**Academy of European Studies & Communication Management**

**The Hague University of Applied Sciences**

# DISSERTATION

## ISDS in TTIP: Threat to Human Rights Protection?

**Merdan Albayrak – 11090529 – ES4-6**

**January 9, 2017**

**Supervisor: Ms. I. Düsterhöft**

**2nd Reader: Ms. M. Van den Haspel**

## Executive Summary

The European Union (EU) and the United States of America (US) are currently negotiating the Transatlantic Trade and Investment Partnership (TTIP). TTIP was launched in 2013. TTIP aims at developing trade rules under investment protection that encompasses arbitration as the method to resolve disputes that may arise between foreign investors and host state governments. The EU and US have a preference for including the investor-to-state dispute settlement (ISDS) mechanism as the procedural rules that govern the arbitration proceedings.

This research deals with the intersection of investment law and human rights. The focus of this research is to examine and to predict how the ISDS mechanism in the TTIP agreement is going to impact the protection of human rights in the EU. This thesis aims to answer this research question from a political science perspective, through the conduct of qualitative desk research.

The literature review provides a critical background to the key topics. With regard to the definitions, the term ISDS will be used as referring to the investor-state arbitration process, and decisions issued through it. ISDS relates to the nature of protection to individual foreign investors and their right to sue host state governments before international arbitration tribunals, outside of domestic courts, for the alleged breach of an investor's rights under an investment treaty due to a governmental action. In addition, ISDS relates to the right of private arbitrators to adjudicate disputes through reviewing governmental actions. Turning to human rights protection, a broad concept of human rights is utilized. This consists of civil, political, economic, social and cultural rights. In this literature review, the key concept human rights protection relates to legislative areas of social and environmental laws that protect such rights. It is used as a surrogate for the notion of states' human rights duties imposing a positive duty on states to legislate in order to implement domestic laws and to enforce legislation to safeguard human rights. This relates to what has been described in this literature review as the right of host state governments to regulate. The next part in this literature review, "Connection between Human Rights Protection and ISDS" points out that over the years, human rights issues have been progressively the subject of numerous ISDS cases and investor against state claims are often based on state decisions, new laws or policy changes that involve matters of vital importance to the public and the state. This research aimed to gather evidence that would either support or dismiss the claim that an ISDS clause in international investment agreements (IIAs) places obstacles in the way of achieving human rights protection in a country by hindering positive rights of host state governments to apply dynamic human rights legislation.

This research produced a number of key findings. Firstly, it was discovered that the commonly accepted principles of treatment for foreign investors in IIAs do not directly obstruct government's right to

regulate; and the arbitration tribunals' verdicts issued through the ISDS process cannot force a government to repeal or change the measures taken in the public interest. Secondly, it was found that to date investment law and arbitration show inconsistent and unpredictable tendencies. Thirdly, it became apparent that the enforceable rights the ISDS creates for foreign investors impinges upon the sovereign state's decision-making power to produce laws and decisions in the public interest. Under ISDS, governments face the risk of reduced policymaking space through the threat of arbitration and its legal costs and compensation awards.

This dissertation came to the conclusion that the inclusion of ISDS in TTIP will likely result to have a negative impact on the protection of human rights in the EU, as under ISDS, EU Member States governments face the risk of reduced policy space due to the fear of expensive ISDS proceedings or the actual cost of compensation awards to foreign investors in ISDS verdicts. This study suggest to exempt ISDS from TTIP negotiations given the uncertainties surrounding the ISDS system in its current form. In case ISDS will continue to be included in TTIP, this study suggests to specify investment protection provisions; to mention human rights concerns and public policy objectives of states as substantial treaty provisions as to narrow interpretation and discretion of arbitration tribunals in relation to the claims submitted to arbitration tribunals.

## List of Abbreviations

| | |
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| BIT | Bilateral Investment Agreement |
| EC | European Commission |
| ECHR | European Convention on Human Rights |
| EU | European Union |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Agreement |
| IIA | International Investment Agreement |
| ISDS | Investor-to-State Dispute Settlement |
| LSE | London School of Economics and Political Science |
| MNC | Multinational Corporation |
| MNE | Multinational Enterprise |
| NGO | Non-Governmental Organization |
| TTIP | Transatlantic Trade and Investment Partnership |
| UDHR | Universal Decleration of Human Rights |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGP | The United Nations Guiding Principles |
| US | United State of America |
| WTO | World Trade Organization |

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## 1. Introduction

Negotiations between the European Union (EU) and the United States of America (US) with the intention to create a free trade area were officially launched in July 2013 at the G8 Summit in Northern Ireland. The project is called "TTIP" – the Transatlantic Trade and Investment Partnership. TTIP is considered to potentially be the most important and ambitious free trade agreement (FTA) ever negotiated by the EU (European Commission, 2015). The EU started bilateral negotiations after EU Member States gave the European Commission (EC) the green light to start trade and investment talks with the US (European Commission, 2015).

Recently, the EU set the direction towards the more active use of bilateral FTAs to pursue its trade policy objectives (Woolcock, 2007). The EU has concluded FTAs and other agreements containing an investment component with many countries worldwide and is negotiating with various other countries (European Commission, 2013). The TTIP negotiations are a part of EU trade policy efforts to promote more open, rules-based trade and investment through the negotiation of bilateral and regional FTAs (European Commission, 2015). The overall direction and strategy of EU trade policy is to increase investment as part of revitalizing Europe's economy (European Commission, 2015).

The facilitation and stimulation of investment is not the only goal of EU trade policy. The EU wants to protect foreign investors in its territory, while also receiving reliable and enforceable guarantees and rights for EU-based investors overseas. As a means to provide investors on both sides with legal certainty the EU and US indicate a preference for including investor-to-state dispute settlement (ISDS) as a mechanism to settle disputes that may arise between a foreign investor and a host state.

The TTIP negotiations are very relevant as they are ongoing. There is a lot of controversy surrounding the TTIP agreement and "opponents and supporters of the treaty are locked in a war of opinions" (Pauly, Sauga, Schiessl, & Traufetter, 2015). Some research, private industry as well as the EC indicate substantial potential economic gains from TTIP (Freytag, Draper, & Fricke, 2014). However, these claims are disputed as scholars, public interest groups and non-governmental organizations (NGOs) point out that TTIP's potential gains are overstated as it neglects various potential implications (Al Jazeera, 2016; Friends of the Earth Europe, 2013).

In particular, debate has arisen regarding rules under investment protection in TTIP that contains an ISDS clause. The EU increasingly negotiates and concludes economic agreements containing ISDS with other states (European Commission, 2013). This trend has been accompanied with a growth in controversial ISDS cases over the past decades occasionally cutting across essential public human rights

interests such as public health, environmental regulation and labour standards. The EC and some business interest groups highlight the advantages of investor-state arbitration.

The main point of criticism against ISDS stems from the assertion that the proposed investor-state arbitration threatens existing regulation for human rights protection. For example, laws and regulations on environmental protection, labour standards and public health. The fear is that the inclusion of ISDS may infringe upon the ability of states to regulate to protect human rights, in interest of the environment, public health and so on. Advocates of ISDS endorse the necessity and benefits of protection provided to EU and US investors through the investment protection standards.

The general link between international investment agreements (IIAs) with ISDS and human rights is recognized in the lecture "Guiding Principles on Business and Human Rights (UNGPs)" by Harvard professor and former UN Special Representative for Business and Human Rights John Ruggie. He says that "the terms of international investment agreements (IIAs) may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so" (United Nations Human Rights Office, 2011, p. 11). The general link in Ruggie's theory forms the basis of this dissertation and looks at topics that this study is addressing. It provides a useful starting point for drawing a connection between ISDS and human rights protection. Based on Ruggie's theory the following hypothesis is derived for the purpose of this research: the ISDS system is a constraint on a state's national regulations and regulatory space.

### 1.1. Research Objectives

The TTIP negotiations take place in confidence and there are demands to make the negotiation rounds more transparent. Documents such as the contents of drafts the reports on negotiation rounds known as "consolidated texts" are classified from the public and can be accessed only by authorised persons in a secret room (Al Jazeera, 2016; Boren, 2015). So far, proposals from the EU and US reveal that both parties want to include ISDS in TTIP. This caused controversy and raised legitimate question from civil society. Most significantly, there is reason for concern that regulations or decisions taken for reasons of human rights protection may be considered a violation of investment agreements in ISDS proceedings. Therefore, this research is very relevant and deserves further attention for learning the modalities of this dispute settlement mechanism in order to understand what ISDS means in the context of investment and human rights.

The purpose of this dissertation is to explore the context surrounding the research question; to examine the most common arguments for and against the inclusion of ISDS in TTIP; and to identify and

understand the linkages between ISDS and human rights protection, focusing on existing IIAs, and their relationship to business and human rights issues. This includes the general content of IIAs and the role of the ISDS system usually associated with IIAs. This dissertation is an attempt to examine and to predict the potential effects of ISDS in TTIP on existing regulations for human rights protection and the EU's future regulatory freedom for human rights protection. Therefore, the central research question of this dissertation has been formulated as follows:

How will the inclusion of the Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) impact the protection of human rights in the European Union (EU)?

In order to answer the central research question, five research objectives were formulated to enable a systematic evaluation:

1. ***Investigation*** of context and literature on the inclusion of ISDS in TTIP; and of human rights protection
2. ***Examination*** of the general connection between human rights protection and ISDS
3. ***Exploration*** of in what way ISDS interacts in relation to human rights protection by way of argumentation
4. ***Evaluation*** on how ISDS impacts human rights protection, and if so, to what extent

### 1.2. Structure

The dissertation is structured as follows in order to provide an answer to the research question and to methodically meet the research objectives. This thesis is presented in a manner that is supposed to offer reading comfort on a step-by-step basis, digging deeper into the topic as the reader advances. The report begins with the Methodology chapter. It explains the type of study, the type of research, ethics and limitations within this dissertation. As will become evident, a desk research approach was applied through qualitatively analysing secondary literature. Then the Literature Review follows. It has two goals. Firstly, the Literature Review aims to provide the reader with a general understanding of TTIP, ISDS and human rights protection. The function is to give a description of the most important topics including the meaning and rationale of investment protection and the main substantive and procedural features of investment treaties Secondly, it aims to review literature that is relevant for answering the research question. Here is the function to give critical insights into the relationship between ISDS and human rights protection. The Literature Review addresses the first three research objectives. The Discussion chapter addresses the fourth research objective by analysing the content in light of the examined literature and research question. In addition, it validates the hypothesis. In the Conclusion

chapter a conclusion is drawn from the analysis that has been conducted and an answer to the research question is provided. In addition, recommendations are made.

## 2. Methodology

The Methodology chapter starts with an account on the type of study that clarifies the nature of this research. Secondly, details follow on the operationalization of the hypothesis and deduction as a the method in reasoning. Next, the strategy through which this research has been carried out is described. Finally, the ethics and limitations to this research are explained.

### 2.1. Type of Study

In the following section it is explained which different types of useful and necessary knowledge were required to achieve the research objectives and to answer the research question. The nature and essence of this research project was mixed with exploratory, predictive, descriptive and explanatory elements. The overarching research question ('how?'-question) was analytical in nature that sought to predict "future situations or events […] based on knowledge of current and past situations (Verschuren & Doorewaard, 2010, p. 106)". This thesis was of explorative nature, because it casted a new light on the topic ISDS in TTIP by drawing it to protection of human rights. This report also contained descriptive elements, because in order to explain something this research first described based on context of the research question and the research objectives. The first section in the Literature Review built a portrayal and was mostly descriptive. This descriptive knowledge supported the explanatory knowledge in the subsequent sections that reviewed literature critically. It also provided the scope for explanations in the chapters afterwards. This is to say that explanatory knowledge was required in the main body of the report in order provide an answer to the research question. With an answer to the research question predictive type of knowledge was produced.

#### 2.1.1. Hypothesis

The research perspective is also known as the hypothesis which was formulated and operationalized in this study. The hypothesis resulted from the general statement by John Ruggie which was linked to topics of this research. This thesis used the basic statement undebated and correct. On the basis of that statement this research developed its own hypothesis. The hypothesis was a formulated expectation about the outcome of the research, namely what the dissertation expected to find (Verhoeven, Doing Research, 2007). This dissertation wanted to see whether the expectation is fulfilled (Halperin & Heath, 2012, p. 131). The hypothesis acted in the confirmatory research as a guide to a process of discovery using logical reasoning to evaluate existing theory. Namely, testing the hypothesis in order to clarify; to make it more detailed and more precise (Verschuren & Doorewaard, 2010, p. 265). In this hypothesis-driven research the topics at hand were investigated by means of desk research. It was checked whether the relationship contained in the hypothesis is valid and if so, how strong the relationship is.

#### 2.1.2. Deduction

For the reason of operationalizing a hypothesis this study applied deduction as a method in reasoning for developing an argument toward a conclusion. The deductive approach in this thesis moved from broader generalizations and theories to specific observations and investigated theoretical concepts and possibilities (Halperin & Heath, 2012, p. 31). This study took a deductive approach instead of an inductive approach, because deduction was designed to investigate the hypothesis that was subject to verification. Moreover, deduction was the most appropriate technique in which theoretical concepts and possibilities could be investigated and eventually an outcome of a policy decision could be predicted. Although induction was not the main technique applied in this study it was used in the preliminary research for the formulation of the research question and hypothesis. During the inductive process it was recognized that the general statement by John Ruggie provided a useful basis for developing a hypothesis and applying deduction to this study.

### 2.2. Desk Research

This section provides detail and reflection on the approach taken to the collection and analysis of data. Hence, measures that have been taken to achieve the research objectives are described. The chosen technique, method or strategy for undertaking research in this dissertation was desk research. The author of this study did not gather data himself, but used specialist literature and knowledge material produced by others (Verschuren & Doorewaard, 2010). The secondary desk research relied on mainly qualitative types of data with additional quantitative data being used.

The main sources throughout this study were government reports and documents by the EC; documents and reports published by NGOs and public interest groups; policy papers published by research institutes and think tanks; journal articles and academic reports written by experts in the field of investment law, arbitration and human rights law. In addition, internet-based material such as articles featured in newspapers and magazines by journalists were used. The statement that was developed into a suitable hypothesis was from John Ruggie.

The quality information was critically selected and evaluated by looking at issues such as authenticity, credibility and representativeness (Macdonald, 2008, p. 293). The quest for information, selection and evaluation of the most appropriate qualitative and quantitative data sets was based on the topics relevant for the purpose of this study. Thus, it was thematically searched for knowledge material. During the search, sources such as the library and internet were visited. On the web the relevant and useful information material was obtained through search engines with defined searches. Through key words

contained in the website descriptions; in the article abstracts, and in the general content of documents the most important and relevant source materials were found.

It was opted for secondary qualitative desk research and not primary research, because primary research was not necessary for research about topics of this thesis. With primary research something would be fully explored, but the TTIP negotiations are still ongoing and not finalized. Thus, primary research would not add any new or useful knowledge to this report and the consulted secondary sources provided an abundance of information There was plenty of useful material available in order to deduce an answer to the research question. Moreover, deduction as a method in reasoning was most fitting with secondary research and most suited for enabling a systematic evaluation of content. Ultimately, this study followed a desk research strategy, because it was the most useful strategy to gather to reach a conclusion. Another issue why it was opted for secondary research was because the prediction in this study was enabled through explanatory and descriptive knowledge. The desk research strategy was the most suitable with these types of knowledge (Verschuren & Doorewaard, 2010).

#### 2.2.1. Analysis

In this dissertation an exploration and analysis of legal, economic and political science literature was carried out. Studying the content of found literature was analysed qualitatively. This means that through qualitative content analysis the collected literature was reviewed. The qualitative analysis was carried out deeply beginning with a focus on language. The works were compared and studied comprehensively based on "the meaning of and relationship between words used" in a comprehensive manner (Verhoeven, Qualitative analysis, 2007, p. 122). Thus, for the interpretation of existing literature, it was looked at the meaning of the material. The qualitative analysis of secondary material in the body of this research was focused on the policy context of the research question and research objectives. Theory, concepts and contents of earlier theoretical and descriptive work were critically selected, evaluated and discussed through detailed comparison of theories in terms of their applicability. The various definitions and stances taken by the authors were compared and assessed based on their value in providing answers to the research question.

### 2.3. Ethics

While conducting the research the ethical issues have been considered. First, in order for the author's bias not to go into the research process steps were taken to minimize bias and to maintain neutrality throughout this study. This was related to the fact that a hypothesis was operationalized and a deductive approach was applied to this secondary research. By selecting authors who supply data that confirm and contradict this study aimed to minimize sources of bias. Pre-existing information and evidence that

supported and opposed were reviewed in the literature. The author of this study systematically reviewed and continually re-evaluated the literature regardless of whether the sources conformed to current popular predictions. By considering this ethical issue both sides of the situation were tried to be seen as clear as possible. Especially the so-called confirmation bias was minimized in doing so.

Another ethical issue that has been considered was related to the fact that this theoretical dissertation was literature-based and relied on ideas, knowledge, and evidence from others. In order to act responsibly and to avoid plagiarism attention has been paid to correct citing and referencing. With this being said, all sources in this study are cited according to the APA rules. Hence, the intellectual property of the authors of secondary sources is protected and respected. Direct quotations were crucial and have been made, because it was believed important to let the reader see the actual language used by the author of the source in order to present the essence of an author's idea.

### 2.4. Limitations

Although the efforts that have been made to strengthen this dissertation's validity and objectivity by the chosen research design, the results still have certain limitations and potential problems that must be acknowledged. This dissertation was limited, because secondary qualitative desk research was conducted. It focused on topics that correspond to the scope of this study and which the author considered the most important, interesting and significant for discussing the literature. This was to the extent that it was not possible to cover all elements due to the limited resources of an undergraduate dissertation. The topics at hand were very broad and complex areas and they consisted of various dimensions. Therefore, a comprehensive insight into the topics was not possible. Not all dimensions were covered in this dissertation, because this research was conducted within a limited scope and time frame. Anything outside the scope of this dissertations leaves room for future research.

Hence, academic field such as law and economics were considered, but only as supplementary to the political science approach that this thesis followed. Bearing in mind the political nature of this undergraduate thesis, it was decided not to dig too deep in the analysis of arbitration cases and arbitration law. Instead, for the purpose of this dissertation, an analysis of literature, for instance on arbitration cases and other close aspects were regarded as sufficient. For the reason that policy analysis required a degree of measurability, it was decided to carry out a plain cost-benefit analysis that involved a review of literature on political, economic and substantial and procedural features of the investment protection clause ISDS. It should be mentioned that there were limitations to taking a deductive approach to policy analysis, because not all policy decisions are suitable for cost-benefit analyses. Both ISDS and the TTIP are subjects that are intensively discussed on many different levels and there are strong positions on

many issues. For example, weighing the numerous cost-benefit variables in the state of affairs surrounding ISDS in TTIP would be very difficult to do. Besides, many variables are basically incalculable. A prediction of policy outcomes is very difficult and the potential size and scope of TTIP added to this uncertainty. Thus, an attempt to cover all these positions and to examine every critical argument against TTIP and ISDS would be unfeasible and therefore this thesis limited the review in some aspects.

To begin with, international investment law is a very broad and complex area that is shaped by, among other things, thousands of IIAs, domestic legal orders and arbitration case law. Consequently. the potential effects involved with the proposed ISDS mechanism are characteristically broad and complex. Thus, giving a comprehensive insight in to the area was not possible. Regarding the discussion of TTIP, it was solely dealt with arguments for and against the inclusion of an ISDS clause in TTIP and whether or not ISDS would impact human rights protection in the EU Member States, and if so, to what extent. There are other issues in TTIP that are subject to criticism, but these issues were outside the scope of this dissertation. There is an abundance of arguments both for and against ISDS in TTIP, but not all of these arguments could be covered. Rather, it was focused on arguments that are the most important and interesting. The arguments for and against ISDS in IIAs are very similar and only differ slightly depending on what IIA is subject to discussion. The same rationale applied to the use of human rights protection as a variable. The potential effects involved with the proposed ISDS in TTIP on human rights protection is very similar and only differs slightly depending on what public policy area is subject to discussion. Although there were specific interesting human rights issues under the heading public interest such as environmental protection or public health that could be examined in relation to this subject, it was outside the scope of this thesis. However, arguments for or against ISDS in relation to other public interest and policy areas were also considered to assist with crafting the bigger picture. It should also be made clear that an assessment of the effects of the ISDS process and outcomes for the human rights situation in host states lies beyond the scope of this thesis. Moreover, it is by no means claimed that the investment regime is not able to have positive overflow effects regarding the general human rights situation in a state. Nevertheless, this study focused on those areas of the ISDS system where there is room for improvement.

## 3. Literature on TTIP, ISDS and Human Rights Protection

This Literature Review will discuss the topics related to the subject of this dissertation. The research within this review focuses on the first three research objectives as outlined under the research objectives section. The starting point is to describe in an overview the following topics: TTIP, ISDS and human rights protection. Then, why a discussion is taking place on the connection between ISDS and human rights protection will be explained to the reader. Having explored the underlying reasons for the connection between ISDS and human rights protection, in what way the general connection works will be discovered in the argumentation section wherein academic views on the ISDS system will be reviewed.

After this chapter, the topics and opinions are clear with a focus having emerged, justifying the need for research on the impact of ISDS on human rights protection. Subsequently, giving way for analysis, verifying the hypothesis, drawing conclusions and providing answers to the research question.

### 3.1. TTIP

#### 3.1.1. Background

The EU and US have a long-standing history of transatlantic cooperation (Roy & Domínguez, 2014). They are the largest economies and the largest trade and investment partners on earth (European Commission, 2015). The interdependence of these two economies has grown rapidly over the course of the past decades. After measures to facilitate transatlantic economic relations particularly since the early 1990s, cooperation between the EU and the US was taken to a next level with TTIP (Van Ham, 2013). The EU and the US economies account for roughly half of world trade and are each other's most important investment partners (European Commission, 2015). Negotiations for TTIP were initiated in 2013, with both parties investing faith in its possibility to bolster recovery from a deep and persistent post-2008 recession (Freytag, Draper, & Fricke, 2014). Moreover, as the EU and US markets combined constitute the largest trading block in the world, a trade and investment agreement would serve to strengthen this position (Van Ham, 2013).

#### 3.1.2. Scope

Negotiators on both sides envision TTIP as a comprehensive and high standard economic agreement (Roy & Domínguez, 2014). TTIP is considered the most important and ambitious FTA for several reasons. First, it has the potential to be largest FTA ever negotiated in terms of the combined economic size, population, and investment covered (European Commission, 2015). Second, EU and US negotiators seek new or expanded commitments in areas where little or no progress was achieved in previous bilateral or multilateral trade negotiations (Van Ham, 2013).

*NEGOTIATION PROCESS*

The TTIP negotiations started on July 7, 2013 in Washington D.C (European Commission, 2015). Negotiations alternate between Brussels and the USA, held in week-long cycles. The EU and the US have held 15 rounds of negotiations so far. The agreement is negotiated as a whole, therefore no topic is finalised until full consensus is reached.

*CONTENT*

The TTIP treaty will "will most likely contain somewhere between 25 and 30 chapters" that can be grouped into three broad ranges of subjects: market access, regulatory aspects and trade rules (European Commission, 2016). The three main elements aim to deliver increased market access through the elimination of barriers to trade and investment; enhanced regulatory coherence and cooperation by dismantling unnecessary regulatory barriers; development of rules related to trade such as investment protection that contains a clause on the settlement of investment disputes between foreign investors and a host state government which will be discussed in the next sections.

### 3.1.3. Investment Protection

A key topic in the TTIP negotiations is investment protection that falls under the trade rules pillar. Negotiations in TTIP on the matter of investment protection were suspended in the initial negotiation rounds and it remains a difficult issue (Copley, 2015). So far only textual proposals on EU's investment protection approach are on the negotiation table (European Commission, 2016). A state signs international trade treaties such as FTAs, BITs and IIAs with another state and thereby they enter into contractual agreements with each other's investors (Kleinheisterkamp & Poulsen, 2014). Investment protection standards in IIAs[1] are the legal and financial structures, rules and dynamics that facilitate, support and protect investment activity (Saldarriaga & Shember, Investment & Human Rights Map, 2014). To address this, the EU and US want to provide basic guarantees to each other known as 'standards of investment protection, as stated in the EU negotiation mandate (Council of the European Union, 2014)'[2]. These are rules on how to treat foreign investors in a host country

[1] Investment chapters in free trade agreements (FTAs) are known as international investment agreements (IIAs).
[2] "a) fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures; b) national treatment; c) most-favoured nation treatment; d) protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation; e) full protection and security of investors and

*INVESTMENT TREATY DISPUTES*

It is possible that during the life cycle of investments disagreements arise between investors and states. For this reason, states act to produce guides, standards and procedures for the settlement of treaty-based investor-state disputes. There are a number of ways on which can be handled between investors and host governments. The most common resolution mechanisms for disputes are administrative or judicial procedures, mediation or arbitration (Saldarriaga & Shember, Resolving Investment Disputes, 2014). The highlight in TTIP for EU and US negotiators is the inclusion of arbitration as the method to resolve disputes between investors and host states, and ISDS as the procedural rules that govern the arbitration proceedings (European Commission, 2015). By concluding an FTA states give consent to the use of arbitration and ISDS with investors who are nationals of the other contracting state (Saldarriaga & Shember, Arbitration, 2014).

Disputes in international investment treaties may occur "in many different contexts, take various forms, and have differing degrees of importance" (Salacuse, 2015, p. 354). These disputes can arise, "because a host state has taken a [governmental] measure that allegedly violates that state's treaty commitments on the treatment it has promised to accord to investments protected by that treaty" (Salacuse, 2015, p. 354). Additionally, "because of the broad treaty standards articulated in investment treaties […] virtually all disputes between investors and host governments are potentially subject to the applicable investment treaty" (Salacuse, 2015, p. 354).

## 3.2. ISDS Mechanism

### 3.2.1. Nature of Protection for Investors

The arbitration process is called Investor-State Dispute Settlement (ISDS) or investment treaty arbitration when the dispute concerns the alleged breach of an investor's rights under an IIA (European Commission, 2015). The ISDS mechanism allows investors from one country, the home state, the right to sue host states for the alleged violation of rights granted to the investor under an IIA concluded between that host state and the investor's country of origin (Schram & Mulder, 2015). In order to bring a case, the investor must claim that the state party has breached rules set out in the agreement (EurActiv.com, 2014). The violation of one of more investor rights under an IIA by a host state could

investments; f) other effective protection provisions, such as an 'umbrella clause'; g) free transfer of funds of capital and payments by investors; h) rules concerning subrogation" (Maes, 2014, p. 4).

be composed of a series of governmental actions or measures that may lead to an investor-state dispute (Salacuse, 2015, p. 355). Moreover, "foreign investors alone […] are able to initiate claims against the government; the government cannot initiate an ISDS proceeding" (Johnson & Sachs, 2015, p. 3). With ISDS, foreign investors are afforded the right under IIAs to bring a claim against host state governments outside the traditional court system (Saldarriaga & Shember, Resolving Investment Disputes, 2014). When an investor considers its rights under an IIA have been breached by the host state, IIAs provide the possibility for investors to bring the matter before specialised investment tribunals (European Commission, 2015).

#### 3.2.2. Role of Arbitral Tribunals

With ISDS as a preferred legal instrument, investor-state disputes are resolved through international arbitration tribunals outside the jurisdiction of national or public courts (Saldarriaga & Shember, Arbitration, 2014). National governments accept the jurisdiction of foreign arbitration centres on issues that might directly or indirectly affect the profitability of foreign investment and the rights of foreign investors under provisions of the IIAs (UNCTAD Division on Investment and Enterprise, 2016). The decision-maker in these ISDS proceedings is a panel of private arbitrators (Monbiot, 2014). An investor as claimant and a state as defendant appoint one arbitrator each. The two arbitrators appoint a third arbitrator that acts as the chairperson. The three arbitrators hear disputes between investors and host states and issue decisions (Schram & Mulder, 2015). The tribunal considers the parties' arguments and evidence, and then adjudicates the dispute (Mulder, Schram, & Homolova, 2016). When deciding the case, the arbitration tribunal assesses the claims based on the treaty standards in an IIA and not the domestic law of the host state that governs the investment (The Economist , 2014).

### 3.3. Human Rights Protection

#### 3.3.1. Definition of Human Rights

The generally accepted idea underlying human rights is that all people of any nationality, place of residence, sex, colour, religion, language, national or ethnic origin, or any other status have the right to live with dignity (European Union, 2016). Human rights can relate to a wide range of issues: accessing essential food, water and shelter, education, healthy working conditions and freedom from torture and slavery (Saldarriaga & Shember, Understanding Human Rights, 2014). These rights are all interrelated, interdependent and indivisible. Universal human rights are expressed by and originate in laws in the form of international agreements, regional treaties and national constitutions of individual countries (Saldarriaga & Shember, International Human Rights Law, 2014).

States have recognized a catalogue of human rights. The most generally recognised human rights instrument is the 1948 Universal Declaration of Human Rights (UDHR). Human rights in Europe are recognised through regional legal instruments such as the European Convention on Human Rights (ECHR). The ECHR is an international treaty that protects human rights and fundamental freedoms in Europe (European Union, 2016). At EU level fundamental rights are recognized in the EU Charter of Fundamental Rights. The Charter is consistent with the ECHR which has been ratified by and is legally binding to all EU countries.

#### 3.3.2. Legislation and Implementation of Human Rights

Both domestic legislation and international law such as international human rights law contain rules and principles whereby sates commit themselves to guarantee basic human rights (Saldarriaga & Shember, International Human Rights Law, 2014). A state protects basic human rights by working towards the implementation of human rights (Maiese, 2004). It utilizes the full scope of its administrative, legislative or regulatory, and legal forces (Nickel, 2014). The proactive engagement of a government through these frameworks results in a number of concrete human rights measures within a state's territory and jurisdiction: effective policies, legislation and implementation of appropriate laws, regulation, and decisions that promote the enjoyment of human rights and protect basic human rights (Saldarriaga & Shember, Understanding Human Rights, 2014). It is pointed out that such governmental measures "may not refer to human rights expressly, but instead operate to protect indispensable human rights" (Saldarriaga & Shember, Understanding Human Rights, 2014). Thus, a government has the obligation to act in certain ways, or to refrain from certain acts, in order to promote civil and political rights and protect basic human rights of individuals or groups (European Union, 2016). The state's ability to pass laws is essential to human rights protection, as such measures are primary tools by which states implement their human rights obligations and address public human rights concerns and interests (Nickel, 2014).

### 3.4. Connection between Human Rights Protection and ISDS

There is a connection between human rights protection and ISDS as pointed out at the outset and throughout this dissertation. This section shall establish reasonable ground for discussing the general connection between human rights protection and ISDS.

Investment protection standards in TTIP and the possible dispute settlement mechanism ISDS have increasingly raised legitimate questions from governments, private industry and civil society. Especially a wide range of stakeholders from civil society have raised concerns and questioned the need of ISDS in TTIP. These concerns relate mainly to the nature of protection provided to foreign investors under

IIAs and the role of arbitration tribunals in ISDS proceedings. As IIAs, and as a consequence arbitration cases with strong human rights connections become more prevalent over the years, it gradually appears to restrict the sovereign state's exercise of regulatory power to legislate in the public interest. This concern about ISDS in TTIP is also expressed in human rights terms: "the capacity and willingness of states to regulate to protect human rights could be limited by potential liability under IIAs" (Saldarriaga & Shember, Investment & Human Rights Map, 2014).

Scholars and NGOs increasingly pay more attention to the so-called concept "the right to regulate" (De Groen, 2016). (Pernice, 2014) claims that "[IIAs] must be recognized as an important step forward in international law to give international law more bite,' nevertheless, he identifies that "there are tensions between [IIAs] and the concept of national sovereignty in international law" (p. 19). (De Zayas, 2015) emphasizes the fact that "after years of experience with [the ISDS mechanism] […] it has become apparent that the regulatory function of many States and their ability to legislate in the public interest have been compromised" (p.6). (De Zayas, 2015) continues to claim that "observers have noted retrogression in the protection of right to life, food, water and sanitation, health, housing, education, culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement" (p .6).

On account of the above reasons it is more understandable why ISDS as dispute resolution mechanism in TTIP is such a controversial and politicized matter in Europe's civil society (Cieschinger & Demling, 2016) (Inman, 2015) (EurActiv.com, 2014, p. 5). Therefore, it is important to take a detailed look at how investor-state arbitration interacts in relation to human rights protection. The following section explores how or in what way the general connection between ISDS and human rights protection works. It is expected that there is a connection between human rights protection and ISDS. Therefore, the next section shall investigate whether ISDS has an impact on human rights protection, and if so, to what degree or extent ISDS actually impacts the protection of human rights.

### 3.5. Review of Argumentation on ISDS

This section takes a detailed look at several categories of objections to the ISDS system and counter-arguments to these objections. It analyses arguments for and against the inclusion of an ISDS chapter in TTIP from an academic and scholarly point of view. After this section, a discussion on the impact of ISDS on human rights protection will be possible. There are various stakeholders with divergences of points of view.

#### *3.5.1. THREAT TO STATE SOVEREIGNTY*

The fundamental feature of sovereignty under international and domestic law is generally considered to be the government's "right to regulate" that gives a sovereign state the power to choose its own domestic laws, to promote any regulation it feels necessary, thus to pass new legislation, in order to protect the public interest within its borders (Tietje, 2014, p. 49).

A common argument against ISDS in TTIP is that it threatens domestic sovereignty and weakens the rule of law, because individual foreign investors are given the right to bring claims against host state governments to an arbitration tribunal (Cooperate Europe Observatory, 2014). It is considered an adverse threat and restriction to the sovereignty of the state to give arbitration tribunals the right to review and possibly undermine the exercise of state public authority (Krajewski, 2014).

(Shehadi, 2014) asserts that "a state, by indicating consent to compulsory arbitration in an investment treaty, may have unwittingly surrendered its sovereignty over matters that could potentially be brought before and arbitration tribunal" (p. 15). (Titi, 2014) clarifies that "the capacity of a state to regulate is well-entrenched in customary international law". However, although "investment treaties impose restrictions on […] state freedom", a state that commits to an IIA is in itself perceived as exercise of the state's regulatory capacity (p. 32). In contrast, (Pernice, 2014) contends that "while it is true that concluding international treaties is an expression of national sovereignty, rather than limiting it, this assumption is questionable if external bodies are given the power to assess and effectively sanction acts of the sovereign" (p. 19).

The seeming problem with the limitation on state sovereignty is a concern that the state will not be allowed to regulate freely and therefore will not be able to achieve public policy objectives important to the state (Salacuse, 2015, p. 356). First, the matter at hand in investment disputes is usually related to public policy decisions, where the host state government takes certain measures. (Marc Jacob) agrees when he writes that "sometimes […] such state action is based on legitimate human rights concerns" (p. 12). For example, "acts meant to protect, […] which [the state] considers important for the public welfare, but which an investor believes violates its rights under a treaty". It is usually said that an arbitration tribunal that finds "the [state] measures taken illegal under a treaty might not only offend the state and force them to pay considerable damages but it will also force the state to repeal or change the measures taken in order to avoid claims from other investors" (Salacuse, 2015, p. 355). However, (Fabry, 2015) contends that "arbitral tribunals can only award financial compensation to investors whose complaints are upheld [and] cannot demand that states withdraw or amend decisions or laws breaching agreements" (p. 14). Thus, an arbitration tribunal cannot directly impinge upon a state's sovereign right to regulate. Under IIAs states can regulate as they consider appropriate, but if states do, they risk paying

compensation to foreign investors (De Groen, 2016). (Jacob, 2010) suggests that "[IIAs] could address human rights concerns either by directly imposing obligations on investors or by referring to state duties" (p. 9). However, the author maintains that "plain reference to human rights provisions in BITs is at present virtually unknown […] Associated areas […] such as labour standards, environmental protection […] are occasionally mentioned in BITs" (p.11). Therefore, in this context, the states' right to regulate becomes a proxy for human rights according to various scholars.

#### *3.5.2. THE RIGHT TO REGULATE*

The right to regulate is found to be the nearest equivalent in international and domestic law to the state's protection of human rights. For example, (Fabry, 2015) insists that the right to regulate is written in recent IIAs and upheld by arbitration awards (p. 14). According to (Tietje, 2014), the right to regulate is incorporated as a legal concept in IIAs. This trend started with the preamble of an IIA, whereby each party clarifies their intentions, for instance, by including recognitions of the right to regulate and the requirement of a demonstrable public interest objective (De Groen, 2016). "A preamble that recognized this approach would reverse the current trends in trade law of seeing the right to regulate as an exception to be narrowly interpreted [by arbitrators]" (Mann, 2008, p. 216). However, (Jacob, 2010) asserts that "such preambular wording […] does not amount to substantive provisions […] Rather, it is merely an indication of the treaties' objects and purposes and hence an aid to interpretation […] It cannot by itself compel a foreign investor or states" (p. 10).

(Sampallo, 2015) argues that "there are clear rules that give the state a right to regulate freely, except under certain circumstances. Arbitration tribunals nowadays have arrived at and articulated the right to regulate mainly in relation to the area of indirect expropriation, the fair and equitable treatment (FET) standard and the non-discrimination principles (p. 56). (Tietje, 2014) further adds that arbitration tribunals arrived at and articulated that "a governmental measure that is bona fide and furthers a legitimate purpose in a non-discriminatory and proportionate way is always considered to be within the state's right to regulate, and no compensation will have to be paid to an investor that suffers a loss" (p. 50). (Sampallo, 2015) points out to an arbitration tribunals decision in one ISDS case which stated that "a measure taken by a state must be proportionate to the public interest that the state strives to protect". Similarly, in two instances of arbitration tribunals' decisions it is emphasized that "a state will […] only be penalized for adopting new legislation or changing current one if their acts are arbitrary, discriminatory or in any other way breaches the IIA entered into […] [Legitimate] acts committed by a government will not be punished by an [arbitration tribunal] (p. 57). For instance, an analysis of arbitration tribunals' decisions in investment disputes shows that in a number of cases arbitration

tribunals have recognized the right of governments to protect public interest or development objectives such as human rights, environment and social policy (Gordon, Pohl, & Bouchard, 2014).

In spite of arbitration tribunals nowadays taking into consideration the host states' right to regulate in some ISDS proceedings, (UNCTAD, 2014) argues that there are "only a handful of international agreements articulated [the] difference [between, for instance] […] the concept of indirect expropriation and non-compensable regulatory governmental measures" (p. 137). Scholars critical of ISDS frequently acknowledge that there are not many IIAs that provide interpretive or explanatory definitions of specific investment protection standards and related issues. (UNCTAD, 2014) further claims that such "vagueness of investment protection standards in IIAs can unduly restrict the freedom of host government to regulate", because it gives considerable power to arbitration tribunals to determine what constitutes "compensable indirect expropriation and non-compensable general regulation, the scope of national treatment, the content of fair and equitable treatment (FET), and the amount of flexibility it grants to government decision-making" (p. 137). (Gerstetter & Meyer-Ohlendorf, 2013) states that "investment case law is not a consistent, uniform body of law […] there have been "divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts […] Consequently, there is considerable uncertainty of how an arbitration panel would interpret an investment norm in a given case" (p. 10). Scholars correspondingly refer to ISDS case law which has shown that arbitrators adjudicating host state government acts with broad discretion and arbitrators adopting expansive interpretation of investment protection standards in ISDS cases were applied to measures taken in the public interest (Shehadi, 2014, p. 19). "This may reflect reluctance to attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and preferences to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis" (OECD, 2005, p. 53).

#### *3.5.3. REGULATORY CHILL*

Consequently, governments might find their basic regulatory functions constrained by "the threat of having to compensate foreign investors if they introduce policy measures designed to respond to changing circumstances (such as financial crises31 or new scientific findings) or to public demand with laws of general application" (UNCTAD, 2014, p. 137). (UNCTAD, 2014) further adds that "the sole possibility of breaching an investment treaty can be sufficient to deter a State from taking any measure that might alter the business environment, even if this is necessary for economic, social or environmental

reasons" (p. 137). This is known as the so-called "regulatory chill" which is closely related to the right to regulate. It is claimed by critics of ISDS and proponents of this theory that that a state will abstain from altering or enacting legislation due to fear of expensive arbitration procedures and the actual cost of awards involved in ISDS. (Curtis & Reynolds, 2015) and other critics of ISDS claim that the threat of arbitration prevents states from exercising their sovereign rights and limits their policy space. These scholars assert that the legal costs to go to arbitration are on average US$8 million and in some cases surpass US$30 million (Gaukrodger & Gordon, 2012). A frequent argument by scholars is that damages awarded to investors on average were $575 million (UNCTAD, 2014). Thus, the fear of legal costs and potential awards by states to investors can create a chilling effect on governments' willingness to legislate and implement public policy objectives in areas such as the environment, labour law, health and human rights. Scholars significantly refer to two ISDS cases from the past. Ultimately, scholars are in consent that specifically this "regulatory chill" is evidence of the indirect influence of foreign investment on legislation.

However, several private interest groups, NGOs and journalists such as (European Federation Investment Law Arbitration, 2015), (BusinessEurope, 2015), (Worstall, 2015) indicate that there is no evidence which would support the theory of regulatory chill. There is the view that it is hard to measure regulatory chill, because political choices are made depending on many independent factors and it is difficult to identify ISDS threat as the reason for chilling effects. Moreover, it is argued that the few cases are anecdotal evidences of this theory and relatively count to nothing in view of all known ISDS cases (Tietje, 2014, p. 92). Another point among those in disagreement with the regulatory chill theory that law, policy and regulation in itself chills government activities and that the point with international law is to curb sovereign measures to make sure that the host state treats the investor fairly and accordingly to the IIA. A scholar substantiates this claim by saying that "it depends on where one stands in a specific discussion whether the perceived chill provokes a good or unwanted outcome" (Cieschinger & Demling, 2016).

## 4. Discussion

This chapter addresses the fourth research objective by discussing the reviewed literature on TTIP, ISDS and human rights protection; the argumentation on views on ISDS and the relationship between ISDS' and human rights protection, in the context of TTIP. Theoretical explanations of the latter concepts help to speculate about what will likely occur in the future, thus to predict the resulting phenomena in the next chapter.

By now, it is known that measures taken by the state are equal to the public interest that the state seeks to protect. However, a measure by a government that is legitimate and furthers a lawful purpose in a way whereby US investors are treated fairly and properly is considered within the state's right to regulate. Therefore, no compensation will have to be paid to an US investor that suffers loss. The government will only be fined for adopting new human rights legislation or changing a current one if their actions interfere with rights granted to the investor under an IIA. Thus, legitimate human rights protection actions committed by a government will not be penalized by an investment tribunal. Hence, a tribunal never can cancel or demand to change a human rights regulation or have any related direct impact on domestic human rights policy. This is to say that through ISDS the state is not automatically unable to adopt human rights measures in the future or would have to pay compensation to investors whenever doing so. Nevertheless, the outcome of ISDS proceedings are rather unpredictable given the role of arbitral tribunals, their vague and broad interpretations of standards in cases and hence the inconsistent case law. Here the distinction must be made between state's ability to regulate for legitimate reasons and states reduced policy space through the chilling effect of claims.

The specific issue of regulatory chill may cause governments to forgo the adoption of legitimate regulatory changes for human rights purposes: the environment, health, or natural resources, because of the threat of arbitration and the resulting fear of expensive arbitration proceedings. This is not surprising given the legal costs, claims, and awards awarded by arbitral tribunals. More precisely, the threat of investment arbitration could have chilling effect on governments' willingness to adopt human rights regulation and could lead governments to not adopt planned measures, to adopt less ambitious regulations, or to agree on a negotiated solution with investors.

Regarding the hypothesis mentioned in the beginning of the chapter and that served as the basis for this study: "the ISDS system is a constraint on a state's national regulations and regulatory space." As has become clear from the previous two sections, ISDS does not put a constraint on existing national regulations, but it does reduce the regulatory space of government to legislate for instance human rights policy objectives important to the state and the public.

## 5. Conclusion

This chapter will revisit the research objectives, summarize the key steps of the research, provide conclusions based on them, and answer the research question. Moreover, recommendations will be provided. This chapter validates the hypothesis mentioned in the introduction and predicts the resulting phenomena, hence answers the research question.

The overall aim of this research was to answer the research question: 'How will the inclusion of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) impact the protection of human rights in the European Union (EU)?' The introduction presented four specific research objectives that made a systematic evaluation and therefore prediction possible:

1. ***Investigation*** of context and literature on the inclusion of ISDS in TTIP; and of human rights protection
2. ***Examination*** of the general connection between human rights protection and ISDS
3. ***Exploration*** of in what way ISDS interacts in relation to human rights protection by way of argumentation
4. ***Evaluation*** on how ISDS impacts human rights protection, and if so, to what extent

Objective 1 was met by giving a detailed account on the literature on TTIP, ISDS and human rights protection. Objective 2 was met by analysing the previous literature and showing the interaction between ISDS and human rights protection. The literature logically drew on new dimensions addressed in an analysis of the causal relationship, between the ISDS and human rights protection.

In conclusion and to answer the research question, the ISDS will most likely impact human rights protection in the EU because of TTIP. Both the literature and discussion revealed that the potential liability under TTIP could limit the policy space of the EU governments to implement reforms, legislation, policy programs to protect human rights.

The discussion on the right to regulate has shown that legitimate measures for the protection of human rights protection will not be penalized by an investment tribunal. Hence, a tribunal never can cancel a human rights regulation or have any related direct impact on domestic human rights policy. This is also to say that through ISDS the state is not automatically unable to adopt human rights measures in the future or would have to pay compensation to investors whenever doing so. Nevertheless, the outcome of ISDS proceedings are rather unpredictable given the role of arbitral tribunals, their vague and broad interpretations of standards in cases and hence the inconsistent case law. Nonetheless, there is substantial risk that this would happen: given the context of TTIP negotiations, whereby the EU negotiates the

biggest modern FTA ever known for the main purpose of economic growth and jobs, the high costs of legal awards and the potential compensation of award for any future legislation may force the EU to change, repeal or withdraw regulations for the protection of human rights. Consequently, in political negotiations within the EU TTIP could be used as an argument not to pass, legislate or adopt sustainable human rights standards.

**Recommondations**

The objectives of this research are not to recommend something in practice, but in terms of future research this dissertation proposes a comprehensive study on possible alternatives for ISDS as a system for the settlement of investment disputes in TTIP negotiations and in general existing and future IIAs. In case the EU and US continue negotiations on the final content of the investment chapter in TTIP with an ISDS clause, it is suggested that both parties include human rights concerns and public policy objectives as substantial provisions to the treaty as to safeguard that arbitration tribunals take into consideration human rights protection in their adjudication of claims. Furthermore, it would be interesting to see more detailed research on the phenomena of regulatory chill as this theory is the only true threat to human rights protection.

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