stable democracies, mature



established Court systems and legislature. The ICS proposal does not address fundamental flaws of ISDS. The ISDS/ICS Chapter should be removed from the EU-US TTIP negotiations.

3. In future trade and investment agreements with emerging economies, negotiators should insist that investors be required to exhaust domestic remedies before proceeding to use investment protection. For these agreements, ISDS should be replaced by a formally constituted and internationally-recognised International Trade Tribunal.
4. Investment protection regimes cannot seek to guarantee a 'stable business environment'. There can be no 'legitimate expectation' that the regulatory environment will not change. Governments at all levels must be able to respond with policy and law to protect citizens' health. Any claim questioning public interest legislation should be considered as inadmissible.

## Introduction: Why is the public health community concerned about investor protection in international trade agreements?

The objective of EPHA and the European public health community is to protect and promote public health in European policies and programmes. Improved health and well-being should be a primary objective of EU policies. EU trade policy is also a tool to achieve a number of public interest objectives, including the protection of public health. To guarantee this, the preservation of the sovereign right to regulate for all levels of governance (regional, national, federal / EU, international), free of external influence or threat of private arbitration is essential.

EPHA welcomes the European Commission's decision to move away from ISDS, as the mechanism is not fit for purpose and lacks accountability and democratic legitimacy, as evidenced by massive public response to the consultation and recent protests. Civil society organisations are concerned that ISDS would seriously undermine democratic policy development (regulatory chill), could prevent governments from implementing public interest policies (regulatory snare) and discriminate against local investors.

However, the European Commission's new proposal for an Investment Court System to replace ISDS does not address all of these concerns. Fundamental concerns remain that the right (and will) to regulate would be effectively compromised by the threat of arbitration. The proposal still does not provide sufficiently strong protection of the right to regulate.

While no sovereign state, in principle, can lose its right to regulate in the public interest under any trade or investment agreement, the threat of being brought before an arbitration tribunal – and the financial and political risks linked to such a procedure - may lead to a 'regulatory chill', i.e. a decision by governments not to introduce a measure,



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>1</sup> In

this context, it is relevant to note that the threat of arbitration is likely to have an uneven ‘regulatory chill’ impact between different EU member states – with smaller states’ right to regulate being effectively more compromised than larger states.

Investments should support the sustainable development of the host country, therefore, safeguards are required ensuring that public health protection takes precedence over investments in health-harmful products and sectors, e.g. tobacco, alcohol, foods high in sugar, salt or saturated fat, or legislation for example which affects access and affordability of pharmaceuticals.<sup>2 3</sup>

In international arbitration, the public policy exception is usually interpreted narrowly.<sup>4</sup> The available case law demonstrates that a major problem with ISDS is the interaction between different sources of international law, including EU law, WTO law, and international conventions on the environment, climate change, public health or human rights. What guarantee is there that domestic public health protection would take precedence over trade and commercial interests, as International Investment Agreements (IIAs) usually provide more favourable treatment for foreign investors?<sup>5</sup> These concerns remain valid for the ICS proposal.

For example, the tobacco industry has a well-documented history of employing tactics to ‘Block, Amend or Delay’<sup>6</sup> public health legislation to curb the impact of tobacco use on health and public budgets. These tactics include the overt threat of international arbitration.<sup>7</sup>

The tobacco industry has been a driving force behind challenges to Australia’s plain packaging law<sup>8</sup>, brought about through the process of the World Trade Organization dispute panel. In 2012, in response to a request by Ukraine, the World Trade Organization Dispute Settlement Body<sup>9</sup> agreed to set up a panel to assess whether the plain packaging law passed in Australia breaches intellectual property rules under the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement or violates the Agreement on Technical Barriers to Trade (TBT). Private businesses and organisations are not permitted to initiate such processes. As of December 2013, seven countries and the EU have joined the dispute as third parties.<sup>10</sup> In May 2014, the Director-General of the WTO appointed panellists to examine the complaint.<sup>11</sup>

<sup>1</sup> [http://www.ehnheart.org/index.php?option=com\\_downloads&id=1949](http://www.ehnheart.org/index.php?option=com_downloads&id=1949)

<sup>2</sup> Terminology used by relevant WHO document

<sup>3</sup> <http://www.ehnheart.org/publications/responses-to-consultations.html>

<sup>4</sup> Legal Instruments and Practice of Arbitration in the EU – study for the EU JURI Committee [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2015\)509988](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988)

<sup>5</sup> UNCTAD Investor-State Dispute Settlement – UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2014 - <http://ow.ly/TktVd>

<sup>6</sup> Mandal S et al (2009). Block, amend, delay: tobacco industry efforts to influence the European Union’s Tobacco Products Directive (2001/37/EC). Work supported by the Smoke Free Partnership through a Cancer Research UK grant. Available at (pdf) [http://www.smokefreepartnership.eu/sites/sfp.ttp.eu/files/EU\\_TL\\_TPD\\_report\\_May\\_2012.pdf](http://www.smokefreepartnership.eu/sites/sfp.ttp.eu/files/EU_TL_TPD_report_May_2012.pdf)

<sup>7</sup> The University of Bath Tobacco Control Research Group. Tobacco Tactics. Available at [http://tobaccotactics.org/index.php/Legal\\_Claims](http://tobaccotactics.org/index.php/Legal_Claims)

<sup>8</sup> Thompson C. The Financial Times. Big tobacco backs Australian law opposers. (29 April 2012). Accessed at (paywall) <http://www.ft.com/cms/s/0/314c9446-91fb-11e1-867e-00144feab49a.html?siteedition=uk#axzz31c6DEx9l> (13.05.14)

<sup>9</sup> World Trade Organization. Understanding the WTO: Settling Disputes: A unique contribution. Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

<sup>10</sup> World Trade Organization. Dispute Settlement Body: Overview of the State of Play of WTO Disputes. Addendum to Annual Report (2013). Accessed at <https://mc9.wto.org/system/files/documents/61A1.pdf> (14.05.14)

<sup>11</sup> <http://www.mccabecentre.org/focus-areas/tobacco/dispute-in-the-world-trade-organization>



As an example of regulatory chill, there is evidence demonstrating that the threat of an investor vs. state dispute from US tobacco interests convinced Canada not to introduce plain packaging with health warnings for cigarettes in the early 2000s.<sup>12</sup> Similarly, New Zealand announced that it would wait for the outcomes of the Australia case before introducing its national plain packaging law.<sup>1</sup>

## Context: What is ISDS? How does the ICS proposal differ?

ISDS is a mechanism provided for in most International Investment Agreements (IIAs) - usually Bilateral Investment Agreements (BITs) that allows foreign investors to sue investment host state governments for breach of obligations that are set out in the investment agreement. It was introduced in 1960s due to ineffectiveness of national courts and diplomatic protection as a form of arbitration where parties have a high degree of flexibility and involvement (e.g. arbitrators are selected by the parties). Arbitrators render a binding award (limited possibility for review of decisions depending on forum).

As ISDS is a form of arbitration which lacks the key characteristics of a recognised Tribunal (independency, consistency and predictability, transparency, qualifications of judges, impartiality, affordability). Any new Investment Court System (ICS) must address these concerns.

ISDS is designed to protect investors wishing to invest in politically unstable countries with immature (or corrupt) legal systems. For example, countries where a government may decide to expropriate private property belonging to foreign investors (which would be illegal in mature democracies), ISDS is intended to provide a forum to bring a legal case against a foreign government and obtain financial compensation, where the investor does not have faith in the independence of domestic courts.

This is clearly not the case in either the US or member states of the European Union. Providing extra protection for foreign investors in TTIP is therefore unnecessary as there is no systematic discrimination against investors in US or EU courts.<sup>13</sup> The Legal Affairs committee of the European Parliament concluded “there is no need for any private investor-state dispute settlement (ISDS) mechanism in this agreement” in their Opinion on the Parliament’s TTIP Resolution.<sup>14</sup> To introduce ISDS or ICS would appear an admission of instability in the political or legal systems of the member states.

Both ISDS and the ICS proposal rely on professional arbitrators or judges who would also be employed in private practice. Both proposals are prone to potential systemic conflict of interest. The likelihood of the arbitrator to find in favour of the complainant (investor) still remains a concern in the ICS proposal – as the Court would gain income from such cases. There are no safeguards that a judge would not also represent/have previously represented the complainant – either the company or the sector – in other cases.

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<sup>12</sup> International trade agreements challenge tobacco and alcohol control policies DONALD W. ZEIGLER Office of Alcohol, Tobacco and Other Drug Abuse Prevention, American Medical Association, Chicago, IL, USA <http://www.ncbi.nlm.nih.gov/pubmed/17132574>

<sup>13</sup> Lauge Poulsen’s testimony to the HoL’s inquiry on TTIP, pp. 51-2., p. 224: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-c/TTIP/TTIPoralandwrittenevidencevolume120514.pdf>

<sup>14</sup> Opinion of the Committee on Legal Affairs (JURI) on TTIP, 04.05.2015



## Evaluation of ISDS and ICS proposal – advantages and disadvantages

While the ICS proposal addresses some of the concerns of the flawed ISDS regime, several questions remain to be answered.

Advantages of ISDS	Disadvantages of ISDS
<ul style="list-style-type: none"> <li>• Allows foreign investors to avoid national courts of the host State if they have little trust in them as regards their independence, neutrality, efficiency and competence in international investment law</li> <li>• Governments do not always incorporate international (e.g. BIT) obligations into national law, and national courts do not decide cases in accordance with international law</li> <li>• Depoliticises investment disputes</li> <li>• Privacy and confidentiality</li> <li>• Recognition and enforcement of awards</li> <li>• Speed, authority and economic value</li> <li>• Dispenses with the need for investors to convince their home State to bring claims against the host state</li> </ul>	<ul style="list-style-type: none"> <li>• Allocation of decision making authority</li> <li>• positive discrimination against local investors as foreign investors are the only parties with rights</li> <li>• Exposes host States to additional legal and financial risks ('regulatory chill' and 'regulatory snare'), without necessarily bringing any additional benefits in terms of additional FDI flows</li> <li>• Private tribunals settling public disputes</li> <li>• Inconsistent and unpredictable application of the law</li> <li>• Parallel proceedings</li> <li>• Few constraints on abusive claims</li> <li>• Qualification of arbitrators and potential conflicts of interest</li> <li>• Lack of full transparency</li> <li>• Lack of meaningful appeal and other accountability mechanism</li> <li>• Systemic pro-investor 'bias' of arbitration tribunals</li> <li>• Increasingly slow and expensive</li> <li>• Encourages treaty, forum and nationality shopping</li> </ul>

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### Remaining concerns after the ICS proposal

- Positive discrimination against local investors as foreign investors are the only parties with full rights;
- Exposes host States to additional legal and financial risks ('regulatory chill' and 'regulatory snare'), without necessarily bringing any additional benefits in terms of additional Foreign Domestic Investment (FDI) flows;
- Private tribunals settling public disputes remains a question;
- Parallel proceedings as there is no requirement to use domestic court first;
- abusive claims are still possible;
- potential conflicts of interest as there is no guarantee for full independency;
- potential pro-investor 'bias' of arbitration tribunals as only the knowledge of trade law is a requirement;
- Its cost implications are unclear.

Neither ISDS nor ICS is necessary to support TTIP, or indeed any Trade and Investment Agreement between countries or blocs which are stable democracies with mature legal systems. Empirical evidence does not support the argument that such clauses stimulate foreign investment.<sup>15,16</sup> The agreement between Australia and the US does not contain ISDS and official statistics show that Foreign Direct Investment (FDI) increased since adoption. Australia has recently renewed its FTA with Japan which also does not include an ISDS<sup>17</sup>. Current bilateral EU-US FDI flows indicate recognition of the stable investment environment and low risk in both directions: According to the European Commission:<sup>18</sup>

***“Total US investment in the EU is three times higher than in all of Asia. EU investment in the US is around eight times the amount of EU investment in India and China together”.***

As ISDS and ICS would only be a tool for foreign investors, there is the question of discrimination against national investors. Apart of national courts, there are alternative solutions (e.g. bilateral contracts, state-to-state arbitration, and political risk insurance<sup>19</sup>) which already provide sufficient protection for foreign investors.

ISDS or ICS cannot replace the need to undertake due diligence of the investment environment and risks in the host country. According to political risk insurance providers the treaties are very rarely relevant for the pricing of investment risks.<sup>20</sup> There are many academics who argue that IIAs do not have a major impact on promoting flows of

<sup>15</sup> <http://www.ephra.org/spip.php?article6113>

<sup>16</sup> LSE Enterprises Costs and Benefits of an EU-USA Investment Protection Treaty pp. 15-18:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf)

<sup>17</sup> <http://www.smh.com.au/federal-politics/political-opinion/isds-the-trap-the-australiajapan-free-trade-agreement-escaped-20140407-zqrwk.html>

<sup>18</sup> <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> accessed on 13th October 2015

<sup>19</sup> Stiglitz, J. E., 2013, South Africa Breaks Out,

<http://www.project-syndicate.org/commentary/on-the-dangers-of-bilateral-investment-agreements-by-joseph-e--stiglitz>

<sup>20</sup> [http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=laugue\\_poulsen](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=laugue_poulsen)





investment.<sup>21 22 23</sup> A UK government study undertaken by the LSE concluded that “Existing evidence suggests that the presence of an EU-US investment chapter is highly unlikely to encourage investment above what would otherwise take place.”<sup>24</sup>

In future international trade agreements, investors should be primarily required to seek domestic remedies before proceeding to international arbitration. The exhaustion requirement is a fundamental principle of international law, but exceptions are made where domestic remedies are ineffective for example if there are undue delays.<sup>25,26</sup> or if domestic courts lacked jurisdiction to provide relief.<sup>27</sup> Furthermore, the ICSID Convention<sup>28</sup> specifically mentions the requirement to exhaust local remedies unless otherwise stated. Accordingly, EPHA considers that such a requirement must be specifically set out in the text of future trade and investment agreements containing investment protection as a condition for initiating international arbitration proceedings.

## Remaining concerns in the Investment Court System (ICS) proposal

The ICS proposal presented by DG TRADE is insufficient to address public health concerns raised on ISDS. It represents only a partial reform and still contains fundamental flaws. In particular ICS would rather lead to a global institutionalisation of arbitration rather than its replacement with an International Trade Tribunal.

There have been some improvements to investor protection standards and ISDS procedures in the Canada-EU Trade Agreement (CETA) and in TTIP<sup>29</sup> but the solutions proposed by the negotiators still contain fundamental flaws as they do not satisfy basic standards of judicial independence and fair process. EPHA agrees with other civil society organisations that:<sup>30</sup>

1. Weak definitions of investment and Fair & Equitable Treatment (FET) fail to resolve discrimination between domestic and foreign investors, leaving the ICS vulnerable to ambiguous and abusive interpretations by arbitrators;
2. Failure to eliminate the potential for conflicts of interest by arbitrators and effectively secure States’ right-to-regulate, which protects against both ‘regulatory chill’ and ‘regulatory snare’ effects;

<sup>21</sup> [http://www.stephankinsella.com/wp-content/uploads/texts/vandavelde\\_second\\_wave.pdf](http://www.stephankinsella.com/wp-content/uploads/texts/vandavelde_second_wave.pdf)

<sup>22</sup> Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation” Emma Aisbett, University of California at Berkeley. [http://mpr.ub.uni-muenchen.de/2255/1/MPRA\\_paper\\_2255.pdf](http://mpr.ub.uni-muenchen.de/2255/1/MPRA_paper_2255.pdf)

<sup>23</sup> <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9090401>

<sup>24</sup> London School of Economics study on costs and benefits of an EU-USA investment treaty, p.44

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf)

<sup>25</sup> Interhandel Case (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21).

<sup>26</sup> See, e.g., El Oro Mining and Railway Co. Case (Gr. Brit. v. Mex.), 5 Int'l Arb. Awards 191, 198 (Perm. Ct. Arb. 1931).

<sup>27</sup> See, e.g., Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 18 (Feb. 28) (“There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief . . .”) See also generally The Finnish Ships Case (Finland v. U.K.), 3 R. Int'l Arb. Awards 1484 (1934) (domestic judicial appeal not required where it would not afford a basis for reversing determination of British Admiralty Transport Arbitration Board that the British government had not requisitioned certain Finnish ships).

<sup>28</sup> International Centre for Settlement of Investment Disputes

<sup>29</sup> EU text of 16/09/2015 [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)

<sup>30</sup> The Consumer Voice in Europe (BEUC), Transatlantic Consumer Dialogue (TACD), Transport and Environment (T&E), European Heart Network (EHN) and the European Association for the Study of the Liver (EASL)



3. TTIP is not the appropriate vehicle for the creation of an ICS or any comparable system of asymmetrical dispute settlement, as both the EU and US already possess mature and advanced judicial systems.

## Public health relevant ISDS case law

There is no evidence to suggest that similar cases, with a regulatory chill intention, would not be brought under the ICS proposal presented by the Commission:

### Tobacco control

- **Phillip Morris vs Australia** for plain packaging of tobacco products (**ongoing case**) - PMA is seeking an order that the Australian Government suspend enforcement of the legislation and compensate PMA for loss suffered through compliance with the legislation;<sup>31</sup>
- **Phillip Morris vs Uruguay** for large health warnings on tobacco products (**ongoing case**). Philip Morris International (PMI) claims that Uruguay's regulatory measures violated the investment protection agreement signed in 1991 between Uruguay and Switzerland, where Philip Morris is headquartered.<sup>32</sup>

### Healthcare services

- In **Achmea v Slovakia**, a company investing in health insurance services sued the Slovakian government over plans to establish a single health insurance company. In this matter, the tribunal ruled it did not have jurisdiction over the democratic process (Achmea I - Slovakia won), but the case for compensation remains open and the company won a previous suit in 2012 (Achmea II – Achmea won).<sup>33</sup>
- **Achmea I** (PCA Case no 2013-12).<sup>34</sup> The arbitral tribunal announced that the design and implementation of its public health policy is for the State alone to assess. Slovakia 'won' but still had to pay 25% of its costs and Achmea paid the costs of arbitration and 75% of Slovakia's costs. The costs of the Slovak Republic in the arbitration have been so far EUR 1.348 million, so, even when victorious it still costs the state to defend.<sup>35</sup>
- **Achmea II** (PCA Case no 2008-13): Achmea BV won the arbitration case against Slovakia in which the Dutch insurer claimed the country breached investment treaties when it forbade health insurers from making a profit. The arbiters on Dec.

<sup>31</sup> <http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge>

<sup>32</sup> [http://www.tobaccotactics.org/index.php/Philip\\_Morris\\_vs\\_the\\_Government\\_of\\_Uruguay](http://www.tobaccotactics.org/index.php/Philip_Morris_vs_the_Government_of_Uruguay)

<sup>33</sup> Eleanor Brooks: Is the NHS under threat from free trade? <http://theconversation.com/is-the-nhs-under-threat-from-free-trade-43857>

<sup>34</sup> <http://www.italaw.com/cases/2564>

<sup>35</sup> <http://www.italaw.com/sites/default/files/case-documents/italaw3207.pdf>



7 2012 awarded Achmea 22 million euros (\$28.4 million) in compensation for damages incurred by its Slovak subsidiary Union AS because of the profit.<sup>36</sup>

### Intellectual property rights (IPR)

- **Eli Lilly v Canada (pending)**<sup>37</sup> Eli Lilly is demanding \$100 million in compensation after Canadian authorities determined that Eli Lilly had presented insufficient evidence (a single study involving 22 patients) when filing for the patent to show that the presented medicine would deliver the long-term benefits promised by the company.<sup>38</sup>

### Pharmaceuticals

- **Apotex v. United States** (August 2014) In this NAFTA Investor-State claim, the Tribunal upheld the United States' preliminary objections to jurisdiction on the grounds, that the company's efforts to win approval for generic drugs in the United States market did not make it an "investor" under the NAFTA.<sup>39</sup>

### Environmental health

- **Ethyl v Canada** which concerned a claim against an environmental law by the Canadian government for health reasons: on April 15, 1997, Ethyl Corporation, a Virginia corporation with a Canadian subsidiary, submitted a claim alleging that a Canadian statute banning imports of the gasoline additive MMT<sup>40</sup>
- **Chemtura Corp. v. Government of Canada** - (NAFTA tribunal Aug 2, 2010). The tribunal ruled that an expropriation did not take place. The total costs associated with the arbitration, (including a \$4000 per day fee for each tribunal member) amounted to almost \$9 million US, with Canada's outlay at just under \$6 million. Chemtura was ordered to cover the entire cost of the arbitration, however it was found responsible for only one-half of Canada's associated legal costs not related to the direct operation of the tribunal. Ultimately, the Canadian taxpayer spent \$3 million to defend a challenge to a decision with a significant public purpose taken by a democratically elected government.<sup>41</sup> ii

<sup>36</sup> <http://www.bloomberg.com/news/articles/2012-12-10/achmea-wins-arbitration-against-slovakia-over-insurance>

<sup>37</sup> Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2 - <http://www.italaw.com/cases/1625>

<sup>38</sup> <http://www.citizen.org/eli-lilly-investor-state-factsheet>

<sup>39</sup> <http://www.jonesday.com/investment-narrowly-construed-under-nafta-in-apotex-v-united-states-08-26-2013/>

<sup>40</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>

<sup>41</sup> <http://www.thecourt.ca/2010/09/08/chemtura-v-canada-the-federal-government-successfully-defends-nafta-claim-resulting-from-pesticide-ban/>



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<sup>ii</sup> There are concrete examples where measures or exceptions for public health within international treaties can be difficult to implement in practice. Only one of 40 attempts to use GATT Article XX and GATS Article XIV at the WTO has ever succeeded due to the high threshold contained within the exception that would be replicated under the current way of approaching ISDS. As complainants usually identify a less trade restrictive approach to achieve the policy object, the State would have a difficult case to make at investor-state tribunals to prove that no less trade restrictive alternative measure existed, inevitably proving a negative.

## About EPHA

EPHA is a change agent – Europe's leading NGO advocating for better health. We are a dynamic member-led organisation, made up of public health NGOs, patient groups, health professionals, and disease groups working together to improve health and strengthen the voice of public health in Europe. EPHA is a member of, among others, the Social Platform, the Health and Environment Alliance (HEAL), the EU Civil Society Contact Group and the Better Regulation Watchdog.

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