Shortcomings in Dutch government study on investor – state arbitration

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The Dutch Parliament asked the government for a study on investor-to-state dispute settlement (ISDS) in the proposed EU – US trade agreement (TTIP). This Note compares the resulting study by Tietje, Baetens and Ecorys with a European Commission consultation document and a Statement of Concern published by over 110 scholars.

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Summary

This Note concludes that the Tietje, Baetens and Ecorys study fails to notice essential shortcomings of investor-to-state arbitration. Modern democratic societies separate powers: legislature, government, and courts. Investor-to-state arbitration on the other hand concentrates power. The ISDS system gives arbitrators the power to review all decisions by legislatures, governments, and courts, but does not observe the separation of powers, lacks basic institutional safeguards of judicial independence, creates perverse incentives, and gives the US an unfair advantage.

Specifically, the study

- does not mention serious issues with the fair and equitable (FET) standard,
- presents a stabilisation clause (changes to laws are only allowed if compensation is paid) as uncontroversial,

- presents an aspirational definition of indirect expropriation, which is industry friendly, not democracy friendly, as the accepted definition under international law,
- does not mention that in investment treaties investor rights trump human rights,
- does not mention serious sovereign debt issues,
- does not mention that ISDS lacks conventional institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators,
- does not mention that a for-profit asynchronous arbitration mechanism – arbitrators are paid for their task at least 3000 US dollar a day – creates perverse incentives: accepting frivolous cases, letting cases drag on, letting the only party that can initiate cases (foreign investors) win to stimulate more cases, pleasing the officials who can appoint arbitrators,
- discusses the ICSID appeal procedure, without mentioning that the president of the World Bank (in practice appointed by the US) appoints all three the arbitrators in annulment cases under ICSID rules, which gives the US an unfair advantage,
- does not mention a study that finds that claimants from the US were 91% more likely to benefit from an expansive resolution than claimants from all other states combined,
- mentions the Loewen case without mentioning that the US pressured an ISDS arbitrator,
- does not mention that a system that gives the US an unfair advantage is a serious threat to the EU's privacy protection,
- does not mention that we can not expect EU investors to win major cases against the US,
- does not mention that it is near impossible to withdraw from trade agreements, as a consequence flaws in the ISDS procedure in a trade agreement will be as good as impossible to solve,
- concludes that the risks of ISDS are overstated – a conclusion which is based on flawed statistics.

Introduction

This Note compares a Dutch government study on investor-to-state arbitration with a European Commission text and a Statement of Concern published by over 110 scholars (hereinafter "Scholars").

Investor-to-state dispute settlement tribunals can review all decisions by legislatures, governments, and courts, and they can award unlimited damages. The largest ISDS arbitration award to date is 50 billion US dollar. ISDS gives foreign investors, usually multinationals, the right to circumvent domestic courts and challenge – under broad conditions – decisions of states for international investment tribunals if decisions may lead to lower profits than expected.

On 3 December 2013 the Dutch Parliament (Tweede Kamer) adopted a resolution in which it asked the government to "investigate, in the short term, the potential social and environmental risks and the consequences of ISDS for the Netherlands and the financial risks for the Dutch government, and to inform the House about the results of this research;" (translation: FFII, 2013)

On 27 March 2014 the European Commission launched a public online consultation on investor protection in TTIP. (Commission, 2014a)

On 17 April researchers, companies and civil society organisations met at the Dutch Ministry of Foreign Affairs to discuss the ongoing "ISDS - TTIP study". The ministry invited participants to send in further comments. Four organisations submitted comments; the Foundation for a Free Information Infrastructure submitted the note "ISDS threatens privacy and reform of copyright and patent law". (FFII, 2014a) At the meeting the ministry announced it would organise an other meeting to discuss the final result. (Buza, 2014) That meeting never took place. At this meeting participants could have pointed out flaws in the study.

On 21 May representatives of 4 civil society organisations and a business association met at the Ministry of Foreign Affairs. The participants discussed the ISDS system's lack of basic institutional safeguards of judicial independence, and the non neutral appointment of arbitrators.

On 24 June the Dutch government published "The Impact of Investor-State Dispute Settlement (ISDS) in the TTIP" by Tietje, Baetens and Ecorys (2014). According to this study the risks of ISDS are overstated.

In July the Scholars published a Statement of Concern about Planned Provi-

sions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), their submission to the EU commission's public consultation on investor-state arbitration in TTIP, written by Harm Schepel, Peter Muchlinski, Horatia Muir Watt and Gus Van Harten. They conclude the EU commission's plans fail on many counts. (Scholars, 2014)

In August the text of the EU-Canada trade agreement leaked, the CETA consolidated text, version of 1 August 2014. (Commission, 2014b)

This Note is divided into two sections. Section 1 discusses substantive investment protection issues: fair and equitable treatment of investors (1.1), indirect expropriation (1.2), right to regulate (1.3), and sovereign debt (1.4).

Section 2 discusses procedural and other issues: no separation of powers (2.1), statistically significant evidence (2.2), Loewen case (2.3), human rights (2.4), flawed statistics (2.5), risk mitigation (2.6), and context (2.7).

(In quotes, footnotes are removed.)

1 Substantive protection rules

1.1 Fair and equitable treatment of investors

The Scholars note that the Commission rightly seeks to curtail unwarranted interpretation of the fair and equitable treatment clause.

In its consultation document the commission writes: "The FET standard is present in most international investment agreements. However, in many cases the standard is not defined, and it is usually not limited or clarified. Inevitably, this has given arbitral tribunals significant room for interpretation, and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework."

Tietje, Baetens and Ecorys state that "Although a seemingly vague concept, fair and equitable treatment has been interpreted by arbitral panels very

narrowly to only include a violation of an investor's fundamental rights or a denial of justice." (paragraph 109)

Contrary to what Tietje, Baetens and Ecorys state, this is not a very narrow interpretation, as "investor's fundamental rights" would include the investor's right to property (and investment is defined very broad in investment treaties).

Tietje, Baetens and Ecorys continue: "Fair and equitable treatment obliges states to accord basic substantive and procedural rights pursuant to the rule of law. Investors are entitled to a stable and predictable legal framework, consistent decision-making by the host state, procedural due process, protection against discrimination and arbitrariness, and transparency in dealing with the host government."

These are not basic rights. Especially "a stable and predictable legal framework" is problematic. Are states only allowed to change their laws if they pay compensation? The commission writes in its consultation document: "The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change. Thus the EU intends to ensure that the standard is not understood to be a 'stabilisation obligation', in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors."

The Tietje, Baetens and Ecorys study takes an industry friendly position that puts a price on legislative changes, a situation the EU commission states it intends to avoid.

The commission notes serious issues with the FET standard. The FFII (2014a) had brought issues with the FET standard to the attention of Tietje, Baetens and Ecorys. However, the study denies there are issues with the FET standard.

The Scholars note that history suggests that the Commission's approach is unlikely to have the desired effect. (Scholars, 2014, answer to question 3)

Tietje, Baetens and Ecorys deny serious issues regarding the FET standard.

1.2 Indirect expropriation

In its consultation document the European Commission writes: "Indirect expropriation has been a source of concern in certain cases where regulatory measures taken for legitimate purposes have been subject to investor

claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements do not provide details or guidance in this respect, which has inevitably left arbitral tribunals with significant room for interpretation."

Tietje, Baetens and Ecorys conclude (paragraph 108): "In sum, the accepted definition of indirect expropriation under international law allows host states the freedom to regulate for the public interest so long as the regulation serves a legitimate and non-discriminatory purpose, strikes a proportionate balance between the protection of the investor's investment and the public interest, and does not substantially interfere with a specific investor's property rights."

The freedom to regulate is subjected to many tests, according to Tietje, Baetens and Ecorys. This would be "the accepted definition of indirect expropriation under international law". If true, international law would strongly limit the freedom to regulate. But how did Tietje, Baetens and Ecorys come to this conclusion?

Tietje, Baetens and Ecorys (paragraph 96) rightly observe that the European Court of Human Rights adopted a broad interpretation of public interest and allowed states a wide margin of appreciation in determining their own public concerns. Then they discuss ISDS tribunal awards to distill their "accepted definition of indirect expropriation under international law".

Their reasoning is based on ISDS tribunal awards and leaves out counter indications, such as the controversiality of ISDS, as shown for instance by the failure to conclude the Multilateral Agreement on Investment, the debates, the commission's consultation, and the Dutch resolution leading to the Tietje, Baetens and Ecorys study; the possibility to not sign, withdraw from or renegotiate ISDS treaties; and the fact that presently only a minority of foreign investments is covered by ISDS.

States can simply avoid this limitation of their freedom to regulate by not signing ISDS treaties, which leads to the conclusion that "the accepted definition" is not an accepted definition under international law, but is at best aspirational. Moreover, the aspiration is industry friendly, not democracy friendly.

In their answer to question 4 the Scholars (2014) make various observations regarding the commission's plans. First, they note the commission's intention "to avoid claims against legitimate public policy measures". However, they observe that the CETA reference text does no such thing.

Second, they note: “All this achieves is to invite arbitration tribunals to engage in yet more discretionary proportionality analysis with, arguably, a somewhat stricter standard of review: ‘manifestly excessive’ rather than ‘not necessary.’ Tribunals will have a license to substitute their opinion for that of a democratic government on the relative importance of the purpose the measures at issue seek to achieve, and to engage in cost-benefit analysis to see whether the costs imposed on investors are ‘excessive.’ In the process, they will also feel empowered to analyze, as part of the determination of whether the impact of a measure is ‘excessive’ in light of its purpose, whether the measure at issue ‘substantially advances’ that stated purpose.”

Third, the Scholars conclude: “It may be grounded in several awards of investment tribunals, but to bring proportionality analysis into the definition of what constitutes an ‘indirect expropriation’ is, quite simply, conceptually flawed”. For the analysis this Note refers the reader to Scholars (2014). The Scholars conclude that under international law “non-discriminatory measures taken in the exercise of a State’s regulatory powers aimed at the general welfare, and which involve the exercise of States’ ‘police powers’, are simply not ‘expropriations’ requiring compensation.”

The Tietje, Baetens and Ecorys study presents an aspirational definition of indirect expropriation, which is industry friendly, not democracy friendly, as the accepted definition under international law.

1.3 Right to regulate

The Scholars conclude regarding the right to regulate: “By its omissions, the consultation text actually confirms boldly that the right to regulate has not been affirmed and preserved, by a clear and unequivocal statement of the right, alongside the rights and protections of foreign investors.” (Scholars, 2014, answer to question 5)

Tietje, Baetens and Ecorys bring a new element into the discussion, a new text. They state in paragraph 132 that the commission’s draft TTIP text article 1 will contain the following: “Consistent with the provisions of this Title, each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as protecting society, the environment, and public health, ensuring the integrity and stability of the financial system, promoting public security and safety, and promoting and protecting cultural diversity.”

The commission did not provide this text in its consultation. Tietje, Baetens

and Ecorys seem to have access to a newer draft version. However, the text does not offer an improvement, as the formulation begins with “Consistent with the provisions of this Title”, meaning that the right to regulate is limited by the other provisions of the Title.

As a side remark, the CETA consolidated text, version of 1 August 2014, does not contain this non-improvement. (Commission, 2014b) The CETA text has a reference to the right to regulate in the non-binding preamble.

1.4 Sovereign debt

The Scholars note that the commission’s proposals do not exclude sovereign debt: “In light of the social misery and hardship the sovereign debt crisis has brought, it requires little discussion to conclude that the mere thought of speculative investors in government bonds seeking damages before investment arbitration Tribunals is utterly unacceptable. The only appropriate way of excluding this possibility is clearly and unequivocally to exclude acquisitions of sovereign debt from the definition of ‘investment’.” (Scholars, 2014, answer to question 1)

Tietje, Baetens and Ecorys do not note the serious issues with sovereign debt. The FFII had alerted the researchers to issues regarding this and also noted that the filter mechanism proposed by the commission creates a perverse incentive. (FFII, 2014a)

2 Procedural rules, further issues

2.1 No separation of powers

In its consultation document the commission writes: “There is concern that arbitrators on ISDS tribunals do not always act in an independent and impartial manner. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or conflicts of interest.” (Question 8)

Tietje, Baetens and Ecorys note: “In ISDS the party to the dispute can appoint its ‘own’ arbitrator, who could then be seen as ‘loyal’ to the party that appointed them. However, as both parties can select an arbitrator, this helps to cancels out bias, and as arbitrators need to be re-appointed for every

case, they tend to be aware of the need to be (and be seen as) unbiased in order not to jeopardise future appointments." (paragraph 136)

This observation is not reassuring. First, it confirms that arbitrators have future appointments in mind while making decisions. They position themselves through their decisions for future financial gain.

Second, arbitrators have great power, but this power is not surrounded by conventional institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators.

Third, a for-profit asynchronous arbitration mechanism creates perverse incentives. Arbitrators are paid for their task at least 3000 US dollar a day. This for-profit system creates perverse incentives: accepting frivolous cases, letting cases drag on, letting the only party that can initiate cases (foreign investors) win to stimulate more cases, pleasing the officials who can appoint arbitrators.

Fourth, the claimants have a 50% influence on the make-up of tribunals. And the executive has a 50% influence on the make-up of tribunals. In a court neither the claimant nor the executive has an influence on appointments, as both parties are not neutral. A government may dislike a law by the former legislative and appoint an arbitrator accordingly. Only courts should decide on constitutional matters and questions of law. The ISDS mechanism does not observe the separation of powers.

Fifth, in practice the US appoints the president of the World Bank. This president

- is ex officio chairman of the International Centre for Settlement of Investment Disputes (ICSID) Administrative Council,
- proposes the ICSID secretary-general,
- appoints all three the arbitrators in annulment cases under ICSID rules (the only possible appeal).

The secretary-general of ICSID

- appoints the third arbitrator if the parties can not agree on the third one,
- will decide on conflicts of interest. (ICSID, articles 5, 10, 38, 52 and Commission, 2014a, Table 8, article x-25.10)

These officials have a link with the US, giving the US an unfair advantage. The US never lost an ISDS case; we can not expect EU investors to win major cases against the US.

The Tietje, Baetens and Ecorys study elaborates on the ICSID appeal procedure (paragraph 256) without mentioning that the president of the World Bank appoints all three the arbitrators in appeal cases under ICSID rules.

These procedural issues are not solved by the commission or the proposals by Tietje, Baetens and Ecorys. The procedural issues are essential for a good understanding of the ISDS mechanism. A longer quote from Scholars (2014, answer to question 8):

"Conflicts of interest: The Commission, rightly, has misgivings about the standards of ethical behavior and conflicts of interest that prevail in the investment arbitration regime. The reference text from CETA does not assuage the fears. While it envisages an unresolved or undisclosed code of conduct to be adopted by Parties, it relies for the time being on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. This instrument, despite being elaborated under the aegis of the IBA, is an act of self-regulation by and for the international arbitration community. The text puts the power to decide on challenges of arbitrators in the hands of the ICSID Secretary-General instead of a judicial official. In light of what was said above this is inappropriate.

The Commission's stated intention is to introduce a code of conduct in the text of the new Treaty. It is so vague on the contents of this code that is difficult to come to any judgment. For example, even if the document mentions concerns arising from the fact that arbitrators often appear in various roles in different proceedings, the document falls short of proposing what is clearly the one single most important rule that is necessary: that arbitrators appointed in cases under the present Treaty may not themselves simultaneously be involved in any capacity other than as an adjudicator in any other investment arbitration, nor have any professional association whether in the context of a law firm, Barrister's chambers, or any other similar relationship with anyone who is involved as counsel or party-appointed expert in any investment arbitration. A few arbitrators self-impose this rule. Other arbitration systems, such as, for example the Court of Arbitration for Sport, have versions of this rule. Its absence in a process to review decisions by legislatures, governments, and courts in matters of profound importance to large numbers of people, at potentially vast cost to the public purse, is totally unacceptable.

One consideration underlying this rule has its basis in the economic interests involved with the (generously compensated) arbitrator appointments themselves. Here, the suspicion is that arbitrators, when they act as counsel, will appoint another arbitrator who may in turn in a subsequent case, when acting as counsel, appoint the first. This is certainly a concern, but the more important consideration sees to the economic interests involved with the representation of claimants: law-firms involved in this work have a clear interest in making sure that claims under investment treaties have a good chance of success, and, given the practice of working on contingency fees, a clear interest in higher rather than lower awards. It is imperative, from this point of view, to make sure that no one who stands to profit in any way from the income generated by the representation of parties to investment disputes acts as an arbitrator.

More broadly, in a system where only one side, foreign investors, can bring claims, does not everyone such as a retired judge who works in the system and wants to continue doing so have an apparent economic interest to encourage more claims? Even with the most robust code of conduct, the absence of basic institutional safeguards of judicial independence undermines fundamentally the claims of investor-state arbitration to neutrality and impartiality."

2.2 Statistically significant evidence

The Tietje, Baetens and Ecorys study does not mention a study on expansive interpretation by ISDS tribunals. The study "examines trends in legal interpretation instead of case outcomes and finds statistically significant evidence that arbitrators favour: (1) the position of claimants over respondent states and (2) the position of claimants from major Western capital-exporting states over claimants from other states."

The study finds that claimants from the US were 91% more likely to benefit from an expansive resolution than claimants from all other states combined.

The study concludes: "These tendencies, especially in combination, give tentative cause for concern and provide a basis for further study and reflection on the systems design, not least because the use of investment treaty arbitration appears to be a relatively recent phenomenon." (Van Harten, 2012)

2.3 Loewen case

During the 17 April 2014 meeting at the Ministry of Foreign Affairs one of the participants said that the US local court treated investor Loewen in a horrible way (after that Loewen started an ISDS case).

An other participant mentioned that in the Loewen case the US put pressure on an ISDS arbitrator. After the Loewen ISDS case one of the tribunal members publicly conceded having met with officials of the US Department of Justice (DoJ) prior to accepting his appointment. The DoJ put pressure on him. (Kleinheisterkamp, 2014)

The US won the Loewen case on a technicality. The participants of the meeting at the ministry discussed the ISDS mechanism's vulnerability to outside pressure.

In its submission to Tietje, Baetens and Ecorys, the FFII again mentioned the US pressure on the ISDS arbitrator and the system's vulnerability to outside pressure. (FFII, 2014a)

Tietje, Baetens and Ecorys write: "Although it is undisputable that both the US and the Netherlands have strong rule-of-law traditions, questions of the impartiality of domestic courts could possibly arise due to the sensitive and at times highly political character of the cases at issue particularly (but far from exclusively) in cases decided by lay juries. The Loewen case may serve as an example. In this case, the arbitral tribunal held that the rights of a Canadian investor had been violated by US courts. The tribunal found that 'the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment', although the claim was fortuitously held inadmissible on other grounds."

The study mentions the Loewen case without mentioning the pressure the US put on the arbitrator, without mentioning the system's vulnerability to outside pressure.

The Loewen case highlights that adjudicators can use a technicality to tip the scale. This makes institutional safeguards for independence all the more important.

2.4 Human rights

The Tietje, Baetens and Ecorys study does not mention serious issues with human rights. The FFII (2014a) had brought these issues to their attention. See also FFII (2014b, sections 1.6, 2.2.3, 2.2.5, 2.2.7, 3.1, 3.1.1 and 3.1) and Scholars (2014, answer to question 1, regarding "In accordance with applicable law" and answer to question 2, regarding article XX GATT).

2.5 Flawed statistics

Tietje, Baetens and Ecorys write: "The second argument against regulatory chill is that most ISDS claims do not challenge legislative acts. Instead, the vast majority of 'regulatory' challenges are administrative in nature: they arise from a preexisting contract, permit, license, or promise from the government. In a study published in April 2014, researchers Jeremy Caddel and Nathan Jensen concluded that the vast majority of investor-state claims arise from executive branch decisions instead of legislative decisions. After analyzing all concluded ICSID decisions, the researchers found that 47% of disputes were associated with ministries or agencies while only 9% (14 total cases) resulted from legislative acts. According to the study: 'Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated'."

Tietje, Baetens and Ecorys overlook that Caddel and Jensen present flawed statistics. Investors primarily challenge decisions and may further challenge an underlying regulation. Caddel and Jensen characterized cases on the type of decision that in their view was primarily challenged, an approach that removed the majority of cases in which a legislative decision was challenged (secondarily).

Moreover, regulatory chill is a limited concept. ISDS having a chilling effect on decisions limits policy space as well. This is a conceptual flaw in the Tietje, Baetens and Ecorys study.

2.6 Risk mitigation

From page 94 on the Tietje, Baetens and Ecorys study discusses risk mitigation. As the authors overlook major issues the safeguards they propose fail to solve these major issues.

For the most part the safeguards they propose are similar to the commission's plans. This Note refers the reader to Scholars (2014) who extensively discuss these plans.

2.7 Context

EU Member States have some 1400 bilateral investment treaties (BITs) in place. This does not make inclusion of ISDS in EU trade agreements uncontroversial. It is possible to withdraw from BITs; it is practically impossible to withdraw from trade agreements. Adding ISDS to trade agreements creates a lock-in, so that flaws in the system will be almost impossible to repair.

The number of cases is rising. In 2013, investors initiated at least 57 known ISDS cases, 24 (42%) of them were filed against EU member states. (UNCTAD, 2014a)

BITs are in place between the US and nine "new" EU Member States; they cover one per cent of US foreign direct investment stock in the EU. To date, there are nine known US investor claims against EU countries. (UNCTAD, 2014b)

One per cent of US foreign direct investment stock in the EU led to nine ISDS cases. Coverage of 100% of US foreign direct investment stock in the EU may lead to hundreds of cases.

The largest ISDS arbitration award to date is 50 billion US dollar.

The Scholars write: "It is true, as the Commission points out, that nine Member States already have BITs in place with the US. It may also be true that, for these nine Member States, the new arrangement might be a better alternative than 'doing nothing.' That, however, hardly seems enough reason to impose on the other two thirds of Member States a Treaty that profoundly challenges their judicial, legal and regulatory systems."

The European Commission issued an injunction prohibiting the government of Romania to pay an ICSID award of more than 250 million US dollar. The commission "had intervened in the underlying arbitration in an effort to persuade arbitrators that the measures taken by Romania sprung from the country's efforts to conform with EU law obligations to eliminate so-called state-aids (e.g.subsidies and incentives)." The arbitral tribunal "were unmoved by the arguments presented by the European Commission." (IA Reporter, 2014)

The injunction may not help Romania as the claimants can seize Romania's assets in 150 countries, but does highlight the tension between EU law and ISDS tribunal decisions.

Conclusion

This Note concludes that the Tietje, Baetens and Ecorys study fails to notice essential shortcomings of investor-to-state arbitration. Modern democratic societies separate powers: legislature, government, and courts. Investor-to-state arbitration on the other hand concentrates power. The ISDS system gives arbitrators the power to review all decisions by legislatures, governments, and courts, but does not observe the separation of powers, lacks basic institutional safeguards of judicial independence, creates perverse incentives, and gives the US an unfair advantage.

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