

**European Parliament's Committee on International Trade (INTA)
in co-operation with the Committee on Legal Affairs (JURI)**

JOINT PUBLIC HEARING

***Transatlantic Trade and Investment Partnership:
Regulatory Aspects and Investor-State Dispute Settlement/Arbitration***

Freya Baetens

Associate Professor of Law, Leiden University; Associate Lawyer, VVGB (Brussels Bar)

Co-author The Impact of ISDS in TTIP

(prepared for the Ministry of Foreign Affairs of The Netherlands)



Universiteit Leiden
The Netherlands

27 January 2015
European Parliament (Brussels)

Overview

1. Reason behind creation of investment law and ISDS
2. Common misunderstandings concerning ISDS
3. Costs-benefits analysis

Reason behind the creation of investment law and ISDS

- Reaction against arbitrary expropriation and discrimination of foreign property
 - Solution: establishing universal 'minimum rights' for all investors (cfr human rights law)
- Reaction against diplomatic protection
 - Solution: private standing before international tribunal
- State-to-state arbitration?

Common misunderstandings concerning ISDS

- System is used by middle-sized/small investors
- Most cases are won by states
- Most investors are *from* EU (mainly Netherlands, UK and Germany) - very few claims *against* EU countries
- Claims most often concern specific administrative/executive acts affecting one particular investor (not general regulation or legislation) – ‘regulatory chill’ not supported by evidence

Costs-benefits analysis

- National courts are 'good enough'?
- Investment treaties protect investments – should also promote development of host state: more balanced treaty-drafting required, e.g.:
 - Restrictive definition of investor/investment
 - Clear definition protection standards
 - Excluding umbrella clauses and market access rights
 - Incorporating public policy protection

Costs-benefits analysis

- Qualifying procedural access to ISDS:
 - Exhaustion of local remedies vs fork-in-the-road clause
 - Frivolous claims safeguard and 'loser pays' principle
 - Mediation as mandatory precursor/alternative to ISDS

Costs-benefits analysis

- Building safeguards into the arbitral process
 - Transparency
 - Active role for third parties (states, NGOs, international organisations, industry)
 - Code of conduct and roster for arbitrators
 - Appellate mechanism
 - Permanent courts?

Conclusion

- Correct and complete information for law/policy-makers and public
- Advantage of general concerted EU strategy
- Model for future treaties:
 - Negotiation leverage with other countries
 - Unique possibility to set major example = catalyst for improvement global investment law