



Proposal to Establish a Multilateral Investment Court

EPHA response to the European Commission inception impact assessment

On 1st August, the European Commission proposed [a roadmap](#) for a Council Decision proposal authorising the Commission to negotiate a Convention to establish a multilateral court on investment.

EPHA welcomes the European Commission's decision to move away from the Investor-to-State Dispute (ISDS) mechanism. This recognises concerns raised by civil society and the public that private arbitration is prone to conflict of interests, lacks transparency and could compromise sovereign governments' right to regulate and provoke 'regulatory chill'. Ahead of the expected public consultation, EPHA has formulated initial comments.

Regarding the proposed policy options, EPHA recommends further development of '**Option 5: work with other interested countries toward the establishment of a permanent Multilateral Investment Court with both a First Instance Tribunal and an Appeal Tribunal with full time judges/members.**' The public health community expects incorporation of safeguards to ensure that any future multilateral investment court guarantees the EU and national governments the right in law and in practice to make policies and laws to protect and improve health.

- 1. A parallel Investment Court System is *not necessary* between trading blocs with stable democracies, mature established Court systems and legislature.** In the context of international trade agreements between partners with mature and stable democracies and Court systems respecting the rule of law, notably between OECD countries, there is no need for a Multilateral Court.
- 2. The right to regulate to protect and improve public health must not be compromised.** Life saving measures which can be affected by the regulatory chill include among others, plain packaging of tobacco, minimum unit pricing of alcohol and food labelling. Reaffirming the right to regulate to achieve public health policy objectives is only a declaration and not a legally enforceable measure which will not prevent investors from suing as arbitrators are not likely to discard a case due to such an exception clause. The Multilateral Court must ensure that it is the legally immutable right of the EU and Member States ('margin of appreciation') to propose and implement policies and measures to achieve public health protection and improvement as democratically legitimate, irrefutable public policy objectives. In contrast, panel members of investment



arbitration courts are in no position to evaluate the relative necessity of a public health measure.

- 3. The principle of exhaustion of domestic remedies must be included in a multilateral permanent investment court system.** In the Multilateral Investment Court System, 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 can be made where domestic remedies are ineffective for example if there are undue delays,^{1,2} or if domestic courts lacked jurisdiction to provide relief.³
- 4. Public health protection must take precedence over investments in health-harmful products and sector, e.g. tobacco, alcohol, foods high in sugar, salt or saturated fat.** Investment protection regimes cannot seek to guarantee a 'stable business environment' at the expense of public health and consumer protection. 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.
- 5. Integrity and independence of future judges must be beyond doubt.** There must be sufficient guarantees that the arbitrators will be able to properly assess domestic law by requiring expertise in the field of domestic public health, social, environmental or other public law, as arbitrators will still assess domestic law. They have to meet the requirements for judicial office. There must be clear rules on how this appointment process will take place or how it can be scrutinized by the public or their democratically elected representatives.
- 6. The compatibility of a Multilateral Court with the EU law should be ensured.** In light of the EU law and settled case law⁴ of the Court of the European Union, a Multilateral Investment Court may not be compatible with the EU treaties, as it might affect the uniformity of interpretation of EU law, undermine the exclusive powers of the Court of the EU on claims for damages pursuant Article 340 TFEU and may negatively affect the completion of the internal market.⁵ Therefore, EPHA suggest that the European Commission request an Opinion of the European Court of Justice on the legality of the Multilateral Investment Court.

Further reading

- **Striking the balance: Protecting Health, Protecting Investments** EPHA position on Investment Protection in TTIP and Trade Agreements. [>>read more](#)
- **Tobacco and Public Health in TTIP** [>>read more](#)
- **Do Revised Investment Protection Rules in the EU-Canada Trade Deal Make Any Difference?** [>>read more](#)

¹ Interhandel Case (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21).

² 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).

³ 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).

⁴ Opinion 2/13 Accession to the ECHR EU:C:2014:2454 and [opinion 1/09 of March 2011](#)

⁵ ClientEarth: Legal briefing EP Legal Service Opinion on ICS in CETA <http://www.documents.clientearth.org/wp-content/uploads/library/2016-09-05-legal-briefing-ep-legal-service-opinion-on-ics-in-ceta-ce-en.pdf>