

Detailed analysis of Commission ICS proposal

by: Transport & Environment (T&E) European Consumer Organisation (BEUC); Transatlantic Consumer Dialogue (TACD); European Public Health Alliance (EPHA); European Heart Network (EHN); European Association for the Study of the Liver (EASL) and their legal experts (as part of the TTIP Advisory Group work)

Topic	ICS Proposal	Questions	Proposed Revisions	Comments
General concept	<p>Investment Court System (ICS) to replace ISDS</p> <p>Protect investors against risks of discrimination while taking into account public demands for a more democratic, accountable and transparent system based on the existing WTO model</p>	<p>What are the Commission's red lines when discussing this proposal with the US as it is very unlikely that the US will adopt the EU text without any major compromises?</p> <p>How will the Commission ensure that the final text fulfills the negotiating mandate?</p> <p>In a true court system, States can also bring claims against investors for violations. Does ICS allow for this, or is the proposal still a one-way street as is ISDS?</p> <p>How does the Commission plan to pursue a comprehensive and systemic reform going beyond the scope of TTIP and how could it be ensured if the negotiations fail to achieve a good outcome in the TTIP negotiations?</p> <p>What action has the Commission planned to update and revise other existing treaties?</p>	<p>As the inclusion of investment protection and ISDS in TTIP is a US offensive interest, it would be better to remove dispute arbitration altogether from TTIP and further develop the proposal in a multilateral forum, with the involvement of interested States who are ready to replace arbitration with a proper Court.</p> <p>We therefore recommend scrapping the ICS proposal from TTIP and relaunching it as a veritable multilateral judicial system to then replace existing ISDS agreements including CETA, EU-Singapore, US-MS BITs, etc.</p>	<p>This is an initial step going in the right direction. However, the proposal maintains the existence of a parallel legal system which is not necessary in the context of TTIP, as both the US and the EU are OECD countries with advanced domestic legal systems.</p> <p>In reality, abusive claims will most likely come under older BITs with less favourable.</p>
Relationship between ICS and domestic Courts	<p>Obligation for investors to choose between national courts and ICS with no U-turn possible nor treaty shopping.</p> <p>Obligation to take into account domestic jurisprudence to avoid incorrect interpretations of law.</p>	<p>Will the Commission consider including a clause to ensure the exhaustion of domestic remedies as a first step?</p> <p>If the inclusion of investment protection in the TTIP agreement excludes it from being considered in national courts, then why not remove it from the text and leave it to national jurisdictions?</p>	<p>Foreign investors, like national investors must exhaust all domestic remedies first</p> <p>National investors must have access to any supranational dispute settlement equal to avenues afforded to foreign investors--ICS is inherently discriminatory until this imbalance is resolved.</p>	<p>Foreign investors are not encouraged to exhaust all domestic remedies first. Parallel arbitration is still not justified as the use of national jurisdictions is sufficient.</p> <p>There is no domestic exhaustion requirement--foreign investors can skirt domestic courts and go straight to ICS. There is also nothing to stop a firm from bringing a case before domestic courts and then re-litigating the case via ICS, so long as the domestic case concluded before the ICS case began. (And the text would allow a foreign firm to simultaneously pursue their claim in domestic courts and in an ICS tribunal if they asked for injunctive relief in the domestic court and monetary compensation in the ICS tribunal.)</p>

<p>Section 1 Definitions specific to investment protection</p>	<p>(x2): "means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk..."</p>	<p>How will the Commission make a distinction between 'positive' and 'negative' investment?</p> <p>How will the Commission take into account the indirect costs linked to a 'negative investment' which could be higher than the pure value of the investment?</p> <p>How will the Commission revise the definition of investment to ensure that States are not exposed to unpredictable legal risks from holiday homes, short-term speculative investments, etc. ?</p>	<p>The Commission should include a link with domestic laws of the host country that could be transposed as following: <i>"investment means property, property rights or property interest as defined under the applicable law of the respondent state at the time the alleged injury occurred."</i></p> <p>Equally, <i>"Investments should support the positive development of the host country, therefore public interests such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity should take precedence over investments in activities that are broadly considered to negatively impact public interest; in the field of public health, such investments include sectors producing tobacco, alcohol and unhealthy foods. These aspects should be accounted for as part of investment calculations ."</i></p>	<p>The definition of investment still includes the broad language of past ISDS agreements.</p> <p>The conception of investment is narrowly formulated and does not account for the positive and negative aspects related to investment.</p> <p>Positive investments create added value, contribute to GDP growth without undermining sustainable development; negative investments generate externalities which can overshadow the pure value of the invested money (e.g. in form of alcohol, diet, smoking related Non-Communicable diseases and the high social and healthcare costs linked to NCDs).</p> <p>Investments should support the positive development of the host country.</p>
<p>Section 2 Article 2: Investment and regulatory measures/objectives</p>	<p>"The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"</p>	<p>How will necessity be determined? What protections are there against a tribunal ruling that environmental, public health, consumer protection, or other social measures are legitimate but not 'necessary'?</p> <p>As the proposed text reinforces the 'legal' right to regulate of a sovereign state. How will the commission ensure that the proposed ICS procedure will not threaten 'financially' the regulators (regulatory chill/regulatory snare)?</p> <p>How will the 'legitimacy' of policy objectives be assessed?</p> <p>How will this article be enforced?</p>	<p>States' rights to regulate in the public interest should not be jeopardised by a Tribunal's interpretation of necessity.</p> <p>The Commission needs to add in this article that no claim related to a public policy objectives will be admissible.</p> <p>Needs to be rewritten to remove ambiguous and weak language that could be maneuvered around in arbitration; "environment or public morals" must be ungrouped and the right to regulate must be made more explicit.</p> <p>Commission must explicitly state that regulations in the public interest will not be considered as 'direct or indirect expropriation' and are not open to claims based on investment protection.</p>	<p>Poses fundamental questions about the necessity of ISDS/ICS--real protection of the right to regulate would favour the use of national courts first.</p> <p>While States under the ICS might legally possess the right to regulate, in practice, this will be restricted by the fact that ICS decisions and awards will not require a change of policy, but will create costs leading to regulatory 'chill' and 'snare' effects.</p> <p>The 'regulatory chill' effect can put pressure on governments seeking to introduce public interest policies. While no sovereign state can, in principle, lose its right to regulate in the public interest under any trade or investment agreement, the fear of being sued before an arbitration tribunal – and the financial and political risks linked to such a procedure - 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).</p> <p>The concept of 'regulatory snare' focuses on the impact for governments that become involved in legal challenge to regulation brought about under international law: it is evidently the case that governments can and do find themselves preoccupied with regulatory issues and facing significant costs and administrative commitment.</p> <p>Additionally, the "right to regulate" language is weakened by several hurdles: a defending government could have to show that the challenged policy was "necessary to achieve" public interest objectives and that those objectives were "legitimate."</p>

Section 2
Article 3: Treatment of Investors and of covered investments

1. "Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5."

4. "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

Is the Commission confident about the limitations regarding investor's legitimate expectations?

How will the Commission prevent expansive interpretations of FET obligations by arbitrators as the list of breaches is not fully closed?

Commission should reframe coverage of FET to only include instances of 'denial of justice,' and generate a closed list of what this includes.

Article 3.2c ('manifest arbitrariness') should be removed as it has frequently been subject to abusive interpretation.

FET is very broad, allowing for challenges of a wide array of non-discriminatory public interest policies. It is problematic that FET is still open to expansive interpretation, especially via the provision on 'manifest arbitrariness'.

For example, the text explicitly states that a tribunal can take into account whether the investor's expectations were frustrated when deciding whether to rule against a policy as an FET violation. (While the text states that such broad foreign investor rights "shall not be interpreted" as committing a Party to not change its policies, it does not say that Parties cannot be made to pay for making such changes.

In any case, the ISDS track record does not inspire confidence that tribunalists would abide by this FET caveat. And the expropriation definition, in combination with the broad definition of investment, would allow for findings of expropriation violations that would not pass muster in many domestic courts.

Section 3
Sub section 2
Article 3: Mediation

1. "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

Is the mediation option to be enforced or optional?

What is the added-value of mediation that would justify the administrative and financial burden of establishing it?

How will the Commission ensure that mediators possess expertise in not only trade law, but public legal interests as well (public health law, environment law, consumer protection law, social protection law, consumer protection law).

Mediation should not be necessary if domestic remedies are exhausted first.

Article 3.4

The [...] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the *fields of law, commerce, industry, public health, environment, consumer protection, social protection or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.*

There is already recourse to mediation through the WTO dispute settlement mechanism, to which both the EU and US are party. It is, however, crucial to ensure that mediation of a dispute is not used as the basis for bringing a later claim.

However, mediation still has the potential to cause regulatory chill and regulatory snare as it is resource-consuming, particularly in terms of its long deadlines. Therefore, we recommend a shortening from 24 months to 6, as this deadline is more appropriate and is the deadline used by the European Court of Human Rights (ECHR). There is no reason to give greater protection for foreign investments than for human rights.

Concerning public health law, knowledge of the following instruments would be desirable:

- the World Declaration and Plan of Action for Nutrition of 1992;
- the WHO Framework Convention on Tobacco Control of 2003;
- the Global Strategy on Diet, Physical Activity and Health of 2004;
- the Global strategy to reduce harmful use of alcohol of 2010;
- Codex Alimentarius Commission Guidelines and Standards (WHO/FAO);
- the Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases of 2011;

Non-communicable Diseases of 2011,
 • the Global action plan for the prevention and control of NCDs 2013-2020 of 2013;
 • the Rome Declaration on Nutrition of 2014 and the Rome Framework for Action on Nutrition of 2014.

**Section 3
 Sub section 2
 Article 4: Consultations**

5. "The request for consultations must be submitted: (a) within three years of the date on which the claimant or, as applicable, the locally established company first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby; or (b) within two years of the date on which the claimant or, as applicable, the locally established company ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Party; and, in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby.

Further clarification is needed what are the deadlines for claimants to submit a claim.

Reduce these deadlines to submit a claim so as to mitigate government exposure to risk of litigation and for the expediency of fiscal planning.

The deadlines (**three years, two years, ten years**) in Article 4(5) are too long and create exposure to the regulatory chill and regulatory snare risks. Six months should be appropriate and is in line with the rules of the European Court of Human Rights.

Investments should not be treated differently from Human Rights violations.

**Section 4
 Article 9: Tribunal of First Instance
 ('Tribunal')**

2. "The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries. "

Will the Commission provide details on judge qualification, selection and case assignment?

Article 9.4

The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. *It is desirable that they have expertise in particular, in international investment law, international trade law, international public health law, international environmental law, international labour law, consumer protection law and the resolution of disputes arising under international investment or international trade agreements.*

Positive step going away from private arbitration, though further details need to be provided on judge qualification, selection and case assignment.

4. "The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements. "

How will the Commission and the MS decide on the 5 judges? And how will they ensure that the President selects from the roster in a random and impartial manner?

Does the Commission envisage fixing salaries for the judges?
 How will the Commission ensure that Members of the Tribunal possess expertise in fields of public interest (public health law, environment law, social protection law, consumer protection law) and not only in the field of trade law?

If a bilateral court were to be established, a secretariat should be established within it and not be managed by ICSID. The secretariat should be in charge of the selection of the judges instead of the President.

This cannot be a true court as long as foreign investors are the only Party that can bring claims to initiate a case.

The text states that by default, the tribunal's fees and costs will still be paid by the Parties. This still creates an incentive for arbitrators to rule in favor of investors, as doing so increases the likelihood that more foreign investors will initiate proceedings in the future, leading to more award-hinged payments. This is despite the inclusion of a "retainer fee" for judges, because the fees charged by tribunalists for ISDS cases vastly outweigh the EU-suggested retainer fee of 2,000 euros/month.

Is it not problematic that, "the disputing parties may agree that a case be heard by a sole Judge who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low..." Third-party status is not equivocal with non-bias and, in this scenario, there will be no moderation from the other judges.

Judges should be appointed full-time and preference should be given to the inclusion of those who have not worked in arbitration for several years, so as to better ensure impartiality.

Tribunalists would still be paid a daily rate, in accordance with ICSID rules. While the proposal says that provisional awards should be concluded within 18 months, it allows the tribunal to easily exceed that "deadline" by simply stating their reasons for doing so.

How will the Commission ensure the independence of the ICSID? EU is still not a member of ICSID - how will this work?

Will the Commission consider an alternative secretariat?

Concerning public health law, knowledge of the following instruments would be desirable: the World Declaration and Plan of Action for Nutrition of 1992; the WHO Framework Convention on Tobacco Control of 2003; the Global Strategy on Diet, Physical Activity and Health of 2004; the Global strategy to

Will the Commission undertake an impact assessment and conduct a cost benefit analysis?

What would be the interpretation of reasonable costs?

Health and Health of 2007, the Global strategy to reduce harmful use of alcohol of 2010; Codex Alimentarius Commission Guidelines and Standards (WHO/FAO); the Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases of 2011; the Global action plan for the prevention and control of NCDs 2013-2020 of 2013; the Rome Declaration on Nutrition of 2014 and the Rome Framework for Action on Nutrition of 2014.

The Commission fails to address the issue of prohibitive costs of proceedings and salaries of the judges. We anticipate that the proposal will still be prohibitively expensive for small-to-medium scale investors.

2. "The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries. "

Will the Commission establish a requirement for tribunalists to adhere to a system of legal precedent, either in the initial claims process or in the appeals process, unless a "Services and Investment Committee" issues a binding interpretation at its own discretion?

How will the Commission ensure that Members of the Appeal Tribunal will have expertise in fields of public interest (public health law, environment law, social protection law, consumer protection law) and not only in the field of trade law?

Article 10.7

The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. *It is desirable that they have expertise in the fields of international investment law and international trade law, as well as international public health law, international environmental law, international labour law, consumer protection law, and other disciplines relevant to the resolution of disputes arising under international investment or international trade agreements.*

This appeal tribunal is based on the WTO Appellate Body (AB). As is the case for the Tribunal, the President predominates the appellate tribunal. In the ICS, the President selects the members judges, which is not the case in the WTO AB. Therefore, the level of his obligations should correspond to the level of his tasks and go further than what is being proposed.

The Commission's estimation of a 6-member appellate body is likely conservative and the expansion clause will need to be invoked. As a cautionary tale, consider the backlog of unresolved appeals that the WTO AB is currently ensnared in.

Concerning public health law, the knowledge of the following instruments would be desirable: the World Declaration and Plan of Action for Nutrition of 1992; the WHO Framework Convention on Tobacco Control of 2003; the Global Strategy on Diet, Physical Activity and Health of 2004; the Global strategy to reduce harmful use of alcohol of 2010; Codex Alimentarius Commission Guidelines and Standards (WHO/FAO); the Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases of 2011; the Global action plan for the prevention and control of NCDs 2013-2020 of 2013; the Rome Declaration on Nutrition of 2014 and the Rome Framework for Action on Nutrition of 2014

**Section 4
Article 10:
Appeal Tribunal**

" Upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The Committee may adopt a decision specifying any necessary transitional arrangements "

How does the ICS replace the old EU national BITs? Can the EU update previous agreements with ICS - CETA/Singapore?

According to international law, how would this clause tackle the issue of the survival clause (that ISDS provisions of existing Bits between the US and 9 EU countries shall still apply)?

The last sentence is not clear: could the Commission clarify the role of the 'Committee'?

After the entry into force of this agreement that arbitration and ISDS included in existing treaties shall not apply.

**Section 4
Article 12: Multilateral dispute
settlement mechanisms**

<p style="text-align: center;">Section 4</p> <p style="text-align: center;">Article 11: Ethics</p> <p style="text-align: center;">Annex II - Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators</p> <p style="text-align: center;">Article 5: Independence and Impartiality of Members</p>	<p>1. "The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law. "</p> <p>1. "Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism. "</p>	<p>Will the President and Vice President preside over cases? Will they be considered as members of the pool, staff, or accorded special status? Does their service in effect reduce the number of serving third-party judges to three?</p> <p>How will the Commission insulate against the 'revolving door' phenomenon wherein judges may permeate the Court despite maintaining strong private interests from prior employment (industry, commerce, etc.)?</p>	<p>The Commission should introduce stronger conditions regarding prior exercise and for former members to complement the proposed code of conduct.</p> <p><u>Annex II / Article 5</u> Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism. <i>When considering trade and investment disputes, the specificity of relevant public interests, such as public health, environment, social protection, consumer protection, should be taken into consideration.</i></p>	<p>The proposal includes new language that requires that ISDS "judges" not serve in tribunals where there are conflicts of interest and to not serve as counsel in investment disputes.</p> <p>It establishes a process for Parties to challenge perceived conflicts of interest. It's a stronger process than included under ICSID in that it does not require the government to convince the other two tribunalists to kick their colleague off the tribunal. However, rather than institute a judicial review for conflict-of-interest challenges, the proposal gives unilateral decision-making power over disqualification bids to a "President" of the tribunal (à la UNCITRAL).</p> <p>The President, chosen at random from the third-Party "judges" not deciding the case, enjoys broad discretion to keep tribunalists with conflicts of interest, as they are not bound by enforceable criteria.</p> <p>The proposal stipulates that the judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. However, pure independence cannot alone guarantee that the specificity of public interest fields (public health law, environment law, social protection law, consumer protection law) will be taken into account in the same manner as international trade law.</p>
<p style="text-align: center;">Section 5</p> <p style="text-align: center;">Article 14: Other claims</p>	<p>1. The Tribunal shall dismiss a claim by a claimant who has submitted a claim to the Tribunal or to any other domestic or international court or tribunal concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) unless the claimant withdraws such pending claim.</p>	<p>What provisions are there to prevent an investor bringing a claim in parallel to a claim brought by the legal entity of which they are a shareholder?</p>	<p>Clear delineation of domestic proceedings that would disqualify recourse to an international tribunal.</p> <p>Creation of a clause to prevent natural persons from bringing claims parallel to those initiated by a legal entity in which they hold shares or financial stake.</p>	<p>The current language of this article is weak, likely in anticipation of the need for political consensus.</p> <p>Fails to adequately define what a claim in 'domestic court or tribunal' constitutes (action for damages, action for annulment?)</p>
<p style="text-align: center;">Section 5</p> <p style="text-align: center;">Article 15: Anti-circumvention</p>	<p>"For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal."</p>	<p>How will the decision to decline jurisdiction be determined?</p>		<p>To prove treaty shopping in cases where the dispute became manifest shortly after the investor acquired their investment, the defending government would have to show that the dispute "was foreseeable on the basis of a high degree of probability" at the time the investment was acquired. The provision grants tribunals broad discretion in interpreting this ill-defined hurdle.</p>

Section 5
Article 23: Intervention by third parties

1. "The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties. "

6. "For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute. "

How will the Commission address the discriminatory nature of the proposed ICS?

How will third parties contribute and participate? What is the framework?

Will '*amicus curiae*' be admissible by the Tribunal and would the panel have any obligation to reflect on it?

Broaden the scope of this provision to guarantee NGOs access to the arbitration proceedings.

Interventions should not be limited to support one or other Parties, a neutral intervention should be possible.

The proposal does not address the fundamental flaw of ISDS which is its discriminatory character.

Language of this article is too restrictive; NGOs and citizens can only intervene if they can demonstrate a 'direct and present interest.'

Article 23 (intervention by third parties) specifies that the intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties. This is inconsistent with the prevailing approach at the WTO where an amicus must be independent of the parties to the dispute. In a situation (like plain packaging of tobacco products) where there is an investment treaty claim and a WTO claim on foot simultaneously, it would be difficult for a body like WHO to file a brief in both forums. WHO would take an independent posture in the WTO dispute so as not to align itself against any Member States. Although the brief is not public, it is a matter of public record that WHO filed a brief in Philip Morris v Uruguay.