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TTIP as a Trojan Horse for Environmental, Health Deregulation and New Corporate Rights

Campact e.V. - Demokratie in Aktion Webinar

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Is Agenda of “Transatlantic Trade and Investment Partnership” Same Old “TAFTA”?

- Many EU consumer, enviro, labor standards better than in U.S. Opportunity for new 21st Century commercial agt. model aimed at raising standards. Huge amount of trade. investment between U.S.- EU. Rules for this relationship will have enormous impact in U.S./EU—and globally. U.S. & EU officials say goal is to set new global norms.
- But 2/11/13 Final Report of the U.S.-EU High Level Working Group on Jobs and Growth announcing decision to launch reveals agenda similar to past U.S. FTAs, old TABD TAFTA agenda plus additional limits on domestic regulatory space.
- TAFTA has been longstanding project of Trans-Atlantic Business Dialogue (TABD) now known as Transatlantic Business Council (TBC). TABD convened in 1995 by U.S. Dept. of Commerce & Euro Commission as official dialogue between U.S.-EU business leaders & U.S. cabinet secretaries & EU commissioners
 - TABD goal: elimination of “trade irritants” & “regulatory convergence”
 - Some TBC members: Accenture, AIG, AT&T, Audi AG, BASF, BDO, British American Tobacco, British Petroleum, BT, Cisco Systems, Deloitte, Deutsche Bank, Ernst & Young, Experian, Ford Motor Co., GE, Grant Thornton, IBM, Intel,, Johnson Controls, Johnson & Johnson, KPMG, Lilly, Merck & Co., Microsoft, Oracle, Pfizer, Philips Electronics, Phillip Morris Intl., Qualcomm, SAP, Siemens, Statoil, Texas Instruments, Thyssen Krupp, TOTAL, Verisign, Verizon, Xerox
- The very notion of homogenized standards raises concerns, given variances reflect different goals/values & democratic governance. But if so, floor, not ceiling (TACD)

“Transatlantic Trade and Investment Partnership”

Not mainly about “trade” but a system of enforceable global governance promoted by large corporations and not subject to changes by those who will live with results.

- Starkly different from past of int’l trade between nations that focused on tariff cutting, lifting quotas. Rather, “trade” agreement as mechanisms of “diplomatic legislating of domestic non-trade policies. Behind-the-border policies decided by trade negotiators. In U.S., U.S. Trade Reps Office (our DG Trade) is advised by 600 official U.S. corporate “trade advisors.”

- “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”
- Agreement Establishing the WTO

- **Permanence : no changes w/o consensus of all signatory nations. Limits room for progress, responses to emerging problems**

- **Binding - unlike most labor, health, environmental treaties. Rules enforced in extra-judicial tribunals. Enforcement outside domestic court systems of matters relating directly to policies now subject to inclusive, open policymaking and adjudication.**

- **Government-government enforcement: countries must gut their laws. Trade sanctions imposed.**
- **Investor-state enforcement: taxpayers must compensate foreign corporations. No due process. No outside appeals.**



Target of TTIP/TAFTA Negotiations Appears to Be Best of U.S. or EU Environmental, Consumer Safeguards

U.S.-EU tariffs rates already low, so negotiation will focus on "*regulatory issues and non-tariff trade barriers*".

How is this agenda in most peoples' interest?

• **Elimination of "Trade Irritants" and "non-tariff barriers"** aka domestic policies that affect U.S. or EU business access to the other market.

- Food: EU bans on ractopamine and chlorine rinses; EU GMO labeling/segregation; EU ban on artificial beef growth hormone
- EU chemical policy REACH
- Aspects of EU climate, fuel directives
- EU consumer privacy protections, "safe harbors" policy
- Elements of U.S. financial reregulation, such as Volcker Rule
- U.S. system of state-by-state insurance regulation

• **"Legacy issue"** Trade irritants that have not been settled, see above...

• **"Behind the border"** - raises questions of democracy, accountability. Non-tariff policies traditionally under jurisdiction of national, state legislatures & regulators

• **"Regulatory convergence"** At what level? Room for progress, addressing new challenges? Obviously, it's not all the "silly differences" examples being touted

Instruments of Regulatory Roll Back

OBILGATIONS TO ELIMINATE REGULATORY DIFFERENCES COULD BE FOUND IN MANY OF THE CHAPTERS:

- **Harmonize** to common standard negotiated between US & EU or accept int'l standards including those of industry standard-setting institutions
 - **Equivalence** - recognize other countries' entire regulatory systems for meat or auto safety as 'good enough' even if different
 - **Mutual recognition** – accepting specific categories of goods approved under the other countries' approval processes
 - **“Free passage”** - approved anywhere must accept everywhere
- **“Regulatory Convergence”** – requirement that governments use specific cost-benefit analyses and risk assessments to create proposed policies; that a policy must be the “least trade restrictive” or to take into consideration trade compliance. TTIP Reg Convergence chapter
- **Notification** must list non-conforming policies, advance notice of prospective policies or changes with right to comment, demands changes.

Obligations to eliminate regulatory differences

- **Harmonization**

Committees set up in agreement to negotiate common uniform standards that will be adopted by the countries domestically. Committees are comprised of government agency officials meeting behind closed doors. In NAFTA and WTO, most stages in this process have not been done according to APA. Alternatively, countries can agree to accept an existing int'l standard and adopt it domestically.

- **Equivalence**

Governments are required to determine whether significantly different—and possibly less protective—regulatory systems and standards in other countries provide “equivalent” levels of protection as domestic regulatory systems. Domestic law stays the same, but imports are allowed if they meet the exporting country's standards. Whole regulatory system is deemed equivalent, so we rely on other country's enforcement.

- **Mutual Recognition** (often of conformity assessment)

Agreement to allow other countries' agencies, or private sector firms under contract determine if products meet the others' standards.

Inclusion of “Investor-State Dispute Resolution” Reiterates Pact’s Agenda is New Corporate Rights

ISDR ostensibly established to provide foreign investors venue to obtain compensation when factory/ land expropriated by a gov’t without reliable domestic court system. *So, why is it in US-EU FTA? Is it US or EU property rights policies or domestic court systems that are a problem?*

- Individual foreign corporations elevated to level of sovereign government: empowered to skirt domestic laws/courts and privately enforce a public treaty by directly challenging gov’ts’ policies before foreign tribunals to demand taxpayer compensation.
- Foreign investors given greater rights, privileges above domestic law /firms. Compensation for regulatory costs/policy changes (Vattenfall, Phillip Morris, Eli Lilly, Exxon, etc.)
- US and EU countries would be submitted to jurisdiction of investment arbitration tribunals operating under rules of World Bank’s ICSID (Int’l Centre for Settlement of Investment Disputes) and or UN’s UNCITRAL (UN Commission on Int’l Trade Law) for investor-state enforcement.
- 3 private sector attorneys, unaccountable to any electorate, many of whom rotate between being “judges” & bringing cases for corps. against govts. (*See Profiting from Injustice <http://corporateeurope.org/publications/profitting-from-injustice>*) Creates inherent conflicts of interest.

Investor-State Dispute Resolution (ISDR) Tribunals—part

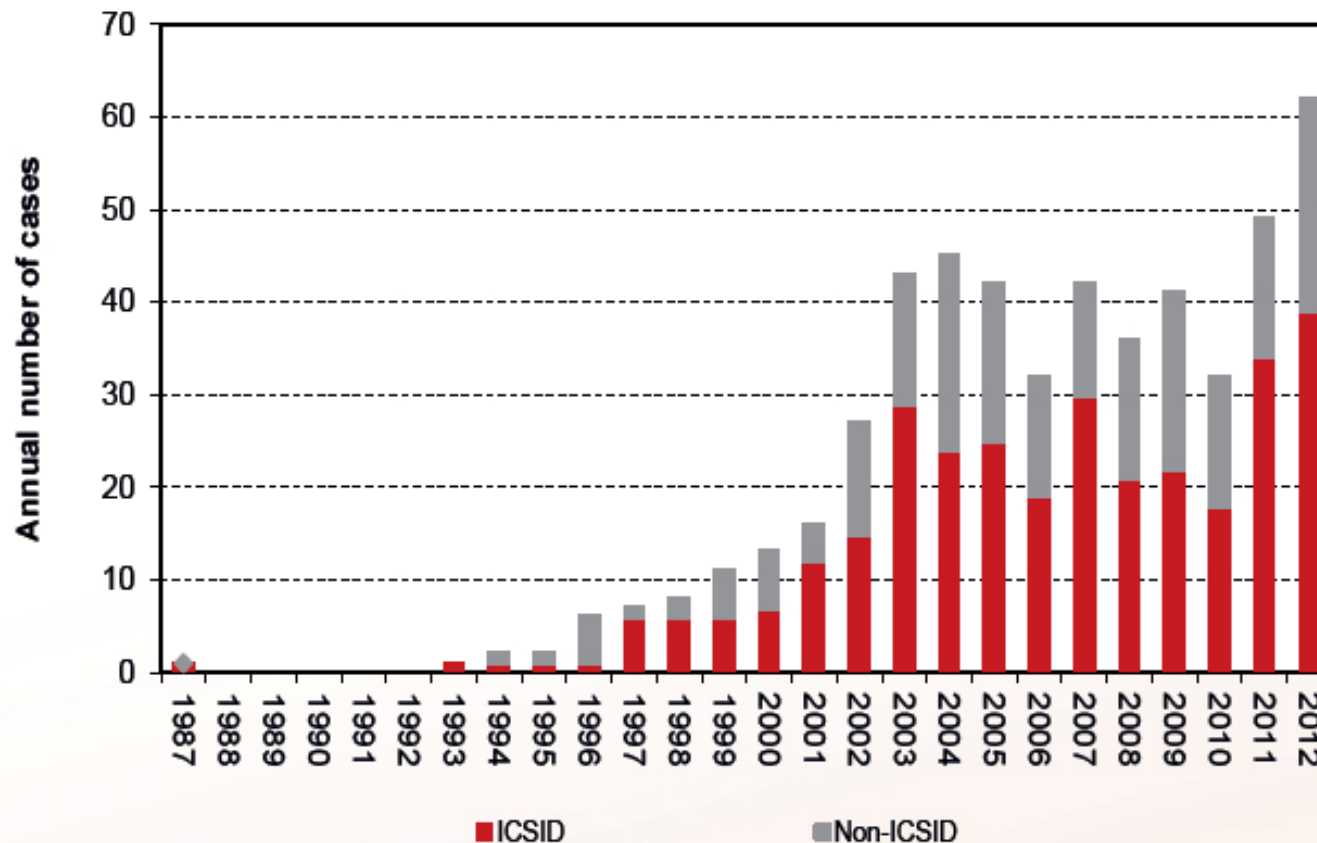
- 2 Unlike domestic judges, tribunalists paid by hour . Gov't's usually ordered by tribunal to pay for share of tribunal costs, even if case dismissed. Costs chill govt action. Filing alone is serious threat: Average cost is \$8M, 1 case now underway legal costs to govt \$50M-plus
- When investor wins, gov't must pay amount of taxpayer money decided by the tribunal as compensation for the offending policy. ISDR challenges launched against wide array of consumer, health and safety policies, environmental and land-use laws, regulatory permits, financial regs & other public interest polices that investors allege undermine “expected future profits.”
- Tribunals operate behind closed doors - lack basic due process
- Absolute tribunal discretion to set damages, compound interest, allocate costs
 - No limit to amount of money tribunals can order govts to pay corps/investors
 - Compound interest starting date if violation new norm (compound interest ordered by tribunal doubles Occidental v. Ecuador \$1.7B award to \$3B plus
- **Rulings not bound by precedent. No outside appeal. Annulment for limited errors.**

Investor-State Dispute Resolution (ISDR) Tribunals—part 3

- ISDR has birthed an entire industry of specialized lawyers and tribunalists (many serving both roles) and specialized equity funds that finance what is lucrative business of raiding government treasuries.
- Under U.S. FTAs/BITs, investors have already pocketed over \$3B in taxpayer money via ISDR cases, while more than \$15B remains in pending claims. More info: “Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. Trade Deals,” Public Citizen memo, June 2012. Available at: <http://www.citizen.org/documents/investor-state-chart.pdf>
- **Nationality-shopping: Philip Morris International plain packaging cases eg.**
 - PMI moved head office of Oz subsidiary to Hong Kong shortly before it ISDR attacked Oz under HK-Oz Bilateral Investment Treaty (BIT); Claimed to be Swiss-based firm to launch ISDR attack against Uruguay under Uruguay-Swiss BIT; Described itself as a US firm in 2010 USTR submission pro-ISDR in the TPP.
- The number of ISDR cases has soared over last decade. Last year cumulative number of launched investor-state cases was nine times cumulative investor-state caseload in 2000, even though treaties with investor-state provisions have existed since the 1950s.

Epidemic of ISDR Attacks Raiding our Treasuries, Chilling Public Interest Initiatives

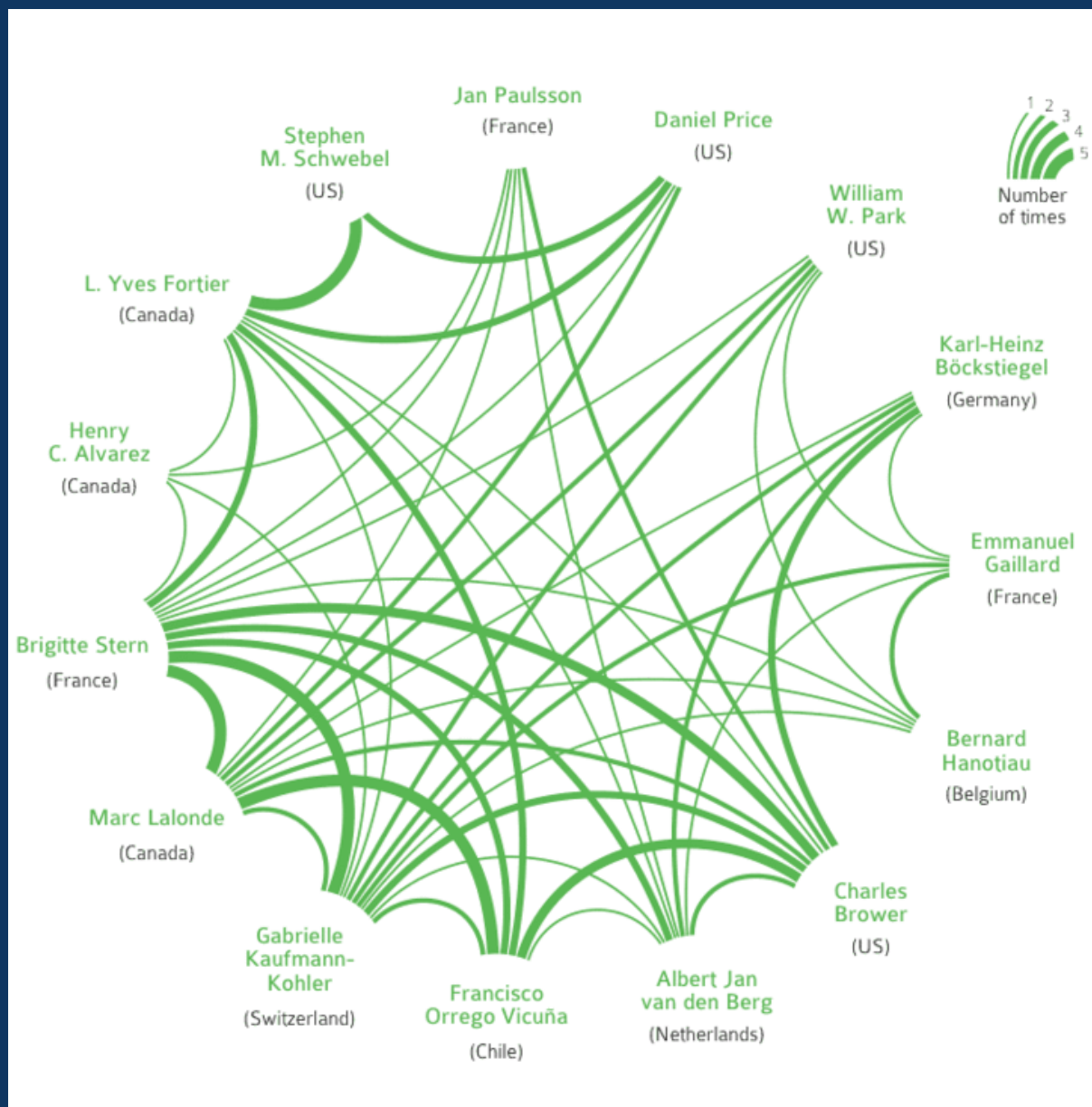
Investor-State Cases Launched Each Year



ISDR in TAFTA
would mean
75,000
additional
cross-
registered
corporations
empowered to
attack U.S. and
EU laws and
government
actions
deemed
permissible in
domestic
courts.

Source: UNCTAD

15 arbitrators alone have captured the decision-making in 55% of the total investor-state cases known today



Source: *Profiting from Injustice* <http://corporateeurope.org/publications/profitting-from-injustice>

New Risks for ISDR in TTIP: Unlike Most Past FTAs/EPAs/BITs, Many Capital Exporting Nations

Already, there is expansive cross investment between the U.S. and the EU. More than 75,000 corporate affiliates are cross-established.

There are 24,249 corporate affiliates from EU countries that would obtain new rights to use ISDR against the U.S. Except for firms covered by some U.S. BITS with former Warsaw pact nations, none now have ISDR rights against U.S.

ISDR for TTIP/TAFTA? *Is it the US or EU Property Rights Policies or Domestic Court Systems that are the Problem...*

Details, mapping of all firms at:
<http://www.citizen.org/TAFTA-investment-map>

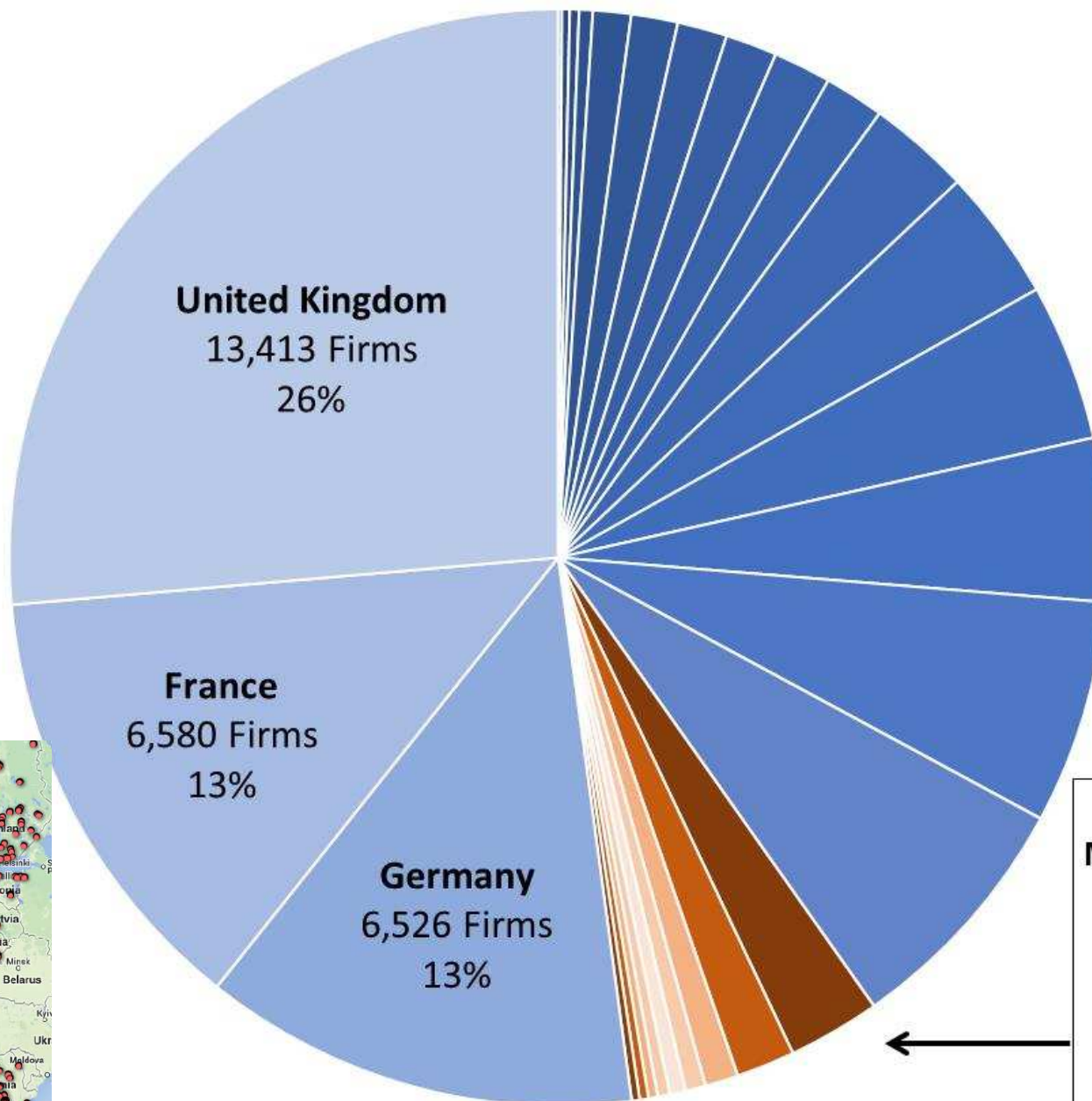
Number of U.S. Corporations in EU Countries & EU Nation Corps in U.S.

Austria	67	Latvia	121
Belgium	1,533	Lithuania	139
Bulgaria	241	Luxembourg	203
Croatia	181	Malta	57
Cyprus	115	Netherlands	2,445
Czech Republic	879	Poland	1,386
Denmark	900	Portugal	772
Estonia	130	Romania	499
Finland	747	Slovakia	300
France	6,580	Slovenia	140
Germany	6,526	Spain	3,357
Greece	698	Sweden	1,976
Hungary	569	United Kingdom	13,413
Italy	3,734	United States	24,249

Source: Uniworld's foreign firms database

TTIP = New Investor Privileges for 92% of the U.S. Firms in the EU

Existing U.S. BITs Cover Just 7.6% of U.S. Investors



Combined Total for Members with U.S. BITs:
Poland, Czech Republic, Romania, Slovakia, Bulgaria, Croatia, Lithuania, Estonia and Latvia
3,876 Firms
7.6%



Cases are Cause for Concern

9 Cases brought under existing BITs between EU Member States and the U.S. challenge taxation measures, transportation policy, and other issues not related to direct expropriation.

▪ **Cargill v. Poland**: Poland adopted quotas affecting Cargill's sweeteners so as to come into compliance with the EU's sugar regime under the Common Agricultural Policy. Investor awarded \$16.3 million.

Just a few environmental, public health, green energy policies challenged in developed countries with robust property rights:

▪ **Vattenfall v. Germany**: Environmental restrictions on coal-fired power plant; Case was settled Now second case related to phase out of nuclear energy - **\$4.6 billion claim**

▪ **Eli Lilly v. Canada**: Canada's patent regime for pharmaceuticals - **\$500 million claim**

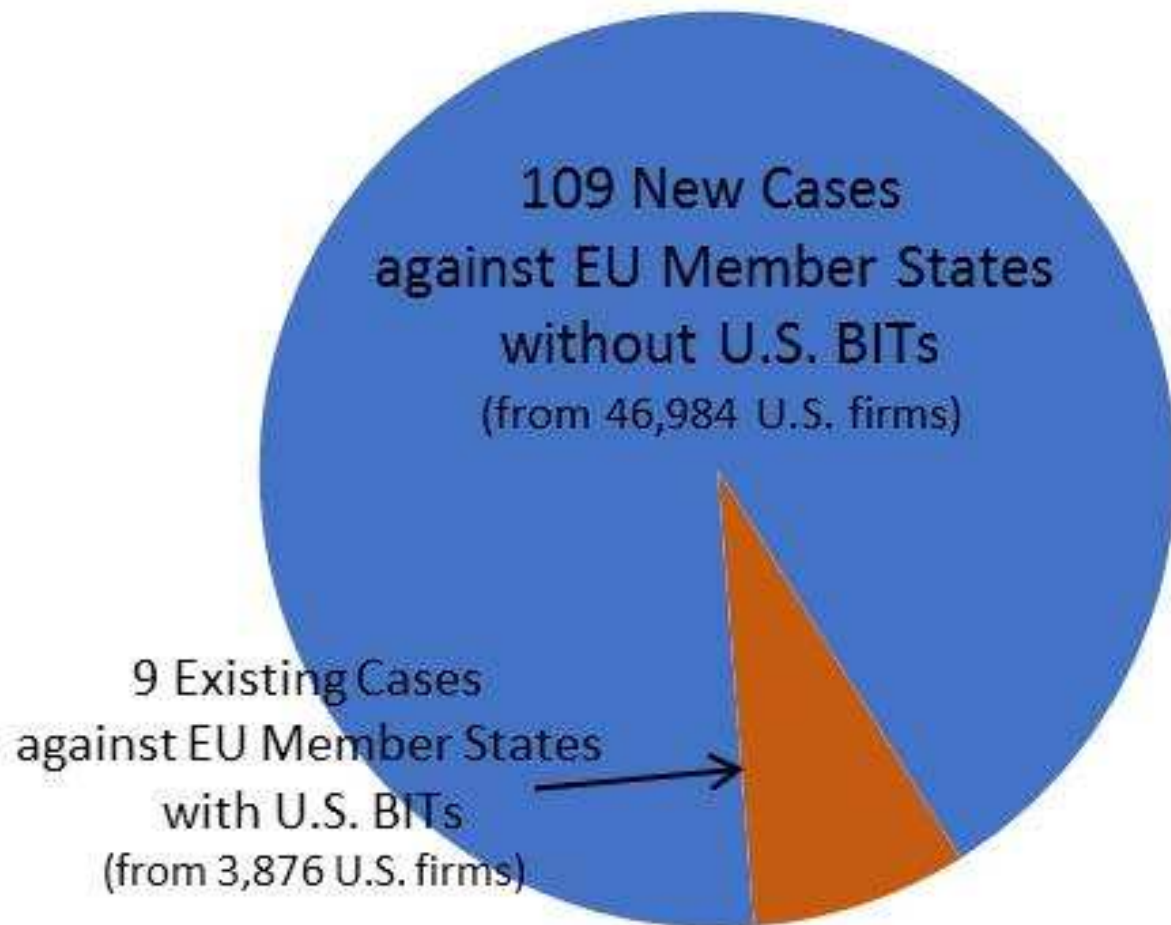
▪ **Phillip Morris International v. Australia**: public health anti-smoking measures

▪ **Exxon Mobil v. Canada**: requirement to contribute to research and development in the country's poorest provinces. **Investor awarded more than \$60 million .**

▪ **Mesa Power Group v. Canada; Windstream v. Canada**: green energy program requirement for certain percentage to be locally produced – **\$725 million claim**

▪ **Lone Pine v. Canada**: Quebec's moratorium on hydraulic fracturing for natural gas, while conducting an environmental impact assessment – **\$250 million**

TTIP's Investor-State Expansion: 109 New Cases against Members?



The projection of 109 new cases does not take into account the rapid growth of investor-state cases in recent years:

That there are no cases brought against the U.S. under existing BITs with EU Member states is also little comfort. There are a total of 33 firms from those countries with BITs in the U.S. (or 0.1% of the EU firms in the U.S. under BITs)

Some NAFTA, CAFTA Consumer, Environmental Cases

INVESTOR WINS AT TRIBUNAL, IS PAID

- **Metalclad v. Mexico:** toxic waste treatment facility, state-level zoning, permits = regulatory takings violation
- **S.D. Myers v. Canada:** MEA enforcement. Federal-level Basel Convention enforcement/PCB toxic trade ban = discrimination, MST violation
- **Pope & Talbot v. Canada:** timber policy – grumpy provincial gov't official = MST violation
- **Exxon-Mobil/ Murphy Oil v. Canada:** non-discriminatory provincial extractive industry R&D fee = performance requirement

INVESTOR PAID IN SETTLEMENT - CHILLING

- **Ethyl v. Canada:** Canada reverses nation-wide chemical ban, corp. paid \$13 M for lost profits while ban was in effect – US states ban same chemical, MMT a gasoline additive
- **Abitibi-Bowater v. Canada:** Water and timber rights. Firm closes, lays off employees. Canadian province withdraws timber, water concessions that were conditioned on continued operation/use. National government settles case – corp. paid \$122 million

USE OF ISDR FOR LOBBYING, THREAT TO OBTAIN REGULATORY ACTION, INACTION

- **Renco v. Peru:** REOPENING POLLUTING SMELTER - filing used to leverage new permit grant
- **Pac Rim v. El Salvador:** MINING - years of ISDR in very politicized case stall out passage of ban on mineral mining; tribunal voids CAFTA claim, continues same claims based on domestic law
- **Commerce Group v. El Salv.** MINING - years of ISDR stall out passage of ban on mineral mining; tribunal voids CAFTA claim, corp. allowed to file annulment year after deadline ran out

Also, Chevron Ecuador Amazon contamination case under Bilateral Investment Treaty...

U.S. LOSES ON MERITS, DODGES PAYMENT

- **Loewen v. U.S.:** U.S. civil court judgment considered covered gov't action in contract fight of 2 private firms. Canadian firm reorganized as US corp., loses foreign status b4 collecting

He who writes the rules, rules...

Secretive process, with those who will live with the results denied access to draft agreement texts.

U.S. trade advisory system empowers 600 corporate advisors to set U.S. agenda, have access to negotiating texts, negotiators.

Negotiations conducted by USTR, which sees it “constituency” as U.S. industry seeking access, rights in other countries.

Current focus of TAFTA project is on facilitating U.S and EU corporate demands, not on meeting human needs for strong food or product safety or environmental protections; access to essential services and medicines; financial stability; privacy; Internet freedom. Indeed, some rules explicitly constrain governments’ policy space to meet such goals.

Sales pitch is that behind-the-border deregulation/regulatory “convergence” creates gains premised on ‘efficiencies’ obtained from eliminating regulatory differences. If this is premise for why this is a good deal for us, needs to be proved that elimination of regulatory difference equals efficiency gains shared widely versus only bottom-line enhancing...

What is evidence for claimed “efficiency” gains?

PREMISE - REGULATORY CONVERGENCE = EFFICIENCY GAIN. Based on unproved anti-regulatory notion of economic gains from deregulation.

• **USTR TAFTA assessment: USITC should assume removal of all NTBs - silly**

• **ECORYS Nederland BV study for EC, basis for jobs numbers seen, for instance, in yesterday's *New York Times*:** “...Unlikely that all areas of regulatory divergence identified can actually be addressed...would require constitutional changes... lack of sufficient economic benefit to support the effort; set of regulations is too broad... consumer preferences, language and geography... Political sensitivities.” ...at most, 50% of all NTMs are within the realm of possibility to be “aligned or even dismantled,” while acknowledging that it would be more “realistic” to expect 25 percent of NTMs to be eliminated or “converged” under a U.S.-EU deal.

- **No consideration of downside costs on consumers, workers, environment. No risk-adjusted estimates of economic costs alongside estimated gains. I.e. not net impact.**
- **Uses gravity regressions, computable general equilibrium model to project relatively small economic gains from convergence/elimination of NTMs. Approach riddled w/ assumptions that could totally skew results (UNCTAD study “Non-Tariff Barriers in Computable General Equilibrium Modeling.” Change in assumptions not only changed magnitude of effects, but changed direction of effects—from positive to negative.)**

• **Empirical evidence on the efficiency impacts of NTM convergence/ removal? Some studies indicate regulatory convergence w/in EU has yielded little or no significant efficiency gains (eg. Barbara Casu, Philip Molyneux, “A Comparative Study of Efficiency in European Banking,” *Applied Economics* 11/03. [www. wharton.upenn.edu/fic/papers/00/0017.pdf](http://www.wharton.upenn.edu/fic/papers/00/0017.pdf))**

So, why now? Premise that EU is so desperate for “growth” that critical regulatory policies will be traded away for “growth” ? But what real gains?