

Ecologic Institute
An International Think Tank for Environment and Development

Berlin
Brussels
Washington D.C.
San Mateo CA



▶ **TTIP STAKEHOLDER FORUM**

TTIP, ENERGY AND THE ENVIRONMENT

Max Grünig
Ecologic Institute

Focus of TTIP

- ▶ focus not on direct fees and tariffs
- ▶ focus on non-tariff barriers, often domestic regulation
 - aim at lower regulatory costs
 - aim at more effective regulation
 - ▶ about 50% of world GDP to be covered
 - ▶ two lead markets in environmental regulation

TTIP and regulation

- ▶ for existing regulation
 - mutual recognition of rules and standards as broadly equivalent
 - harmonised regulation
 - cooperation on implementation
- ▶ for new regulation
 - better compatibility through design
 - considering impact on EU-US trade in impact assessment and cost-benefit analysis

Potential environmental impacts

- ▶ TTIP may lead to mutual recognition of standards
 - potential for lower environmental standards
 - potential for higher environmental standards
 - potential for no impact
- ▶ TTIP may imply that certification abroad will be accepted
 - no impact on standards, possibly on implementation
 - lower certification costs

Potential environmental benefits of TTIP

- ▶ will include measures to foster trade in environmentally beneficial products + services
 - low carbon
 - resource efficient
 - energy efficient
- ▶ green public procurement
- ▶ consumer information
- ▶ unrestricted and sustainable access to raw materials

Same Same but different

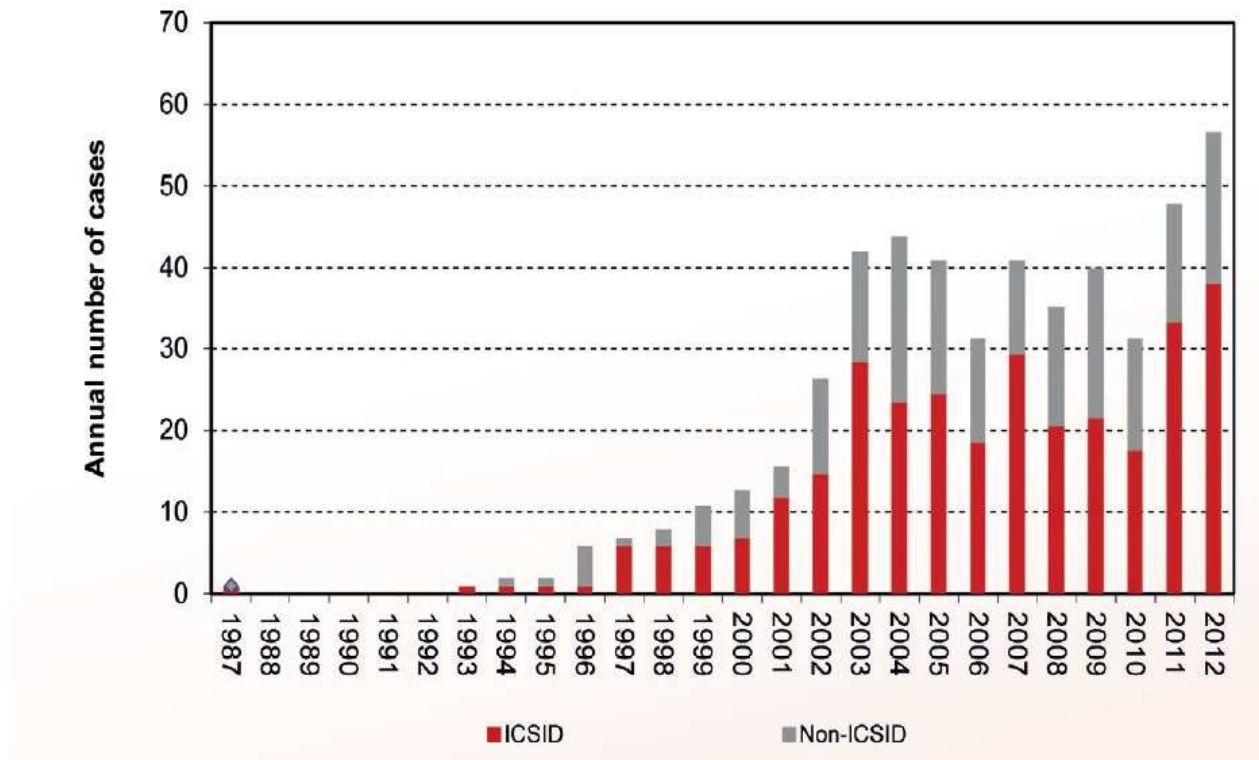
- ▶ differences in regulatory culture
 - precautionary principle in the EU?
 - case law and self-regulation in the US?
 - or more nuanced picture?
- ▶ resulting levels of protection
 - no clear answer (evidence points both ways)
 - stronger EU: GMO, hormone meat, chemicals, chlorinated poultry
 - stronger US: pollution (esp. air, PM)

Investor-state dispute settlement (ISDS)

- ▶ protect investors against
 - direct and indirect expropriation
 - unreasonable, arbitrary or discriminatory clauses
- ▶ ensure that investors are treated in a fair and equitable way (FET)
- ▶ umbrella clause (converts a contract claim, i.e. a claim based on a specific contract between two parties under civil law, into a treaty claim, i.e. a claim under public international law)
- ▶ allows private investors to sue a host state for the alleged violation
- ▶ possibly limiting EU and US ability to implement new environmental regulation

Past experience with ISDS

- ▶ 514 known disputes by the end of 2012



source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2013)

ISDS issues

- ▶ high legal costs: 8 mn USD per case up to 30 mn
- ▶ high compensation payments (up to 1.7 bn USD)
- ▶ diverging findings on same issue
- ▶ lack of transparency of procedures
- ▶ limited redress options
- ▶ conflicts of interests for arbitrators
- ▶ challenges to environmental measures

Recommendations

- ▶ best: remove ISDS from TTIP
- ▶ otherwise, provisions must be formulated in a narrow and precise manner, in order to minimize any risks for environmental regulation
 - prevent investors from bringing multiple or frivolous claims (investors who lose pay all litigation costs, including those of the state)
 - make the arbitration system more transparent
 - deal with conflicts of interest and consistency of arbitral awards

Where are we?

- ▶ language in the EC negotiation mandate is firmer on some issues and rather light on others, including
- ▶ “*should* be without prejudice to the right of the EU and the Member States to adopt and enforce... measures necessary to pursue legitimate public policy objectives”
- ▶ “Consideration *should* be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement...”
- ▶ “The investor-to-state dispute settlement mechanism *should* contain safeguards against frivolous claims.”

Which way do we go?

- ▶ interpretation of the key terms will decide which way the balance swings:
 - ▶ *necessary*
 - ▶ *legitimate*
 - ▶ *direct and indirect expropriation*
 - ▶ *unreasonable*
 - ▶ *arbitrary or discriminatory*
 - ▶ *fair and equitable*
- calls for a precise and restrictive language regarding ISDS

Discussion

- ▶ Let's not forget structural and procedural aspects over the visibility of single issues.
- ▶ If there are risks and opportunities, how can we ensure that the opportunities are seized?
- ▶ Do we need ISDS between two entities with functioning legal systems?
- ▶ Rights should also entail obligations, i.e. with investor rights should also arise new investor obligations.

THANK YOU!

Max Grünig

Ecologic Institute, Pfalzburger Str. 43-44, D-10717 Berlin
Tel. +49 (30) 86880-0, Fax +49 (30) 86880-100

max{dot}gruenig{at}ecologic{dot}eu

www.ecologic.eu