Response to the European Commission inception impact assessment on the establishment of a Multilateral Court for investment dispute resolution
7 October 2016

The European Heart Network (EHN) welcomes the European Commission’s decision to assess the potential of establishing a multilateral court for investment dispute resolution. This decision acknowledges that:

a) the prevailing Investor-to-State Dispute (ISDS) mechanism is not fit for purpose; and
b) managing numerous Investment Court Systems (ICS – the new EU concept of ISDS) in parallel is “sub-optimal in terms of policy effectiveness and increases the risk of creating inconsistencies in the application of substantive investment protection provisions.”

The inception impact assessment document further recognises that “maintaining and managing 10-15 or more ICSs in EU trade and/or investment decreases the cost efficiency of these systems.

Below we offer our comments, some of which go beyond the scope of the inception impact assessment. Nevertheless, we believe that they are pertinent to current EU negotiations of bilateral trade and investment agreements.

Multilateral court for investment dispute resolution

A multilateral court for investment dispute resolution has benefits compared to bilateral ICS and ISDS. This for the many reasons set out in the inception impact assessment document, e.g. consistency in the interpretation of substantive rules. We welcome the consideration of establishing a secretariat. We also welcome the proposal that the court must ensure effective transparency of its work and easy access for users to documents; in that context we recommend that criteria for what constitutes ‘confidential and protected information’ be defined. It is important to avoid abuse of the right to designate documents as confidential.

We reiterate (some of the) comments we have made in the past, to the consultation on ISDS and the proposal for the ICS in the context of TTIP, as we believe they are also valid in the context of a multilateral court for investment dispute resolution.

Right to legislate

The Treaty establishing the multilateral court for investment dispute resolution must declare that all parties to the court preserve their right to regulate in a legally binding manner. The judges/panel members of the court must respect the parties’ margin of appreciation when
deciding on regulatory measures to protect, improve and promote public health. This entails the recognition that measures which are potentially effective protect public health must be considered legitimate provided that they are not patently discriminatory.

*Exhaust national remedies*

Investors must be required to seek domestic remedies before proceeding to the multilateral court for investment dispute resolution. The exhaustion of domestic remedies is not required if such remedies are not available or manifestly ineffective, or domestic courts are unable or unwilling to provide legal protection.

*Qualification of judges/panel members*

It is reasonable to require that the judges/panel members should have some specialisation in investment law. We submit that it is also reasonable and desirable to require that they have expertise or experience in societal and public policy matters.

We agree that a permanent court with professional full-time judges and public tenure would be the best option as this should guarantee their integrity and independence. It is essential that the judges/panel members are in a position to render awards that are fair and impartial.

*Replacement of ISDS in bilateral investment treaties (BIT)*

The inception impact assessment document suggests that the current EU policy of including in each EU agreement a bilateral ICS constitutes a significant step forward to provide an alternative form of dispute resolution as compared to the traditional ad-hoc ISDS system.

The document admits that this policy has certain limitations. In particular, it does not provide an effective solution to the continued existence of numerous EU Member State BITs with ISDS. Moreover, whilst the conclusion of new EU trade and/or investment agreements with ICS should lead to the replacement of the corresponding Member State BITs with ISDS, this process is “likely to take many decades and there is no guarantee that it will eventually cover all Member State agreements”.

Consequently, EHN recommends that the EU no longer includes ICS in its bilateral trade and investment agreements but puts its efforts into establishing a multilateral court for investment dispute resolution. Or that, at a minimum, currently negotiated bilateral trade and investment agreements should stipulate that ICS will cease to exist automatically for example three years after its entry into force in the expectation that such a clause will accelerate negotiations to establish a multilateral court for investment dispute resolution.