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# ▶ TTIP – EPC DIALOGUE *INVESTOR-STATE DISPUTE SETTLEMENT AND TTIP - THREAT OR OPPORTUNITY?*

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## 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

# Potential environmental impacts

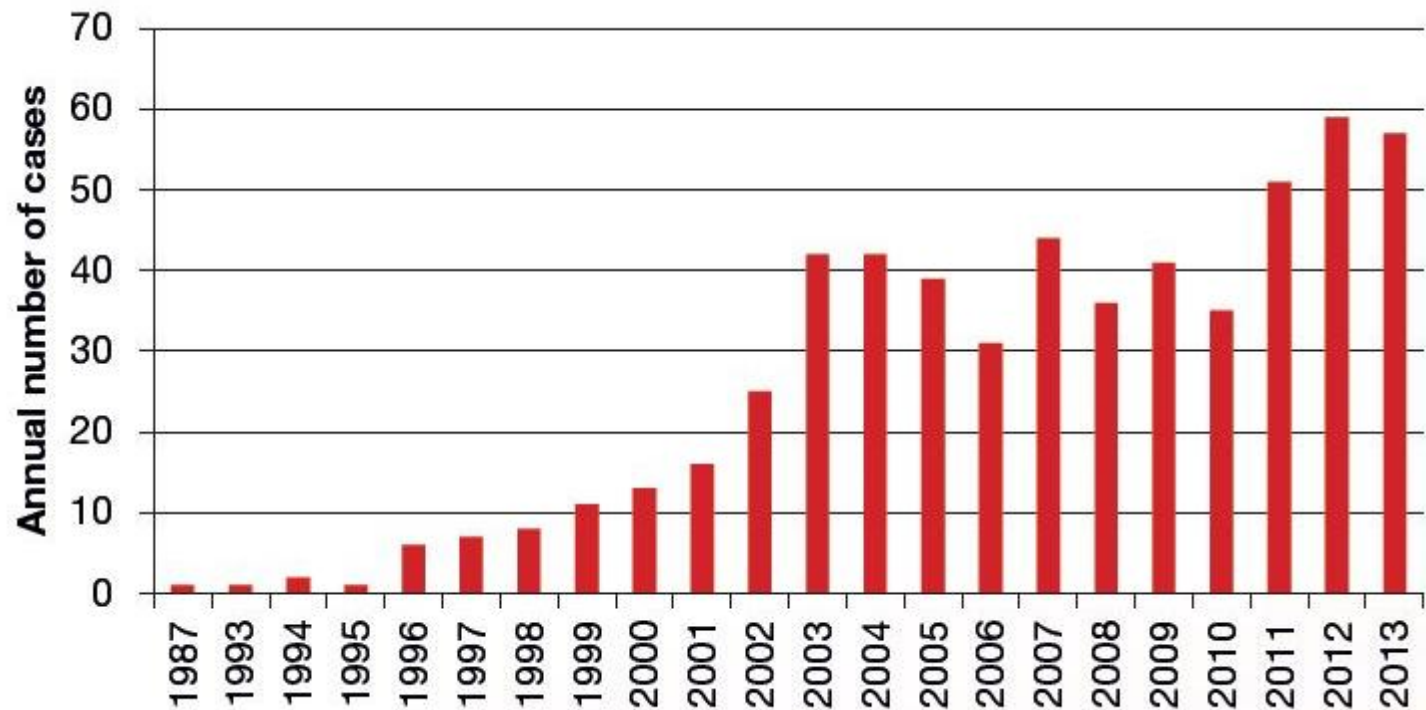
- ▶ ISDS may lead to
  - potential for lower environmental standards
  - potential for direct and indirect health impacts through damage to ecosystems
  - potential for direct and indirect economic and social impacts through damage to ecosystems

## ISDS – what is to be won?

- ▶ who benefits and why?
- ▶ do we achieve a balanced distributions of benefits and costs?
- ▶ are additional investor rights matched with additional corporate responsibilities?
- ▶ what is the objective of ISDS?
  - for investors
  - for states

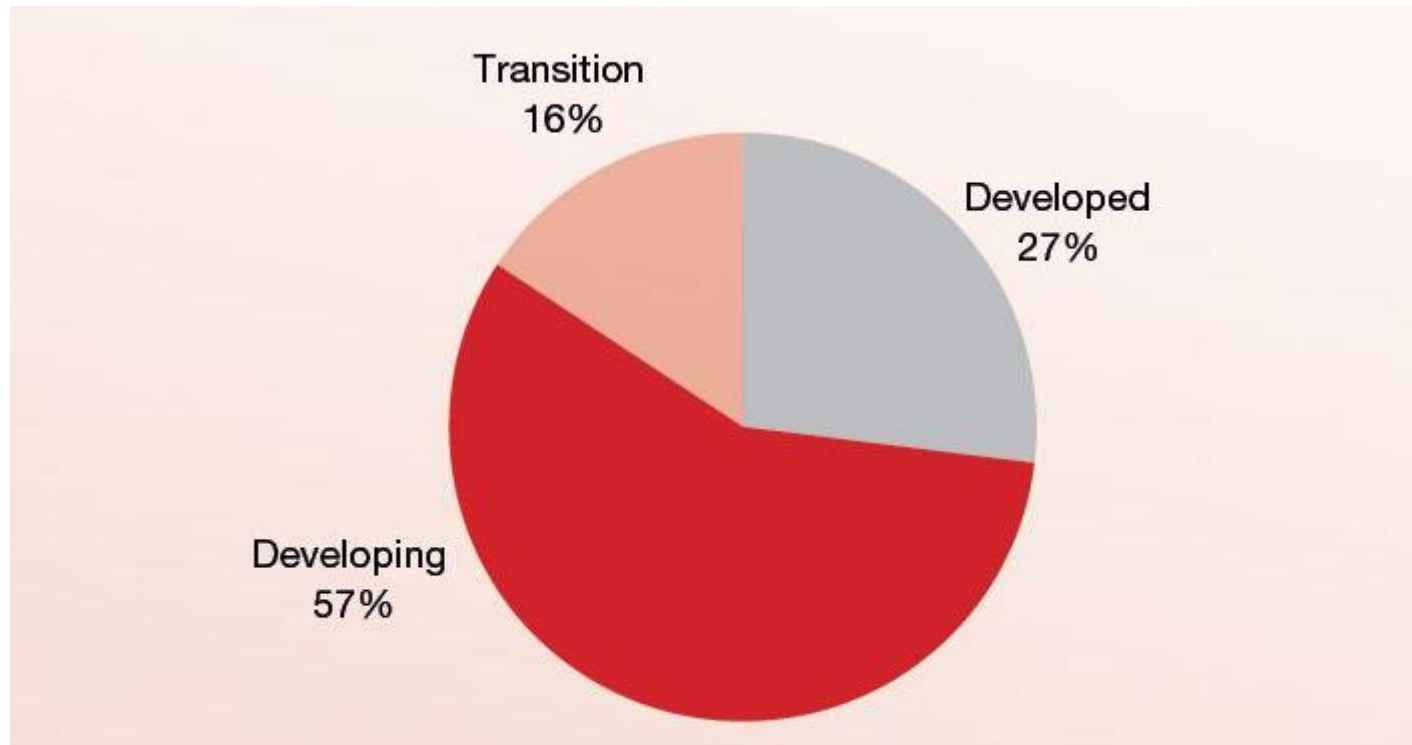
# Past experience with ISDS

- ▶ 568 known disputes by the end of 2013



source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2014)

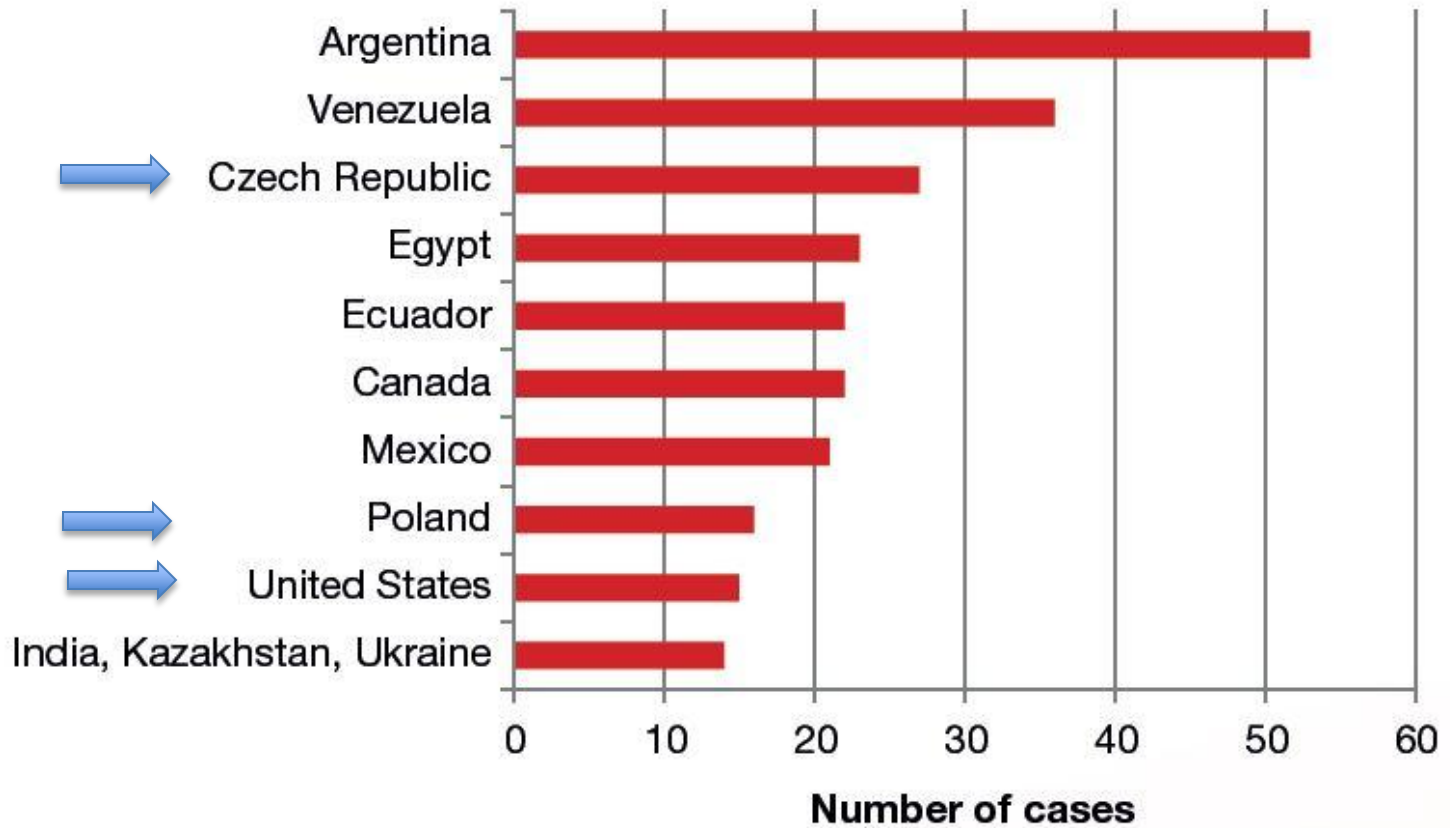
# ISDS most frequent respondent states



source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2014)

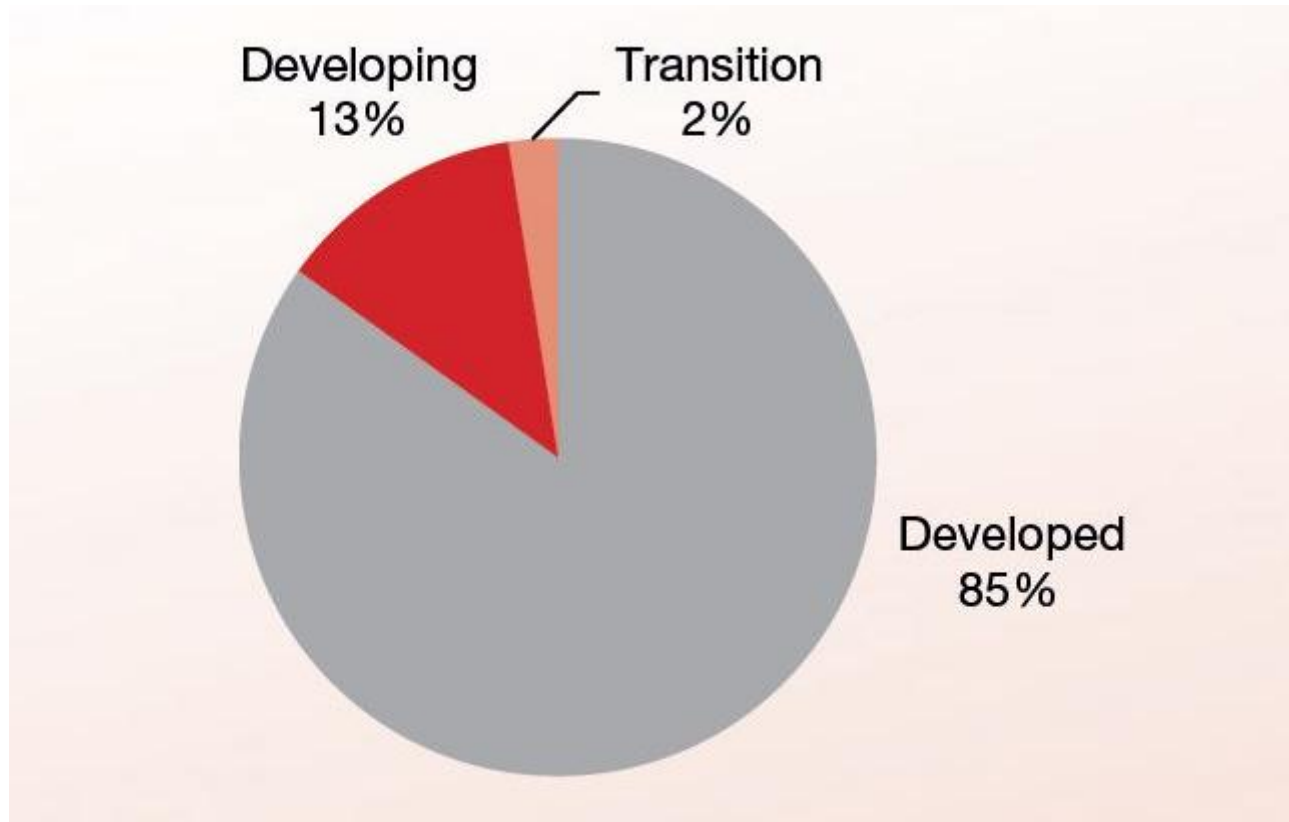


# ISDS most frequent respondent states



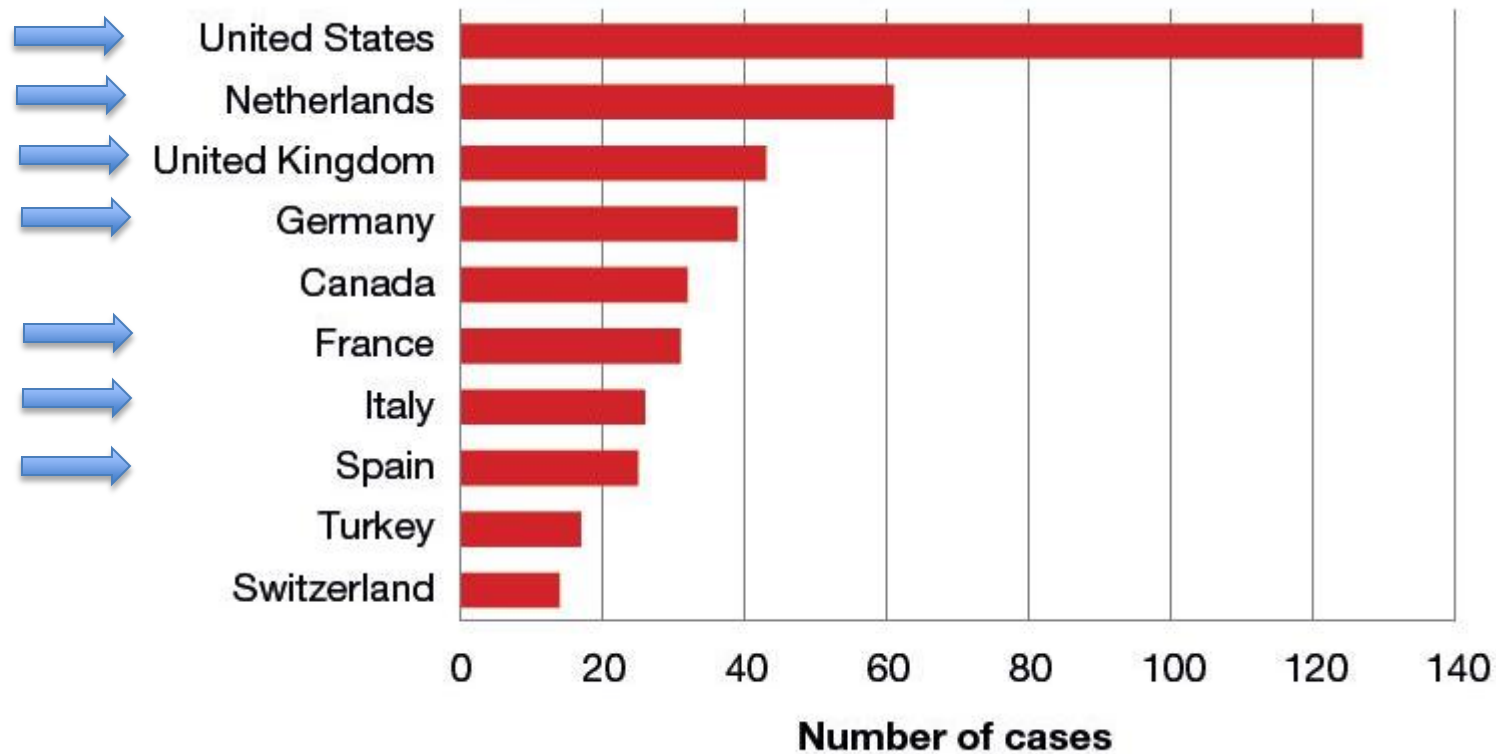
source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2014)

# ISDS home states



source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2014)

# ISDS home states



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# ISDS and environment (I)

- ▶ renewable energy cases
  - 25% of all cases in 2013
  - protecting investments in renewables
  - mostly in Spain and in Czech Republic
  - claim against loss of tax subsidy
  - in 2014 additional cases vs. Spain and Italy
- ▶ enforcement of a court decision in Panama in relation to FDI in a hydroproject

## ISDS and environment (II)

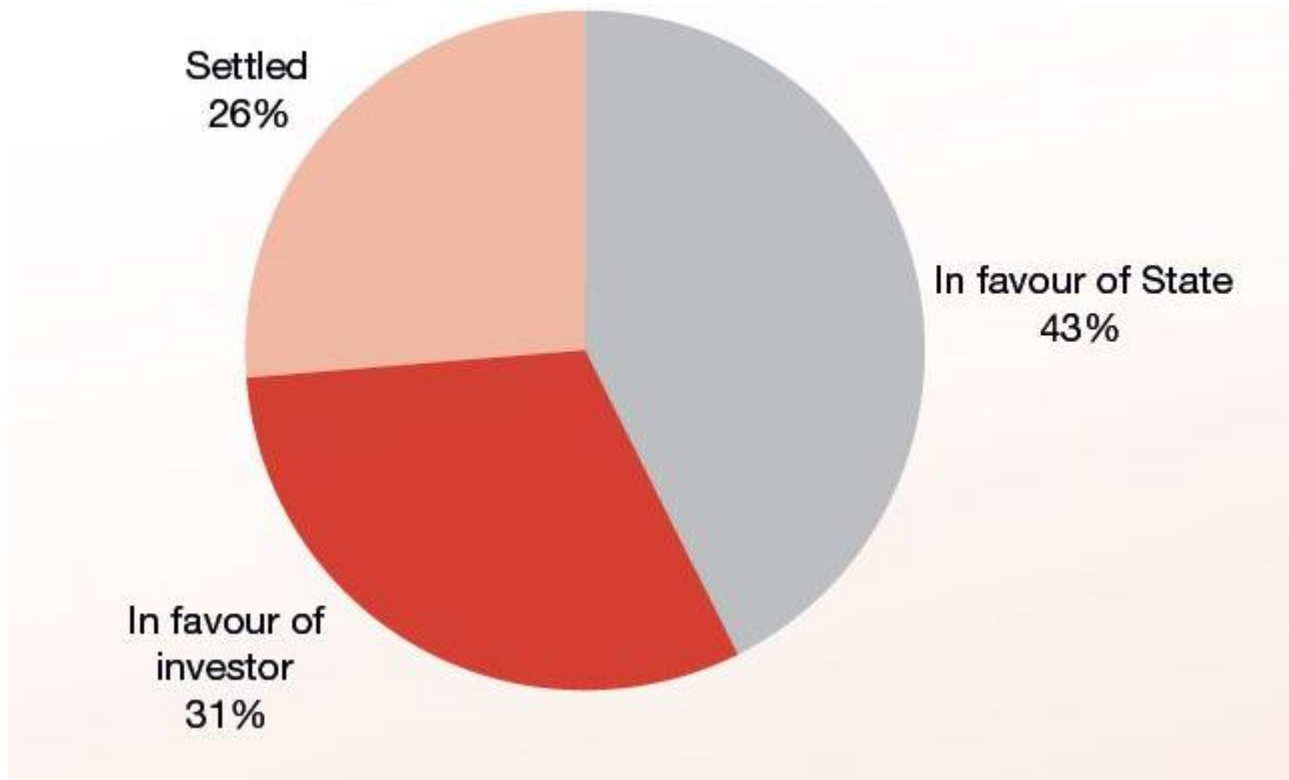
- ▶ challenging environmental measures
  - Quebec's moratorium on hydraulic fracturing
  - Ontario's moratorium on offshore wind farms
  - failed developments of beachfront resorts in environmentally sensitive areas (Croatia and Costa Rica)

## ISDS issues

- ▶ clear winner and loser states
- ▶ high costs: 8 mn USD /case up to 30 mn
- ▶ high compensations (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

# BUT: complex picture

- ▶ investors don't always win (from cases up to 2013)



source: UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2014)

# 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?

- ▶ discussion of the EC consultation on ISDS:
  - ▶ *possibly more narrow definition of investment*
  - ▶ *limitations to most-favoured-nation treatment*
  - ▶ *insufficient approach to expropriation*
  - ▶ *uncertain impact of proposed changes to ISDS*
    - *transparency of proceedings*
    - *multiple claims and domestic courts*
    - *conduct of arbitrators*
    - *costs borne by losing party*
    - *appellate mechanism*

## 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 (increased liability).

# THANK YOU!

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