



Association Européenne des Magistrats

Groupe régional de l'Union Internationale des magistrats

European Association of Judges

Regional Group of the International Association of Judges

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STATEMENT FROM THE EUROPEAN ASSOCIATION OF JUDGES (EAJ)

**ON THE PROPOSAL FROM THE EUROPEAN COMMISSION
ON A NEW INVESTMENT COURT SYSTEM.**

The proposal of “*new Investment Court System*”, as announced by the European Commission on September 16th 2015 is regarded by the European Association of Judges (EAJ) with serious reservations. The EAJ asks the European Parliament and the Council to scrutinize the proposal very carefully questions whether European Union really needs a completely new Court system to deal with the rights of investors and if so whether the proposed “*new, modernised system of investment courts*” (Commissioner Malmström) really is the best system we can get.

Following Section 3 of the Transatlantic Trade and Investment Partnership (TIPP) on the “Resolution of Investment Disputes and Investment Court System (short:”ICS)” of the Commission draft text from 16.09.2015 (tradoc_153807), the European Commission tries to introduce an elaborate system of amicable dispute resolutions for claims of an investor against a party (e.g. member state of the treaty) for alleged breach of investor’s rights. These include all kinds of assets like shares, stocks and other forms of equity, participation in an enterprise, intellectual property rights, movable property or claims to money (section 3, definitions x2), owned or controlled by the by investors of one Party in the territory of the other Party (section 3, definitions x1). The protection of the investor is therefore covered by a wide range of private, criminal, administrative and tax law of the other party. The ICS should get competence in all these areas of national law of the parties.

All member states of the European Union are, by definition and in reality, democratic states under the Rule of Law with well-functioning judiciaries that has competence according to national law.

- **Competence to establish the ICS.**

Legal competence is needed to introduce a new court into this well-established judicial system within the European Union and its member states. The EAJ is in doubt that such a competence does exist.

In its opinion 1/09 of March 8th 2011 on the then draft text on a European and Community Patents Court, the European Court of Justice rejected the competence of the European Union to establish a new Court system outside the existing European one.

The basis of its opinion was the fact, that *“the judicial system of the European Union is moreover a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions”* (sect 70), in which the planned patent court must be regarded as *“outside the institutional and judicial framework of the European Union. It is not part of the judicial system provided for in Article 19(1) TEU. The PC is an organisation with a distinct legal personality under international law.”* (sect. 71). Therefore, the ECJ saw the PC outside the European Court system. *“It is clear that if a decision of the PC were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States.”* (sect 88).

Therefore, the ECJ held that *“the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law”* (sect 89).

The competence for the European Union to establish a Court system outside its existing one is therefore very limited. Besides, it has to be questioned very carefully if the national legal systems and the transfer by them of competences by them to the European Union includes the transfer of the competence to establish an International Court system with exclusive competence. Thus if the investor submits a claim to the ICS, art 6 par.1 against a member state with no recourse to a supreme national court, a constitutional court of a member state or the ECJ.

The EAJ does not see the necessity for such a court system. The judicial system of the European Union and its member states is well established and able to cope with claims of an investor in an effective, independent and fair way. The European Commission should promote the national systems for investor’s claims instead of trying to impose on the Union and the member states a jurisdiction not bound outside the decisions both of the ECJ and the supreme courts of the member states.

- **Independence of Judges of the ICS.**

For the Tribunal of first Instance, fifteen judges will be elected for a term of six years by a “committee” from jurists with being qualified in their respective countries for appointment to judicial office or of recognised competence. They shall have demonstrated expertise in public international law with expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements (art 9). The judges shall be paid a retainer fee of around 2.000.-€ a month, other fees and expenditure, which might be transferred by the Committee into a regular salary (art 9, sect 12-15).

The six judges for Court of Appeal shall be qualified for the highest judicial office in their member state or jurist of recognised competence and will be elected by the committee for six years. Their retainer fee shall be around 7.000.- € a month (sect 10).

Judges both of the Tribunal and of the Appeal Tribunal shall be chosen people whose independence is beyond doubt. They shall be independent from government, and not take instructions from government or organisation with regard to matters related to the dispute. (sect. 11).

These provisions for the election, time of office and remuneration for the judges of the ICS do not meet the minimum standards for judicial office as laid down in the European Magna Carta of Judges or other relevant international texts on the independence of judges.

The Magna Carta points out, that the independence of judges shall be statutory, functional and financial (sect 3). Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence (sect 5).

Neither the appointment, nor the term of office nor the retainer fee meet with this requirements. The committee which is to appoint the judges has not been shaped. However, it is impossible for such a committee to have an oversight on the judges and jurists in all member states of the treaty which might be qualified to be appointed. The treaty keeps quiet about who is going to present suitable candidates to the committee, and or the procedure to be applied. The committee therefore might be a last safeguard against unsuitable appointments, but is no guarantee for an independent appointment in line with sect. 3 of the Magna Carta.

Besides, the proposed text asks for experience in international investment law. However, most of the disputes might arise on matters of national or European law from all scopes of material law and will not have much to do with “investment law”. Therefore, it is doubtful if the criteria for selecting the judges for the ICs are chosen well.

The term of office of six years is much too short to guarantee the independence of the judges appointed.

As the judges do not have to expect a proper salary, their financial independence is in danger. Judges should be appointed by the relevant national mechanisms and have security of tenure.

- **Conclusion**

The European Union and its member states have a well-functioning judicial system which is capable of protecting the rights of an investor in all areas of law. It should be central to an international treaty on trade and investment, to apply this system to investors as the central body to safeguard its rights.

Systems outside this judicial system, either on a basis of arbitration or as a new established International Investment Court System do have to prove that arbitrator or judges in these systems are selected, organized, remunerated and have a term of office which guarantees their personal independence and the independence of the system according to European and international standards. The EAJ is not satisfied that the proposed ICS do meet with this criteria.

For the recognition and execution of decisions of the ICS – even more for those under a tribunal system- it is essential under European Union Law, that at least a final appeal can be made either to the ECJ or one of the national supreme or constitutional Courts, depending on the question of law. The necessity to guarantee the interpretation and application of European Union law and not harmonized national law to the ECJ or a supreme court cannot be given away by an international treaty. This would alter, as the ECJ puts it in its opinion 1/09, the very nature of the European Union Law and might infringe national constitutional law.