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TTIP. Memorandum on the arbitration system

In order to justify the addition of a section "investor's protection" in the TTIP, the European Commission is highlighting that the investors are a deciding factor for growth and employment and that letting American investors being dispossessed in Europe and vice versa should be avoided. Predictably enough there is no objection on that point.

Nonetheless, it does not mean that everyone should agree with the arbitration system which it offers to reach that result. Such is the issue dealt in this memorandum in which we will:

1. Identify the objectives sought to be achieved by the Commission: four "key guaranties".
2. Demonstrate that the arguments shown by the Commission to justify the arbitration system only rest on convictions and affirmations.
3. Highlight the risks which this system is weighing against the future.
4. Offer an acceptable solution to every stakeholder, which will eliminate the written risks **whilst completing the objectives sought to be achieved by the Commission, the States and the investors as well as the civil society's expectations**.

This proposition is very simple, it aims to replace the arbitration system such as it is currently intended, by an arbitration system as similar as possible with the one used by the WTO on since 1994.

CONTENT

I OBJECTIVES OF THE EUROPEAN COMMISSION: IMPLEMENT FOUR "KEY GARANTIES" TO BENEFIT THE FOREIGN INVESTORS

The only two documents in French put online by the European Commission on the TTIP are the following:

1- A non-dated "Frequently Asked Questions", containing 23 questions and answers provided by the Commission. The document can be found on:
http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/index_fr.htm

2- An "information memo" dated of the 23rd of November 2013; it is a dozen pages document, more detailed than the FAQ which can be found on:
http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152016.pdf

The first document does not mention the precise objectives aimed by the Commission through the "investments" section. However, the second document (page 5) is describing the four "key guaranties" generally granted in the free trade agreements and on the investments and endorsed by the Commission.

The four guaranties are the following:

1- The protection against discrimination ("treatment of the most deprived nation" and national treatment".)
2- The protection against expropriation to other purposes than public political objectives and without appropriate compensation
3- The protection against an unfair and inequitable treatment – for example not complying with the fundamental principles of equity.
4- The protection for capital funds transfer[1]

It is therefore based on those guaranties that we have to continue our reflection, keeping in mind that those guaranties also have to be offered to national investors.

II A POOR ARGUMENTATION, INDEED IRRATIONAL TO JUSTIFY THE ARBITRATION SYSTEM

To simplify it to the greatest extent, the arbitration system which is negotiated in the TTIP agreement consists in granting to every American investor the right to demand compensation to a European country in which he has invested, whether for example this country adopts a social or environmental law that could reduce its current or potential (and vice versa).

Therefore, the European Union offers to bypass the national Tribunals and consequently the national laws (including the national constitutions), and to create supranational tribunals, called the "arbitration panel". Only investors shall be entitled to call upon the Tribunal and not the States, even though foreign investors would behave badly on their own territory.

Facing numerous criticisms, the Commission has issued lots of peaceful declarations (see page 4), without really convincing anyone.

In any case, the analysis of the arguments presented by the European Commission to justify the aim of this arbitration system is extremely poor since it is not based on any concrete or preexistent case.

1- The "Frequently Asked Questions" of the European Commission on the TTIP

Please find in the appendix the only page dedicated to the dispute settlement on the Frequently Asked Questions of the European Commission. The reading will only take you two minutes.

The reader will not find any either rational, objective, measurable or verifiable argument in it. The text is only setting out hypothesis and convictions. When it is evoking a possible concrete situation, you realize that it has never happened either in the

[1] In this memorandum we will not be commenting the objectives. They do exist. We will be answering them.

United States or in Europe, because it has been strictly forbidden for a long time on both continents.

This situation is the following: "(for example when a manufactured product in a factory belonging to a foreign investor is forbidden from one day to the other, without compensation, whereas the same products manufactured by local companies are still allowed".) This case has been forbidden for a long time by the World Trade Organisation regulations, joined both by the United States and the European Union. We do not understand that senior officials would have chosen such an example, while our democracies are all States observing the rule of law and not rogue States. It does not make the reader feel comfortable.

2- The "Information memo" of the European Commission of November 2013 and the declarations of Commissioner de Gucht

This information memo does not show the advantages of the arbitration system either. As in the previous document, convictions and non backed up affirmations by precise facts can be found.

Actually, this memorandum is aiming to explain how the EU is considering a way to improve the arbitration system, to prevent the many drifts noticed in that kind of agreement. This is where we were able to identify the objectives pursued by the Commission.

And that is not all. In order to correct the "imperfections of the current system", the Commission is describing six points to be improved:

- clarifying the concept of "indirect expropriation"
- clarifying the concept of "fair and equitable treatment"
- preventing abuses of procedures from investors
- making the arbitration system more transparent
- taking into account conflicts of interests and the consistency of arbitral sentences
- introducing guaranties for the different parties

It looks like a lot of adjustments have to be made to a system yet presented as a **"key tool"** in the Frequently Asked Questions of the Commission.

Especially if the declaration of the Commissioner in charge of the negotiation is added, published on April 4th 2014, in the EU report on Foreign Trade: "I completely agree with the numerous criticisms according to which procedures of the disputes settlement between investors and States have only lead until now to very worrying examples of dispute against States. The problem lies in some characteristics of the 3000 investment agreements which are currently occurring in the world…"

In the sequel of his declaration, the Commissioner is explaining that the 3000 agreements in force (key tools…) are ill written, as the arbitration clauses of the agreements Canada and United States will be, and that they shall not bring any problem… Can we declare for sure that any law firm will not find flaws in the text?

This report can be found on:
http://trade.ec.europa.eu/eutn/psendmessage.htm?tranid=9529

To summarize, it is not possible to use precise and verifiable facts to demonstrate that this arbitration system is interesting for States, for people and for investors and that it will not lead to any misconduct.

It may be why the American Embassy offered in June to those in favor of "*this transatlantic free trade agreement who would be unsatisfied with negative media coverage which it was subjected to*" to send their ideas and projects in order to organise a "positive" debate on the subject. "*We will support you*!" assures the American Embassy in Berlin, **the latter promising a financial contribution of up to 20 000 dollars!**

See for example the article of La Tribune on:
http://www.latribune.fr/actualites/economie/international/20140619trib000835965/partenariat-transatlantique-quand-les-etats-unis-proposent-20.000-dollars-aux-pro-ttip.html

That is not very reassuring. We can perceive that as another flashing light encouraging us to be prudent.

III MAIN CRITICS TO THE ARBITRATION SYSTEM

If it is ever established, this arbitration system will come with four serious disadvantages.

1- **This will irreparably lead to a transfer of our sovereignty in favour of the private sector.** With such a retaliatory tool, foreign investors would be able to bring "friendly pressures", along with threats of dispute to the States that will legislate on the environment, health or any social sector, as long as those initiatives would be able to drive down their profit. This transatlantic agreement will set their income in stone! It is an empowerment never seen so far. This will be very discreet, but the power of influence given to the foreign investors in the drafting of the French law, already major, will become significant.

2- **It will officially state from both a political and legal point of view the supremacy of trade law over all other rights.**

Sustainable development is going to be definitely and irreparably killed by this aspect.

The concept of sustainable development and its consequences have been well summarised by Mr Ban Ki Moon on June 3rd of 2011 in Beirut. He declared: "*We will not build a just and equitable world unless we give equal weight to all three pillars of sustainable social, economic and environmental development. From access to clean water to agricultural productivity, from soil conservation to flood control, forests are central to economic development, poverty reduction and food and nutrition security*."

The arbitration system is exactly going in the opposite direction, because it prioritizes finance, instead of placing it on the same level as the rest.

The mediators will judge in light of two elements: the TTIP agreement and checking that the profit of the company which will have had taken to the Arbitration Court is indeed going down. Other considerations, figuring in national or European laws, including constitutions, will theoretically be non enforceable. In order to achieve that result, it is indeed essential to bypass national legislations and Courts, hence this supranational arbitration system.

Along with this solution, trade law will certainly be placed both politically and legally below all other rights. Such was the case when an investor tackled the rising Egyptian minimum wage or challenged a decision of the Peruvian government to regulate toxic waste management as well as closing a dangerously polluting smelting plant.

Once the agreement signed, citizens will structurally be placed to serve finance. It will be beyond repair.

3- **It will confer an unbalanced and unjustified disadvantage to foreign investors.** In its information memo, the Commission (page 9) is explaining that it will clearly define the "fair and equitable treatment" norm, having in mind that it will only set new rules to the State (and consequently to national taxpayers) and not to investors. For example, in compensation for this extortionate right which was acknowledged to them, no commitment will be demanded to foreign investors, **not even to have paid their taxes those last ten years**. Who can actually stand out and explain this on the 8:00 pm news? Nonetheless, it will have to be said one day or another. We live in a democracy.

4- **This system will constitute a real "corruption machine".** The negotiation of the TTIP is driven by two senior offices serving the general interest of the continents they represent. Their position grants them the duty to provide to this new judicial body the best practices existing in the world for Courts in terms of transparency, integrity, solemnity and impartiality. For example, this arbitral Court should be a worldwide window display.

But it is not the case and it is incomprehensible.
What does the European Union say about this issue in its Frequently Asked Questions? "*The European Commission agrees that the system could be improved and has actively participated in the creation of the new rules of the Nations united for transparency during dispute settlements between investors and States. In the trade agreements currently negotiated, the European Union* ***is doing its best*** *to obtain better rules, (particularly the one about testing mediators by the public authorities, the creation of a code of conduct for mediators, etc…")*
"The European Union is doing its best". Who is pressuring them so that senior officials cannot do better than "doing their best"? Is that reassuring?

Peoples obviously agree so that this arbitral Court, if it ever is created, would be a worldwide window display of probity. If there is any doubt, we can still conduct a survey… it is true that the system has a major conception fault. Indeed:

1 – The arbitral Tribunal will only be called upon by foreign investors
2 – We are assuming that the investors will never be condemned by this Tribunal
3 – Cynical conclusion: they have no interest whatsoever that those mediators should be corruptible

Here is maybe one of the reasons which can explain the content of this report « World Investment Report » of the Cnuced. See on:
http://alternatives-economiques.fr/blogs/chavagneux/2013/06/27/quand-les-multinationales-attaquent-les-etats-en-justice/
This report may have inspired the declaration of the Commissioner De Gucth as quoted above, according to which 3000 agreements existing today have **ONLY** reached worrying decisions.

What does the Commission offer to guarantee the probity of this arbitral Tribunal? The answer is given to us in the information memo of November 2013.

On page 10, we can read that: "the EU has introduced a **code of conduct** that states specific and restrictive obligations for mediators. This code of conduct is already a reality in the agreement negotiated with Canada and the EU will do its best to impose it in the future investment agreements. Those obligations will cover conflicts of interest and broader issues on mediators' ethics, which means the recommended behaviour in particular situations.

The EU has integrated in the trade agreement with Canada a list of people – which has to be proved both by the EU and Canada – able to act as a mediator in a particular dispute. Those people, picked according to their expertise, will have to respect the code of conduct. This will erase all risk of **conflict of interests**. The EU will speak in favour of the adoption of those similar lists with other partners of the negotiation. Another new aspect in the system of disputes settlement, the EU **aspires** to the creation of an **appeal**

mechanism so that we can assure the coherence and the legitimacy of the system submitting those sentences to be checked."

When we are aware of the rising development of corruption on the planet and in every field, who can actually believe that a simple good practice guide will protect us against corruption?

Let's explore further. Can the Commission answer to those following questions?

1. Where shall the head office of this Tribunal be (Paris? Brussels? Berlin? New York? The Caiman Islands?)
2. Who shall appoint the judges? (the American and European citizens?)
3. According to which criteria?
4. Shall they be compulsory chosen among magistrates of their native countries?
5. Shall they have to take an oath? Under which form?
6. What obligations shall they have? (declaration of assets at the beginning and at the end of their appointment, declaration of potential conflicts of interest...)
7. Shall we refuse one or several judges?
8. In case of misconduct, omission or declaration of conflicts of interest or corruption, who will be able to bring criminal proceedings? Against which law? Quid, if the individual suspected of corruption is not remanding to summons? Shall an international warrant of arrest be issued?
9. Shall hearings be public, so that the press and the civil society can assist (as it is the case in Tribunals of 28 members?)
10. Shall sentences be put online? Shall they be translated in French? Official language of the UN and the EUROPEAN UNION?

This leads us to a system where French professional judges will be submitted to extremely strict criminal law in case of misconduct and where supranational mediators will only have to respect a good practice guide, without risking extremely strict criminal sanctions. Here again, it will have to be explained clearly to the French people on the 8 pm news.

That is why we fear that this arbitration system might become a real "corruption machine".

IV WHAT SOLUTION TO TAKE ON TO ELIMINATE THE DESCRIBED RISKS WHILST RESPONDING TO THE OBJECTIVES SOUGHT BY THE COMMISSION

According to us, the reply lies in reproducing the procedure of the dispute settlements which was developed at the World Trade Organisation in 1994 and which properly works.

Put in a very simple way, the dispute settlements is organised in the following way at the WTO:

1– There is a "Dispute Settlement Body" entitled DSB. It is an arbitration Tribunal.

2 – The DSB can only be called upon by one of the sovereign States parties of the agreements of the WTO. No company can directly call upon it.

3 – The purpose of the DSB is strictly regulated in the WTO agreements. Rules are clear and known.

4– When a State decides to formally call upon the SBD, the procedure is carried out very fast and a decision is issued within 15 months, included in appeal.

5– The operating principles are the following: equity, rapidity, efficiency and mutually acceptable solution[2].

See on **http://www.wto.org/french/thewto_f/whatis_f/tif_f/disp1_f.htm**

This solution is fundamentally different from the one contemplated by the United States and the European Union. Indeed, instead of gathering a foreign multinational with a country it gathers two sovereign states and so two sovereign people that settle a dispute together through their respective representatives.

The aspect "loss of sovereignty" is no longer in order.

Besides, before tackling another country and claiming unbelievable damages (like we have seen in the past with the 3000 existing agreements), a sovereign state will use good judgment, for it will always risk ending up later on in a "sprayer sprayed" situation. This saves us from excess. At the OTA, States think about it for a long time before calling upon the Dispute settlement Body. Additionally, the four principles on which works the DSB: equity, rapidity, efficiency and mutually acceptable solution) are highly valued.

To make things clear, the defense of foreign investors is perfectly handled and investors stay in their places. They remain simple investors. They are not raised to the same level as sovereign peoples. That is essential for the future.

IV– 1 There are many advantages to such a solution

The four key guarantees can be granted by the system

1- The protection against discrimination ("treatment of the most deprived nation" and national treatment".)
2- The protection against expropriation to other purposes than public political objectives and without appropriate compensation

[2] Indeed, the WTO has a lot of flaws and it has to be improved. In this memorandum, we will only show that, in the limits of the mission which it was entrusted to, the DSB is fulfilling its purpose with no misconduct and definite danger for democracies.

3- The protection against an unfair and inequitable treatment – for example not complying with the fundamental principles of equity.
4- The protection for capital funds transfer

If a European or American law implicates one of those guarantees, the Dispute Settlement Body will possibly be called upon. So, difficulties met by national and foreign operators will be dealt with equally, within a 15 month period maximum and with transparency.

Of course those key guarantees have to be clearly defined in the agreement. This will call for reminding that the notion of fair and equitable treatment implies that no one can actually pretend to enjoy rights if he does not discharge with his duties. For example, every American or European company settled on the other continent has to pay its expenses normally due without tax optimisation… we are facing a fundamental pillar of the equity principle targeted in the 3rd key guarantee.

- **The legal difficulties alluded by the Commission can be resolved**

In its information memo, the Commission states page 5 that "the principal interest of the ISDS mechanism (arbitration) is linked to the non-executory aspect of the investments agreements in front of national tribunals in a lot of countries.

Consequently, an investor who has been previously a victim of discrimination or expropriation cannot refer to the rules on the protection of investments in front of national tribunals and demand compensation. The dispute settlements between investors and States enable investors to directly refer to the rules especially thought of to protect their investments."

Given the offered solution, a law that could create discrimination or unfair expropriation could be immediately contested by the other continent as it is done at the WTO. The latter would pay heavy compensations until its regulations erase contested discrimination or the possibility to proceed to unfair expropriation. The company will then be able to address itself to demand compensation to national tribunals, if no solution can be found. All of this is working perfectly fine at the Commission within the WTO agreements.

- **The six imperfections found in the current agreements (see page 3 and 4 below) may be corrected without any difficulty.**
- **The four main criticisms against the arbitration system like it was initially planned will be raised:** renouncement of a part of the peoples' sovereignty, the supremacy of trade laws over the rest, unbalanced advantage conferred to the foreign investor, corruption machine.
- **A stronger legal certainty will be given to States.** They currently live under 3000 different agreements, all of them badly written… which might therefore trigger

abuses as shows Commissioner Gucht's confession of April 4th 2014. Besides, the extraordinary complexity thus created which will have to be put to an end; those 3000 agreements are likely to block future negotiations on the climate which will take place in Paris in 2015. Even if blockings will not officially come up, heads of states will extremely suffer from lobbying actions.

This may also be the reason why the World Summit on Sustainable Development in 2012 actually failed, which was beyond understanding for the peoples.

- **Finally, the main objective sought by the Commission will be fully explained.**

Given that the transatlantic agreement is designed to create largest free-trade area ever implemented since the beginnings of humanity, the United States and the European Union reckon that the norms which will be set in the agreement will be promulgated very soon to the rest of the planet. The transatlantic agreement has therefore the purpose to become a WTO agreement.

If it should be the case, it is clear that the creation of a dispute settlement mechanism modelled on the WTO's will only make it easier to achieve this ambition, although the arbitration system currently planned will be an impossible blockage to question.

IV –2 How to proceed in concrete terms?

We think that the idea, according to which States and the European Parliament will have the right to refuse to sign the agreement, whether it should not correspond to their points of view, is dangerous. Pressures will be staggering. Unfair dismissal, outsourcing and capital flight will be violent and broadcasted by the media. We must not shut out European parliamentarians' attempts of corruption. History shows that European parliamentarians have given in to corruption).

If the solution submitted in this memorandum should be chosen, Heads of State and the European Parliament today can:

- Demand to withdraw the arbitration system negotiated in the agreement with Canada
- Demand to cease all negotiations on the arbitration system with the United States
- Demand tripartite negotiations (Europe, Canada and the United States) to implement an arbitration system modelled on the WTO's in force. There will be no vanquished and we will then enter a whole new dynamic.

53 grand Rue – 60540 PUISEUX LE HAUBERGER France – P/F : +33 3 44 26 56 07
website: www.pauvrete-politique.com
email : pauvrete.politique@9online.fr

Extract of the FAQ put on line by the European Commission in 2013 on the transatlantic agreement project. **http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/index_fr.htm**.
Our arguments are only based on certainty and convictions.

Why has the European Union included the dispute settlement between investors and States within the transatlantic partnership?

The European Commission, the Member States and the European Parliament are convinced of the dispute settlement mechanism between investors and States to be a first class tool to protect EU investors abroad.

A country equipped with a strong legal system does not automatically imply that foreign investors will be duly protected. The latters may risk to be dispossessed from by their host state (particularly in case of nationalisation) or see their investments reduced to nothing after the adoption of national laws (for example when a product manufactured by a foreign investor is forbidden from one day to the other without any compensation whereas same products manufactured by local companies are still allowed.) If investors cannot call upon local courts or if those courts are not fit to efficiently consider their request, there is no other court at which they can seek damages. Under these conditions, adding a provision in the investment agreement on the dispute settlement between investors and States grants certainty to investors guaranteeing them to appeal to such a court.

Even though the Union and the United States are developed economies, investors can nonetheless face problems which their internal jurisdiction cannot always settle efficiently. This is why we think that adding provisions in the transatlantic partnership which would protect investors, would bring a real added value. Besides, given that it associates two of the first global economies, this partnership will set a model for the future.

Measures to protect investors will not prevent governments to adopt laws and to repeal some of them. Those measures can at most lead to compensations. The Member States of the European Union have been legislating for years, whereas they have already signed 1,400 partnerships of that kind. Eight Member States have established agreements in investments with the United States, which has not prevented them from falling into line with the European acquis during negotiations linked to their accession to the EU. In any case, the Union is working on making things clearer so that that the true regulatory measures cannot be challenged.

The European Commission admits that the system could be improved and has taken an active part in the elaboration of new rules of the United Nations for transparency in the dispute settlements between investors and States. Within bilateral trade agreements which it is negotiating, the Commission endeavours to obtain better rules (particularly in relations to the control of mediators by the public authorities, the elaboration of a code of conduct dedicated to mediators, etc).

53 grand Rue – 60540 PUISEUX LE HAUBERGER France – P/F : +33 3 44 26 56 07
website: www.pauvrete-politique.com
email : pauvrete.politique@9online.fr