MEDEL
Magistrats Européens pour la Démocratie et les Libertés

BIG TRANSATLANTIC MARKET: YIELD AND BOW DOWN

MEDEL´s opinion on the construction of a international investment court for TTIP – proposal of the European Commission from 16.09.2015 and 12.11.2015

"Remove justice and what are kingdoms but gangs of criminals on a large scale? What are criminal gangs but petty kingdoms?"
Augustine of Hippo, *De Civitas Dei*

1. Context

In its most recent appeal "Democracy requires independent courts, judges and prosecutors", MEDEL pointed out that the attacks on human, social, cultural and economic rights could come from the economic and financial power.

This seems to be what can result from the negotiations leading to the creation of the Transatlantic Free Trade Area, which may put multinational corporations at the same level as sovereign States.

Despite the profusion of acronyms and alike (TTIP, BMT, TFTA, MAI, TPA, TABD, TABC, TISA, GATS...), all that is publicly known about the free trade and investment agreement between the European Union and the United States of America, known as Transatlantic Trade and Investment Partnership (hereinafter (TTIP), and its negotiations, is exactly this: the negotiating governments do not want citizens to know or know very little.

In one of its recent judgments[1], the Court of Justice of the European Union has already warned that such secrecy has its limits, although facilitators continue to argue that negotiations for international agreements require secrecy, discretion and confidentiality, as if the truth is too much for the people to handle or the democratic scrutiny is a

[1] http://www.alde.eu/uploads/media/judgment_03072014.pdf

nuisance. MEDEL believes that it is unacceptable if these negotiations were known only when the risk of affecting the lives of millions of workers, consumers and citizens of the European Union could no longer be avoided.

Increasingly, media has revealed that not only facilitators and those executing the strategy of the national governments considered including an arbitration clause in the "priority" negotiations on TTIP, but, together with others, they also signed a letter defending the inclusion of legal investment protection mechanisms in the TTIP negotiations (the controversial Investor-State Dispute Settlement Clause), all this with a view to achieving successful negotiations.
This clause is about establishing arbitration mechanisms that has been already called "secret courts".

In fact, these ISDS arbitration mechanisms fall outside the legal framework of democratic Rule of Law states. Besides, they can decide without appeal, are not obliged to enforce legislation adopted by parliaments or institutions whose composition is determined by democratic elections, and, unlike the courts, they do not need to conduct public hearings. To accept that States shall be bound by this type of dispute decisions, which would not be valid under their own laws, would mean to co-operate against ourselves and dress the wolf in a sheepskin coat.

2. The installation – as proposed by the EU-Commission – of a court for capital investments in the framework of the Transatlantic Trade and Investment Partnership (TTIP) is to be rejected

MEDEL cannot identify any legal basis nor need for such a court.

The presumption, obviously connected with the proposal of creating an international court for capital investment, that national courts of the EU member states cannot grant effective legal protection to foreign investors, lacks objective grounds. If the EU Commission had detected weaknesses in an EU member state, these weaknesses should have been declared and clearly defined to the national legislator. Then it would be the function of the legislator and the judiciary to establish corrections inside the well-examined national and European system of legal protection. Only in this way the right to legal protection, to which any subject in in the European Union is entitled to, can be guaranteed.

The creation of special courts for specific groups of subjects is a wrong way.

a. Detailed Evaluation

The Investment Court System (ICS) planned by the EU Commission, embedded in a system of mediation and consultation, shall be competent for claims of violations of the investor's protection clause (art. 1 no. 1 of the TTIP).
At the same time, in the definition of the draft, investments include every type of rights including stock shares, shares of companies, copyrights, mobile goods and debt claims (Chapter II, definition x2).
The legal protection of investment ranges therefore from civil law beyond the general administrative law to the social and tax laws.
The Commissions proposal would lead to a situation in which the ICS had competence for jurisdiction in these areas in order to grant the comprehensive protection of investors. They shall be able to appeal to the ICS if they had losses by means of violation of the investors' protection clause (art.1 no.1).

b. Lack of legislation competence

MEDEL doubts seriously the competence of the European Union for the establishment of a court for capital investments.
The installation of the ICS would oblige the European Union and the member states to submit to the jurisdiction of the ICS, and to apply international procedural law chosen by the plaintiff (art. 6 no. 5, 2; art. 7 no.1).
Decisions of ICS would be binding (art. 30 no. 1).

With the ICS not only the legislative power of the Union and the member states would be restricted, but also the established court systems within the member states and the European Union would have to be modified. MEDEL avers that there is no legal basis for such a modification by the Union. .

As the European Court held in his opinion 1/09 from 8.3.2011 regarding the installation of the European Patent Court, the Union offers a "complete system of rights of appeal and procedures that shall guarantee the control of lawfulness of the institutions' activities" (see motivation no.70).
Analogous to the planned Patent Court, which was examined there, the ICS would be a court standing "outside the institutional and judicial framework of the Union" (motivation no. 71).
It would be, like the Patent court, "an institution that would be provided with an own legal personality by international law".
Therefore a decision of the ICS violating Union law would neither be object of a procedure regarding the violation of EU contracts, nor could it lead to "whatsoever financial responsibility of one or more member states"(see motivation no. 88).
Therefore the ICS would "withdraw the competence for interpretation and application of Union law from the courts of the member states and the European court and from the latter the competence to respond to questions of preliminary rulings submitted by the national courts and therewith distort the competences assigned by treaty to the organs of the Union and to the member states, who are essential to protect the nature of Union law" (see motivation no.89).

MEDEL does not see any justification for the installation of a special court for investors.

The member states, as constitutional states establish and guarantee access to law by means of public national judiciary to all subjects.
It is the member states' task to assure access to law for all and to guarantee - by appointing the adequate facilities to the courts – that access is ensured also to foreign investors. The composition of an ICS therefore is the wrong way to provide for legal certainty.

c. Independence of the magistrates

Neither the prospected procedure for the nomination of the ICS' magistrates, nor their statutes are in conformity with the international requirements of independence of courts.

The ICS appears, against this background, not as an international court but as a perpetual arbitration body.

The Magna Carta for Judges from the CCJE (17.11.2010) requires the independence of judges under professional and financial aspects, guaranteed by law (2010/3, lit.3). Decisions about selection, appointment and career have to be based on objective criteria and to be taken by the organ that has to safeguard independence (lit.5).
Both criteria are not met by the ICS.
For the decision-making of the ICS not only questions of civil law play a decisive role but also questions of administrative, labour, social and tax law.
The selection of ICS' judges from among the experts of international public law and international investment law with experience in settling international trade disputes (art. 9 no. 4) reduces considerably the stock of candidates and neglects the indispensable expertise in the respective national law sectors. The candidates for judges are restricted to a circle of persons who already occupy the international arbitration bodies to a large extent[2].

3. A political and judicial bow must be stopped

[2] This impression is intensified by the fact that the selection procedure is not yet precisely delineated. It will depend from the independence of the selection committee and its distance to the international arbitration bodies to what extend the selection of the best qualified national jurists with special experience in the interested law sectors will be assured. This is - at least actually - not guaranteed. Even the mandate period of six years with the option of a further period, a basic salary retainer fee" of ca. 2.000 Euro a month for first instance judges and 7.000 for appellation courts as well as expenses in case of de facto assignment (art. 9 no. 12 and art. 10 no. 12) arise doubts whether the criteria for professional and financial independence of these judges of an international court are satisfied.

To negotiate and, based upon endorsement letters from the inside, to subscribe to the inclusion of an arbitration clause which facilitates the establishment of a special court is a serious and disrespectful attitude towards the democratic Rule of law and the sovereignty of any State, because all this is being done without involving the people who legitimize the same States and should still be the origin of sovereignty.

Should not the rulers of a State or even the mere executors of their policy act to safeguard the well being of their citizens instead of advancing the opportunistic interests of the markets and their appetite for profit?

After all, what do these TTIP negotiations conceal?

Will it enrich ordinary citizens or multinational corporations?

The answer does not seem difficult, if with the guarantee to protect the investment of such multinational corporations a secret court comes as an advanced instrument , and an exceptional *à la carte* justice, tailor-made for the investors' higher rights.

A secret, special, private arbitration tribunal overriding the States' courts is established for no other purpose than to defend the neo-liberal cartel and guarantee multinational corporate greed.

This tribunal shall grant multinational corporations legally binding privileges; it shall have the power to punish States and, at the same time, it shall have the advantage of not being accountable to the voters, as well as of not having to comply with the rules of the democratic game or face the popular uproar or its victims who will be seen as "collateral damage".

On balance, why is it only the protection of investors which, according to TTIP negotiations, deserves a legal and judicial mechanism as exceptional as a secret court ?

If the investment rights are thus guaranteed, and the economic, social and human rights of the people bound by such agreements by their own governments are not, then according to a basic principle of precaution, we have grounds to suspect that there is a serious and significant risk of regulation and existing levels of protection in areas like labour, food, privacy, finance or health – with the "pressing" need for the privatization of the latter –, medication, internet freedom, energy, culture, copyrights, natural resources, education, access to professions, access to public facilities or the possibility of travelling or emigrating being undermined.
Add to this the fear that multinational corporations may sue States (EU Member States) in special tribunals for enacting laws that upset their profit forecasts or for not opening up the sectors of general interest to privatization or to the irreversible logic of the market and it becomes visible why nothing will escape from multinational corporations.

There is no doubt that companies generate employment opportunities, create wealth and help to develop a country, if they are companies with corporate social responsibility. Nowadays, however, in case they are just financial instruments aimed at sustaining the shareholder value that has to increase at any price, and the irresistible desire for profit and dividends, they are also a source of unemployment, as well as a tool for weakening the social and economic cohesion and, frequently, causing ecological ruin.

By using language of manipulation or sophisticated letters, *facilitators* instil into the public the insidious belief that the prerequisites for the negotiation of a clause that protects the investment through a secret tribunal are rational.

Facilitators do certainly know that this special justice is an intrusive power, whose proposal sets an ideological and inhibiting trap suited to the "*justice-for-the-market*", a type of justice that matters to the *facilitators* and inspires them; a justice, they would wish would be forgetful of the Constitution or the Charter of Fundamental Rights of the European Union and replace it by the laws of the market, thus completely abandoning the certainty that there *are still judges in Berlin*.

Actually, *facilitators* hide the most ruthless ideological, political or social battle fought by those who want to place private business interests ahead of State interests by encouraging acceptance of the expropriation of rights, in the name of the "*extraordinary opportunity*" and the "*huge potential for national States*".

The TTIP and the ISDS clause are legal mechanisms to protect the underlying spirit of that ideology of entrepreneurship, which in the end encompasses a set of wild powers resistant to risk and competition.

In the wake of the 2008 financial crisis, it would be catastrophic – because it would be too naive – to persist in making the mistake of thinking that governments can control the behaviour of the markets.

But to yield to those interests and even ensure their defence against whom offers it to them seems to be truly sinister for the sole reason that it is the State itself that indulges the market with the "weapons" that will cause deadly damage to it.
It's not just a question of protecting the investment, but also of strengthening multinational corporations, and thus one falls into the old tale of the *Trojan Horse* without being both particularly creative and sincerely naive.

Popular sovereignty, as well as social justice or justice administered on behalf of the people are the most serious dilemmas of neoliberalism, which seeks by all means to delegitimize the idea of justice, as well as the powers of the State to promote the common good or the public interest.
The new paradigm and the new order will thus be based on other dogmas, such as freedom, inequality, and indifference to citizens, consumers and workers, hostility to public justice or to the practice of democracy, because they are considered unnecessary obstacles to the free market.

In the same way that the context of today's world does not favour public justice as a function of the State, it does not favour the State itself.
The vocation of public justice for stabilizing social expectations and for being a social regulation instrument par excellence is undermined either by delegating public sector powers to private, administrative or arbitral entities, or by minimizing public functions in the name of business and market effectiveness, with a view to involving it in that same process of dilution of State sovereignty.
The independence and autonomy of the judiciary as well as of its duties are conditioned by this context and, as such, the latter does not favour institutions such as the Judiciary (**Judges and Prosecutors)**, legitimized by its independence and autonomy and which invokes the social and political recognition of this quality as its foundations.

In the future we will be facing one of two challenges, but they can occur simultaneously and cause tension.

The first challenge is delegitimization of the institutions and the mistrust of their rituals leading to worn-out judiciaries as well as to their fragmentation and their diminishing symbolic and institutional significance.
Judiciaries are hereby pushed into a state of existential anxiety, typical of these ephemeral, deregulated and ever-changing times.
This is a phenomenon accompanying the loss of importance of the nation-states and the associated sovereignty entailing the erosion of the inherent authority and which is reducing politics to virtually nothing. Within that framework justice is understood as political activity *lato sensu*.

The second one is about the possibility of resisting those scenarios of social and institutional disintegration. This implies that being defenders of civilizational references, such as human dignity, public interest, and in particular the democratic rule of law – as a source of legitimacy and underlying motive of their functional and political legitimation, thus corresponding to the just law and the promotion of its respect, as if *Lacordaire* would be increasingly right in his teaching, whereby in an unequal society is a just law which sets free and freedom which oppresses: "*Between the strong and the weak, between the rich and the poor, between the lord and the slave, it is freedom which oppresses and the law which sets free*" –, magistrates assume individually or collectively a resistance.

If the economic power can pose dangers for democracy, as well as for an independent and common justice, those negotiating on behalf of the States and having a true support can also pose a danger, thus *con-fusing* State with economic and financial power – one merging into the other – and justifying the supposed improbability: through government action, States yield and, away from democratic scrutiny, subordinate popular sovereignty to the elementary and inalienable investor rights.

Magistrates and citizens need to mobilize to not be condemned to a simple form of protest and regret the lessons that come too late.

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