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## DONALD TRUMP, TPP, NAFTA AND INTERNATIONAL INVESTMENT LAW: TIME TO PANIC OR TIME FOR HOPE?

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### **Abstract:-**

*When newly elected President Donald Trump took the office he almost immediately, with a stroke of a pen, withdrew the US from Trans Pacific Partnership (TPP) and vowed to do the same with North American Free Trade Agreement (NAFTA). Given the magnitude and the significance of both of these treaties not only for international trade, but also for international investment, the urgency of such decisions seem unprecedented. This article examines potential impact of these developments on international investment law regime in the broader context of globalization issues.*

**Keywords:-** TPP, NAFTA, international investment law, international investment treaties, international investment arbitration.

## INTRODUCTION

Changes or a mere possibility of them often lead not only to excitement, but also cause fear or feelings of uncertainty. When the newly elected US President Donald Trump signed an executive order withdrawing the US from TPP and confirmed his intention to pull the US out of NAFTA as well, international investment law practitioners and scholars as well as foreign investors most certainly at least paused for thought. For although both TPP and NAFTA are essentially complex trade treaties, both contain exhaustive investment chapters focused entirely on the legal framework governing foreign investment in the signatories' states.

Throughout his presidential campaign Donald Trump was not shy to express his dislike of NAFTA, which he called "one of the great economic disasters" that has "destroyed" the US". He was consistently voicing his intention to withdraw the US from NAFTA if elected. He was also quick to criticize TPP at every opportunity, calling it a "horrible deal" and "insanity". Whilst during presidential campaign such a firm position could have been a part of a campaign strategy aimed at gaining votes within a specific electorate group, Donald Trump had been expressing such views well before his presidential campaign gained any momentum, and when elected President Trump wasted no time in following on his election vows.

Potential impact of President Trump's decisions in relation to TPP and NAFTA on global economic trade relations is an enormous subject on its own and has already generated great interest. This paper however focuses on the legal analysis of possible implications of Trump's decision on international investment law, a separate legal field specialised in foreign investment. In the context of international investment law, this paper aims to consider the most obvious questions that come to mind in the light of Donald Trump's strong position on TPP and NAFTA: what now for foreign investment in Asian-Pacific region; what if NAFTA really is next to be axed; and so what for the narrow, but extremely dynamic, fast growing and powerful 1 legal regime of international investment law? Is it time to panic, or is it time for hope and opportunity? Every change presents not only challenges, but is also an occasion to review and revisit *status quo*, take score, adjust and adapt. What threats and opportunities arise for international investment law regime in the era of President Trump?

### TPP story

Just three days after his inauguration, on 23 January 2017, President Donald Trump signed a memorandum addressed to the United States Trade Representative directing to "withdraw the United States as a signatory to the Trans-Pacific Partnership (TPP), to permanently withdraw the United States from TPP negotiations (...)" [1].

This action of the new US President has been as controversial as TPP itself since its very inception. Although TPP is a multilateral treaty with 12 signatories, withdrawal by the US is effectively neutralising the treaty before it has even been ratified by the parties. After the withdrawal of the US there are 11 remaining parties to TPP: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam. The future of the treaty without the US, its major player, is rather bleak.

Legally, without the US, TPP will simply not come into force. Article 30.5 of the treaty prescribes two ways in which it can become effective. Firstly, it could come into effect 60 days after the 12<sup>th</sup> TPP member completes its ratification procedures [2]. This avenue is clearly impossible now. However, given the complexity of the treaty and a large number diversified partners participating in it, the treaty provides an alternative mode of entry into force. If within 2 years not all signatories have completed their ratification process, the treaty comes into force when at least 6 of the original signatories, which together account for at least 85 per cent of the combined GDP of all 12 signatories, have ratified the treaty [3]. Without the US, which represents over 60 percent of TPP's GDP, the treaty simply cannot come into effect.

What is the impact does this have and what are the losses for international investment legal regime? The actual effect on international investment law is largely intangible since the treaty hasn't been in force yet and no investors have become beneficiaries of the treaty protections yet. Although it is difficult to speculate about the impact of the treaty not yet in place, there have been indications that the investors have begun taking into account the expected establishment of TPP in their investment and corporate decisions. For instance, Japanese companies in the United States and Canada were planning to use TPP to conduct their importexport activities in the rest of the group. About 22 per cent of the 300 executives surveyed indicated that the prospect of TPP had already affected their corporate FDI decisions in favour of the 12 Pacific Rim member countries, while over 50 per cent suggested that the agreement, if implemented, will influence their investment decisions [World Investment Report, 2016:33, footnote 10]. The significance of the US withdrawal could potentially affect the future direction of international investment law regime in the Asia-Pacific region and perhaps even globally.

TPP carries a significant economic and political weight. Reaching an agreement after years of complex negotiation process and against significant opposition has been an enormous achievement in itself. TPP region receives a sizeable share of global foreign direct investment (FDI) inflows, 34 per cent. In 2015 alone, FDI inflows to TPP group rose by 68 per cent to 1

\$593 billion. The US has been one of the main recipients and sources of FDI into and within the TPP region. TPP's FDI stock in 2015 was \$9 trillion, about the size of the economies of Australia, Belgium, Canada, France, Germany and

Sweden combined. Intra-TPP investment accounted for an average 36 per cent of total inflows to the group between 2010 and 2014 [World Investment Report, 2016:10].

TPP was an opportunity to harmonise this large and diversified investment market, further liberalise and ease investment flows and offer unified protection for investors.

Notably, the US has been the main architect of the treaty and TPP investment provisions are modelled on US investment policies. TPP's investment chapter largely follows the US Model Bilateral Investment Treaty (BIT) and is overall generally consistent with the majority of the US BITs. TPP represents US driven model for legal foreign investment framework, characterised by strong investment protections, liberalization and removal of barriers for the flow of foreign investment. Among TPP parties, the US would be the biggest capital exporter, since the US has been consistently the largest outward investors in the world, with US\$300bn outflow investment in 2015 alone. TPP was designed to facilitate uniform and predictable legal framework for foreign investment in the region. Most importantly for the US investors, TPP was meant to provide substantial protections for the US investors in the Asia-Pacific region, further enhanced by investor-state dispute resolution mechanism. It was envisaged that TPP would deter the governments of contracting states from discriminatory or abusive actions towards the US investors.

What specific protections has TPP offered to the US investors? The treaty includes core and standard provisions: full protection and security standard (TPP, Article 9.6), protection against discrimination based on nationality (TPP, Article 9.4 and 9.5), against expropriation without compensation (TPP, Article 9.8) and against unfair and equitable treatment. The protections are offered in respect of a very broadly defined investment, covering a non-exhaustive list of tangible and intangible assets, including intellectual property rights. The treaty aims to preserve national policy space by allowing states to regulate in the public interests, including health, safety and environmental protection (TPP, Article 9.16). Investor-state dispute resolution mechanism (ISDS) permits investors to seek recourse through investment Arbitration Avenue, but includes safeguards to prevent abusive and frivolous claims. Arbitration provisions include also few enhanced standards, like allowing public access to hearings and documents (TPP, Article 9.24), or permitting *amicus curiae* submissions (TPP, Article 9.23) or binding joint interpretations of the investment provisions (TPP, Article 27.2.2). Unusually, TPP provides an opportunity for disputing parties to comment on draft arbitration awards, adding to procedural formalities and extending overall time for reaching final decision in a dispute (TPP, Article 9.23.10).

Disappearance of TPP means retaining existing *status quo* of the legal framework governing foreign investment between TPP signatories. Even if TPP ever came into force, it would overlap with 39 existing bilateral or regional international investment agreements among TPP parties [World Investment Report, 2016: 122, footnote 23]. Whether it would contribute to this confusing “spaghetti bowl” of treaties or simplify it, it is debatable since the treaty does not include provisions dealing with the existing overlapping agreements. It remains silent and leaves it to the parties to decide whether to terminate or not existing overlapping investment treaties. For example, Australia and Peru agreed that their existing BIT (dated 7 December 1995) will be terminated upon entry into force of TPP [World Investment Report, 2016: 122, footnote 23]. Mostly however, TPP signatories have not dealt with possible overlap of TPP with other treaties.

In his executive order, President Trump expressed the intention “to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals”. It is unclear whether the intention is to retain existing legal framework for foreign investment with Asia-Pacific nations or whether such pursuit of bilateral trade deals will cover foreign investment as well.

The decision of President Trump to revert to bilateral investment policy making would be at odds with regionalism, one of the most prominent trends of recent years in global investment policy making. Up to 90 countries globally are currently involved in ongoing negotiations of regional and megaregional treaties [World Investment Report, 2015:1079]. Europe, Africa and Asia has seen substantial activity aimed at regionalism and consolidation of investment policies landscape. The EU Lisbon Treaty of 2009 granted exclusive investment policymaking competence to European Commission (Part. V, Title II, Art. 207(1) of the Consolidated EU Lisbon Treaty). EU has already successfully completed treaty negotiations with Singapore and Canada. Investment Agreement for the COMESA Investment Area signed in 2007 is just one example of consolidation of investment legal framework on African continent. In another example, Southern African Development Community (SADC) signed Protocol on Finance and Investment on 18 August 2006 (entered into force on 16 April 2010) aimed at harmonization of investment policies among its members. As a result of this regional effort, SADC has issued Model Bilateral Investment Treaty Template in 2012. Further, member states of COMESA, East African Community and SADC launched in 2015 the COMESA-EAC-SADC Tripartite Free Trade Area. Among other African multilateral initiatives, draft model investment treaty for member states of EAC is being discussed at the Sectoral Council on Trade, Industry, Finance and Investment and includes several investment provisions including national treatment and most-favoured-nation provisions. The African Union is also developing Pan African Investment Code, which is expected to include innovative provisions aimed at balancing the rights and obligations of African host states and investors. Substantive consolidation of investment agreements on Asian continent took place in 2009 when ASEAN Comprehensive Investment Agreement (ACIA) has been signed. An alternative to TPP is a proposed Regional Comprehensive Economic Partnership Agreement (RCEP), a free trade agreement between ten member states of the ASEAN (Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam) and six other south Asian states (Australia, China, India, Japan, South Korea and New Zealand). Another major initiative is ongoing

negotiation of the Pacific Agreement on Closer Economic Relations - Plus, a trade agreement between Australia, New Zealand and several Pacific island countries.

Among other initiatives in the field of international investment framework, Ecuador, the Dominican Republic and Venezuela agreed to establish a Southern Observatory for reporting on the state of international investment disputes, monitor activity of international investment tribunals, reform proposals and coordination efforts. Also, UNCTAD World Investment Forum established in 2008 is designed to facilitate consultation and provide a global platform for investment governance. UNCTAD is also engaging in few work stream initiatives to assist in the continuing development of investment policies.

The common characteristics of such ongoing regional and multilateral efforts across the globe in the field of international investment include pursuit of more investment, more capital, more favourable investment conditions and acceleration of economic growth. Regions increasingly group together to increase their competitiveness against other regions. These regional and inter regional treaty efforts alongside other multilateral initiatives in the field of international investment, have been indicative, until now, that the balance has been gradually shifting from bilateral to regional treaty making, thereby increasing the impact of regions in international investment policy rulemaking [World Investment Report 2012:86].

The US decision to go against multilateral initiative of TPP and pursue bilateral relationships instead could potentially indicate the reverse, or slowdown of this regionalism globalization trend. It is arguable whether this is good or bad news for international investment law and whether the US has sufficient bargaining power to stand out in global investment policy making regionalisation trend. The road to consolidation and harmonization of investment rules and moving towards multilateralism in investment law have just become more complicated.

It could be argued that regional treaties like TPP, instead of simplification and consistency would lead to multiplication of treaty layers, adding vertical overlap on top of often already existing horizontal overlap of international investment policies and agreements. This complexity makes it difficult for states and investors to navigate elaborate investment policies' landscape and assess and mitigate any risks relating to investment or policy making. Faced with multiple legal basis for possible claims, investors will either choose the most advantageous one or even seek recourse under more than one treaty [4].

It will now never be known whether TPP would bring all the benefits its proponents advocated or whether it would be a "horrible deal" Donald Trump was claiming it to be. It is however unlikely that collapse of TPP, "the treaty that never was", will have any long term detrimental effect on international investment regime. Regardless of the criticisms, international investment law has never been more far reaching and present on the global scene.

### **NAFTA story**

TPP and NAFTA share many similarities in their investment chapters. However, withdrawing the US from NAFTA would bring entirely different set of consequences. NAFTA's importance in the evolution of the discipline of international investment law, for better or for worse depending on the view, cannot be underestimated.

NAFTA has been concluded at the height of the "roaring" 1990s [Stiglitz], a golden era for the neoliberal hegemony of the US, characterised by the explosion of economic activity, including in the field of foreign investment. The number of treaties quintupled during the decade, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s. The number of countries involved in bilateral investment treaties reached 173 [UNCTAD, 2000:iii].

Although NAFTA, like TPP, is a comprehensive agreement focused on trade, its famous Chapter 11 is devoted entirely to investment. Chapter 11 generated enormous attention and resulted in extensive volume of commentaries, controversy and arbitral jurisprudence. NAFTA provided the most comprehensive contribution to unified application of international investment rules and helped to define standards of protection of foreign investments, which have influenced international investment law well beyond the borders of NAFTA signatories.

Given the historical context of negotiations of NAFTA as primarily trading agreement, the amount of controversy and the number of cases originated from Chapter 11 was not necessarily foreseen by NAFTA parties [5]. Interestingly, at first, Chapter 11 of NAFTA did not seem to be noticed by the investors at all. The first NAFTA investor-state arbitration was not initiated until January 1997 with a notice of arbitration in *Metaclad v. Mexico*, three years after NAFTA came into force. In fact, all early cases were initiated by the US investors against two other parties, Canada and Mexico [6]. The first claim against the US under Chapter 11 was brought in 1998 by a Canadian investor [7].

Chapter 11 of NAFTA embodies the principles of investment protection favoured by the US. It emphasises high standards of treatment of foreign investment and its protection and very little scope for sovereign space and sovereign control over foreign investment. Chapter 11 contains all the elements to ensure the highest level of investment protection. Main obligations under NAFTA are included in Section A of Chapter 11: national treatment (both pre and post entry) (NAFTA, Article 1102), most-favoured-nation treatment (NAFTA, Article 1103), minimum standard of treatment including fair and equitable treatment, full protection and security (NAFTA, Article 1105), prohibition of performance requirements (NAFTA, Article 1106), protection against expropriation (direct and indirect) without compensation (NAFTA,

Article 1110) and the right of repatriation of profits and the transfer of funds associated with the investment (NAFTA, Article 1109).

NAFTA has been criticised for leaving limited regulatory powers to the host state. The proceedings and outcomes of many arbitration cases under Chapter 11 often caused public outcry and controversy. It is worth noting that the US has never lost NAFTA claim. Most controversial NAFTA cases involved Canada and Mexico. For example, *Lone Pine v. Canada*, *Ethyl v. Canada*, *Metalclad v. Mexico* or *TecMed v. Mexico*. The main criticism of NAFTA concerns potential limits of state sovereignty, regulatory chill effect and perceived preferential treatment given to foreign investors [Kinnear & Hansen:101]. Perhaps the most significant positive development brought by NAFTA was introduction of transparency into the arbitration system. The provisions of NAFTA expressly allow either disputing party to make an award public when Canada or the United States is a party to the dispute (NAFTA, Annex 1137.4). In practice, all three parties comply with the transparency standard to a much greater extent. The documents, pleadings, awards, background material, notes and interpretations are available through online resources.

Setting aside the debate whether President Donald Trump alone can withdraw the US from NAFTA, or whether he needs support of the US Congress, legally NAFTA is a very easy treaty to withdraw from. Under Article 2205, a party may withdraw on a six-month notice. The agreement would then remain in force among the remaining signatories [8]. Strikingly, NAFTA does not contain a survival clause, which typically extends the protection of the agreement for a period of time (usually 15 or 20 years) after its termination. Potentially then, the US investors with interests in Mexico and Canada as well as Canadian and Mexican investors with interests in the US, could be deprived of protection under NAFTA within just 6 months. Given that many investments are long term commitments undertaken precisely because of effective protective umbrella of NAFTA, it is hard to speculate the fate of such investments and investment relationships after the sudden death of legal backbone support of NAFTA.

NAFTA is the second treaty with the highest number of related investment disputes (59 cases), just after the Energy Charter Treaty (with 99 cases). Out of the total of 59 NAFTA cases, the US has been a respondent in only 16 cases and the US investors sought protection in 41 cases. The US investors have been the biggest beneficiary of NAFTA legal framework. Scrapping NAFTA would deprive the US investors of one of the main legal safeguard for their investments in Mexico and Canada.

NAFTA arbitration cases contributed substantially to the development of international investment law doctrines. Many NAFTA arbitration awards serve to provide guidelines on national treatment, most favoured nation treatment, minimum standards of treatment and expropriation issues. NAFTA tribunals provided extensive analysis of issues relating to national treatment including “like circumstances” [9] and “less favourable treatment” analysis [10]. Issues of minimum standard of treatment were also considered in several NAFTA cases [11] and were subject to binding interpretative statements by NAFTA parties [KaufmannKohler]. Expropriation, especially indirect expropriation, was another important issue heavily discussed by NAFTA tribunals, which have provided extensive interpretation and legal guidance on the issue [12].

Full analysis of the many years of NAFTA arbitration is well outside the scope of this paper. NAFTA has been and continues to be a benchmark for investment treaty making and investment arbitration due to the characteristics of Chapter 11 and the quality of the arbitration proceedings and awards under NAFTA. Removal of such treaty from international investment landscape would surely not contribute to harmonization and clarification of a complex web of international investment law rules. Without a doubt withdrawing from NAFTA would not occur without strong opposition from two remaining NAFTA signatories and the community of foreign investors.

### **What next for international investment law?**

How would the disappearance of TPP and NAFTA affect the overall status and future direction of international investment law?

The answer to this question is not a straightforward one since international investment law is not a typical legal regime. It is a very dispersed and diffused system, heavily decentralized, composed of a multitude of over 3000 treaties [13], customary international law and diversity of arbitral institutions (often contradicting each other [Reinisch, 2008]), foreign investment insurance schemes, local laws, investment contracts and no single prevailing authority or clear hierarchy. International investment regime emerged through a progressive evolution process and not as a result of clearly defined legislative acts or conventions. It “cannot be explained by a singular motive, agent or plan, be it BITs as credible commitment to attract investments, BITs as photo opportunities tumbled into uninformed countries” or “as dark conspiracy pupeteered by rent seeking arbitrators and law firms. There is no single creator, plan or deliberate design.” [Pauwelyn:374]. The regime thrives on globalization, liberalization, borderless world and seamless flow of capital. International investment law has also been heavily influenced by historical context and major global events, like colonization, decolonization, world wars, cold war or financial crisis, which all left their mark on the discipline. It remains to be seen whether President Trump and his administration will also leave a distinctive mark on the regime.

For those who claim that “the law of foreign investment is at the cross roads” [Shan, 2012:1], removal of TPP and NAFTA could be interpreted as yet another indicator that international investment regime is in a phase of transition” [Sauvant: xxxi], “going through a period of reflection, review and revision” [World Investment Report, 2015:120], which “may

herald long-term shifting paradigms” [Hindelang & Krajewski:3]. The latest developments in the US investment policy making could be illustrative of the shifts “in response to changing economic realities and multiple crises” [UNCTAD, IAA Issue Note, 2013:5]. Perhaps then, given such a strong approach to TPP and NAFTA by the new US President, it could as well be that “international investment law is entering a critical new era” [Shan & Su:1] indeed.

International investment regime has never been without controversies and has been subject to numerous critical debates [Schill:57; Waibel et al; Kaushal) and now more than ever before “faces considerable challenges and serious critiques” [Schill:57]. After all, it has been created to protect interests of private investors in foreign territories. In mixing of domestic and foreign interests, sovereign and corporate power, locals and outsiders, there is bound to be tension.

Nevertheless, even the strongest opinions about potential crisis of the system do not necessarily mean that such crisis is indeed taking place. Perhaps the regime thrives on crisis? It certainly experiences high level of activity in times of economic meltdown, like in case of Argentina and arbitration caseload that followed its financial crisis of the beginning of the century. After its economic crisis, Argentina clearly became the leading investor-state respondent state, with 54 known cases filed against Argentina since 2001.

The facts indicate that the world of international investment is showing more signs of vitality than distress and international investment law has been described as “the fastest growing area of international law” [Brower & Schill:472], “one of the great international legal success stories” [Simma:574]. Global foreign direct investment flows jumped by 38 per cent to \$1.76 trillion in 2015 and reached their highest level since the global economic and financial crisis of 2008–2009. With forecasts of global foreign direct investment flows surpassing \$1.8 trillion in 2018 [World Investment Report, 2016:x], the future appears promising for foreign investors. Improvement of macroeconomic conditions are likely to increase investment appetite and global economic growth is predicted to accelerate in foreseeable future [World Investment Report 2015: xi].

Such favourable global economic conditions are a fertile ground for dynamic activity within international investment law. This forecasted growth is partly attributed to continued investment liberalization and promotion measures. In 2014, more than 80 per cent of investment policy measures were aimed at improving entry conditions and reduce restrictions [World Investment Report, 2015: xi]. Overall, majority of new policy measures are focused towards investment promotion, facilitation and liberalization. In 2015, 46 countries and economies adopted 96 policy measures affecting foreign investment. Of these measures, 71 related to liberalization, promotion and facilitation of investment. The share of investment liberalization and promotion measures reached 85 per cent, which is above the average between 2010 and 2014 [World Investment Report, 2016:90]. Many countries either passed new laws or amended their existing legislation in order to provide incentives or to facilitate investments [14]. From Australia to Mexico, the states are looking for ways to attract capital and provide incentives for foreign investment. The states open their economies and industries, improve investing conditions, privatize economy sectors and remove obstacles to facilitate foreign investment in their territories. The international investment regime has all the premises for further growth, with or without TPP and NAFTA.

And indeed the expansion of international investment law continues, with more and more treaties coming into existence. The year 2015 alone saw the conclusion of 31 new international investment treaties – 20 BITs and 11 other treaties with investment provisions, that is more than two treaties per month. Recently, the annual number of BITs has been slightly declining, with the main investment treaties negotiation efforts focused on large regional treaties with wide geographical jurisdictional scope, like doomed TPP or increasingly problematic TTIP. The reverse to bilateral treaty making may now be in order if Trump’s administration follows through with new bilateral investment policy making initiatives.

Strong investment provisions are also increasingly being included in wide range of international treaties beside BITs, like economic partnership or cooperation agreements (recently signed between Australia and Japan (2014), Japan and Mongolia (2015), and one between ASEAN and India (2014)), free trade agreements (recent examples include three FTAs signed in 2014, between Australia and Korea, Canada and Korea, and Mexico and Panama). This diversifying tendency includes recent EU Association Agreements, all signed in 2014, with Georgia, Moldova and Ukraine, which also contain investment protection provisions, although limited in scope. Countries previously staying outside of the legal framework of investment treaties, like Brazil, are now becoming active participants in international investment regime (recent Cooperation and Facilitation Investment Agreements entered into by Brazil with countries like Chile, Colombia, Malawi, Mexico, Angola and Moçambique).

In one form or another, it appears that countries from all corners of the world are actively participating and interacting with international investment regime. They are either reviewing their legislation and policies, negotiating new treaties, reviewing and renegotiating their existing treaties, producing new models of international investment treaties (Norway, Colombia, India, Indonesia, Egypt) or introducing new approaches to international investment (EU, Brazil, India and Indonesia). This trend is not limited to a specific group of countries or regions but includes at least 12 African countries, 10 countries from Europe and North America, 8 Latin American countries, 7 Asian countries and 6 economies in transition [World Investment Report, 2015:108]. Also, since 2012 at least 60 countries, both developing and developed, have been involved in developing model investment treaties [UNCTAD, IIA Issue Note, 2016:5]. Such increasing activity is unlikely to be affected by the collapse of TPP or even

## **NAFTA.**

Expansion is also taking place in investment arbitration [15]. In 2015 alone, investors initiated 70 known arbitration cases, which is the highest number of cases initiated in one year so far and does not take into account fully confidential arbitration cases. Overall, there have been total of 767 known treaty-based investor-state arbitration cases to date. Majority of existing states either had to respond to investment claim or their investors resorted to investment arbitration to seek protection for their investment on foreign territories. The cases are mostly brought against developing states, although the share of cases against developed states is increasing [World Investment Report, 2015:112]. Among the claimants, the prevailing trend is that the investors from developed countries are responsible for vast majority of arbitration cases. Out of those 767 cases, the US investors initiated staggering 148 of them as claimants, making the US investors one of the main beneficiaries of the protections offered under the investment regime. The amounts awarded in compensation or agreed through settlements are also reaching record levels [16]. Whatever criticism is being provoked by these developments [Olivet & Eberhardt2012], it is clear that the system is not only being increasingly utilised, but the growing number of treaties also provide a vast base for potential future claims to arise.

As international investment law continues to spread and entrench its global influence, naturally it has its critics. Perhaps then, to a certain extent, the large number of critical views of the system illustrate the potency of international investment law and reflects its capacity for continuous adaptation, resilience and reinforcement. Its flexible composition of multiple decentralised interactions between diversified allow for gradual slight adaptations of the system “following simple rules of self-interest and self-preservation” [Pauwelyn: 384]. International investment regime is “generally perceived as deeply sub-optimal but continues to thrive and evolve (highly contested but dynamically stable)” [Pauwelyn:379].

## **Will America be “great again” without TPP and NAFTA**

Election motto of Donald Trump “Make America Great Again” appealed to a large US electorate and effectively helped Donald Trump get elected. This simple slogan resonated with the masses, who believe that American national interests and interests of American citizens, workers and communities have been neglected in favour of other goals and international agenda far removed from the ordinary lives of millions of Americans.

This dilemma is closely linked with more general debate about a condition of a sovereign state and national interests in the current globalization era. The globalization is, after all, a background, or perhaps the main cause, of the profound transformation that the state underwent in the last few decades. Globalisation is transforming the world in all its aspects, including contemporary international sovereign state system. The prevailing views point to a conviction that the globalization changes are somewhat detrimental to the state itself. The current contestation of state sovereignty around the world seems to have its source in the “inability of the modern nation-state to navigate the uncharted, stormy waters between the power of global networks and the challenge of singular identities” [Castells:304]. Globalization, associated with transnational connections and global dimensions, implies the processes that extend beyond the structures of states, bypassing or leaving the states behind, or better said, below. “It is certainly true that, in step with the processes of globalization, the sovereignty of nationstates, while still effective, has progressively declined” [Hardt & Negri:xi].

This process is so overpowering that it being said that even the most dominating-states, like the US, are not supreme and sovereign authorities, either outside or from within. The states are simply gradually more and more powerless in controlling monetary and fiscal policy, trade and investment, even its budget, collection of vital tax revenue and fulfilment of its social benefits commitment.

Sovereign state seems not only be rendered incapable and to certain extend useless by the process of globalization, but is also being conceptually challenged from multi directions. Sovereignty issues are becoming marginal compared to more important affairs of global dimension, like threats to global economy, transnational political relations, security or environmental concerns, refugee crisis. From that point of view, the world has become “borderless” [Ohmae] and national state lines and borders are no longer impermeable.

It may seem that a sovereign state does not appear to be thriving in the current globalized world. It is being challenged, questioned and diminished. The position of state in relation to international investment law does not look any better at first sight. Here too the state is not being supremely regarded, with mainly demands placed upon it for providing stable investment environment. Globalised neoliberal economy requires the state to compete for capital, to encourage investors and to guarantee their safety and economic interests. Further, the state is being challenged on macro and micro level. On macro global level, it needs to display competent capabilities to not only comprehend complex developments in financial and technological world, but to provide effective regulation to manage and maximise benefits of these new phenomena. It also needs to be able to predict and prevent global economic threats. From within, the state has to confront growing social difficulties, redistribution problems and provide solutions to aberrations brought about by globalization processes [Schneiderman].

This is one side of the story about the state and its role in globalised world. For as many as there are opponents and critics of the state and sovereignty, who have moved the state aside from the world podium or who have written it off altogether, there are also its proponents and protagonists who see opportunity for the state in this global calamity.

A closer look into not the realm of globalisation offers a glimpse of contradictory, differentiated and selective processes marked with tensions and confusion. There are forces parallel to, or competing with, globalization occurring with the same intensity as the deterritorialization and globalization itself. Santos distinguishes between “deterritorialization, globalization and the erosion of national sovereignty [that] are taking place with great intensity in legal fields directly controlled by world capitalism, either as globalised localism or as localised globalism” and “legal fields controlled by cosmopolitan principles in the name of oppressed social groups or a jeopardised common heritage of humankind [where] the tension between deterritorialization and reterritorialization is very high, and the prerogative of national sovereignty, far from eroding, seems rather untouched in its hegemonic claims” [Santos:376]. This understanding reaffirms old Westphalian system, which “may be a blink of an eye in the scope of human

history but we are living in its time” [Alvarez:263]. A number of arguments could be brought to support the belief that, although globalization has transformed the world in extraordinary ways, the state is proving a “remarkable capacity to adapt to different environments and to constrain the actions of transnational actors” [Eric: 637]. The state proves to be possessing highly flexible capacity to adapt to changing reality. Perhaps even the oscillation in the role of the state is simply part of the eternal cyclical change pattern of human evolution and now its state’s “turn to return” [Alvarez]. With his election campaign motto “Make America Great Again”, Donald Trump appealed to national sentiments of social groups disadvantaged by globalization processes.

Similarly, international investment law has impressive adapting capabilities too. It has demonstrated remarkable conforming capacity of reformulating its mode and success formula whilst steadily expanding its influence and retaining its priorities of protecting and promoting investment in the first place. This correlation between international investment regime and states seems almost self-perpetuating. The ongoing challenge to the state by international investment regime serves to strengthen the state’s resolve to protect its sovereignty and expand its regulatory powers. The state appears to be strong and flexible enough to endure many challenges. The same could be said about international investment law. “The regime most criticized for ignoring the will of states has become the foremost example of their persistent power” [Alvarez:231].

The analysis of some of the latest investment policies introduced in several states provides many interesting examples of states’ reassertion of authority and retaking control over foreign investment policy. There is a continuing parallel trend of a rise of regulatory restriction policies on the investments. Newly introduced investment restrictions and related policies include revision of entry regulations, rejection of investment projects, nationalization and special treatments of strategic industries and security concerns. The share of restriction provisions against liberalization policies oscillates between 22 per cent in 2011, 25 percent in 2012, 27 per cent in 2013 and 25 per cent in 2014. There were 20 investment restricting measures adopted worldwide in 2012, 23 in 2013 and 16 in 2014. The largest share of new restrictions or regulations appeared in developed countries, followed by developing countries and then transition economies.

Whilst liberalization provisions and promotion of investment is still an overwhelming trend, the number of new investment policy restrictions illustrates that the states are active in the efforts to reaffirm their sovereign control. The states are re-entering the economic dimension and empowering themselves through stricter controls and regulations.

If President Trump proceeds to recalibrate the architecture of the US international investment relations, it would not be the only example of state reassessing control over its investment policy. There is also a parallel trend in international investment law, where states push back against the regime altogether by withdrawing from investment arbitration regime. The trend started in Latin America, following a number of high profile arbitration cases and large arbitration awards. In addition, few Latin American countries elected left or center governments, which, together with disenchantment with Washington consensus policies and adverse arbitration consequences, provoked anti-globalization sentiment. The water privatisation dispute in Aguas del Tunari in Bolivia (*Aguas del Tunari v. Bolivia*) and a large volume of arbitration cases against Argentina and its emergency anti-crisis measures, amongst other factors, contributed to the wave of withdrawals from ICSID Convention. In 2007, Latin American countries reunited for the fifth summit of the Bolivarian Alliance for the Americas, during which they issued a statement rejecting “legal, diplomatic and media pressure exercised by some multinational companies, which having made vulnerable constitutional rules, national laws, contractual obligations, regulatory environmental and labour resolutions, resist the application of sovereign rules by threatened countries by initiating international arbitration”. Latin American states decided to withdraw from the ICSID convention “in order to guarantee the sovereign right of countries to regulate foreign investment on their national territories” [17]. Bolivia notified the World Bank of its withdrawal [18] straight away in 2007 under Art. 71 of the ICSID Convention [19]. Ecuador was next to withdraw under Art. 25(4) of the ICSID Convention [20] in respect of the disputes relating to the exploitation of natural resources and in 2009 Ecuador denounced the ICSID Convention in its entirety under Art. 71 [21]. Venezuela was the latest Latin American country to withdraw from the ICSID Convention in 2012 [22].

Overall the current transformative changes point to another shift in the perception of investment regime. The debate is moving slightly away from the North-South controversies of powerful developed states versus weak developing states and towards increasingly more prevailing issues of confrontation between economic interests of the investors and public interests and sovereignty of states. “The featured debate of international investment law-making seems to have shifted from a “North-South Divide” to a “Private-Public Debate” [Shan, 2007:660]. There are several contributing factors to this. First of all, developed states themselves have become recipients of capital from developing states and exposed to threat of international arbitration. US, Canada and other developed economies have not been discriminated against the reach of large arbitration claims, and NAFTA is one of the examples (*Ethyl v. Canada*, *Mobil Investments v. Canada*, *Vattenfall v. Germany*, *Windstream v. Canada*, just to name a few). Secondly, the developing countries are losing their



underdeveloped status, by growing their economies, developing their investment regimes and improving their infrastructures. Investment outflows from developing countries continue to grow, whilst developing Asia became the world's largest investor region. In 2014 alone investment outflows from developing countries reached US\$ 468 billion, which is a 35 per cent share of total global investment outflows [World Investment Report, 2015:5]. The investment activity between developing countries themselves has also intensified.

### Conclusions

Donald Trump's presidency comes at the time of great economic uncertainty and volatility for many US citizens affected by the enduring economic crisis and disadvantaged by globalization processes. It also comes at the time of high visibility of social movements, human rights groups, environmental concerns, religious claims, ethnic and minority diversity. For many who voted for Donald Trump, it is a time of great expectations and hope that his presidency will alleviate some of their struggles and address their concerns. For others, it is a time of fear of unknown that is about to come. For international investment law, it is none of it and all of it at the same time. Collapse of TPP and possibly NAFTA would mark substantial developments in the discipline. However, international investment law has become a potent legal regime and, despite criticisms and backlash, it is on course to further strengthen its grip on global economic governance. It shows extraordinary resilience and adaptability to changing global conditions and is reaching unprecedented levels of global coverage and impact. The beneficiaries of international legal framework, mainly foreign investors, can rest assured. There is also some hope for international investment law critics and opponents. Donald Trump might bring important international investment treaties back to negotiating table. It is an opportunity to assess and address the status of the regime, discuss the prevailing issues and advocate changes.

It is however unlikely that Donald Trump could, or even would like to, single-handedly derail international investment law from its firmly set course to global domination of investment relations.

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- [2]. TPP, Article 30.5: Entry into Force. 1.) This Agreement shall enter into force 60 days after the date on which all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures.
- [3]. TPP, Article 30.5: Entry into Force. 2.) In the event that not all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures within a period of two years of the date of signature of this Agreement, it shall enter into force 60 days after the expiry of this period if at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013 have notified the Depositary in writing of the completion of their applicable legal procedures within this period. 3.) In the event that this Agreement does not enter into force under paragraph 1 or 2, it shall enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have notified the Depositary in writing of the completion of their applicable legal procedures.
- [4]. A controversial practice of "treaty shopping", or "forum shopping", or more nicely put "forum planning", has been used by the investors to leverage their position against host states and maximise their benefits from investment protection regime. Investors can speculatively structure their investment and creatively format corporate nationality within their investment structure to gain access to the most favourable treaty protection. Most controversial cases include: *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction 21 October 2005 and *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction 10 June 2010. See also Wehland, H. (2013). *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*. The author discusses principles of *lis pendens* and *res judicata*, jurisdictional fragmentation and competition, and the potential abuse of the complexities of the system of international investment protection.
- [5]. US Senator Kerry suggested in 2002 that legislators who passed NAFTA did not anticipate the arbitrations which would result. "When we passed NAFTA, there wasn't one word of debate on the subject of the chapter 11 resolution - not one word. Nobody knew what was going to happen. Nobody knew what the impacts might be." Statement of Senator Kerry. (21 May 2002). Congressional Record - Senate S4592, Vol. 148, No. 66. Retrieved from: <https://www.congress.gov/crec/2002/05/21/CREC-2002-05-21pt1-PgS4592.pdf>
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- [7]. *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Notice of Arbitration 30 October 1998.
- [8]. NAFTA, Article 2205. Withdrawal: A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

- [9]. Cases like *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award 26 June 2003, *Methanex v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005, *GAMI Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award 15 November 2004, *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Final Award 20 April 2004 contributed to the analysis of alternative approaches to “in like circumstances” test (as a threshold or as an exception basis).
- [10]. See cases like *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award on Merits of Phase 2, 10 April 2001, *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1 (NAFTA), Award 18 August 2009 and *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5 (NAFTA), Award 21 November 2007.
- [11]. Three early cases considered minimum standards provisions of NAFTA: *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000, *S.D. Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award 13 November 2000, Second Partial Award 21 October 2002 and *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), Award on Merits of Phase 2, 10 April 2001.
- [12]. *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award 30 August 2000, *Glamis Gold Ltd. v. United States*, UNCITRAL, Award 14 May 2009, *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/1, Award 18 August 2009.
- [13]. 3304 international investment agreements (including 2946 BITs) were in place by the end of 2015 according to the World Investment Report 2016 and further 9 international investment agreements were signed in the first four months of 2016. UNCTAD international investment treaties database lists 2958 BITs, out of which only 2323 are in force and additional 367 treaties with investment provisions, out of which only 297 are in force. See: <http://investmentpolicyhub.unctad.org/IIA> (Accessed on 3 February 2017).
- [14]. This has been achieved in variety of ways: either by introducing new investment promotion law (Bolivia), reducing approval requirements for investments (China), offering guarantees and incentives to investors and simplifying investment approval procedures (Cuba) or decreasing the number of prohibited and conditional business lines (Vietnam). Some countries have even established agencies providing a strategic plan and incentives for the attraction of investment (United Arab Emirates) or pledged easing migration regulations, guaranteed rights to repatriate funds and stable tax legislation and custom tariffs (Uzbekistan). Largest Asian economies are the most active in promotion and liberalization of investment by introducing various measures, including increasing foreign investment cap across the industries (India and Indonesia). Chile promulgated a new framework law on foreign investment, which guarantees investors access to the formal foreign exchange market, the free remittance of capital and earnings, protection against discrimination, and exemption from sales and service tax on imports of capital goods. Egypt amended its investment law, creating alternative out-of-court forums to amicably settle investor-state disputes and granting incentives for investment in specific sectors or regions. All data derived from United Nations. Conference on Trade and Development. (2016). *World Investment Report 2016 Investor Nationality Policy Challenges*. New York: United Nations. Retrieved from [http://unctad.org/en/PublicationsLibrary/wir2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf)
- [15]. Direct arbitral recourse by the investor against the host state, is being described as “the one of the most progressive developments of international law of the last century”. Schwebel, S. (2009). A Critical Assessment of the U.S. Model BIT. *Keynote Address at the British Institute of International & Comparative Law Twelfth ITF Public Conference in London, 15 May 2009*. Retrieved from [http://www.bicil.org/files/4253\\_schwebel-bicil15may2009speech\\_cor2.pdf](http://www.bicil.org/files/4253_schwebel-bicil15may2009speech_cor2.pdf)
- [16]. For example: *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Final Award 18 July 2014, US\$ 40 bn compensation awarded; *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. AA 228, Final Award 18 July 2014, US\$ 8.2 bn compensation awarded; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award 18 July 2014, US\$1.8 bn compensation awarded; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Final Award 5 October 2012, US\$ 1.7 bn compensation awarded; *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award 9 October 2014, US\$ 1.6 bn compensation awarded.
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- [19]. Art. 71 of the ICSID Convention: “Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.”
- [20]. Art. 25(4) of the ICSID Convention “Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)”.

- [21]. *ICSID ICSID/8 CONTRACTING STATES AND MEASURES TAKEN BY THEM FOR THE PURPOSE OF THE CONVENTION*, May 2016: [...] On December 4, 2007, the Republic of Ecuador notified the Centre pursuant to Article 25(4) of the ICSID Convention that: “The Republic of Ecuador will not consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others. Any instrument containing the Republic of Ecuador’s previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date.” On July 6, 2009, the depositary received a written notice of Ecuador’s denunciation of the Convention. In accordance with Article 71 of the Convention, the denunciation took effect six months after the receipt of Ecuador’s notice, i.e., on January 7, 2010. Retrieved from: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf> (Accessed 20 October 2016)
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#### **Treaties:**

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- [15]. *Free Trade Agreement between the Government of Canada and the Government of the Republic Korea* entered into on 22 September 2014 (not in force yet).
- [16]. *Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi signed on 25 June 2015 (not in force yet).*
- [17]. *North American Free Trade Agreement* between the Government of Canada, the Government of Mexico and the Government of the United States, signed on 17 December 1992 and entered into force on 1 January 1994.
- [18]. *Trans Pacific Partnership Agreement* between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and, Viet Nam signed on 14 February 2016 (not in force yet).