



# TTIP, ISDS and the Implications for Irish Public Health Policy

A Report for the Irish Cancer Society

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*Executive Summary and Recommendations*

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## Foreword

A country's ability to pass laws that will protect the health and wellbeing of its citizens, without intimidation by large multinationals who claim they are due compensation if the law is changed, is core to the democratic process in most developed countries.

Recently, Ireland has used legislation to curtail the ability of the tobacco industry to recruit child smokers. The leadership shown by the Irish Government is being challenged in Ireland's court system by the tobacco companies who fear their profits will drop. They are arguing that their business interests have been negatively affected and should be paid compensation. The reality is that tobacco companies already force the State to spend millions of Euro in health costs; it is unthinkable that they believe they are due money because fewer people are choosing to smoke.

The Irish Cancer Society is confident that in a domestic court of law, public health will trump the rights of such companies.

The introduction of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union, however, potentially allows multinational companies, such as the tobacco industry, another avenue by which they can challenge public health law introduced by democratically elected parliamentarians. As part of the TTIP negotiations, the 'investor protection' mechanism known as the Investor State Dispute Settlement (ISDS) has been mooted.

The ISDS mechanism is different from the judicial system because instead of a judge making a decision on a case, a three-member panel made up of representatives from both sides, plus an agreed third member, arrives at an agreement. The introduction of ISDS allows multinational companies to circumvent the domestic courts system and effectively sue the country through the confidential arbitration mechanism that has been criticised by academics as being 'broken'.

It is via ISDS that Australia is being sued by tobacco companies for their extremely successful introduction of standardised packaging of tobacco, and why in turn other countries who want to introduce the measure have delayed their plans thanks to the threat of expensive litigation.

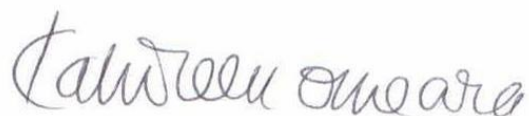
This has brought about a heated debate across Europe about what rights national parliaments should have to introduce public health measures and has resulted in a European Commission consultation which saw an overwhelmingly negative response to ISDS.

As negotiations continue, on 8 July 2015 the European Parliament passed a 'compromise text' on TTIP that promises to 'to replace the ISDS-system with a new system [...] where private interests cannot undermine public policy objectives'.

While this may address many of the issues around ISDS, it remains to be seen whether it will address the major imbalance in such arbitration cases.

The Society believes that TTIP can exist without a commercial arbitration mechanism. Latin American countries are actively seeking to withdraw from trade agreements with ISDS. South Africa has cancelled trade agreements with Germany, Spain and Belgium in a backlash against ISDS. Australia has decided not to include an investor dispute mechanism in some of its future trade negotiations.

It is for this reason the Irish Cancer Society commissioned Dr Joshua Curtis and Dr John Reynolds to investigate the effect of such a mechanism on public health policy in Ireland. I would like to thank them for their comprehensive piece of work which will inform not only the response of the Society to the ongoing negotiations, but the response of European civil society.



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## EXECUTIVE SUMMARY

### 1. INTRODUCTION

#### 1.1 – Overview and Objectives of the Study

Free trade agreements and investment treaties have the stated aims of promoting economic activity and growth through increased global trade and investment flows. The presumptions that broader societal benefits—such as improved population health—will trickle down from such market liberalisation are increasingly called into question by deepening levels of social and economic inequality around the world. Against this backdrop, the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States (US) and the European Union (EU) has generated concern as to its potential effects on public health policy and standards. The present study seeks to build on and deepen the existing research and analysis in this regard, with the specific purpose of clarifying and evaluating TTIP's implications on health policy in Ireland.

The study is sensitive to Ireland's specific economic situation; that is, its economic model, current financial, regulatory and social situation, medium-term economic prospects and its institutional and policy structure with regard to public health. It is suggested that peripheral EU States like Ireland can benefit from an understanding of the experience of global South countries with respect to trade liberalisation and the evolution of investor protection through international treaties. In light of historical and recent developments in international trade and investment law and policy, the study addresses the likely implications of TTIP on public health policy in Ireland under three categories:

- general or cross-cutting considerations such as government regulatory space, social costs and the obstacles that TTIP may pose to alternative models of public health governance;
- the impact of investment provisions;
- and the impact of trade provisions.

The overarching aims of the study are to:

- map the likely effects of TTIP in the Irish health sector context and critically evaluate the health-related risks and benefits;
- inform debate over the relationship between transnational modes of trade and investment governance on the one hand, and democratic control over localised and national public health policy on the other;
- provide an evidentiary and analytic framework that may better inform public engagement, advocacy strategy and policy-making with respect to economic liberalisation and health policy in Ireland and beyond.

#### 1.2 – A Brief History of International Trade and Investment Regulation

In terms of its potential coverage of the global economy, the proposed TTIP constitutes the most extensive free trade and investment agreement of its kind, and would create the world's largest free trade zone. In its bilateral/regional approach it represents the latest stage in a series of international trade and investment liberalisation processes that have been underway in various forms over recent years.

International trade law has been constituted primarily by a multilateral State-based framework in the form of the General Agreement on Tariffs and Trade (GATT) from 1947, and the World Trade Organisation (WTO) since 1994. The early focus on lowering tariffs on cross-border trade has over time largely shifted to collectively removing 'non-tariff barriers' to trade including domestic laws, regulations and standards.

International investment law, by contrast, does not have a comparable multilateral institution or legal framework, but is made up instead primarily of a more fragmented system of bilateral investment treaties (BITs) between States. A central and controversial feature of this system is the investor-state dispute settlement (ISDS) process whereby foreign investors—i.e. multinational corporations—who perceive their interests to have been adversely affected by a host State policy can bypass the domestic legal system in that State entirely and bring their claim before an ad hoc investment arbitration tribunal.

This system has generally functioned to open up global South resources and markets to investment from the global North, to develop high standards of protection for investors without comparable responsibilities, and to limit the regulatory space of host States. Under ISDS, corporate investors can bring legal claims against States, but not the other way round. Investment arbitration tribunals tend to be favourably disposed towards commercial interests, and developing countries have been ordered to pay large damages claims to foreign investors, even where important public interest factors such as health, the environment or socio-economic rights underpinned the disputed government measure.

Due to increasing resistance from the global South, both to further trade and investment liberalisation measures at the WTO and to investor protection under BITs and ISDS, the recent trend within the global North in particular has been to construct new bilateral, regional or plurilateral agreements that contain both trade and investment components together. This trend, however, is not limited to pure North/South agreements as can be seen in the form of TTIP, as well as the Trans-Pacific Partnership (TPP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

### 1.3 – The TTIP Negotiations in Context

Deeper economic integration has been raised progressively higher on the agenda of transatlantic relations since the end of the Cold War, and has come to take on particular significance in recent years given the rise of developing economies and a loss of influence in the WTO. The EU and the US have come to view closer economic relations and transatlantic regional development as an important counterweight to the growing influence of Asia in the global marketplace. In 2007, the Transatlantic Economic Council was created, with the aim of intensifying cooperation in the areas of investment, trade, and regulatory cooperation. The signing of the Lisbon Treaty in 2009 expanded the EU's competences in relation to trade and foreign investment. In 2011 the EU and US appointed a High-Level Working Group of senior government officials investigate the scope for a possible trade and investment agreement. Negotiations for TTIP were initiated in 2013, with both parties also investing faith in its possibility to bolster recovery from a deep and persistent post-2008 recession.

The negotiating mandate given by the Council of the European Union to the European Commission refers to the aims of job creation and economic growth through increased market access and greater regulatory compatibility. The market liberalisation agenda and the ISDS mechanism in particular have attracted much scepticism in Europe, prompting the Commission to initiate a public consultation on the ISDS element in 2014. While the overwhelming majority of the response was opposed to the inclusion of ISDS, the Commission is continuing to operate under the expectation that it should seek to negotiate its inclusion in some form.

## 1.4 – TTIP and Public Health

Despite a certain amount of privatisation of the health sector in many countries, health care in the EU is still seen as a fundamentally public service that is provided and regulated according to a social rationale, rather than as a primarily market-based or economic enterprise. Public health is therefore inseparable from the idea of democratic autonomy exercised through representative government, free to develop and implement policy according to the changing health needs of the population and available scientific knowledge and technologies.

Proponents of TTIP claim that the agreement will deliver economic growth and better regulation, which will ultimately benefit social sectors such as health. Critics argue that the empirical evidence linking trade and investment agreements to economic growth is lacking, and that far from raising social protections, regulatory harmonisation has been shown to reduce regulatory standards to the lower common denominator, restricting the ability of the state to regulate in the public interest. Harmonisation with a country such as the US, where healthcare is heavily susceptible to private and market interests, presents major risks for the EU. State autonomy in determining public health policy may also be limited by investor protection under ISDS, the liberalisation of trade in health services, and the protection of intellectual property rights (of pharmaceutical companies and tobacco companies, among others).

## 2. GENERAL IMPACTS OF TTIP ON PUBLIC HEALTH POLICY IN IRELAND

### 2.1 – Net Economic Benefits and Fundamental Rationale of TTIP

The main benefits of TTIP to the people of the EU and Ireland, as projected by its proponents, are economic. Theoretically, these benefits accrue through a process whereby the direct financial and other benefits to multinationals and investors are transmitted downwards in a variety of ways – through the creation of employment, local re-investment of extra earnings, increased tax revenue, and increased demand for secondary goods and services brought about by the presence of foreign investment. The trickle-down theory of economics upon which the bulk of TTIP's presumed socio-economic benefits for the broader population ultimately depend, however, has been widely rejected by leading economists. If a trickle down does occur the key factor is government intervention and management, to actively steer the gains accruing to multinationals into productive benefits for the broader society. This requires the maintenance of government capacity to act and regulate.

This describes TTIP's ironic 'double-bind'. On the one hand the government will need to regulate to ensure the equitable and productive distribution of any benefits; and on the other hand TTIP proponents argue that there will be no benefits unless government regulations are restricted in accordance with the core thrust of the agreement. However, this double-bind only arises if there are clear potential economic benefits from the agreement. Otherwise government capacity is lost for no valid reason and it would make little sense to accept the trade-off.

Yet, even the most optimistic projections in studies cited by the European Commission indicate that the overall economic growth across the EU directly accruing from TTIP will be minimal at best, suggesting that this capacity would indeed be lost for no good reason.



## 2.2 – US Foreign Investment in Ireland

TTIP also contains potential economic and financial losses for individual EU States through trade and investment diversion to other EU States, as well as financial liability under the ISDS mechanism. This is particularly the case for States that presently receive relatively high volumes of US investment. Ireland's level of US foreign investment as a percentage of GDP is the highest of any EU country, and at seven times the EU average is hugely disproportionate relative to the vast majority of the Member States. This leaves Ireland particularly vulnerable to trade and investment diversion and ISDS claims arising from TTIP. At the same time, it demonstrates quite clearly that Ireland does not need TTIP or an investment chapter to attract US investment, as it is currently attracting very large quantities without such potential liabilities.

## 2.3 – Public Health and the Right to Health in Ireland

Ireland has legal obligations under international human rights treaties to progressively realise the human right to health for all within its jurisdiction. This entails the highest attainable standard of physical and mental health, and obliges States to ensure a variety of facilities, goods, services, conditions and democratic processes necessary to respect, protect and fulfil the right to health of the population, including access to medical services and essential medicines. This in turn implies that governments need to maintain an ability to intervene in the economy to such a degree as is necessary to realise these obligations, thereby intrinsically connecting the right to health to the State's capacity to regulate. Initiatives to redress the sub-standard and steadily deteriorating nature of Irish public health care provision, particularly if based on greater competition and more private actors in the health sector and insurance market, will require close government oversight and regulation of the system to ensure equitable benefits, attention to marginalised sections of the population and a high quality of services and products. TTIP presents potential obstacles in that regard. International human rights bodies have increasingly highlighted that trade and investment agreements present structural opposition to the States' ability to vindicate socio-economic rights, and are problematic as such. The Irish government should therefore, at a minimum and with some urgency, undertake a comprehensive human rights impact assessment of TTIP before committing the State any further to the agreement.

## 2.4 – Social Costs and General Impact on Public Health

The potential social costs of TTIP are represented by threats to social security, labour rights and public health standards through the closing of regulatory space and challenges to government action under the ISDS mechanism, the prioritisation of intellectual property rights, and the lowering of standards through regulatory harmonisation or non-tariff barriers to trade. Overall, TTIP may lead to a deterioration in democratic governance, and a potentially decreased respect for human rights without the potential for significant economic benefits that would provide any balance. This is the likely conclusion for the EU as a whole, yet for Ireland in particular the prognosis is far worse than the EU average. For Ireland the likely social costs are significantly higher due to the severity of the financial and public health challenges it currently faces, and the likely economic costs are the highest out of all EU Member States.

### 3. INVESTMENT IMPACTS

#### 3.1 – Explaining the Investment Law Regime and ISDS

The substantive provisions of international investment law confer high levels of protection on foreign investors, including:

- ‘national treatment’ principles which mandate that foreign investors must be treated the same as nationals of the host State, thus precluding certain forms of legislation or policies aimed at redressing societal imbalances, attending to human rights, or protecting domestic industry and interests;
- full compensation in the event of expropriation, which is broadly construed as including ‘indirect expropriation’ in the form of regulation that has a significant negative impact on an investment’s economic value, even if it is, by nature, enacted through due process of law, is non-discriminatory and is for a public purpose;
- minimum standards of treatment including “fair and equitable treatment” and “full protection and security”, which are vague and subjective standards that have been interpreted broadly by ISDS tribunals as providing very high, and often unintended, levels of investor protection, including an obligation on the State not to violate an investor’s “legitimate expectations”.

Where they are not satisfied that these protections have been upheld, foreign investors have recourse to take the host State directly to ISDS arbitration. This can generally be done without the requirement of any attempt to resolve the dispute within the domestic legal system. National jurisdiction and the normal rules requiring the exhaustion of domestic remedies before recourse to international adjudication are circumvented in a manner that departs from customary practice in almost all other comparable regimes of international law.

As such, investment agreements are in a sense inherently unbalanced in that they confer substantial and powerful rights on foreign investors yet do not bind them to any substantive obligations. Investors must observe certain minimal procedural obligations, such as waiting a set period of time before bringing an ISDS claim against a State, and are under a general expectation to establish and conduct their activities in accordance with the domestic law of the host State. However, contravention of the law is not necessarily a bar to having their rights vindicated by an international tribunal. In the case of *Occidental Petroleum Corporation v. Ecuador*, for example, the oil company was awarded US\$ 1.77 billion in damages by an investment tribunal, despite a finding that the company had clearly violated Ecuadorian law, because the government’s response to such violation was adjudged to have been “disproportionate”.

It is widely accepted that the majority of ISDS arbitrators come from a background in commercial arbitration and arguably are influenced by the interests and viewpoint of investors. The structural biases and imbalances in the system have led to a backlash against it in recent years. Latin American countries have begun to withdraw from the jurisdiction of ISDS tribunals, South Africa and Indonesia have cancelled BITs with a number of European States, and Australia has moved to exclude ISDS from some of its investment agreements.

#### 3.2 – Investment Liberalisation and Social Policy

Over the last 30 years, reductions of State intervention in the economy and a decline in public funding for social programmes and economic assistance both nationally and internationally have led to an increasing dependence of States on foreign investment and trade opportunities to underwrite growth

and living standards. By various measures—economic, fiscal and social—Ireland’s approach to development and liberalisation in this regard may be difficult to sustain. Social protections will be placed under increasing strain by the further marketisation of a socio-economic model already defined by relatively low tax and low spending on public services. The evidence also suggests that investment liberalisation and ISDS pose substantial risks for a peripheral and investment-dependent country like Ireland, in terms of the restriction of regulatory space and exposure to damages claims. As such, any further trade or investment liberalisation measures that are to be legally locked in by a treaty such as TTIP must be scrutinised extremely closely with regard to their social impact.

### 3.3 – ISDS and Public Health

Trade and investment liberalisation has granted investors a range of legal tools that can be used to influence political and regulatory processes in host States to their advantage. Such tools are not absolute, however, and can be subject to qualification or exception on public health grounds. When it comes to implementation, much will turn on the interpretations and weighting given to such qualifications or exceptions by ISDS arbitrators.

Tobacco company Philip Morris is currently pursuing two separate ISDS claims, against Australia and Uruguay, on the basis that tobacco plain packaging legislation in those countries infringes on the company’s intellectual property rights, violates the “fair and equitable treatment” standard, has a negative impact on its economic interests amounting to expropriation, devalues its trademark, and is disproportionate to the stated aim of protecting public health. With both cases pending, it remains to be seen how plain packaging regulation will fare under ISDS. What is clear is the effect of a ‘regulatory chill’, with concrete evidence showing that some countries which are subject to BIT protections for tobacco multinationals are awaiting the results of the Philip Morris ISDS claims before deciding whether and to what extent to pursue their own legislative proposals on plain packaging. If Philip Morris wins its claims, the regulatory chill on plain packaging will be consolidated and far-reaching. Ireland is not currently bound under any international investment treaties and so does not have to consider such concerns to date, but ISDS jurisdiction under TTIP would change this completely.

Investment protections under TTIP are also likely to impact the health sector through the secondary health impacts arising from investors challenging environmental regulation and food standards, as well as from the liberalisation of health insurance markets. These and other cases highlight the ongoing controversy and unpredictability as to the nature and extent of investor protections on the one hand, and States’ regulatory autonomy on the other. The implementation of an ISDS mechanism that allows investors to circumvent domestic and regional judicial processes (which have more holistic mandates than ISDS tribunals whose primary mandate is investment protection) will be detrimental to the protection of public health, in the context of tobacco regulation and more broadly. As such, if an investment chapter is to be included in TTIP, the explicit exclusion of tobacco control measures and other public health priorities should be considered.

### 3.4 – Assessing the Case For Investor Protection and ISDS in TTIP

The arguments made in favour of the inclusion of ISDS in TTIP include the following:

- *ISDS depoliticises disputes and overcomes deficient domestic legal systems, thereby giving aggrieved foreign investors a fair hearing and contributing to the development of an international rule of law.* This suggestion that investment arbitration reduces the exposure of

investors to politicised processes and provides increased legal certainty as compared with domestic judicial systems in the EU or US appears unfounded at best and disingenuous at worst.

- *The security afforded by justiciable investment protections leads to increased investment and economic benefits.* There is a notable lack of empirical evidence, however, to positively link investment protection provisions and ISDS to increased levels of foreign investment. In Ireland's case, the country is quite evidently already viewed as a highly desirable destination for US investment for a number of reasons, despite the absence of specific protection under international investment law. On the available evidence, therefore, it is unlikely that investor protection under TTIP will bring discernible economic benefits to Ireland.

### 3.5 – The Major Cost of Investor Protection and ISDS – Freedom to Regulate

Claims by investors can be raised and vindicated through the established domestic courts and legal systems in the US and the EU. As such, the institution of a supra-national legal structure and claims mechanism, with all of the uncertainties that it entails, appears unwarranted. The primary costs associated with this are the constricting of the State's freedom to regulate in the public interest, and the related chilling effect of investment provisions and arbitration. Within the EU, such costs must be balanced against a status quo situation where the threat of arbitration claims by US investors do not exist.

### 3.6 – Assessing the EU Position and TTIP's Investment Provisions in Relation to Public Health Policy

The study finds that the existing EU proposals are insufficient to adequately protect public health. There is far too much uncertainty regarding the effectiveness of the proposals to satisfy the requirements of an overall precautionary approach, and unless or until that situation changes the risks must be taken as outweighing the benefits. As such, ISDS should be definitively excluded from TTIP, and in this case it would be of little sense to include any substantive provisions on investment. Many if not most of the reform proposals are essentially bets that the system will thereby be improved and that the regulatory space and other responsibilities of States will be accorded due weight. Such bets are far too risky to proceed with international treaty rules as far-reaching as TTIP's investment chapter.

### 3.7 – Revenue and Budgetary Implications

The costs of arbitration awards can be high, representing a significant drain on public funds. Awards have typically been in the hundreds of thousands of US dollars, but awards upwards of US\$1 billion are becoming more regular. In addition to the damages awarded, the State will incur costs for the litigation process of around US\$ 8 million per arbitration. There is no reliable 'loser-pays' rule operating in ISDS, and most tribunals have left the State to pay its costs even when it has 'won' the arbitration. These facts put into question the oft-repeated claim that ISDS represents a fast and cheap solution to disputes relative to the workings of domestic courts. In addition, the size of the outlay in defending a case can be a strong incentive for governments to make settlements and pay off dissatisfied investors even when a claim may not have much chance of succeeding. These effects are particularly strong with respect to large claims made by investors with deep pockets and comparatively little to lose relative to the possible gains from arbitration. This potentially significant financial drain on government resources is heightened in countries with high concentrations of foreign investment such as Ireland.

### 3.8 – An Investment Court?

Debate over ISDS has intensified as its effects begin to be felt closer to the metropolitan centres of the global North through CETA and TPP as well as TTIP. The deep public concern in the EU has brought about a temporary halt to the negotiations with respect to ISDS. In early 2014, the European Commission initiated a public consultation on the issue and received a highly skeptical response, with an overwhelming majority backing the exclusion of ISDS from the negotiations completely and calling for a serious reappraisal of its fundamental rationale. The Commission has responded with a new proposal, outlining a move towards the establishment of an International Arbitration Court. This idea has been in circulation in the broader sphere of international investment law for some time, and may be able to solve some of the deep problems and imbalances of investment arbitration. The Commission's plans have yet to take full shape and much remains to be seen, however. Other proposals have been mooted, including an alternative draft investment chapter that limits the scope of foreign investor protection quite severely, while still ensuring equality of protection with that afforded to domestic investors. These options represent steps in the right direction, but need to be fleshed out and may still remain wed to a significant and unjustified shift in power from democratically accountable governments and domestic judicial systems to supra-national commercial arbitrators.

## 4. TRADE IMPACTS

### 4.1 – WTO Tobacco Plain Packaging Cases

Challenges to Australia's tobacco plain packaging legislation have been brought in the WTO in tandem with the ISDS claims made by Philip Morris against the same legislation under international investment law. In contrast to the investment law ISDS system, claims against States under the WTO trade law system can only be brought by other States, not by corporations. Such claims are however typically brought by States for the benefit, if not at the behest, of influential corporations. Over the course of 2012-2013, five countries (Ukraine, Dominican Republic, Honduras, Cuba and Indonesia) initiated proceedings against Australia in the WTO over its plain packaging legislation – all major tobacco exporters acting at the behest of their domestic tobacco manufacturing industries and/or multinational tobacco companies that operate within their jurisdiction.

International trade law primarily imposes obligations on States to liberalise trade conditions. It does not explicitly provide for a State's right to regulate in the public interest, but does allow for specific exceptions from the general rule of removing barriers to trade, including on public health grounds. The burden of proof will be on Australia to demonstrate that its legislation is as good as 'indispensable' to the protection of human life or health, and the WTO dispute resolution body will assess whether such interference with trading conditions, branding methods and intellectual property rights is proportional to the health aims being pursued. Given the explicit public health exceptions in trade treaties, such legislation may be more likely to be upheld in the WTO judicial process than it might be in an ISDS investment tribunal. However, decisions weighing public health considerations favourably over the imperative to reduce barriers to trade are far from guaranteed. In 2011, for example, Thailand's tax regulation of tobacco imports was successfully challenged at the WTO by the Philippines, at the behest of Philip Morris.

## 4.2 – Intellectual Property Rights

TTIP is intended to complement and build on the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Any such expansion of the protection of intellectual property rights will be of major benefit to the pharmaceutical industry in both the US and the EU, and will have a tangible effect on healthcare costs. As it is, the existing TRIPS system itself is widely viewed as problematic, representing an unfair balance between the interests of pharmaceutical corporations and the value placed on public health. The TRIPS framework has contributed variously to increasing expenditure on pharmaceuticals, longer periods of pharmaceutical patent protection, and the denial of timely access to generic medicines. In this light, the efforts of the EU and the US to strengthen and extend intellectual property rights are likely to have negative rather than positive public health outcomes.

## 4.3 – Technical Barriers to Trade (Non-Tariff Barriers) – Regulatory Harmonisation

Regulatory convergence, cooperation and harmonisation are one of the most central issues in the TTIP negotiations. With tariffs between the US and EU largely eliminated, attention has shifted over time towards 'technical barriers to trade' – in essence, domestic rules and regulations. This category of barriers to trade is potentially extremely broad and not well defined, but as the chief source of frustration for business, technical barriers are now the primary focus of the drive for continued trade liberalisation. Yet many such regulations have evolved out of processes of long and arduous civil campaigns and legislative debates. They exist at a critical point where common economic conceptions of efficiency and other social conceptions of efficiency and socio-economic justice come into direct contact, and can often collide. An approach to regulatory harmonisation that does not take the social value of regulations to heart runs a serious risk of damaging the public interest, and public health in particular.

Many are now deeply concerned that the unclear but extensive influence that a proposed new Regulatory Cooperation Body (RCB), currently proposed within the framework of TTIP, will internalise an unbalanced approach to regulations. If care is not taken to ensure the continued policy space of States to regulate when necessary, in a timely manner and in a way that respects democratically determined preferences regarding approaches to risk assessment and risk management, public health and democratic self-determination will clearly be threatened. A re-think may be required in relation to setting up a new supra-national regulatory harmonisation regime that does not adequately provide for equitable and full public participation. The fate of the EU's highly valued 'precautionary principle' may hang in the balance, and the question of whose voice will seek to influence the future direction of standard setting at the global level is open to serious debate.

## 4.4 – Trade in Services

The primary area of concern in relation to the services chapter of TTIP relates to the potential for the agreement to require that public health care services be opened up to private healthcare providers in the interests of market liberalisation and competition. As such, the risk exists that by facilitating greater privatisation of the health services sector, TTIP may lead to an increasing loss of government control, service quality and democratic accountability in this area. TTIP will ultimately contain an option for States to exempt public services, and those pertaining to health in particular, from the relevant provisions of the agreement. In this case, it is recommended that, in addition to the appropriate exclusions at the EU level, Ireland exclude its health services to the full extent possible.

## 5. CONCLUSIONS AND RECOMMENDATIONS

The clear conclusion drawn from this study is that the predicted economic benefits from TTIP are too small or speculative to justify the associated social risks. The underlying structural causes of the 2008 global financial crisis—and its ongoing impacts—were defined and exacerbated in large part by excessive power being granted to the market, as well as by failures to foreground the social effects of government policy and regulation, and, more importantly, the disastrous social effects of a lack of government regulation. The TTIP process ultimately risks the further disintegration of social fabrics, rather than their restitution. **The study finds that the economic, social, legal and democratic cases for the imperative of TTIP are weak overall. As such, available political avenues should be pursued to bring about the suspension of its negotiation and a fundamental reappraisal of its basic justification and rationale.**

In the event that the political momentum in the negotiations ultimately continues, we set out a series of detailed recommendations at the end of the study with respect to all of the important sections of the agreement and all the main actors, delineating the basic safeguards necessary for any concluded TTIP agreement to have the least possible negative effect on public health.

Some of the key recommendations in this regard are highlighted here.

### **Key Recommendations**

It is recommended that, at the least, certain aspects of the current framework of the agreement be removed from the negotiations. These include the ISDS mechanism (in any form) and the Regulatory Cooperation Body. Both establish the new nature of TTIP among trade agreements as a so-called ‘living agreement’, allowing for the further extension of its disciplining effects on social and public interests well into the future, and in ways that cannot be predicted or foreseen. Given the broad range of threats to government regulatory autonomy and the democratic self-determination of peoples, this evolving aspect of TTIP, which may escape democratic control, should be rejected.

In any eventual agreement, the following minimum safeguards should be established:

- With regard to any dispute settlement system that may be included, there should be a provision requiring the prior exhaustion of domestic remedies, and the adjudication process should be fully judicialised in line with the structure of WTO dispute settlement, including full transparency, a rule of precedent, ethical guidelines on the conduct of adjudicators, criteria for appointment equal to that of domestic judges, and the establishment of an appellate body with full review powers;
- With respect to any Regulatory Cooperation Body (RCB) that may be included, there should be provision for a multi-stakeholder advisory committee, complete transparency, meaningful democratic oversight and accountability, with clear provision for approval from the European Parliament for any expansion in the regulatory agenda of the RCB and any adaptations to existing regulations and regulatory processes that may subsequently be incorporated into law;
- A clause should be included that legally establishes the State’s right to regulate in the public interest, incorporating the principles of the WTO Declaration on the TRIPS Agreement and Public Health, with application to TTIP in its entirety;
- A provision requiring the agreement to be interpreted and implemented in consistency with the obligations of States and the responsibilities of corporations and investors under international human rights law;

- A clause making clear that any regulatory harmonisation between the EU and the US must be in an upward direction to the level of the highest available standards of safety and security of the public interest;
- A general exception clause should be included that does not adopt a test of necessity but employs a lower standard of causal connection for the exception of government measures ‘related to’ or ‘reasonably understood as required for’ the stated public aims, also expressly excepting measures taken to fulfil States’ human rights obligations under international and domestic law.

The following recommendations are made with respect to the main actors addressed in this study.

The **European Commission** should:

- Conduct a fully independent human rights impact assessment of TTIP as a whole, in addition to social and environmental impact assessments, as soon as possible to guide and inform future negotiations;
- Provide complete transparency to the public in the conduct of negotiations, with respect to all documents and communications.

The **European Parliament** should:

- Take all available measures to exclude ISDS in any form from the agreement, reflecting the strong public opposition evident in the response to the Commission’s 2014 consultation;
- Ensure that any dispute settlement system in TTIP mandates the prior exhaustion of domestic remedies, as indicated by the Parliament’s own resolution of 8 July 2015 requiring that “the jurisdiction of courts of the EU and of the Member States is respected”.

The **Irish government** should:

- Conduct national human rights, social and environmental impact assessments of TTIP;
- Formulate a clear policy advocating exclusion of ISDS in any form from TTIP, given the country’s high risk of incurring serious costs from ISDS and its evident success in attracting US investment without taking this risk;
- Establish an inter-departmental committee to assess the coherence of government policy on TTIP with respect to impacts on health, social issues and the environment.



