

Baby Milk Action answers to the European Commission's consultation on investor protection in TTIP

Submitted online to the European Commission on 13 July 2014

1. Scope of the investment protection provisions

Baby Milk Action/IBFAN remains wholly opposed to the objectives and the approach taken by the EU in relation to the scope of investment protection in TTIP. We do not believe that the claims made in the EU's explanatory text are credible. We oppose the fact that the investor-state dispute settlement (ISDS) transfers power and responsibility away from democratic control to an arbitration tribunal.

2. Pre- and post-establishment treatment

Baby Milk Action/IBFAN disagrees with the EU's approach to national treatment and most favoured nation (MFN) treatment. The sovereign rights of democratic states must take precedence over the commercial interests of foreign investors. The right and duty of Governments to adopt measures to protect health, the environment, consumers or other public policy goals must not be laid open to challenge before ISDS arbitration tribunals, as seems to be the case under the EU's proposed outcome for TTIP.

3. Fair and equitable treatment

Baby Milk Action/IBFAN rejects the EU's approach to fair and equitable treatment (FET) for investors in TTIP or any other agreement. To grant an arbitration tribunal the power to adjudicate over the scope of FET is an unacceptable transfer of responsibility away from democratic control, and we oppose this provision entirely.

4. Expropriation

We reject the EU's approach to expropriation.

5. Right to regulate

Baby Milk Action opposes the EU's treatment of the right to regulate in TTIP. The protection of investors has been at the heart of many challenges to sovereign states in the past, and is an unacceptable erosion of democratic accountability and duty. The right to regulate is absolute, and must not be undermined or traded off against powers for foreign investors.

Member States, as primary duty bearers, have an obligation to protect, promote and support child health and ensure – through appropriate legislation - that *'marketing and advertising do not have adverse impacts on children's rights.'*¹ These obligations are enshrined in many Human Rights and World Health Assembly Resolutions. For example the *Convention on the Rights of the Child (CRC) The General comment No. 16 (2013)* outlines State obligations regarding the impact of the business sector on children's rights. Para 20: *"States should ensure that marketing and advertising do not have adverse impacts on children's rights by adopting appropriate regulation and encouraging business enterprises to adhere to codes of conduct and use clear and accurate product labelling and information that allow parents and children to make informed consumer decisions."*

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16 June 2011, the UN Human Rights Council endorsed the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" proposed by UN Special Representative John Ruggie. <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/Home>

If it is to face the challenges and threats that lie ahead the Europe Union's rights to legislate for human health or environmental protection must not be sabotaged or by foreign investors.

6. Transparency in ISDS

We do not find the promises of ‘improved transparency’ to be credible, especially since the EU seems to envisage a general power for ISDS tribunals to protect ‘confidential information.’

7. Relationship to domestic courts

The European Union already has functioning judicial systems, as does the USA. As said above EU laws need to be strengthened in favour of environmental and human protection not undermined or subjugated to the rights of foreign investors

8. Arbitrator ethics and qualifications

No Comment

9. Frivolous and unfounded cases

No Comment

10. Adding a ‘filter’ to ISDS

No Comment

11. Guidance on interpretation

Neither the EU or the USA have implemented the World Health Assembly marketing recommendations as required - the US having failed completely in this regard. These recommendations are a minimum requirement for all countries and their interpretation is hotly contested by the baby feeding industry at national and global level, including at Codex Alimentarius. Foreign investors must not be granted new powers or access to arbitration tribunals via an ISDS mechanism. In the area of infant and young child feeding any interference by the US government in EU policy space will erode any resolve the EU might have to protect child health by implementing WHA Resolutions.

12. Appellate mechanism

13. General assessment

Baby Milk Action/IBFAN rejects in its entirety the EU’s approach to ISDS, to investor protection and to TTIP itself. The proposed transfer of power to transnational capital at the expense of popular sovereignty and democratic rights is wholly unacceptable. ISDS must be removed from TTIP, and negotiations towards TTIP must be abandoned. EU citizens can expect no gains and many threats as a result of ceding new powers to US investors. The EU should instead support the international negotiations towards a binding treaty on the accountability of transnational corporations. The UN Human Rights Council approved in June 2014 the establishment of a working group to elaborate a binding treaty on the human rights impacts of transnational corporations and other business enterprises.

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¹ General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights* Para 20 “States should ensure that marketing and advertising do not have adverse impacts on children’s rights by adopting appropriate regulation and encouraging business enterprises to adhere to codes of conduct and use clear and accurate product labelling and information that allow parents and children to make informed consumer decisions.”

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