UNIVERZA V LJUBLJANI
FAKULTETA ZA DRUŽBENE VEDE

Lučka Vavpetič

Mehanizmi za reševanje sporov med investitorji in državami v prostotrgovinskih sporazumih, Transatlantic Trade and Investment Partnership in Comprehensive Economic and Trade Agreement, ter njihov vpliv na evropske javne politike

Investor-State Dispute Settlement Mechanisms in Transatlantic Trade and Investment Partnership and Comprehensive Economic and Trade Agreement and its impact on European policies

Magistrsko delo

Ljubljana, 2016

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Mednarodni investicijski sporazumi, skupaj z mednarodnim pravom in mednarodnimi institucijami tvorijo kompleksno sestavo svetovne trgovine, ki dobiva vedno bolj pomembno vlogo tudi v domačem političnem okolju. Reševanje sporov je bil že od nekdaj bistven izziv za mednarodno skupnost. Z nastankom moderne države, je bilo reševanje trgovinskih sporov predvsem politično, z vse večjo liberalizacijo držav in trga pa je postajal vedno bolj depolitiziran. Prostotrgovinski sporazumi kot sta Transatlantic Trade and Investment Partnership (TTIP) in Comprehensive Economic and Trade Agreement (CETA), razburjata javnost predvsem zaradi vključitve relativno novega mehanizma ISDS (Investo-state dispute settlement), ki omogoča tujim investitorjem neposredno tožiti državo, če naj bi ta kršila ali diskriminirala tujega investitorja. Predvsem okoljevarstveniki, skupine za zaščito potrošnikov in sindikati opozarjajo, da bi lahko prišlo do zlorabe tega mehanizma, nižanja okoljski in delavskih standardov, z namenom povečanja profita tujih podjetji. V svoji magistrski nalogi sem analizirala ISDS in njegov učinek na javne politike. Skozi zgodovinsko analizo sem predstavila političen, pravni in teoretski razvoj mednarodnega trgovinskega sistema, ki je pripeljal do nastanka takšnega mehanizma. S študijo primera prostotrgovinskega sporazuma North American Free Trade Agreement (NAFTA) sem raziskovala potencialne učinke na evropske javne politike, kot so okoljevarstvene, kmetijske, delavske ali zdravstvene javne politike.

Ključne besede: mehanizem za reševanje sporov med investitorji in državami, evropske javne politike, prostotrgovinski sporazumi, liberalizacija trga

Investor-State Dispute Settlement Mechanisms in Transatlantic Trade and Investment Partnership and Comprehensive Economic and Trade Agreement and its impact on European policies

International investment agreements together with the international law and international institutions are forming a complex composition of world trade, which is gaining increasingly important role also in the domestic political environment. Settling of disputes has always been a significant challenge for the international community. With the creation of modern state, resolving trade disputes was mainly political act, but since states have increasingly liberalized markets, it has become more depoliticized. Free trade agreements such as the Transatlantic Trade and Investment Partnership (TTIP) and Comprehensive Economic and Trade Agreement (CETA), upset the public primarily due to the inclusion of a relatively new mechanism ISDS (investo-state dispute settlement), which allows foreign investors directly sue the host state if the state violated or discriminated the foreign investor. Especially environmentalists, consumer protection groups and trade unions warn that could lead to abuse of this mechanism, the lowering of environmental and labor standards, in order to increase the profits of foreign companies. In my master thesis I analyzed the ISDS and its impact on public policy. Through historical analysis I presented the political, legal and theoretical development of the international trading system, which led to the creation of such mechanism. With the case study of Free Trade Agreement North American Free Trade Agreement (NAFTA), I researched the potential effects on European public policy, such as environmental, agricultural, workers' health or public policy.

Keywords: investor-state mechanism, European policies, free trade agreements, market liberalization

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1 INTRODUCTION

Disputes are an imminent part of life. We all had disagreements with other people, whether with other family members, friends, co-workers or authority figures. People often do not see eye-to-eye or just have different interests which is not surprising and also not necessarily a bad thing. A discord can push for new ideas and better solutions and can, in the end, even bring people closer together, but only if provided an environment for a constructive debate.

A dispute can be characterized as a distinct disagreement regarding an exact issue, policy or law in which a claim or allegation of one party is met with counter-claim, resistance or rebuttal. An international dispute therefore exists whenever such a disagreement implicates governments, institutions, juristic persons (corporations) or private individuals in various parts of the world (Merrills 1996, 1). Since international disputes are also inevitable part of foreign relations, they need to be handled with a systematic approach.

The essential condition is the commitment to pursue disputes only by peaceful means. Standardized methods for nonviolent dispute settlements on a domestic level where set basically parallel with the formation of first states. Laws and institutions were established to inhibit self-help and facilitate that disagreements are to be resolved without interrupting the social order (Ibid). The progress was much slower on the international parquet, where originally the topic was looked down as trivial. "The emergence of international law, which in its modern form can be dated from the seventeen century, was accompanied by neither the creation of a world government, nor a renunciation of the use of force by state" (Merrills 1996, 1).

Only in last century is settling disputes become the main pillar in international trading system. Guidelines are negotiated among trading parties and dispute mechanisms provide protection in the event if one party makes a violation of those guidelines. Without specified rules that must be adhered by all trading parties and an effective way to amicably resolve quarrels, the whole system collapse.

A broad network of international investment agreements (IIAs) amplified by the rule of international law is the platform for the existing regulation of foreign investment. Even though this network interacts with other international treaties in important ways, IIAs are the primary public international law instrument regulating the promotion and protection of foreign investment (Newcombe and Paradel 2009, 1). Although each IIA is specific, as the

result of a particular agreement between different parties, they all have similar form and content. Most IIAs incorporate very much alike treaty-based standards of promotion and protection for foreign investment with an investor-state arbitration mechanism that admits foreign investors to impose these standards against host states. This network of IIAs grants foreign investors a vigorous and dynamic technique of international treaty enforcement (Newcombe and Paradel 2009, 1–2).

The rapid increase in the use of investor-state dispute settlement (ISDS) in recent years underlines the legitimacy of the international investment system, and raises concerns about the functional inadequacy of ISDS's. This phenomenon is currently highlighted by the European Union's attempt to adopt two major trade agreements, the Transatlantic Trade and Investment Partnership (TTIP), with the United States, and the Comprehensive Economic and Trade Agreement (CETA) with Canada. The negotiations for TTIP are still ongoing, whereas the negotiations for CETA are completed and it is in the process of democratic confirmation. Both trade agreements include investor-state dispute settlement mechanisms, which is the most controversial element of these already contentious trade agreements.

"Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures" (United Nations Conference on trade and development 2013). Critics emphasize that ISDSMs allow foreign investors to bypass domestic courts to directly challenge government measures before unaccountable, *ad hoc* arbitration tribunals. Furthermore, the Commission's introduced definition of investment broadens the scope of protection far beyond what is commendable from a regulatory or public interest perspective (Sinclair 2014).

2 CONCEPTUAL FRAMEWORK

2.1 RELEVANCE AND OBJECTIVES OF THIS THESIS

In my theses I will analyze the investor-state dispute mechanism and research the advantages and disadvantages that it has or might have for broader state politics and policies. My focus will be on the ISDSMs in TTIP and CETA, and their potential effect on the policies of the European Union's Member States that are not strictly investment policies.

In the last few years there has been a remarkable outrage among the public over the impact of TTIP and CETA on democracy. Majority of the opponents of the agreement have been labor groups, consumer protection groups and environmental protectionists. But lately increasingly more academics, international organizations and lawyers have made oppositions, mainly toward the investment protection clause that incorporates the investor-state dispute settlement mechanism.

One of the primary critics of both multilateral trade agreements is that they are being negotiated in secret and the text is not publicly available. The reason is that agreements, which are strictly trade related, do not have to oblige the EU transparency rule. But the concern is, that this are not strictly trade agreements, and will affect EU's public policies and therefore it should be public. European commission (EC) is negotiating on behalf of EU and has made some of the draft provisions in the TTIP publicly available. Whole official CETA text has also been published on-line by the EC in July this year.

An article about the ISDS in the Economist (2014) started with a very horrific introduction, "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do…" It argues that private firms learned to abuse the mechanism and are getting even so bold that they buy firms in countries, where they have the jurisdiction and can simply apply to gain access of the mechanism. One case that also gained some public attention is Vattenfall v. Germany. After the Fukushima disaster in Japan in 2011 Germany decided to close its nuclear power industry. Subsequently, Vattenfall, a Swedish company that operates two nuclear plants in Germany, used ISDS in Energy Charter Treaty and demanded compensation of 3.7 billion Euros (The Economist 2014).

Statements like these made me question national and international law and the level of democracy, especially in European Union, since I am an European citizen. If private foreign entities are capable to sue national governments for protecting the environment or public health and safety or other public interests, what does that mean for democracy? It made me interested to research the so-called ISDS mechanism and find out if it really gives such a unprecedented power to businesses.

The aim of this thesis is to disclose whether the assertions that this mechanism will strengthen the impact of businesses on health, environmental, labor or agricultural policies are plausible.

Therefore, the objective of the thesis is to determine the outcome impact of ISDS on national policies but first it has to be established whether or not there are any in the first place.

2.2 RESEARCH QUESTIONS

How transparent and legitimate is the investor-state dispute mechanism in TTIP and CETA?

Does ISDSM in TTIP and CETA enable private businesses to challenge national policies, such as environmental, health, agricultural or labor policies?

2.3 METHODOLOGY

This thesis is divided into three parts. First, is the overview of the historical evolution of international dispute settlement system with the theoretical explanation. The second part focuses on the modern system of investor-state dispute settlement mechanism and the international trade agreements, TTIP and CETA, so that it presents and analysis important cases and statistics. The last part is a comprehended case study of North American Free Trade Agreement's (NAFTA) investor-state claims. I chose NAFTA because is the most similar trade agreement to TTIP and CETA and supposedly has identical ISDS mechanism.

I must note that when I started to write my thesis, none of the agreements were made public yet. My approach to the research is based on analyzing previous and present cases and theories to find a likely conclusion. But this year we saw a lot of changes; the investor protection clause in both agreements has been reformed; CETA text has been made public; and even some of the draft provisions in TTIP are officially available on-line, and not just on Wiki-leaks. I will address these changes, but the main focus will be on the ISDS as it exists so far.

"There is no one method of acquiring knowledge about politics but rather a variety of methods" (Marsh and Stoker 2010, 15). In my research I will use both quantitative and qualitative methodological approaches. The explicit distinction between those methods is that quantitative methods gather the collection of data on a recurrent circumstance and uses statistical techniques to analyze it; whereas qualitative methods uses individual interviews or focus group discussions as a mean to observe and discover about politics (Ibid). The

dichotomy among both methodological approaches is the most common base for policy analysis (Kustec Lipicer 2009, 135).

The analysis of primary, secondary and tertiary data and sources will enable me to gather existing knowledge about my research topic. I will use it to establish the historical overview and theoretical premise.

An *ex ante* analysis of institutional design of the dispute settlement mechanism will help me to examine its institutional structure and to determine the degree of the impact on policies that ISDSM's in TTIP and CETA may have. The purpose of *ex ante* evaluation is to obtain information on the consequences (out-puts and out-comes) of political content, which has not yet been formally implemented (Kustec Lipicer 2009, 83). For this I will use historical and comparative approaches, as well as meta-analysis of existing research, to study the evolution of investor protection, investor-state claims made in the past and present in different countries, and to determine level of transparency and legitimacy.

In the end I will undertake a case study of North American Free Trade Agreement (NAFTA), in order to determine the positive and negative impacts of ISDSMs on policies. A case study is a comprehensive research of a particular event or problem and it is designed to disclose casual causes that can either be used in similar situations or provide a starting point for theoretical structure (O'Brien and Williams 2013, 27–28).

3 HISTORICAL OVERVIEW OF INTERNATIONAL INVESTMENT DISPUTES

Foreign trade can be explained as being composed of two different levels. The first is the economic transaction where goods and services are traded for money or other goods and services by individuals or entities in two different countries; the latter is that by nature it is also a political process, which makes challenging decisions between competing values, priorities and interest groups (Cohen and others 1996, 3). International trade has expanded in the last two centuries and became an essential and inevitable part of everyday life in a developed society. It is also a crucial factor for domestic economy and international relations.

The international trading system is an extremely complex organism that went through many different periods. To fully understand the investment dispute settlement mechanisms,

especially the current debates over regulation and institutionalization, we must start at its inception. The historical development of dispute settlement is linked with the progression of international law, international trading system, international organizations, and theories of political economy that will provide important perspectives in order to comprehend the contemporary investment treaty framework.

3.1 FIRST DEFINITIONS OF THE STATUS OF ALIENS

Although the history of international law is highly dispersed, early historical records show the initial attitude of political societies towards foreigners was more or less pretty hostile everywhere. These foreigners or outsiders, also known as aliens, from the Latin word *alius*, meaning 'other', were regularly treated as enemies or barbarians (Newcombe and Paradel 2009, 3). Under the Roman law, aliens were basically outlawed, while the Germanic tribes were not as harsh, still, they denied them any legal protection. The legal position of aliens began to notably improve through the Middle Ages to the present time.

The evolution from the system of personal law to the territoriality of law, with an expanding control of a central rule over the individuals within its jurisdiction and with the emergence of territorial independence and sovereignty, which was a crucial criterion for accepting a state into the society of states, is the essential narrative of the legal relations among the state and individuals, and its own citizens and aliens (Borchard 1913). The development of agriculture contributed greatly so that people became more attached to their land and thus more territorial. Law on the basis of individual principles could no longer withstand and so the same laws started to apply for people living on the same territory.

"Feudalism further strengthens the idea of land ownership and it embodied the notion of the territoriality of rights with the personal relation between lord and liegeman now knownunder modern transformations as sovereignty" (Borchard 1913). People became affiliated to a particular terrain and so they obtained the status of a citizen or nationality, which gained them special rights on that area, notwithstanding for foreigners. "Nationality, which term is less ambiguous than its synonym citizenship, is the most important of the three relations (other two being residence and domicil) in which a person may be subject to the control of a particular state" (Ibid).

First modern scholar to fully tackle the status of aliens was Emmerich de Vattel. In his book *Law of Nations* (1758), Vattel agreed that government has the right to regulate how foreigners enter their state, but once accepted, they are subject to the same national or local laws as their own citizens. He argued that the host state[1] is obliged to assure the same protection under law to foreigners as its own nationals, yet foreigners are not obliged to abide every rule of the sovereign, because they remain citizens of another country.

> *In Vattel's view, foreigners' membership in their home state extended to their property, which remained part of the wealth of their home nation. As a result, a state's mistreatment of foreigners or their property was an injury to the foreigners' home state.... For this reason, Vattel opposed the 'droit d'aubaine' or right of escheat, by which the property of foreigners passed to the host state at their death* (Newcombe and Paradel 2009, 4).

3.2 THE ECONOMIC NATIONALIST SCHOOL OF THOUGHT

One event can be described and explained in various ways. It depends on our interpretation or from what perspective we look at it. "Facts do not exist independently of explanatory frameworks" (O'Brien and Williams 2013, 8). Theory influences the way we perceive pieces of information that are thought to be true. In order to understand the world and make productive decisions, people developed theories that can help us focus on the most essential facts, prioritize information, make predictions, prepare for likely out-comes, or plan action and mobilize support for certain action (Ibid). Thus, through historical evolution of international political economy, miscellaneous theories have developed.

"For the past 200 years, the construction of the world space has resulted from two processes: a permanent need for capital accumulation and the associated requirement to find new sites of investment, and the geopolitical rivalry and competition between contending states" (Serfati 2015). International political economy applies to the academic field of study which explores the connections between political and economic phenomena beyond state borders and its central concern is how, despite the absence of an international state, tocontinue to carry out

[1] The term host state means the state in which the investors make their investments; and the term home state means the state of nationality of the investor.

the tasks on a national state at the global level (O'Brien and Williams 2013, 24; Serfati 2015). "International political economy studies the political battle between winners and losers from global economic exchange" (Oatley 2008, 2).Three major schools of thought can be defined that all other theories derive from and are essential in understanding the evolution of the investor-state dispute settlement.

The first and the oldest major contemporary school of thought is the nationalist perspective. It originated in the fifteenth Century, simultaneously with the rise of the national state in Europe. This theoretical perspective focuses on the function of the state and the significance of power in forming outcomes. The protection of a national unit is in the center of an economic nationalist analysis and the interest of the state or the nation is the essential for the comprehending activity in international relations (O'Brien and Williams 2013, 9). Specific theories deriving from this school of thought are called mercantilist, state-based theory, power politics, statist or economic nationalist. Realism is the equivalent in international relation theory (Ibid).

Mercantilism was the leading doctrine in Europe until the nineteenth century. Mercantilist position was that there is a definite supply of wealth in the world and states must secure their interests by obstructing economic interests of another state. It is also referred to as 'zero-sum game' which basically means "one state's gain is another state's loss" (O'Brien and Williams 2013, 9).They believed that unregulated markets cannot be trusted and some sort of government management and control was inevitable (Cohen and others 1996, 56). As we shall explore further on, global trade really started to expand in the nineteenth century with the liberal revolution. Before there was colonialism and trade among neighboring colonies of opposing empires was discouraged, as European states aimed to be as self-sufficient as possible (O'Brien and Williams 2013, 9).

Mercantilists or economic nationalists perceive the state as the leading actor in the international political economy. They accept supremacy of the political over any other aspect of social life, therefore in this viewpoint, the state is superior to the market and market affiliations are formed by political power (O'Brien and Williams 2013, 9–10). "According to descriptive economical nationalists, production, consumption, exchange, and investment are all governed by political power" (O'Brien and Williams 2013, 10).In the contemporary mercantilist view, the international trade is a competition among states, carried trough national firms (Hocking and McGuire 2004, 4).It is not surprising that diplomatic protection

developed and peaked at the same time as this theoretical perspective, because they believe that when businesses are in crisis, they turn to their home state for help.

3.2.1 DIPLOMATIC PROTECTION

Diplomatic protection was able to commence because of a clear definition of legal position of states towards its citizens and aliens, as well as the legal position among states themselves. Nowadays every human being has certain fundamental rights, so called human rights, granted by all member states of international community. These international human rights arose from natural rights (the right to personal security, to liberty and to private property), which originated in the political philosophy of the eighteenth century that peaked in the French Revolution (Borchard 1913). When these rights of a foreigner are unduly violated by the host state, his or hers home state is justified by international law to come to their aid and interposing diplomatically on their behalf (Borchard 1913).

The basic principle of diplomatic protection is that damage caused to a state's national is damage caused to the state itself and the home state can make a claim for restitution against the host state for injuries to the home state's national. Essentially a state 'espouses' the claim of its national (Newcombe and Paradel 2009, 5). Diplomatic protection comes from the colonial and imperial era where states exerted all possible means (economic, political or military) to protect their citizens abroad. Powerful states regularly exercised 'gun-boat-diplomacy' which means the treat and/or use of force to reinsure diplomatic protection claims (Newcombe and Paradel 2009, 8–9). Because of these abuses less-powerful states were hesitant to exercise their right of diplomatic protection.

One of the primary problems of diplomatic protection is that states can decide if they want to use it or not. And countries often did not help its national, either for the reason that they were worried about the 'gun-boat-diplomacy' or just did not want to jeopardize economic or political relations with another country. Individuals, who wanted to make claims against the host state, were left to the mercy of their home state and the 'right' relations between them. Subsequently, even when the home state uses diplomatic protection to help its national, it is not legally bounded to transfer the award to the investor. Furthermore, since there are intricated transnational corporations (TNC) that affiliate in various countries, "each possessing, in all probability, a different legal nationality, and a highly international

shareholder profile, it may be difficult, if not impossible, to state accurately what the firm's nationality should be for the purposes of establishing the right of diplomatic protection on the part of a protecting state" (United Nations Conference on trade and development 2003).

From its formation, diplomatic protection has had several forms. Aside of diplomatic settlement of claims and resolution through coercive means, states established *ad hoc*commissions and arbitral tribunals to arbitrate cases concerning the host state's treatment of foreigners and their property (Newcombe and Paradel 2009, 7). Treaty of Amity, Commerce and Navigation between the United States of America and Great Britain, or so-called Jay Treaty of 1794, was the first to create a three mixed commissions, consisting of American and British nationals in equal numbers, which dealt with cases where negotiation was not possible. These mixed commissions were not in fact *ad hoc* tribunals because they were not strictly speaking organs of a third-party adjudication, but their function was to some extent as a tribunal, which marks a milestone in modern history of international arbitration (International Court of Justice).

In the nineteenth and in the beginning of the twentieth century states started to use more frequently these arbitral commissions and different *ad hoc* tribunal were set up to handle individual claims. These commissions were based on the model of diplomatic protection, which meant that commonly only states were participating in the proceedings and not the individuals, who have made the claim in the first place. Nevertheless, one of the first direct investor-state arbitration took place in 1864 between Egypt and a Turkish company LaCompagnie Universelle du Canal de Suez. The firm appealed for reimbursement from Egypt after a law was passed that breached a concession agreement allowing work on the Suez Canal. Even though there was no arbitration clause in the agreement, both parties decided to use arbitration as a mean to settle the dispute, and mutually concur on Napoleon III as arbitrator (Newcombe and Paradel 2009, 8). After World War I more accords granted direct claims for individuals.

As previously mentioned, settling disputes based on the principle of diplomatic protection, while it was advanced for that period, did not solve all problems, for example the still remaining use of force. The Drago Doctrine, developed from the Calvo Doctrine, asserted the principle that countries are not authorized by international law to use force to reclaim contract debts. It was incorporated into the Hague Convention II of 1907 Respecting the Limitations of the Employment of Force for the Recovery of Contract Debts, but it was not till the General

Treaty for the Renunciation of War 1928, that international law completely prohibited the use of coercive means and obliged states to resolve disputes solely by pacific means (Newcombe and Paradel 2009, 10).

3.3 THE LIBERAL SCHOOL OF THOUGHT

Today's predominant school of thought first emerged in the eighteenth century as a parallel to Britain's Industrial revolution and Age of Enlightenment in Europe. Adam Smith (1723-1790), Scottish moral philosopher, is seen as one of the founding fathers of liberal or classical thought. He advocated for deregulating commerce and the establishing of bigger national and global markets as a way to create wealth for everyone. Liberal thought developed as a critique to economic nationalist thought, since liberals argue that restriction and protectionism of economic process were indeed impoverishing states (O'Brien and Williams 2013, 13–14).

Where economic nationalists view the world as anarchy, liberals view it as interdependent. For liberals there is a number of key actors, but they focus their analysis on the individual. They stress out the capability of individuals to select the best choice and negotiate the conditions for cooperation; instead of a zero-sum game, liberals vision positive-sum game where everybody gains (O'Brien and Williams 2013, 13). Economic nationalists are skeptical towards companies, but liberals view them as a source of wealth and as an opportunity for satisfying individual self-interests that in return generate a society-wide harmony of interests, consequently defending the freedom of choice and free market (O'Brien and Williams 2013, 14). Adam Smith formed a strong critique of mercantilist idea, but he did not offer a solid theory of international trade. This was later compensated by another founding father of liberal thought, David Ricardo, who developed the theory of comparative advantages in the nineteenth century. His stand was that "countries produced what they were best at producing, and by trading with others they were better off than if all countries sought to produce everything they needed" (McDonald 1998, 18). Although theory of comparative advantages sees trade between two countries as a gain for both states, it still recognizes that one country can have a bigger share of gains than the other (Cohen and others 1996, 58–59).

There are additional theories within the liberal school of thought, that stretch from liberal institutionalists, who still see the state as an important actor, although entangled in the network of interdependence and international organizations, to those who argue for absolute

free-trade, because they view the state's power fading away, borders vanishing and a rising power of corporations (O'Brien and Williams 2013, 14).Since the nineteenth century, liberalism is the dominant school of thought in the developed countries that also transferred on to developing countries.

One type of contemporary liberal theory advocates free trade at all costs. This absolute free trade approach views the market as fully competitive and does not tolerate any form of protectionism. Even a response to an unfair trading practice is incorrect, for instance discriminatory pricing or dumping is simply thought as a benefit to the consuming country and a loss for the exporting country (McDonald 1998, 23). Governmental policies do not support this view. They still want to protect certain sectors, because of national or strategic importance. This is shown also in IIAs where specific sectors or industries are completely excluded from the IIA's set of rules.

Although the contemporary trade politics are predominantly liberal, the mercantilist state-centered politics exist uncomfortably alongside, for two main reasons. First, there is a view that politics and economy exist in two separate worlds and the political relations, with their pursuit for power, are the dominant one; second, states are pursuing 'national interest' that is balanced on economic interests of a scope of domestic constituencies (Hocking and McGuire 2004, 2–3). "The state may be challenged, its function may be changing, but it is not powerless" (Weiss in Hocking and McGuire 2004, 3).There was a streak of market liberalization with some interruptions. One of the set-backs was Marxism, an alternative critical thought that I will elaborate later on, but the recent 2007-08 financial crisis again evoked some critical discussions, focusing on the role of state regulations in domestic and global markets.

3.3.1 FAIR AND EQUITABLE TREATMENT STANDARD

Because of increased world trade and investments from the nineteenth century on, it was even more imperative for the states to protect its citizens and regulate economic interests abroad. In the beginning of the twentieth century, there was already a prevailing consensus between international lawyers in the United States and Europe, predominantly capital exporting states, "that there existed a minimum standard of justice in the treatment of foreigners" (Newcombe and Paradel 2009, 11).

There were always oppositions to diplomatic protection and minimum standard of treatment, especially in capital importing states, notably in Latin America, where abuses of diplomatic protection were particularly evident. Carlos Calvo, a legal scholar from Argentina, argued in his I*nternational Law of Europe and America in Theory and Practice*1868 that any interference, diplomatic or otherwise, in the domestic affairs of other state, must be prohibited and investment claims have to be settled solely under domestic law in local courts (Newcombe and Paradel 2009, 13; Shihata 1986). His core principal was that aliens should not received a better treatment, they should be completely equal to nationals, and therefore aliens have to accept the governance of the host state. The so-called Calvo Doctrine, which was never officially adopted, but later embodied in several constitutions of Latin American states and in treaties concluded between them, still is the most famous theory opposing the institution of diplomatic protection and presents an important argument against minimum standard of treatment (Shihata 1986).

Minimum standard of treatment later developed into fair and equitable treatment standard, first referenced in the 1948 Havana Charter for International Trade Organization that a lot of developed countries did not ratify due to unresolved issues after World Wars. It became accepted as a principle later on through the widespread network of bilateral investment treaties (OECD 2004). Fair and equitable treatment is nowadays a necessary standard which protects foreign direct investments.

> *It is an "absolute", "non-contingent" standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most favoured nation" principles which define the required treatment by reference to the treatment accorded to other investment* (Ibid).

There are different interpretations of this principle almost in each agreement or treaty that it appears, and some argue that the meaning is intentionally put ambiguously, for arbitrators to use it for their own advantage in particular disputes. Untill now there is no normative content.

3.4 MARXISM

The critical school of thought was formed in the nineteenth century, as an opposing thought to liberalism. Marxism was the first leading critical perspective in international political economy, but not the only one. It is one of the three most common, the other two being feminism and environmentalism. All of the critical thoughts emphasize the oppression within society and the struggle for justice on behalf of different groups or causes. In terms of my analysis, the Marxist and environmental theories are most substantial.

Marxism is named after Karl Marx (1818-1883), who viewed capitalism as an exploitation of workers. He did not agree with the liberal's view of harmonic interests but saw division between classes in society and advocated for working class to seize power (O'Brien and Williams 2013, 17). "According to Marx, capitalism is characterized by two central conditions: the private ownership of the means of production, or capital, and wage labor" (Oatley 2008, 9). Marxists thought focuses on class as the essential actor in the international political economy and they dismiss liberal focus on individuals and accept economic nationalist's collectivism, but see the state as an agent of class interest groups. In their view, corporations are an instrument of exploitation and working class oppression; capitalistic fierce competition tends to push down worker's wages; capitalism leads to wealth inequality, which increases tension between countries; capitalism undermines social stability with overproduction and underconsumption (O'Brien and Williams 2013, 18). The concentration of capital in the global economy and capitalist's control of the state is altered into a system of exploitation of the developing states by the large capitalist states (Oatley 2008, 10). Socialism and communism came from the Marxist school of thought and they view private property as the roots for social inequality and injustice and want to abolish it. Subsequently they see public control of economy as the only proper way to achieve prosperity.

3.4.1 THE PERIOD DURING THE WORLD WARS

The first state to actually implement these ideas was Soviet Union. In 1917, the revolutionary government put an order to abrogate all private property, along with the property of aliens (Newcombe and Paradel 2009, 13). This nationalization was momentous for international community and especially for Western countries who thought that all societies view the right to private property as one of the essential human rights.

In 1920s and 1930s more efforts were made to achieve minimum standards of treatment and protect private property abroad from nationalization and other treats. One example was the predecessor of the International Court of Justice (ICJ), Permanent Court of International Justice (PCIJ), established in 1922 in the Convent of the League of Nations. It was the first permanent international court with general jurisdiction, which formulated a number of aspects of international laws and it provided its development (International Court of Justice).During its operation, PCIJ asserted that "diplomatic protection is the elementary principal of international law","confirmed that vested rights of foreign nationals must be respected" and "that an illegal seizure of property requires reparation"(Newcombe and Paradel 2009, 15). It came to its completion the same year as the League of Nations, in 1946.

3.5 AFTER THE SECOND WORLD WAR

After the Second World War the international community was determined to establish permanent peace and with it a stable international trading system. At the same time it had to deal with decolonization and nationalization in Africa and Asia where most countries adopted socialism, as well as East European countries. This has led to even more disputes which focused on the two leading questions: to what extent should obtained rights, granted by colonial states, including natural resource concessions, be respected; and what should be the principal of compensation for the expropriation of those obtained rights (Newcombe and Paradel 2009, 19). Because of the greater risk of nationalization, expropriation, new regulations, and breaches of contracts in developing countries, international arbitration bolstered after the war. Developing countries did not particularly trust international arbitrations, but foreign investors preferred it to local governments, that they viewed with distrust (Newcombe and Paradel 2009, 24).

3.5.1 THE HAVANA CHARTER AND GATT

From 1947 to 1948 multilateral negotiations for the Havana Charter took place. It was an ambitious project to create an international legal, institutional framework for the regulation of international trade and investment, and to establish International Trade Organization (ITO). Although it failed, it still had significant ramifications on the development of international trading system as we know it today.

Havana Charter included general statements of principal, particular obligations of national policy dealing essentially with national barriers to trade and provided various restrictions for trade (Suranovic 1998). It introduced investment protection provisions for national treatment, just compensation for expropriation and most-favored-nation treatment (MFN) (Newcombe and Paradel 2009, 19); the latter becoming one of the crucial provisions of the General Agreement on Tariffs and Trade (GATT), which prohibited discrimination between members and among imported and domestic goods (Suranovic 1998).

The GATT negotiations were preceding concurrently as the Havana Charter negotiations. GATT was mostly based on Havana Charter and had minimal administrative arrangements for the reason that ITO was anticipated to have that responsibility (Ibid.). ITO was meant as the third pillar of the modern international financial system, the first two being International Bank for Reconstruction and Development (World Bank) and International Monetary Fund (IMF). In the end, US did not ratify the Havana Charter, consequently GATT was left without institutional framework and additionally no investment provisions were included, which meant that from then on trade law and international investment evolved separately (Newcombe and Paradel 2009, 19–20).

3.5.2 SHIFT TO PROMOTING ECONOMIC DEVELOPMENT

During the two decades after the Second World War an important shift in perception of investment disputes occurred. Different non-governmental initiatives with the purpose of establishing a multilateral legal framework for foreign investment were negotiated. First two being *International Code of Fair Treatment for Foreign Investment* (ICC Code) and International Law Association (ILA) *Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court* (ILA Statute); and even though neither was adopted, they brought a new concept - the essential concern is no longer the state's responsibility for injuries to foreigners and their property, but rather the protection of foreign investment with the goal of promoting economic development (Newcombe and Paradel 2009, 20–21). This transformation in vernacular means also change in political and economic ideology that promotes foreign private investment as imperative for economic development. It is a response to nationalization and expropriation, based on Marxists rejection of private property.

Next non-governmental initiative was the *Draft Convention on Investments Abroad* (Abs Shawcross Draft Convention) that granted fair and equitable treatment, protection against discriminatory measures, just and effective compensation for expropriation and above all it was the first mechanism that specifically provided for direct investor-state arbitration (Newcombe and Paradel 2009, 22).

3.5.3 FOREIGN DIRECT INVESTMENT

"Foreign direct investment (FDI) is the process whereby residents of one country, the source country, acquire ownership of assets for the purpose of controlling the production, distribution and other activities of a firm in another country, the host country" (Moosa 2002, 1).United Nations Conference on Trade and Development (2016) defines FDI as "an investment involving a long-term relationship and reflecting a lasting interest of a resident entity in one economy (direct investor) in an entity resident in an economy other than that of the investor." A characteristic that is specific to FDI is control. The direct investorshave lasting interests, because they seek a certain level of authority over the company's operations in the host country. Individuals or business entities can engage in FDI.

A large number of firms prefer direct investments over portfolio investments, for the reason to maintain at least the majority of control that enables them to select one or more members on the board of directors, or manage contractual non-equity arrangements, such as subcontracting, franchising, product sharing, licensing etc. (Moosa 2002, 2).In the nineteenth century FDI mostly took the shape of lending by Britain to fund economic development along with the ownership of financial resources (Moosa 2002, 16). Developing countries prevailingly saw FDI as a mean for developed countries to take control of their economy and likely to cripple their development and sovereignty. Especially countries emerging from colonialism had this view, which is not surprising, because they in fact did not have control over their economy and were systematically exploited by foreign companies (McDonald 1998, 269). The use of FDI has prominently expanded in 1980s with the change of perspectives. The deregulation of financial markets raised capital in circulation and made it more feasible for foreign investments, Japan became a major supplier of FDIs in US and Europe, and because of modern technologies, for instance computerization, it was more problematic to control capital flows (Moosa 2002, 17; McDonald 1998, 269).

Direct investments have rapidly increased ever since. There was a setback in 2007-08, because of the financial crisis, but as the latest UNCTAD World investment report (2016) shows, FDI flows increased for 38 percent, to 1,76 trillion US dollars, the highest level since the crisis. Nevertheless, the discussion over the growth of multinational (MNC) and transnational corporations (TNC) activities like foreign investments and its impact on sovereign states continues. Two opposing arguments are considered in my research. First is the liberal view of positive indirect effects of FDI, which say that TNCs boosts national welfare by more straightforwardly "exposing the host economy to: the political and economic systems of other countries; the values and demand structures of foreign households; superior attitudes to work practices, incentives and industrial relations; and the many different customs and behavioral norms of foreign countries" (O'Brien and Williams 2013, 137).On the other hand, the critics argue that the negative indirect effect of FDI can bring disturbance "by introducing conflicting values through advertising, business customs, labour practices and environmental standards" and can exert "direct interference in the political regime or electoral process of the host country" (O'Brien and Williams 2013, 138). No matter which argument we prefer, the basic fact is that FDI notably contributed to a greater globalization and has become an inevitable instrument in the international trading system.

3.6 INTERNATIONAL CENTER FOR SETTLEMENT INVESTMENT DISPUTES

International Center for Settlement Investment Disputes (ICSID) is one of the five organizations of the World Bank and was established under its auspice in 1966, by the Convention on the Settlement of Investment Disputes (the Convention). It is an independent and depoliticized dispute-settlement institution, although it is not a permanent court but rather a forum that the contracting states have agreed on. ICSID provides arbitration, conciliation and fact-finding for settlement of disputes and its process is constructed to evaluate the specific features of international investment disputes and the parties involved, preserving equity between the interests of investors and host states (International Centre for Settlement of Investment Disputes). Its predominant purpose is to create an environment of mutual trust between investors and States. ICSID is an instrument of international policy for promoting investments and economic development (Shihata 1986, 4).

"The ICSID Convention does not define the term "investment," and this lack of definition, which was deliberate, has enabled ICSID tribunals to accommodate both traditional types of

investment in the form of capital contributions and new types of investment including service contracts and transfers of technology" (Shihata 1986, 5). Although, under Article 25(4), any Contracting State has the possibility to apprise ICSID, at any time, of the class or classes of investment disputes which may exclude from ICSID auspices. States and investors have the autonomy to decide when they want to use ICSID's system, nevertheless, once both parties agreed, Article 25(1) ensures that neither party can unilaterally retract its consent (Shihata 1986, 5–7).

The ICSID Convention also takes into consideration particular objectives that were the basis for the Calvo Doctrine. With provisions on application on domestic law, the exhaustion of local remedies, and diplomatic protection, it provides developing countries with the advantages that possibly could not be acquired even with the Calvo Doctrine (Shihata 1986, 10). Especially regarding diplomatic protection, the ICSID Convention is particularly assertive that investor's home state cannot use diplomatic protection before all other means were exhausted, from domestic law of the host state to ICSID machinery, which provide for greater depoliticization.

3.6.1 ENERGY CHARTER TREATY

In 1991 the European Energy Charter declaration was signed in Hague with the purpose to launch a political initiative for the international energy cooperation, securing energy supplies and sustainable economic development. That was the basis for the Energy Charter Process. With the expanding interdependence among net exporters of energy and net importers, countries of Eurasia quickly recognized the mutual benefits for multilateral rules that can provide for a more fair and efficient framework for international energy cooperation (International Energy Charter). In 1994, Energy Charter Treaty (ECT) was signed and it focuses on four comprehensive provisions: protection of foreign investment, but only in energy sector; resolution of disputes; non-discriminatory terms for trade in energy sector and promotion of energy efficiency with minimal effect on environment. It is important to notice that a lot of investor-state claims are made based on ECT.

3.7 ENVIRONMENTALISM

Environmental perspectives are relatively new in the theory of international political economy. None of the major school of thought incorporated environmental issues in their theories, because they did not have to. In the last few decades though, the world has witnessed a great deal of natural disasters, extreme weather conditions, pollution, and extinct animal species, to start a serious debate among international community about saving the environment.

Extreme and fast industrialization causes extreme pollution, especially when there are none or very few environmental regulations, but environmentalism views more complex linkages among environment and global economy. Environmental change is connected with globalization and the problem of sustainability.

> *The historical process of capital accumulation and the pursuit of economic growth have contributed to the current environmental degradation. Key issues concerning growth and development strategies, industrialization, international trade and North-South relations, for example, require re-examination in the current historical conjuncture* (O'Brien and Williams 2013, 242).

Environmentalism is hard to define because there are so many variations and not a single approach, especially in defining the main cause for environmental degradation, but there are some key features: besides the mentioned view on globalization, effective managing environmental degradation is with global cooperation; environmental deterioration can exacerbate inter-state and intra-state tensions; uncertainty, finite natural resources will be interchanged with technology; and irreversibility, once a species is extinct, it cannot reappear (O'Brien and Williams 2013, 243–244).

Since 1992 United Nations Conference on Environment and Development (UNCED) in Rio and the resulting Agenda 21, environmental issues have found a permanent spot in the international political agenda. But despite various pledges, oral and written commitments of governments, corporations, NGO’s and other international actors, practice still does not always reflect that.

Some scholars argue that trade and environmental protection are in complete harmony with each other and trade liberalization improves environmental sustainability, whereas others

dispute and claim that free trade furthers unsustainable systems of consumption and production. Because of these opposing views, there is a lack of international regulatory policies joining trade and the environment (O'Brien and Williams 2013, 256). Critics like to point out that in the spirit of competition, companies look for ways to cut down costs and consequently relocate production to countries with lower environmental standards. On the other hand, countries want to attract foreign investors so they lower the environmental standards. Developing countries have generally lower environmental standards than developed countries. Developing countries are also more depended on FDIs so they even lower the already weak environmental laws or refuse to adopt higher standards, which consequently force even those countries with high standards to deregulate environmental policies.

Governments tend to favor the mainstream economists view that the 'race to the bottom' does not happen often and especially not in the environment policies case. In their opinion, the degree of environmental protection standards is not an important factor in deciding the location of the production. Some even claim that "countries may indeed reap competitive advantages through higher environmental standards" (Nordstrom and Vaughan in O'Brien and Williams 2013, 256).

3.8 WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) is an international organization that regulates trade between nations. It was established on the 1st of January 1995, it is based in Geneva and has 164 member states. With its many purposes- it provides opening for trade, a forum for governments to negotiate trade treaties, a place to settle trade disputes, it monitors national trade policies, provides technical assistance- it is basically an organization where member states can resolve trade problems among each other (World Trade Organization). WTO was created at the GATT's seventh round of negotiation, the Uruguay Round (1986-1994). After the failed ITO, GATT has finally received an institutional mechanism.

WTO has a philosophy that embodies a clear free trade orientation, but at the same time acknowledges the temporary protection of distressed industries in order to provide for their adjustments (McDonald 1998, 18). The settling of disputes is the substantial objective of the WTO. Under the previous GATT, settling disputes procedures had no permanent timetables,

claims prolonged to infinity and rulings were easier to block. The Uruguay Round improved that by more structured process, greater time discipline and it made it impossible for a losing party to block the adoption of the ruling (World Trade Organization). Nevertheless, the first focal point is to resolve an argument with consultation or mediation.

The Uruguay Round also brought Trade-Related Investment Measures (TRIMs) that limited the state's ability to control certain aspects of MSN activities, for instance performance requirements, where firms had to acquire some percentage of their production (Oatley 2008, 35–37).The rules and norms of WTO dispute settlement are drafted in Dispute Settlement Understanding (DSU) and the main body accountable for it is the WTO General Council (Hocking and McGuire 2004, 122).Only a member state can bring a dispute to the DSU and in the end both states can appeal to the appellate body, which is a permanent body of the WTO.

But the WTO did not change the global dimension of settling disputes. It is still a process ruled by power politics, because the states which participate in the DSU the most, have greater capabilities to form the interpretation and operation of trade standards and regulations in their favor (Hocking and McGuire 2004, 126).Nevertheless developing countries have been much more actively using the DSU to affirm and protect their trading rights; as many as 44 percent of developing countries claims have been against other developing countries (Baru and Dogra 2015, 22).

WTO also views disputes as a unique event and not as an indicator for inequality in international trading system, despite the expanding trade conflicts in recent years (Hocking and McGuire 2004, 126–127). Regardless of the reform, there is still a lack of transparency and access that spawns criticism from the public and governments around the world.

4 INVESTOR-STATE DISPUTE SETTLEMENT IN INTERNATIONAL TRADE AGREEMENTS

4.1 ISDS

The most straightforward definition of ISDS is given by European Commission (2015) that says investor-state dispute settlement is a mechanism incorporated in international investment agreements to ensure that commitments to protect mutual investments, which were made by the countries between each other, are respected. As indicated in the historical overview,

before the appearance of ISDS, foreign investor disputes were settled mostly with political means (diplomatic protection, 'gun-boat-diplomacy') or were not settled at all. ISDS is therefore seen as a progressive institutional innovation insofar as it helps to lessen causes for international tension and offers alternatives to military force (Gaukrodger and Gordon 2012). It has an essential risk reducing function, which supports more confidence in both parties and the conduct of their investment accord (United Nations Conference on trade and development 2003).

The international investor protection system is widely dispersed and there is no one mechanism used but rather different types or variations. Additionally, international investment agreements are based on international law, which frequently are not part of the domestic legal system. Consequently they cannot be appealed before domestic courts, which can rule on disputes brought only on the basis of national law. "This is the *raison d'être* for international tribunals, including for investment matters" (European Commission 2015). Various international institutions have their own investor dispute resolution, but ISDS is distinct. There are three main features, founded in IIAs and other international documents where ISDS is included, that make this mechanism quite one-of-a-kind.

First, the ISDS's legal ground is complex and diverse, while most of the other dispute settlement mechanisms are grasped in well outlined treaty frameworks. The legal ground of ISDS is dispersed across dispute resolution provisions included in some 3000 investment treaties, other international conventions (prominently the New York Convention and the ICSID Convention) and arbitration rules (Gaukrodger and Gordon 2012). In every agreement the ISDS mechanism can be negotiated and modeled based on parties needs.

Second, investor-state mechanism enables private parties to bring claims against States, taking into account the various preconditions laid down in specific investment agreements (investment protection standards), and can bring large monetary awards (Gaukrodger and Gordon 2012). With ISDS private parties have direct access to claim compensation from host state, which is not common. For example, WTO allows only its member states to bring cases, although some are proposing to allow non-governmental organization to be able to legally participate in the dispute settlement process, for instance with petitioning *amicus curiae.*

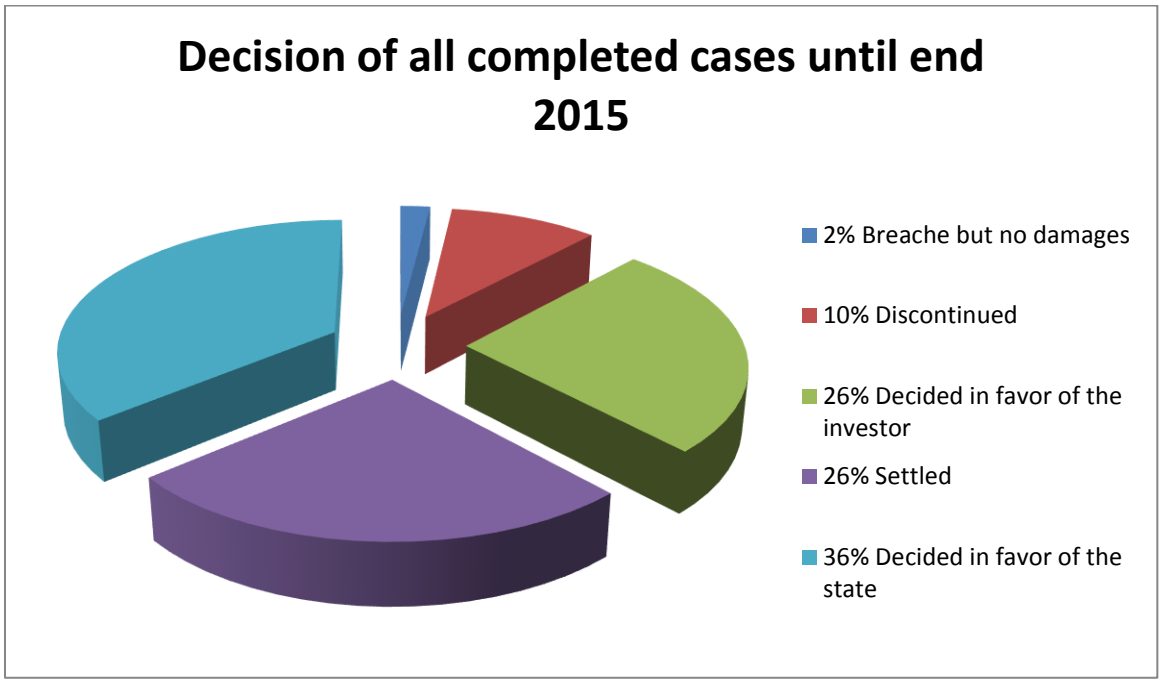
Third, the institutional set-up of ISDS is highly similar to commercial arbitration, for instance *ad hoc* tribunals, party appointed arbitration panels, giving priority to rapidly find conclusions (Gaukrodger and Gordon 2012). In recent years the emphasis has been on the use of

‘alternative dispute resolutions’ mechanisms, with the goal to find the fastest, cheapest, most amicable method, preferably one which avoids domestic or international courts (United Nations Conference on trade and development 2003). The aim is to grand a neutral forum to settle investment disputes, to depoliticized investment disputes and grant disputing parties more control.

ISDS claims are brought by various groups, from individuals to big corporations. Gaukrodger and Gordon (2012) point out that an OECD survey (based on 95 investor-state cases, during 2006-2011) showed that 22 percent of the claimants were “either individuals or very small corporations with limited foreign operations.” Therefore the notion that only big corporations, which can afford an army of lawyers, can bring investor-state claims, is false. But the vast majority of claims are still made by medium or large corporation, almost half of the cases, according to the same survey, and for one third of the cases there is little or no information at all.

Proponents of ISDS mechanism like to point out that most of the claims involve administrative actions “by the executive branches of governments affecting foreign investors, such as the cancellation of licenses or permits, land zoning or breaches of contract” (European Commission 2015). This might be true in the past, but the trend is changing. The recent UNCTAD review on ISDS developments (2016a) highlights that legislative reform in the renewable energy sector was one of the most frequently challenged state conducts in 2015. Last year investor-state tribunals carried out at least 51 decisions, of these 31 were in the public sphere. Majority of the public ruling on jurisdiction were decided in favor of the State, while investors won most of those on merits (United Nations Conference on trade and development 2016a).

Figure 4.1: Decision of all completed cases until end 2015



Source: United Nations Conference on trade and developmen (2016a; 2016b).

The statistic shows that most of the cases are decided in favor of the state. But we need to consider the 26 percent of settled cases, where we do not know who actually won. In how many of those cases the state settled by paying the investor? How much taxpayers money was spent on those discontinued cases? What was the decision in the un-known cases and how many are there? Ergo, the statement that the state mostly wins is a quite far-fetched.

In 1987, less than five ISDS claims were filed. This number has steadily risen and in 2015 seventy new cases were filed, a record number so far. Over all number of publicly known claims is 696 and 107 states have been litigated in one or more investor-state disputes (United Nations Conference on trade and development 2016a). Until 2013, mostly developing countries have been the recipients of claims; this trend is changing too, with more and more cases filed against developed countries, around 40 percent in 2015. Home state of investor who makes the notion for arbitration is still predominantly a developed country, more than 80 percent of all known cases (United Nations Conference on trade and development 2016a; United Nations Conference on trade and development 2016b). The claimed award in 2015 cases extents from 15 million to 12 billion US dollars, whereas the data is available only for one quarter of the known cases (United Nations Conference on trade and development 2016a).

4.2 THE EXPANSION OF BILATERAL INVESTMENT AGREEMENTS

A Bilateral Investment Treaty (BIT) is an agreement among two countries with the objectives for mutual promotion and protection of private investment. Even if each investment treaty is different, most BIT's will generally set up the following: defining investment; setting up grounds for admission to each country; establishing the proper form of compensation, should any investments be expropriated; providing for free transfer of funds; setting up dispute settlement mechanisms (for both individuals and States); and requiring national treatment, most favored nation treatment, and fair and equitable treatment (Parker 2012). The main goal is to appeal to foreign investors by establishing better protection for their investments.

Germany was the first state to develop a BIT program and it signed the first BIT in 1959 with Pakistan. The *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments* (Germany-Pakistan (1959)) incorporates a lot of substantive provisions which have also prevailed in the following BIT's (Newcombe and Paradel 2009, 42). Whereas ICSID Convention does not define the term "investment" at all, Germany-Pakistan BIT defines it broadly. The main goal is to stimulate foreign investments and protect investors from potential discriminations. It also includes state-to-state dispute settlement mechanism before the International Court of Justice (ICJ) if both parties comply, or if they do not comply, it provides for an arbitration tribunal upon the petition of either party (Ibid.).

Early BIT's, in the 1960s and 1970s, were commonly relatively short, usually around five to six pages and centered on basic protections such as MFN treatment, national treatment, a general minimum standard of treatment, rights to transfer capital and returns, and compensation for expropriation (Newcombe and Paradel 2009, 43).

> *Although the obligations on the state parties to BITs were formally reciprocal, BITs were developed by capital exporting states to protect the economic interests of their nationals abroad. Until Romania began concluding BITs with developing states in 1978, the Iraq-Kuwait (1964) was the only one that did not fall within the developed-developing state paradigm. It is also noteworthy that several major developing states did not conclude BITs until much later. China, for example, did not conclude its first BIT until 1982; Brazil and India not until 1994* (Newcombe and Paradel 2009, 43–44).

But the real beginning of contemporary BIT practice indicated the Chad-Italy Treaty (1969), because it mixed substantial investment promotion and protection commitments with binding investor-state mechanism to approach alleged violations of those commitments (Newcombe and Paradel 2009, 45). Since 1990s BIT's have drastically increased. Newcombe and Paradel (2009, 48–49) note that the two main reasons for this phenomenon are heightened political commitment by developed and developing countries for economic liberalism and freer international trade; and the shortage of developing countries to FDI. Developing states were depended on international lending and aid, but because of the recession in 1980s aid and lending was scarce and they started to compete for FDI to boost economic development. This competition forced developing countries to liberalize economic policies.

The main goal of BITs is to built protection for both parties so that it attracts foreign investment. Most investor-state claims in 2015 were invoked by BITs, majority of them dating back to the 1990s (United Nations Conference on trade and development 2016a).

4.2.1 INTRA-EU BIT's

Since 2004 a new type of BIT's emerge, the so called intra-EU BIT's. These are BIT's among European Union Member States. Before 2004, there were just two intra-EU BIT's, but because of the expansion of EU in 2004 and 2007, twelve new states entered, predominantly from Central and Eastern Europe, the same countries that already had various BIT's with the old Member States, thus automatically creating intra-EU BIT's (Olivet 2013). There are approximately 200 intra-EU BIT's, established almost nearly exclusively between old and new Members States (European Commission).

Intra-EU BIT's create different predicaments, because of regulatory overlap with EU legislation. According to European Commission, they are not consistent with the EU single market, because they only cover investment from the particular BIT partner country and not from all EU Member States and thus provide for parallel jurisprudence through arbitration procedures. Hence these Intra-EU BIT's conflict with the jurisdiction monopoly of the European Court of Justice and should be terminated (European Commission; Olivet 2013). The provisions of intra-EU BIT's overlap and are in conflict with EU law on cross-border investments. The Commission asserts that these problems occur merely in intra-EU BIT's and do not affect bilateral agreements between EU member states and non-EU member states.

> *The EC has maintained that intra-EU BITs discriminate between EU investors from different Member States because it grants some and not others the right to sue Member States at international tribunals. Furthermore, the EC is concerned that investor-to-state arbitration is binding and is not subject to review by the European Court of Justice (ECJ). The EC understands that ECJ is the forum to resolve issues of EU law involving an EU Member State* (Olivet 2013).

Most of the claims target Central and Eastern European countries. Until 2013, there have been 77 investor-state cases against Central and Eastern European countries, and 50 of those cases came from companies from fellow EU Member States, which means 65 percent of all investor-state cases against Central and Eastern European states were grounded on intra-EU BITs. In comparison to West European states that until 2013 had just 7 known cases and only one was grounded on intra-EU BIT (Ibid). What is especially problematic and almost grotesque is that Central and Eastern European states were sometimes victims of investment lawsuits, because they changed their regulations to accord with the EU law.

One such case happened with Hungary. Hungary privatized its energy sector in 1990s and provided State aid to private electricity firms, such as Belgium Electrabel, French EDF, and British AES. In 2004, when Hungary became a member of EU Union, they eliminated the aid program and put a cap on electricity prices, considering the instructions from EC to accord with EU competition law. Between 2007 and 2009, all three companies filed lawsuits against the host state, based on the loss of expected future profits (Ibid). In the case of British AES, EC made an unparalleled petition as *amicus curiae*[2]. The tribunal holdings and important information are barefaced only through news reports since the case has not been made public. "The *AES* tribunal treated the EC's petition consistently with past ICSID decisions on *amicus* participation. Thus, the tribunal allowed the EC to file a submission but not to access the parties' pleadings" (Triantafilou 2009). The AES claim was the first dispute settlement brought under Energy Charter Treaty and although the company has a corporate status in the UK, it is an US based corporation.

The reason for EC's concern was because they needed to affirm their legal recommendations for regulatory mandates that have huge policy significance on whole European Union. EC

[2] "Latin for "friend of the court;" frequently, a person or group who is not a party to a lawsuit, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision" (Legal Information Institute)

wanted to point out the ramifications of a conflict between that EU competition law and tribunal's jurisdiction. A better legal option for EC would be intervention rather than *amicus curiae*. "However, party autonomy and jurisdictional concerns usually prevent tribunals from allowing third parties to participate as interveners-subject to limited exceptions in the commercial arbitration context" (Ibid). In the end, Hungary won in the cases of AES and Electrabel, but apparently not because of EC's argument. Hungary still had to pay enormous legal and arbitration fees; in the case of AES, the bill added to 5.5 million US dollars (Olivet 2013).

The dispute between EDF and Hungary was ruled in favor of the investor. The Tribunal concluded that the termination of the agreement did not violate the conditions of the ECT, but Hungary had not sufficiently compensate EDF's "stranded costs" in the extent approved by EU law and has so breached the ECT's fair and equitable treatment standard (Volterra Fietta Client Alert 2015). Hungary further argued that paying award would be violating the EU law, based on the case Micula v. Romania.

> *In Micula v. Romania, the European Commission had argued that the payment of compensation to an investor on the basis of an award rendered under an intra-EU BIT would, in the specific circumstances of that case, constitute illegal State aid under EU law and that such an award would be unenforceable within the EU. The European Commission had also argued (as it has done in relation to several similar cases) that payment of damages pursuant to intra-EU BITs is generally contrary to EU law on the basis that it constitutes discrimination as among investors from different EU Member States* (Volterra Fietta Client Alert 2015).

Another case of investment disputes incurred as a result of compliances with EU law is Eastern Sugar v. Czech Republic. In 2000, Czech Republic's government allocated sugar quotas to comply with EU's agricultural quota system. The claimant was Easter Sugar, a Dutch company in ownership by corporations located in third countries (British, French and German sugar interests), using their corporate status in the Netherlands to file charges under the Netherland-Czech Republic BIT (International Investment Arbitration and Public Policy 2016). The claimants disputed the quota system and argued that it gives advantage to new

competitor and sugar beet growers, at the expanse of cane sugar producers. Ruling was in favor of the investor and Czech Republic had to pay around 25 million Euros.

This is an example how foreign investors could (and do) attack general agricultural and employment policies with investment treaty claims and it raises the question if this could be settled in different way. The tribunal decided that Czech Republic violated the intra-EU BIT, even thought they were complying with the EU law and their goal was to allocate sugar quotas, for better market competition and to maintain employment for sugar beet growers. It also demonstrates how an EU member state's BIT commitments can cross with its regulatory obligations under EU law (Ibid). Czech Republic is particular because it is the most sued country in EU. Until 2013 it had 18 claims, 13 of them based on intra-EU BITs. Since 2005 they tried to withdraw from or at least renegotiate the BIT's and they successfully amended 22 BITs and terminated 6 intra-EU BITs (Olivet 2013).

Most of Western EU Member States dismiss EC's proposition to terminate intra-EU BITs. In the 2008 annual report of the Economic and Financial Committee (EFC) for the Council of the European Union most EU Member States made it clear that they "did not share the Commission's concern in respect of arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements" (Council of the European Union 2008). The most outspoken Member States have been the Netherlands, Belgium, Germany and the United Kingdom. Especially the Netherlands have given numbers of arguments for validation of the intra-EU BITs. In the middle of the Achmea (previously Eureko) v Slovakia case, the Dutch Ministry of Economic Affairs presented written observations, arguing "that Slovakia can terminate the treaty unilaterally, but the protection for investors as included in the treaty would remain valid for 15 years as stipulated in the so-call survival clause" (Olivet 2013).

Netherland has currently 91 BITs with countries around the world, mostly developing countries. Out these are 12 with fellow EU Member States- Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia (Investment Policy Hub 2016). It is not surprising that the Dutch government is the most outspoken, since they want to protect not only their own investors abroad, but also approximately 20,000 so-called mailbox companies that are registered in the Netherlands, but with no employees (Olivet 2013). As previously mentioned, these companies can use Netherlands BITs to claim investment protection.

As in the two previous years, one third of all ISDS cases filed in 2015 were claims between EU Member States. From 26 intra-EU cases, 7 were initiated by intra-EU BITs and the remaining 19, by ECT. The total number of known intra-EU ISDS claims was 130 by the end of 2015, which is roughly 19 percent of all known ISDS cases globally (United Nations Conference on trade and development. 2016a). The opinion of some EU member States has also changed since the 2008 annual EFC report. As the UNCTAD's World Investment report (2016b) notes, in October 2015, the delegations from Netherlands, Austria, France, Finland, and Germany submitted a non-paper to the Trade Policy Committee of the Council of the European Union concerning the intra-EU BITs. They suggested: creating an agreement between all EU member States to coordinate the intra-EU BIT termination; including existing investor rights in the EU law; and establishing a biding dispute mechanism, but only as a last resort after all other legal means are exhausted.

4.3 TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

TTIP is the short-term for the Transatlantic Trade and Investment Partnership, which is a comprehensive trade and investment agreement between the European Union and the United States of America. The US is EU's biggest export market and TTIP would eliminate tariffs, cut red tape (reduce bureaucracy) and decrease restrictions on investment in order to make it more accessible for EU companies, large or small, to export goods and services and to make investments in the US (European Commission). The EU and US are two of the most developed economies in the world, together they make up for 40 percent of global economy, and have the highest standards of consumer protection. With TTIP, the already strong relationship between them would be strengthen in a way that will increase economic growth and create more jobs in addition to the approximately 13 million jobs in EU and America, already supported by transatlantic trade and investment (Office of the United States Trade Representative).

Politics of multilateral trade, after the World Wars, have dominantly been transatlantic trade politics, where US and EU have set the agenda, achieved crucial compromises, and established multilateral agreements throughout the bilateral deals to negotiated discrepancies among them (Hocking and McGuire 2004, 36). Still there remain considerable differences in regulations and bureaucracy. For example, in connection to data, EU prefers more rigorous

standards to protect privacy and private rights, whereas US favors solutions driven by the market (Baru and Dogra 2015, 52).

One of the basic differences also lies in diverse approaches in risk management, which can be seen in the ongoing dispute, since 2003, over the regulation of genetically modified organisms (GMO) in food product. For instance, EU has the precautionary principal, which means that products that are suspected to have potential health or environmental risks, even though there is no hard evidence or scientific consensus, fall under the responsibility of producers and must provide transparency and information, hence the labeling of GMO products. US argues that when there is no scientific consensus, products should be treated equally and has rejected labeling requirements (European Union Center of North Carolina 2007). Public's view on GMO regulation is was always different among EU and US, where people in EU are more concerned about the safety, although in last few years more and more people in US are getting concern about the effects. Some fear that ISDS in TTIP will enable US corporations to challenge EU's labeling requirements of GMO products.

The first round of the negotiations took place in Washington, in July 2013. The latest round was in Brussels, from eleventh to fifteenth of July this year and was the fourteenth round of negotiation. European Commission represents the EU at the negotiation table, which was approved by EU Member States before the negotiations began. America is being represented by the US trade representative and his team. The next negotiation round is scheduled for autumn this year.

Some question the need for investment protection rules between two highly developed economies, but according to European Commission the investment protection is needed for:

> *providing a level playing field for EU investments in the US – currently, firms from EU countries that have bilateral investment agreements with the US are better protected than those from EU countries that do not; setting basic rules about investment protection. This is important for creating a business environment that encourages sustainable growth and jobs; reforming the current investment protection system to make it more balanced and transparent and to protect the right of governments to regulate in the public interest* (European Commission).

European Commission and US trade representative reject the allegation that ISDS will enable corporation to sue governments for policy that want protect public interests like environment, labor, or health. European commission points out that EU Member states have already singed around 1400 BITs and IIAs, which most include ISDS and they want to improve it by making it more transparent. According to them, investor-state mechanism is only for protecting investors who might be wrongfully affected or discriminated by the home state. "For example, a law banning a product made in a foreign-owned factory whilst not banning products made by domestic companies" (European Commission). They argue that it will not affect government ability to pass laws and it will not bypass domestic courts.

But the public's mistrust towards the agreement is only growing, so in response the EC has launched a 90 days long on-line consultation in March 2014. The response was a wide-spread opposition to ISDS in TTIP, where the mechanism is seen as treat to democracy, public finance and public policies (Eurpoean commission). Specifics of the criticism are elaborated in the following.

4.4 COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

The Comprehensive Economic and Trade Agreement is the most far-reaching bilateral, high quality treaty between European Union and Canada. It is the first trade agreement negotiated between EU and another major global economy. Negotiations started in 2009, not in secret, but they were not much publicized in the media. They came to conclusion in 2014, but the agreement must be yet approved by Canadian government, EU Parliament, EU Council and EU Member state's governments.

CETA has the same basic goals as TTIP; strengthen the relationship between like-minded, developed economies; create more jobs; reestablish conditions that form international trade in goods and services; reduce tariff and non-tariff barriers; promote investment. However it is not the same agreement. Canada is a different trading partner, the 12th most important for EU, especially for its natural resources, its energy and raw materials (European Commission). EU is Canada's second largest trading partner and Canada is expecting that with CETA, they will "gain preferential access to the largest market in the world" (Global Affairs Canada).

European public understands ratifying investor-state provision in CETA, would approve its incorporation in TTIP (Sinclair 2014). CETA's full text was made available to the public this

year, after they made some improvements, focusing on the investment chapter and took into account the criticism and concern of the public.

4.5 POSSIBLE IMPACTS OF ISDS ON PUBLIC DOMAIN

Based on my research so far, I will here further present and analyze some of the main concerns and issues on how ISDS could affect public domain, if included in TTIP and CETA.

4.5.1 HIGH COSTS

High costs indisputably present a big problem with investor-state mechanism. Counsel and experts weight on the biggest part of the expenses, approximately 82 percent of total costs, next are arbitration fees around 16 percent and only two percent for institutional cost that provide secretariat services (ICSD, UNICTRAL, PCA…) Few credit the high costs to small number of available arbitrators, others emphasize the type of counsel and methods of proceedings; large law firms mobilize teams of lawyers utilizing expensive litigation methods borrowed from corporate practices (Gaukrodger and Gordon 2012). Another aspect to consider is the allocation or the final decision on who will bear the costs. Outcomes on costs decisions in ISDS are highly uncertain and evidence is assorted on whether cost allocation is widely more favorable to investors than to States (Gaukrodger and Gordon 2012). Trend is recent years points to an even greater rise in costs.

High costs introduce policy issues such as access for small and medium businesses or individuals to the ISDS mechanism. In addition developing countries can be more exposed in the process and easier targets for investors because they usually have less experience with international investment disputes and have fewer resources. "It has been noted that the high costs of ISDS or the threat of such costs can have a dissuasive effect on States and that investors can use the spectre of high-cost ISDS litigation to bring a recalcitrant State to the negotiating table for purposes of achieving a settlement of the dispute" (Ibid). This also applies vice versa, for the investors. But states have higher stakes, because they use taxpayer's money to cover the costs. Furthermore, even if the case is decided in favor of the state and the claimant must cover some of the state's legal fees as a part of the award, state is still left with part of the expenses.

In addition to high cost there are also claims for high awards. Until now, the highest single known award claimed is 13,58 billion US dollars. Even though the end award granted is usually lower, it still presents a real threat to public finances and nascent disincentives for regulations in public interests.

4.5.2 TRANSPARENCY

Since the beginning of the new millennium, the transparency has been somewhat improved. However, it is still allowed to keep proceedings and awards completely confidential, if both parties want so, even if the case affects public issues (United Nations Conference on trade and development 2013). One of the key principals of democratic ruling is complete transparency when it concerns public interests. Nevertheless, there are several factors to consider.

European commission (2016b) report of the on-line public consultation states that some groups, predominantly business groups, are concerned "that the provisions in the proposed approach on transparency go further than most national legal systems and that this could entail a risk that genuine confidential information and trade secrets could be disclosed." They are also worried that with public hearings, the process could become again politicized and could affect the out-come. On the other hand, predominantly NGOs and trade unions have stated that a number of the exceptions to the transparency rule that is made with the goal to protect business confidential information may be too broadly interpreted and may undermine the effectiveness of the transparency (European Commission 2016b). "Institutions of global governance will fail to meet the test of democratic control in the absence of transparent procedures, access for nongovernmental groups, and mechanisms trough which policy can be explained and justified to the range of stakeholders" (O'Brien and Williams 2013, 310).

In 2015, sixteen States signed and only Mauritius ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (United Nations Conference on trade and development 2016a). It is an international attempt towards greater transparency, although it enables a Party "the flexibility to formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules (negative-list approach)" (United Nation Commission on International Trade Law), and besides both parties have to agree on the

Transparency Rules. It applies to number of investor-state based agreements concluded after the first April 2015.

With appointed arbitrators, which have no political attachments or accountability, litigating behind closed doors in *ad hoc* committees, which proceedings do not need to be public, the ISDS lacks institutional design and proceedings are not based on the rule of transparency. It is almost identical to commercial arbitration. This is made completely on purpose to prevent politization of cases, like it happened in the past. ISDS is supposed to be the most depoliticized dispute mechanism so far and to achieve that it cannot be open to public scrutiny. But if the cases involve areas that are in public's interests, such as public policies, environmental or health regulations etc. then, according to democratic principal of transparency, it must be open for public scrutiny.

4.5.3 DEFINITIONS AND APPEALS

In most international agreements, the definition of investment is put in very broad and ambiguous terms. Consequentially it can result in little certainty and legal clarity in comparison with conclusive list of covered investments. In his submission to EC's public consultation, has Sinclair (2014) stated that CETA's proposed definition of investment (before this year's reform) exceeded the protection outside the commercial investment scope on to the regulatory scope that is in public interest. Furthermore, a lot disputes happen over cancelation of concession. Concessions are contracts that provide companies access to resources, which are publicly owned, with the purpose of providing public service. Therefore it cannot be defined as commercial investment and disputes over concession must be decided in domestic courts.

A few known investor-state cases have shown inconsistent legal interpretations of a similar or even identical treaty provisions as well as differences in assessing the merits of the case when it comes to the same facts (United Nations Conference on trade and development 2013). Such an unpredictable dispute mechanism undermines international effort to establish a rule-based trading system.

There is no possibility to appeal the decision of the arbitrators. For example NAFTA does not contemplate appeals; however it enables both parties to challenge decision in the host state's domestic courts (Harbine 2002). Another concerning factor are the erroneous decision that

occurs because the arbitrators do not have possibility of effective reviews. Existing review mechanism operates within narrow jurisdiction limits; even if "manifest errors of law" are identified, ICSID annulment committee can be unable to annual an award (United Nations Conference on trade and development 2013).

5 NAFTA CASE STUDY

5.1 WHAT IS NAFTA?

North American Free Trade Agreement (NAFTA) came into effect in 1994. It is a comprehensive trade agreement which established clear rules for trade and investment between its signatures countries Canada, the United States, and Mexico, and generated one of the sizable free trade zones in the world (Nafta now).

NAFTA lowered tariffs and eliminated most of the non-tariff barriers among the contracting member States; however the primary objective is the cross-border liberalization of trade (services, foreign investment, intellectual property rules etc.). Because of that objective has NAFTA conceived number of provisions which protect foreign investors from discrimination by host states and expended the settlement of investment disputes (Owens 2014). One of the most controversial provisions in the agreement is Chapter 11, the investment chapter. Similar to new multilateral agreements, the investment chapter grants private foreign investors the right to sue host state government "for actions that are deemed by international arbitrators to be unfair, discriminatory, or "tantamount to expropriation" by impeding the investors rights to profit" (Gallagher and others 2009).

NAFTA exceeded the conventional guidelines of free trade area in many ways. Various measures to liberalize the proceeding of FDIs, such as nondiscriminatory treatment, mandated guarantees of free transfer of funds, expropriation protection and eradication of performance requirements (Cohen and others 1996, 241). Already during the NAFTA negotiation a heated debate kindled between the proponents, where the business groups were most notable, and opponents, where the labour groups were the loudest. The biggest fear among US labour groups was wage reduction and cutting jobs due to relocation of production to Mexico. But very few even mentioned the investment protection clause, which only later became so contentious.

More and more studies concluded that NAFTA needs reforms, but they do not agree on what and how vast the reforms should be. The biggest criticism is still directed against the ISDS and because this mechanism is also included in the TTIP and CETA, it presents a perfect opportunity to analyze it and determine the impact of investor-state mechanism on domestic politics and policies.

5.2 NAFTA CHAPTER 11 CASES

Chapter 11, the investment chapter, establishes an investor-state dispute settlement mechanism between investors and NAFTA contract states. It is a first international agreement of such scale to incorporate ISDS. It ought to ensure equal, non-discriminatory treatment between NAFTA investors, according to the principle of international reciprocity, and due process before an impartial tribunal (Nafta now). This of course is not new, but NAFTA was the first comprehensive multilateral trade agreement to establish ISDS mechanism. Already during the negotiation process were a lot critics who argued for more environmental and labor protection, but the investment chapter was not really a concern at that time.

There are two sections in NAFTA's chapter 11. First, section A, lists the commitments of contracting governments and the rights of the investors. It lists standards like MSN, fair and equitable treatment standards, expropriation etc., where the Article 1114 states: "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures" (Nafta Secretariat), and features parties commitment to environmental protection with the prohibition of disputes over environmental regulations. Section B depicts the litigation process for dispute settlement. The applicable arbitration rules can be chosen between the ICSID Convention, if both parties agree, the Additional Facility Rules of ICSID, if just one of the parties is a member of ICSID Convention or the UNCITRAL Arbitration Rules.

The arbitration tribunal has three arbitrators, one chosen by each party and a third arbitrator agreed on by both parties. The parties are not required to exhaust domestic legal means in order to use investor-state mechanism (Harbine 2002). Decision of the tribunal do not have to be based on past disputes.

There are many investor-state claims under NAFTA and not all are made public. I collected the data from various sources, government's official sites, international organization's on-line sites, and already done research. I must point out that the data for award varies from source to source. For the claimed award I chose the Investment policy Hub data and for the final award it depends which source actually notes it. I counted only the claims were it was clearly a challenge of government regulation or policy on environmental protection, health, agriculture or labor standards. I did not include claims, which disputed administrative procedures or antidumping, even if it was in the same domain, or other policies. I must also point out, that for some claims, there was not enough information to conclude if the claim challenged a regulation or just administrative proceeding. Regardless of these limitations, I could gather enough data for a compelling case study.

This is the data for all the known cases until January 1st, 2016.

Table 5.1: All NAFTA claims challenging regulations or laws in public domain

COUNTRY	CHALLENGED POLICY	ALL KNOWN CASES	STATUS OF THE CLAIMS
CANADA	ENVIRONMENTAL PROTECTION- 11 HEALTH- 4LABOR STANDARDS- 0AGRICULTURE- 7	38	ACTIVE- 7 WITHDRAWN- 7 DECIDED IN FAVOR OF THE STATE- 3 DECIDED IN FAVOR OF THE INVESTOR- 2 SETTLED- 3
USA	ENVIRONMENTAL PROTECTION- 3 HEALTH- 3 LABOR STANDARDS- 0 AGRICULTURE- 1	20	ACTIVE- 0 WITHDRAWN- 2 DECIDED IN FAVOR OF THE STATE- 5 DECIDED IN FAVOR OF THE INVESTOR- 0 SETTLED- 0
MEXICO	ENVIRONMENTAL PROTECTION- 3 HEALTH- 0 LABOR STANDARDS- 0 AGRICULTURE- 2	22	ACTIVE- 0 WITHDRAWN- 0 DECIDED IN FAVOR OF THE STATE- 4 DECIDED IN FAVOR OF THE INVESTOR- 1 SETTLED- 0

Source: Investment policy hub; Global Affairs Canada; Sinclair and Mertins-Kirkwood (2015); U.S. Department of State.

From this complete overview, we can see that Canada is the most sued country out of all three contracting member states. It is not just the total amount of claims, 38, it has also the most claims that challenges public affairs, majority is based on environmental protection.

Environmental protection is in all countries the most challenged public regulation and that why I chose to further analyze it.

Table 5.2: NAFTA environmental claims against Canada

CASE NAME and DATE	ARBITRATION RULES and CLAIMED AMOUNT (USD)	NAFTA ALLEGED BREACHES	SUMMARY	STATUS OF THE CLAIM
Ethyl Corporation v. Government of Canada April 14, 1997	UNCITRAL 251 million	Indirect expropriation National treatment Performance requirements	US Chemical company disputes Canada's ban on MMT. On April 25, 1997 the Parliament of Canada passed the Manganese-based Fuel Additives Act that prohibits any imports or interprovincial trade for commercial purposes of MMT, because of environmental concerns focused on vehicle emissions.	Canada revoked the MMT ban and settled out of court for 13 million USD.
S.D. Myers, Inc. v. Government of Canada July 22, 1998	UNCITRAL 70,9 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims National treatment Performance requirements	US waste disposal company disputes the Canada's temporary export ban, from 1995-97, on polychlorinated biphenyl (PCB). PCB is a synthetic chemical used in electrical equipment and its highly toxic substance which biodegrades slowly. Investor claimed that the ban was not for environmental protection reasons but for Canadian PCB remediation businesses.	Tribunal decided in the favor of the investor with the final award of 3,8 million USD.
Crompton (Chemtura) Corp. v. Government of Canada November 6, 2001	UNCITRAL 100 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims Most-favoured nation treatment	Agro-chemical company from US disputes the ban on the trade and use of lindane. After the US Environmental Protection Agency verdict to ban Canadian canola treated with lindane, because of health and environmental hazards, Canada agreed to restrict and eventually ban lindane. The Investor argued it was a breach of NAFTA.	Tribunal decided in the favor of the state, the investor had to pay full costs of the arbitration and one half of Canada's legal fees.
Vito G. Gallo v. The Government of Canada March 30, 2007	UNCITRAL 106 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims	Allegedly in 2002, an US citizen V.G. Gallo became the owner of the Canadian company Enterprise. In 2004, the government of Ontario restricted the use of Adams Mine as a landfill, prohibited any disposal of waste, because of environmental concerns. Gallo challenged that decision based on the Ontario's law that provides compensation of reasonable expenses, but inhibit	Tribunal decided in the favor of the state, because the Claimant could not prove that he became the owner of the Enterprise before the Ontario's new regulation. It also questioned Gallo's

			compensation of any possible profits or loss of goodwill.	minimal involvement in management of the Enterprise. He also had to pay full cost of the arbitration.
Clayton and Bilcon of Delaware Inc. v. Government of Canada February 5, 2008	UNCITRAL 101 millions	Fair and equitable treatment, including denial of justice claims Full protection and security, or similar National treatment Most-favored nation treatment	US company wants to construct and operate a large quarry and marine terminal on an environmental sensitive area in Nova Scotia. An Environmental Assessment (EA) was made by the Canadian government which found possible considerable adverse environmental effects and widespread public concern and decided to reject the proposed project. The investor now claims the EA was made in arbitrary, discriminatory manner.	Pending. The Tribunal found that Canada breached three out of four alleged offences. In 2015 Canada filed an appeal with the Federal Court of Canada, calling for repeal on the award on jurisdiction and liability, because the Tribunal surpassed its jurisdiction and that the award is in conflict with the public policy of Canada.
St. Marys VCNA, LLC v. The Government of Canada May 13, 2011	UNCITRAL 275 millions	Indirect expropriation Fair and equitable treatment, including denial of justice claims National treatment Most-favoured nation treatment Arbitrary, unreasonable and/or discriminatory measures	US cement company claimed it was a casualty of political interference. In 2004 the investor started the licensing process for a quarry in Ontario. Because of local citizen's group protested against it, based on environmental and social ground- they argued it will pollute the groundwater; the local politicians issued Ministerial Zoning Order (MZO) and stopped the licensing process. The investor argued it was discriminatory, unfair, because the ties between the local activists and politicians.	The claimant withdrew the charges, because he realized that it lacked a standing to bring a NAFTA claim. Apparently that was after a settlement, but the data differs; on Canadian government internet site says there was no payment, CCPA says the Ontario government paid 15 millions in compensation.
Mesa Power Group LLC v. Government of Canada July 6, 2011	UNCITRAL 738,6 millions	Fair and equitable treatment, including denial of justice claims National treatment Most-favoured nation treatment Performance	US energy company challenged the 2009 Ontario's Green Energy Act. The Act provided incentives for renewable energy producers with its Feed-in Tariff program. The investor argued it imposes forbidden domestic content requirements and inconsistent performance requirements, which are discriminatory against his company.	The Tribunal decided in the favour of the state. Canada also argued the Tribunal has no jurisdiction related to the acts of Ontario Power Authority, since it is not covered in NAFTA. The claimant shall pay the full amount of

		requirements Full protection and security, or similar		arbitration costs and 30 percent of Canada's legal fees.
Mercer International, Inc. v. Canada January 26, 2012	ICSID Additional Facility 231,6 millions	Fair and equitable treatment, including denial of justice claims National treatment Most-favoured nation treatment	US publicly traded company owns and operates, through its Canadian subsidiary, a pulp mill in British Columbia, which is both a consumer and producer of electricity. The company argues it was unfairly treated by the regulatory and other measures made by the provincial government. BC Hydro and B.C. Utilities Commission entered into preferential Energy Purchase Agreements with other mills, that provide cheaper electricity to their competitors, while their company gets embedded cost rates, that are higher and are denied subsidiaries.	Still pending. Canada claims that most of the allegations do not fall under the Tribunal's jurisdiction.
Windstream Energy LLC v. The Government of Canada October 17, 2012	UNCITRAL 522,1 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims National treatment Most-favoured nation treatment	US wind power company challenges the Ontario's government 2011 moratorium on freshwater offshore wind development. In 2008 the investor set in motion a request for an offshore wind farm in Lake Ontario. In 2009 they got the regulatory approval with Feed-in-Tarrif (FIT) approval, but allegedly (claimed by the Canadian government) did not signed it. In 2011 Government of Ontario decided to undergo more research for regulatory framework on offshore wind farms and stopped all activities, till further notice. The investor claims it is a specific discrimination against their company, because they have the FIT contract.	Still pending.
Lone Pine Resources Inc. v. Canada November 8, 2012	UNCITRAL 109,8 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims Full protection and security, or similar	US oil and gas company challenges Canada's ban on fracking. From 2006 to 2011, the investor acquired exploration permits to mine for shale gas or hydraulic fracking in Quebec. In 2011 the government of Quebec revoked those permits with An Act to limit oil and gas activities (Act). The decision was based on strategic environmental study on hydrocarbon development and documents on environmental and socio-economic impact of shale gas industry. The investor disputes that the decision was made on environmental grounds and claims it is an unfair, political and populist	Still pending.

			action. Canada also argues the company was not unfairly treated, because this Act applies for all companies, domestic or foreign.	
Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada October 16, 2014	ICSID Murphy 3,8 millions Mobil 15,2 million	Minimum Standard of Treatment Performance Requirements	Two US based companies challenges, for the second time (the first time was in 2007), the Guidelines on Research and Development Expenditures (Guidelines) implemented by the Canada-Newfoundland and Labrador Offshore Petroleum Board (Board), which demands to donate a percentage of the profit to research and development. The investors argue that it represents a fundamental shift in regulation and violates minimum standards of treatment.	Still pending. Previous decision was decided in the favor of the investors. Canada filed an application to Ontario Supreme Court, that the Tribunal breached its jurisdictions, but was rejected and had to pay Mobil 10,6 million and to Murphy 2,6 million.

Source: Investment policy hub; Global Affairs Canada; Sinclair and Mertins-Kirkwood (2015).

Total of the claimed awards are around 2,433 billion US dollars and the final award granted, or settled, based on the available information is 35 million US dollars, not accounting the arbitration and legal fees.

Table 5.3: NAFTA environmental cases aginst USA

CASE NAME and DATE	**ARBITRATION RULES and CLAIMED AMOUNT (USD)**	**NAFTA ALLEGED BREACHES**	**SUMMARY**	**STATUS OF THE CLAIM**
Methanex Corporation v. United States of America June 15, 1999	UNICTRAL 970 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims National treatment	Canadian corporation that distributes methanol challenges California's ban on the gasoline additive MTBE, which methanol is an ingredient. MTBE has contaminated the gorund and surface of water in California.	Tribunal decided in the favour of the state and the investor had to pay full arbitration fees and full legal fees of the state.
James Russell Baird **March 15, 2002**	/ 13,58 billion	Indirect expropriation Fair and equitable treatment, including denial of justice claims Most favored nation treatment	Canadian investor disputes US environmental regulation. US banned the disposal of radioactive waste at sea or bellow seabed.	Inactive

		Performance requirements National treatment		
Glamis Gold Ltd. v. United States of America July 21, 2003	UNCITRAL 50 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims	Canadian mining company challenged environmental regulations in California, that banned mining to limit its open-pit impact and with respect to indigenous people's religious sites. The claimant argued it interfered with its purposed gold mine and lost revenue.	Decided in favor of the state. The investor had to pay two thirds of the arbitration costs.

Source: Investment policy hub; U.S. Department of State; Sinclair and Mertins-Kirkwood (2015).

Total of the claimed awards are around 14,6 billion US dollars and the final award granted, or settled, based on the available information is zero, although not including the arbitration and legal fees.

Table 5.4: NAFTA cases against Mexico

CASE NAME and DATE	**ARBITRATION RULES and CLAIMED AMOUNT (USD)**	**NAFTA ALLEGED BREACHES**	**SUMMARY**	**STATUS OF THE CLAIM**
Metalclad Corporation v. The United Mexican States October 2, 1996	ICSID Additional Facility 90 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims Full protection and security, or similar	US waste disposal company challenged the Mexican local government decision for declaring an area an ecological zone. The investor argued it was wrongfully refused a permit to operate a hazardous waste facility, because Mexican local governments of San Luis Potosí and Guadalcázar wanted to create an ecological preserve in that area.	Tribunal decided in the favor of the investor and issued an award of 16,7 million. Mexico petitioned for statutory review before the British Columbia Supreme Court, based on the notion that the Tribunal exceeded their jurisdiction and enforcing the award would violate public policy. The award was partially set aside (15,6 million plus interest)
Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States	ICSID Additional Facility 19,2 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims	US waste managing company challenges the cancellation by the Mexican city council of Naucalpan of a concession contract for commercial and industrial waste collection.	Decided in favor of the state

December 10, 1996		National treatment		
Waste Management, Inc. v. United Mexican States June 30, 1998	ICSID 36 million	Indirect expropriation Fair and equitable treatment, including denial of justice claims	US waste managing company challenges the asserted breach of a 15-year concession granted by the State of Guerrero and the municipality of Acapulco to Acaverde, for public waste management.	Decided in favor of the state.

Source: Investment policy hub; Sinclair and Mertins-Kirkwood (2015).

Total of the claimed awards are around 145,2 million US dollars and the final award granted, or settled, based on the available information is 15,6 million plus interest, although not including the arbitration and legal fees.

US has the highest amount for claimed award and the lowest for final award. Canada has most claims challenging environmental protection, the most granted in favor of the investor, the most settled out of court, the highest amount of the award paid by the government, and the most cases that are still ongoing, 5. In one case the government of Canada had to actually revoke a ban that was intended to protect the environment. Labor standards were never challenged in known NAFTA cases.

6 CONCLUSION

Trade and war aggregate one of the primal forms of international communication and influences prosperity on a global scale. Thus have been policy decisions on trade, e.g. how different tariffs level affect domestic and international communities, always a central issue (Hocking and McGuire 2004, 1). But in the last few decades, international trade politics have become even more complex, due to the increasing number of states participating in multilateral international trade agreements. Through my research we examined the evolution of international dispute mechanisms and the theory of international political economy that influence and dictates the international trading system. The contemporary dispute mechanisms are even more complex, as a result of diverse international and domestic laws. Investor-state dispute settlement mechanism itself does not have a one concept, but it has many variations depending on specific international investment treaty. Nevertheless, it can be defined as an unique dispute mechanism, that enables private entities to sue national governments.

To answer my first research question: How transparent and legitimate is the investor-state dispute mechanism in TTIP and CETA? It is not at all transparent, because its litigations happened behind closed doors. Parties can decide if the proceedings of the claim can be a public knowledge. Consequently, because of lack of transparency that is based on commercial arbitration concept the question about legitimacy is more complex. If the claim challenges only administrative and business areas, the ISDS mechanism has little legitimacy; it does protects the investors from potential discloser of sensitive business information and politization of disputes, but it also has no effective review mechanism and it is higly unpredictable. But if the claim challenges regulations and law that are in public interests, then it is has no legitimacy at all. This brings me to my second research question.

Does ISDSM in TTIP and CETA enable private businesses to challenge national policies, such as environmental, health, agricultural or labor policies? Based on the NAFTA case study is the answer yes, it does. It did happened also by revoking different IIAs, for instance ECT, BITs and the specific case of intra-EU BITs. These situations do happen and based on the UNCTAD report, the trend is expanding. In 2015 we saw the record high cases of ISDS in total, but also more cases that challenged national regulations.

ISDSMs with their broad definition of investment can evoke cases that concerns public interests and influences the national decision-making process. It can revoke regulations that were made to protect the environment, health or national agriculture. It is true that rarely such cases are decided in favor of the investor, but nevertheless, they occur and because of the high legal fees, the state still loses some money, which could be spent more productively. Especially because of the high costs, investors could just make a treat of using ISDS, if states want to make new regulations.

In the NAFTA case study it is interesting that Canada is the most sued country. Based on historical overview, the dispute settlement on foreign investments has primary evolved because of the different levels of development between countries. Developing countries had no liberal principals, unreliable domestic legal proceedings and different standards. So developed countries created a mechanism to protect their investment, which is primarily based on western-liberal principals. From this notion the logical conclusion would be that out of the three NAFTA contracting parties, Mexico should be the most sued, because it is the least developed. Canada is maybe the most sued because it has the highest environmental and health standards out of the three.

This finding makes me question the EC's assurances that TTIP will not affect the EU's environment or other regulation standards. With ISDS as it is in NAFTA, it definite can. Based on the reform that they made these years, I assume they also realized that. The new investor protection provision in CETA allegedly eliminates most of the problems that occur in the contemporary ISDSMs; "it creates a permanent investment Tribunal and an Appellate Tribunal; establishes strict rules of ethical behavior for the Members of the Tribunal; introduces full transparency in investment dispute settlement proceedings; does not protect so-called "shell" or "mailbox" companies" etc. (European Commission). But skepticism remains, especially if this agreement is between two developed economies and democratic countries, why are the domestic laws courts so terrifying to foreign investors.

Nobel Prize-winning economist Professor Joseph Stiglitz noted that the proposal of the reformed ISDS mechanism, now called Investment Court System (ICS), would still enable companies to circumvent national legal systems and appeal against governments in parallel tribunals if laws and regulations undermine their profits. "It could still curtail desirable policymaking to protect people and the planet" (Eberhardt 2016). Corporate Europe Observatory just published a new report on ICS and argues the ICS is basically the same as ISDS.

"The development of international economic law is creating a system in which political authority is migrating to regional and global centers without a proper system of checks and balances" (O'Brien and Williams 2013, 310). ISDS is a great example of contemporary conflicting political economy theories on international and national level. The dominant liberal theory has become questioned. Trade liberalization effects national sovereignty and democracy. On one hand we need to protect the foreign investment, but at the same time we need to protect democracy. Supporters of the liberal school of thought will defend the existence of ISDS in TTIP, CETA or other IIAs. Supporters of critical thought and economic nationalists are more cautious or completely reject it. The issue of social justice in the international trade will have to get more attention in the future. The prevailing neoliberal ideology covers the question of justice and equity in its naïve faith in market solutions (O'Brien and Williams 2013, 307). Democracy remains the goal of developed and also developing states, but there has been a dispersion of democratic norms. Recent protest against trade agreements challenges the perceptive of democratic nations.

My research focused only on the possible effects of ISDS on public interests and not on the solution of foreign investment disputes. Investor-state mechanism's main purpose is to enable private entities to sue national governments and that will always present a nascent possibility for investors to use it for their own interest that might be in opposition of home states public's interests. On the other hand there is always the possibility that national domestic courts will discriminate foreign investors, that why they try to avoid them. We will never achieve a perfect system, but not allowing any type of criticism against the dominant theoretical thought is not a democratic way.

MEHANIZMI ZA REŠEVANJE SPOROV MED INVESTITORJI IN DRŽAVAMI V PROSTOTRGOVINSKIH SPORAZUMIH, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP IN COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT, TER NJIHOV VPLIV NA EVROPSKE JAVNE POLITIKE– SUMMARY IN SLOVENIAN LANGUAGE

V zadnje stoletju je reševanje sporov postalo eden izmed glavnih dejavnikov v mednarodnem trgovinskem sistemu. Mednarodni trgovinski sporazumi ponujajo zaščito in s tem večjo zaupanje med vsemi pogodbenicami, zaradi česar se ustvarja še več mednarodne trgovine in investicij. Široka mreža mednarodnih sporazumov o naložbah (MIS), skupaj s pravili mednarodnega prava, je osnova za obstoječo ureditev tujih naložb (Newcombe and Paradel 2009, 1). Vse bolj razširjena mednarodna trgovina, skupaj z napredkom tehnologije je v zadnjih nekaj desetletji nepredstavljivo povečala svetovno trgovino. Globalizacija je pripomogla k temu, da so tudi države v razvoju vse bolj pomembni akterji v globalnem trgovinskem sistemu, ki je bil že od nekdaj zelo kompleksen.

V svojih magistrski nalogi sem analizirala mehanizem za reševanje sporov med vlagatelji in državo in raziskala prednosti ter slabosti, ki jih ima ali jih potencialno bi lahko imel na širše nacionalne javne politike. Moj poudarek je bil na ISDS (investor-state dispute settlement) v Transatlantic Trade and Investment Partnership (TTIP) in Comprehensive Economic and Trade Agreement (CETA), in njihovem možnem vplivu na politike držav članic Evropske unije, ki niso strogo naložbene politike. Ena izmed glavnih kritik obeh prostotrgovinskih sporazumov je, da so pogajanja skrita za zaprtimi vrati ter besedilo ni javno dostopno. Razlog za to je, da sporazumi, ki so striktno trgovinski, se ne potrebujejo držati evropskega načela o transparentnosti. Toda skrb je, da to niso striktno trgovinskimi sporazumi, in lahko vplivajo na evropske javne politike in bi zato moral biti javno dostopni. Evropska komisija (EK) se pogaja v imenu celotne Evropske Unije (EU) in je v zadnjem letu naredila nekaj osnutkov določb v TTIP-u, ki je še v postopku pogajanja, javno dostopnih ter celotno CETA besedilo, kjer so poganja že zaključena in je v postopku demokratične potrditve, je bilo objavljeno tudi na spletu.

Pričujoče magistrsko delo je razdeljeno na tri dele, pri čemer se prvi del osredotoča na zgodovinski razvoj mednarodnega trgovinske sistema ter predstavi pravno, mednarodno-politično in teoretsko razlago za nastanek takšnega modernega mehanizma za reševanje sporov. Z nastankom moderne države v petnajstem stoletju, je bilo reševanje sporov predvsem politično. Trgovinski spori so se reševali z diplomatsko zaščito, tako da je država »posvojila«

tožbo svojega državljana in v imenu njega zahtevala vračilo (Newcombe and Paradel 2009, 5). To pa je imelo ogromno pomanjkljivosti. Eden od glavnih problemov diplomatske zaščite je, da se lahko države odločijo, ali ga želijo uporabiti ali ne. In države pogosto niso pomagale svojim državljanom, bodisi iz razloga, da so bili zaskrbljeni zaradi 'gun-boat-diplomacy', t.i. grožnja za uporabo vojske, ali pa ni želela ogroziti ekonomskih oz. političnih odnosov z drugo državo. V tem času je prevladala merkantilistična teorija, ki vidi državo kot glavnega akterja v mednarodni trgovini ter zaščita državne enote je v središču gospodarstva in ključnega pomena pri razlagi mednarodnih odnosov (O'Brien and Williams 2013, 9). V devetnajstem stoletju je to perspektivo mednarodne ekonomske politike izpodrinila liberalna šola mišlenja, ki ne vidi več države kot glavnega akterja, vendar več različnih igralcev, med drugimi predvsem podjetja, mednarodne institucije ter individualnega človeka.

Ena izmed najpomembnejših liberalnih teorij je teorija primerljivih prednosti, ki jo je razvil David Ricardo in pravi da naj države proizvajajo tisto, kar znajo najboljše in s trgovanjem z drugimi državami bodo na boljšem položaju, kot če bi želele biti samozadostne (McDonald 1998, 18). To je bilo popolnoma v navzkrižju z merkantilistično teorijo, ki ni vzpodbujala trgovine med državami. Prav tako v devetnajstem stoletju so se pojavile kritične šole, ki pa so dobile večji pomen v naslednjem stoletju. Prva je bila marksizem, ki popolnoma zavrača privatno lastnino ter jo vidi kot glavni razlog za vse večje socialne neenakosti v družbi. Osredotoča se na družbene razrede in predvsem želi izboljšati položaj delavskega razreda. To je bil poseben izziv za zahodne liberalne države, ki so videle privatno lastnino kot eno izmed osnovnih človekovih pravic. Nacionalizacijo privatne lastnine, ki so jo pričele izvajati socialistične in komunistične države že pred in tudi po svetovnima vojnama, so morali preprečiti. Spremenili so retoriko o tujih investicijah in niso več zagovarjali pravico do privatne lastnine, ampak da tuje investicije spodbujajo razvoj in blaginjo vseh držav (Newcombe and Paradel 2009, 20–21). V zadnjih nekaj desetletij pa se je pojavila še ena nova kritična šola, ki se osredotoča na varstvo okolja ter vidi ekonomsko politiko kot pomemben člen oz. dejavnik pri zaščiti okolja.

V drugem delu sem definirala ISDS, ki je mehanizem v mednarodnih investicijskih sporazumih, ki zagotavlja, da obe strani spoštujeta obljube za zaščito investicij (European Commission). Predstavila sem statisične trende, ki kažejo na vse večjo in širšo uporabo ISDS v sporazumih in poseben primer intra-EU sporov, ki direktno napadajo evropske regulacije tako, da jih evropska komisija tudi želi ukiniti.

Izpostavila sem štiri največje promanjkljivosti ISDS mehanizma, kot so visoki stroški, pomanjakne transparentnosti, nepopolna definicija investicij ter nemožnost se pritožiti. Nekateri trdijo, da je razlog za tako visoke stroške, majhno število razpoložljivih arbitrov, drugi pa upozarjajo na vrsto svetovanja in metod postopka; velike odvetniške pisarne mobilizirajo ekipe odvetnikov z uporabo dragih metod pravdnanja, ki so se jih sposodili iz praks podjetij (Gaukrodger and Gordon 2012). transparentnost se je v zadnjem desetletju nekoliko izboljšala. Vendar pa je še vedno dovoljeno, da so postopek arbitracije in plačila popolnoma zaupna, če se obe strani s tem strinjata, tudi če na primer tožba vpliva na javne politike (United Nations Conference on trade and development 2013). V večini mednarodnih sporazumih je definicija investicij zelo odprta in pri sporih med tujimi vlagatelji ter nacionalnimi vladami se je pokazalo neskladje pravne razlage podobne ali celo enake določbe v pogodbah, pa tudi razlike v ocenjevanju utemeljenosti primera, ko gre za ista dejstva (Ibid). ta mehanizem je izredno nepredvidljiv, kar spodkopava mednarodna prizadevanja za vzpostavitev tem bolj univerzalnih pravil in norm.

Tretji del s študijo primera prostotrgovinskega sporazuma North American Free Trade Agreement (NAFTA) pokaže, da je bilo od vseh 70 poznanih sporov, 34 takšnih, ki so se dotikali javnih politik. Največ je bilo na podlagi okoljevarstvenih politik, kjer je Kanada najbolj tožena država. Na podlagi tega sem zaključila, da ISDS predstavlja potencialno nevarnost za evropske javne politike, saj zaradi široke definicje investicij, ponuja možnost tujim investitorjem, da spodbijajo nove regulacije pred *ad hoc* tribunali.

ISDS ni transparenten in nima legitimnosti, če lahko tuji investitorji tožijo države za zakone in regulacije, ki naj bi bile v javnem interesu. Do sedaj so v večini primerov države zmagale, vendar kljub temu to latentno povzroča strah pred izgubo suverenosti. Trenutno dominantna liberalna teorija se osredotoča samo na prosto trgovino in ne vidi nevarnosti, ki se že dogajajo in se lahko samo še potencirajo.

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