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

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SPEAKING NOTES – FREYA BAETENS

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1. Reason behind the creation of investment law:
   - Reaction against arbitrary expropriation and discrimination of foreign property
   - Establishing universal 'minimum rights' for all investors – idem for creation of human rights law

2. Reason behind the creation of ISDS:
   - Reaction against diplomatic protection (home state espouses claim of its national, acting on its behalf against foreign state)
   - Essentially political and arbitrary nature of diplomatic protection, i.e. loss of control over claim (which arguments are (not) brought; under which conditions can/should a settlement be accepted) and uncertainty of obtaining an effective remedy
   - Solution: 'private standing' before international courts and tribunals – idem for human rights adjudicatory bodies
   - Consequence: state-to-state arbitration risks elevating economic dispute to 'higher' level, possibly influencing international relations between states as a whole + decision whether to espouse a claim would not necessarily be taken on legal grounds (whether investor has been injured), but other factors (relative size of the state, need for foreign aid) would also play

3. Common misunderstandings concerning current system:
   - ISDS is mainly used by 'middle-size' (or even small) investors – large multinationals have often other means of solving disputes at their disposal
   - Most ISDS cases are won by respondent states; even in those that are won by the claimants, the investors usually receive much less compensation than what they asked for
   - Investors *from* EU Member states bring most claims: 225 in total (compared with US investors: 125) – more specifically, by investors from The Netherlands (61), the United Kingdom (42) and Germany (39)
   - Virtually no claims are brought against these countries
   - Claims are most often not brought against legislation or general regulation, but against administrative or executive decisions affecting one particular investor in the framework of a specific concession, permission or promise

- In the few cases where an investor did challenge legislation, the investor almost invariably lost the case.
- The existence of 'regulatory chill' (governments would refrain from enacting rules concerning the environment, health, etc. because they fear arbitration cases) has never been conclusively proven – there does seem to be an impact in terms of 'precautions' taken, for example, when decisions affecting foreign investors are taken, executive authorities act with more transparency (e.g. consultation) and insert disclaimers in order to safeguard future changes in policy – is this such a bad development?

4. <u>Costs-benefits analysis: the system is far from perfect and needs to be improved</u>:
   - Often-heard argument: national courts are 'good enough'
     - Good legal protection does exist under national laws of the EU and the US but is unfortunately not always consistently applied in 'politically sensitive' cases (national loyalty)
     - According to this line of argument: should the European Court of Human Rights be abolished? Like the ECtH, ISDS is meant to address the most egregious cases where investors' rights have clearly been violated by a state and where national authorities have not been able or willing to rectify the situation
     - Common misconception: national court proceedings are not necessarily less expensive as the state pays not only its own legal costs, but also most of the costs of the proceedings (salaries of judges and support staff, upkeep of court buildings, etc.) and in many countries two or even three instances are able to examine a case (i.e. doubling or tripling the costs)

   - Investment treaties are supposed to protect investments as well as promote development of the host state: the first element currently overshadows the second --- this can be remedied by better treaty-drafting, for example:
     - Restrictive definition of protected investors and investments (denial of benefits in case of 'mailbox companies' and nationality-shoppers; prudential and other carve-outs for particularly sensitive sectors such as the banking industry)
     - Clarifying vague treaty standards, such as fair and equitable treatment
     - Excluding umbrella clauses which allow for national contract claims to be brought under the umbrella of the treaty and its international dispute settlement mechanism
     - Excluding market access rights, restricting protection to already established investments
     - Incorporating public policy protection (health, environment, human rights objectives,…)

   - Qualifying procedural access to ISDS:
     - Exhaustion of local remedies (whereby the investor has to go through the entire national court process - from court of first instance, over appeals court, to the supreme court - before being able to bring an international claim: not recommended: adds massively to the cost and duration of proceedings) or 'fork in the road' clause (investor has to either initiate national court proceedings, or international arbitration, but not both)
     - Frivolous claims safeguard: offering tribunals a way to reject manifestly unfounded claims at a preliminary stage – linked to a 'loser pays' principle whereby a frivolous claimant has to pay (in addition to its own legal costs), all costs of the proceedings and possibly even the legal costs of the respondent

  - Mediation as mandatory precursor/alternative to ISDS proceedings: claimants need to resort to mediation (in a 'serious', good faith manner) before being able to initiate arbitral proceedings

- Building safeguards into the arbitral process
  - Transparency (2013 UNCITRAL rules): publication of information about the dispute (final awards are in the large majority of cases already in the public domain but also: open hearings, written submissions and evidence online available) with exception (to be interpreted restrictively) for classified information (for states) and confidential business information (for investors) --- when in doubt whether the exception should apply: tribunal should decide (not self-judging)
  - Active role for other states that are parties to the treaty, as well as third party stakeholders (NGOs, international/regional organisations, industry)
  - Code of conduct (clear disclosure rules; avoiding conflicts of interest) and roster of arbitrators ('menu' of potential arbitrators to choose from, selected by all states that are members to the treaty, ahead of any conflict)
  - Appellate mechanism (as suggested by Commission): will add to the stability, predictability and legitimacy of investment law; mistakes can be remedied >< will also add to the duration (and cost) of proceedings --- evolution of WTO Appellate Body: in the beginning, nearly all 'losing parties' appealed, over time a more stable jurisprudence developed and the number of appeals decreased
  - Another possibility: creation of a standing or permanent bilateral 'TTIP' court (however: more expensive as permanent judges need a permanent salary, a building, administrative support, regardless of whether cases are ongoing)
    - a standing or permanent court for all investment cases (TTIP and other BITs) has also been suggested: politically unrealistic as it would mean that a large number of states would have to agree on exactly the same judges
    - for the same reasons of lack of political agreement, it seems unfeasible to hope for the creation of an international organization with a separate dispute settlement body, such as the WTO
    - both have been tried and failed (Multilateral Investment Agreement and International Trade Organisation / Havana Charter)

5. Conclusion:
   - Most important, regardless of whether investment is included in TTIP or not: correct and complete information for law/policy-makers and the broader public
   - Including an investment chapter in TTIP has advantages and disadvantages; the current system is far from perfect but improvement is possible to remove or mitigate current criticism
   - Advantage of general concerted EU strategy, rather than individual country strategy (3000 IIAs already exist, almost half were concluded by EU Member States, including major treaties such as the Energy Charter Treaty to which all EU member states are parties)
   - TTIP could serve as a model for future treaties: EU negotiation leverage for treaties with other countries (e.g. China) + unique possibility to set a major example which can serve as a catalyst for the improvement of international investment law globally.