

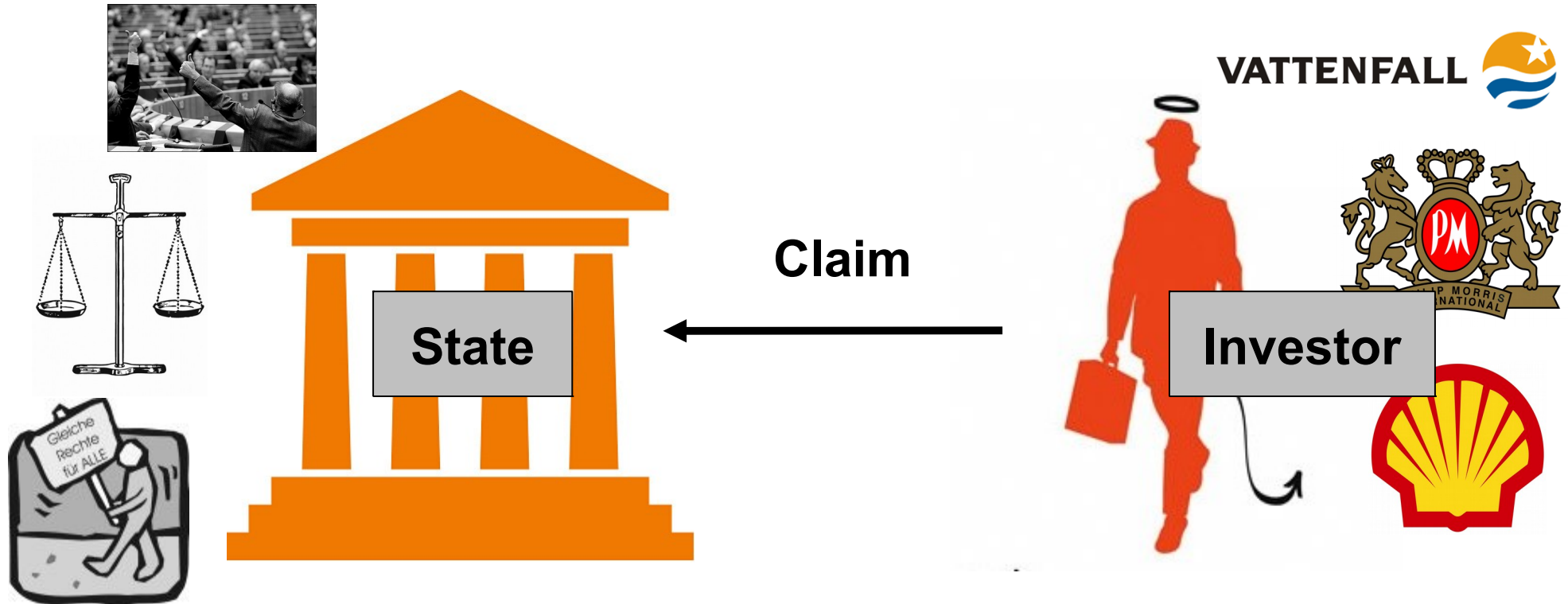
# ISDS forever & everywhere

## The EU investment agenda

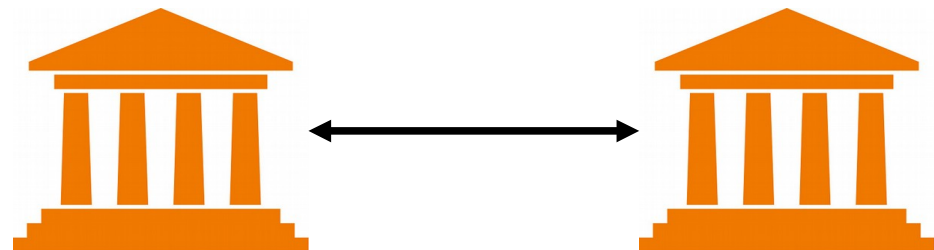


Pia Eberhardt  
Corporate Europe Observatory  
26 October 2017

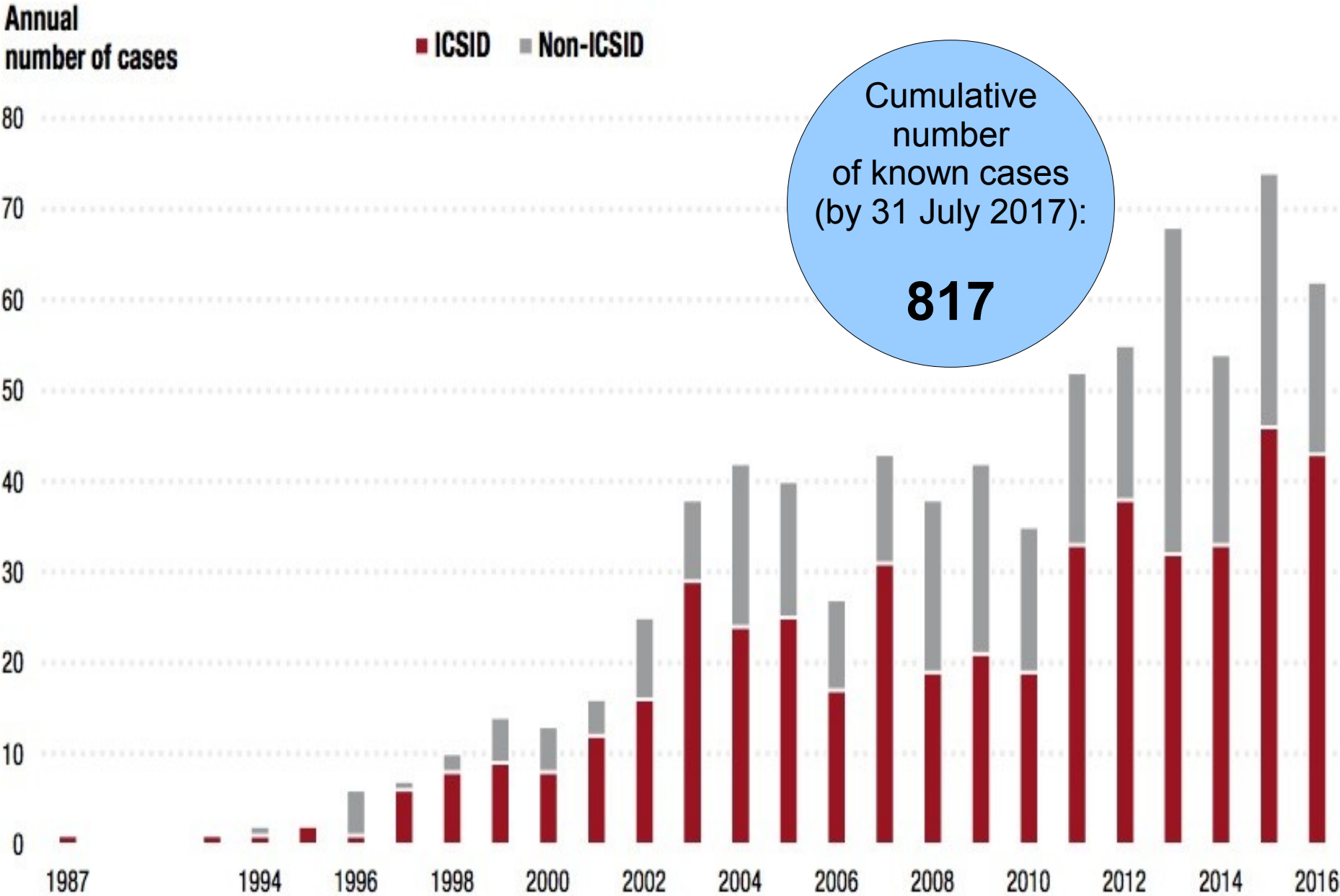
# What is ISDS?



International investment treaties



**Figure 1. Trends in known treaty-based ISDS cases, 1987–2016**



Source: ©UNCTAD, ISDS Navigator.

# Massive crisis of legitimacy

*“If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as ‘investor-state dispute settlement,’ or ISDS.”*

*‘Economist’ editorial, 2014*

# **The EU investment agenda – part 1: expansion**

# TTIP investor rights: the EU proposal multiplies legal & financial risks for member states

**28** EU countries could be sued directly compared to only **9** today



**100%** of US investment in the EU covered compared to only **1%** today



**51,495** companies could sue directly compared to **4,500** today



Nearly **900** investor lawsuits could hit EU countries compared to **9** known claims today



# SUING THROUGH CETA: SOME SUBSIDIARIES OF US-BASED COMPANIES WITH 'SUBSTANTIAL BUSINESS INTERESTS' IN CANADA



**Cargill**

**ConocoPhillips**  
Canada

**McDonald's**

**KOCH**

**Pratt & Whitney Canada**

**Ford**

**Citi**

**ConAgra Foods**

**Microsoft**

**ExxonMobil**

**Google**  
Canada

**Mondelez International**

**BOEING**

**GM**  
Canada

**UNIVAR**

**IBM**

**MONSANTO**

**Imperial**

**Walmart**

**DOW**

**Chevron**

**Coca-Cola Canada**

**LOCKHEED MARTIN**

# **The EU investment agenda – part 2: lock-in through further institutionalisation**



# The EU proposal for a multilateral investment court

- International convention to establish a multilateral court for investor disputes
- First instance & appeal tribunal
- Both would be independent (e.g. with judges with a fixed salary & secure tenure)
- Effective enforcement regime

A Court would become a device for neoliberal rule of investment protection with even greater authority... The affirmation of **slanted positions in a more authoritative fashion** is the likely outcome.

*M. Sornarajah, National University of Singapore*



**The EU investment agenda –  
the consequence: an even  
tighter golden straightjacket**

Investment protection as part of a “long term strategy, carefully thought out by business” to **redefine “public regulation as government ‘taking’ of private property that requires compensation.**

Because any new regulation is bound to have some economic impact on private assets, this doctrine is a formula to shrink the reach of modern government and cripple the regulatory state – undermining long-established protections for social welfare and economic justice, environmental values and individual rights. Right-wing advocates frankly state that objective – **restoring the primacy of property against society’s broader claims.**

*William Greider, 2001*

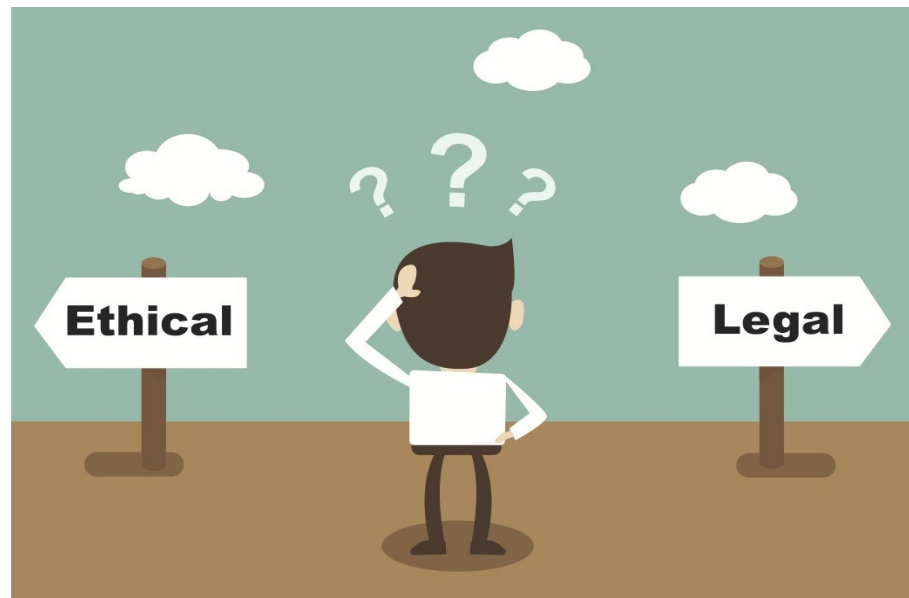
I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation [...]. Virtually all of the new initiatives were targeted and most of them never saw the light of day.

*Former Canadian government official*



Every month I get a threat... We have to review the risks, how strong the claim is. We try to minimize the costs of the state.

*Lawyer at the Czech Ministry of Finance*



The federal government has an army of trade lawyers whose job it is to pounce on any breath, any thought of departure from the trade disciplines. They're there to crush... This was a sledge hammer that the trade people were more than happy to use vis-à-vis initiatives of other departments.

*Canadian policy expert about how ISDS is used against environmental policy*

# **The EU investment agenda – part 3: re-legitimisation**



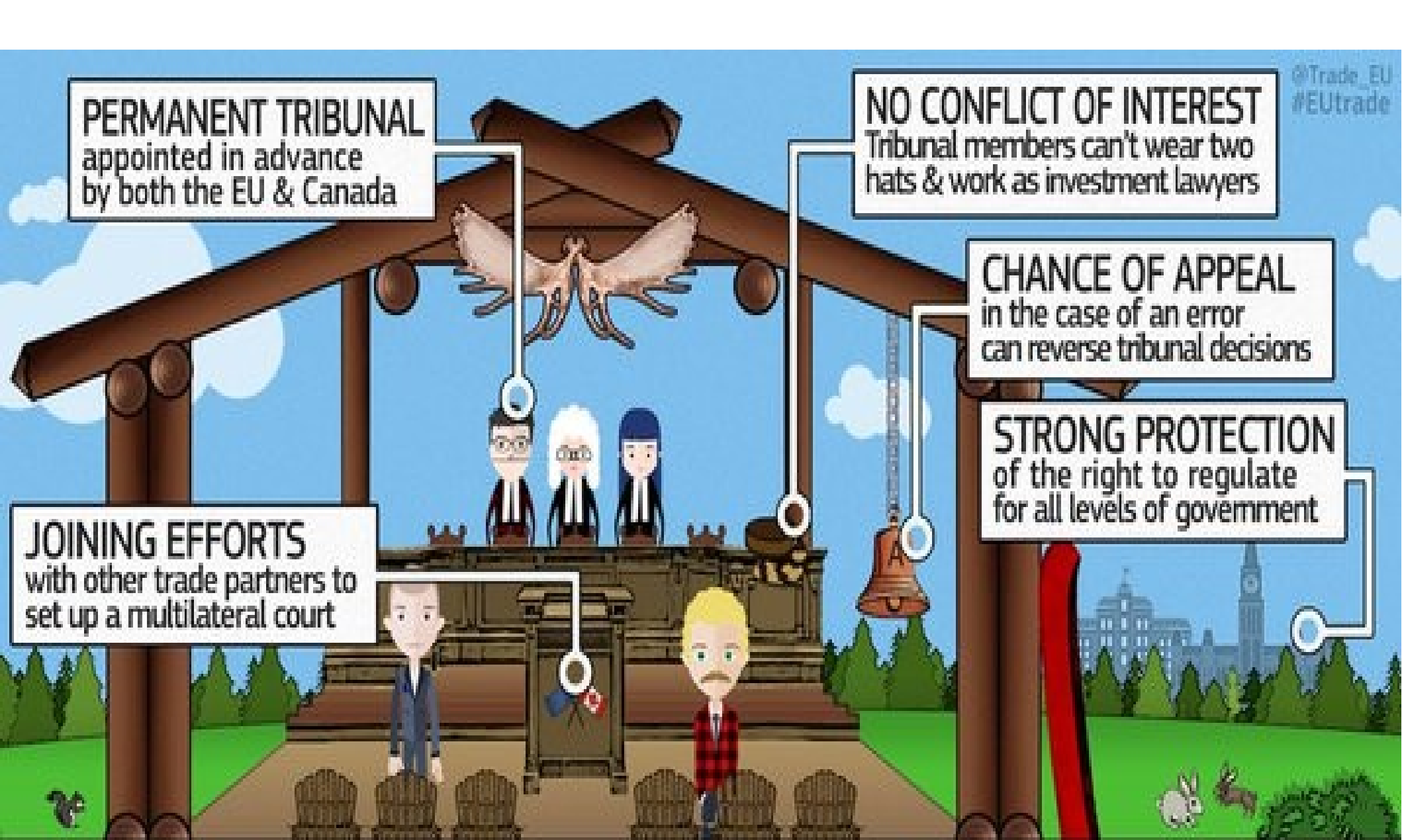
**PERMANENT TRIBUNAL**  
appointed in advance  
by both the EU & Canada

**NO CONFLICT OF INTEREST**  
Tribunal members can't wear two  
hats & work as investment lawyers

**CHANCE OF APPEAL**  
in the case of an error  
can reverse tribunal decisions

**STRONG PROTECTION**  
of the right to regulate  
for all levels of government

**JOINING EFFORTS**  
with other trade partners to  
set up a multilateral court

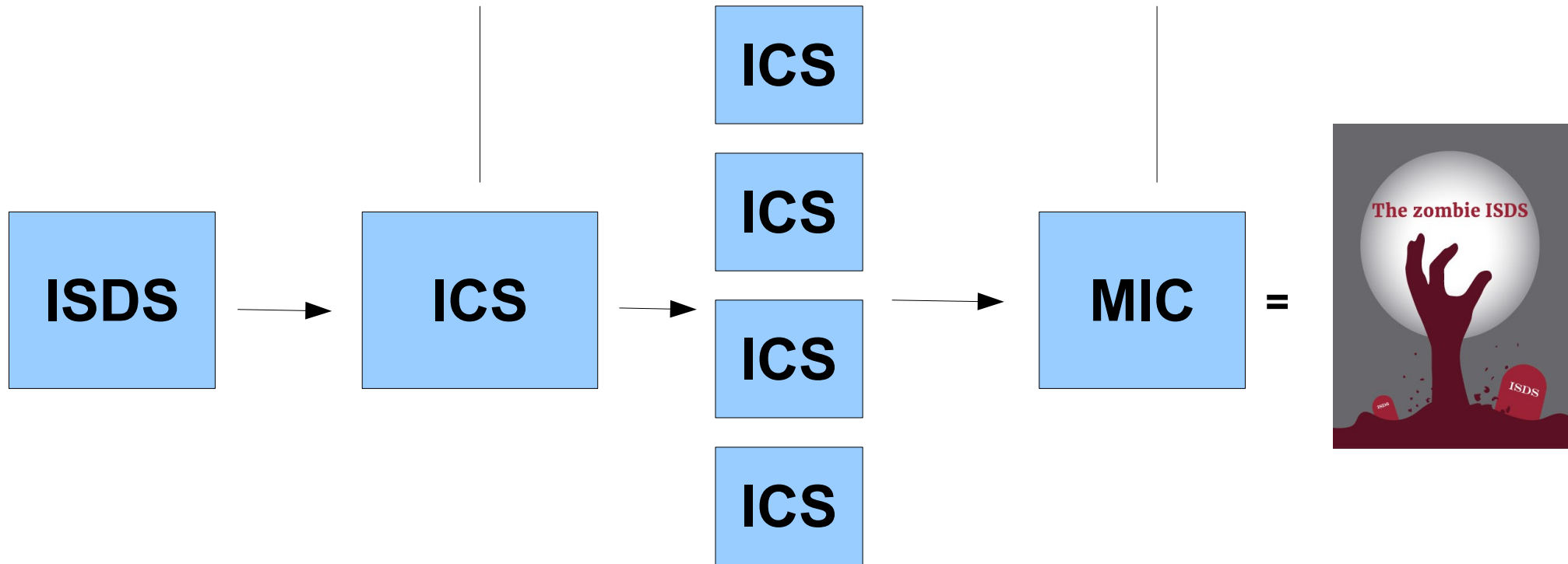


**NEW APPROACH ON INVESTMENT IN CETA**  
INVESTMENT DISPUTE SETTLEMENT SYSTEM



ISDS with procedural reforms:  
transparency, list of pre-appointed  
arbitrators (break from party  
appointments), no counsel-arbitrator  
double hat, appeal process

More institutionalised &  
multilateralised ISDS/ICS with  
further improvements of the dispute  
settlement process (e.g. fixed  
salary for 'judges')



**Same  
basis**

- Foreign investors suing states for compensation
- based on their own law
  - in their own judicial system
  - both exclusively available to them

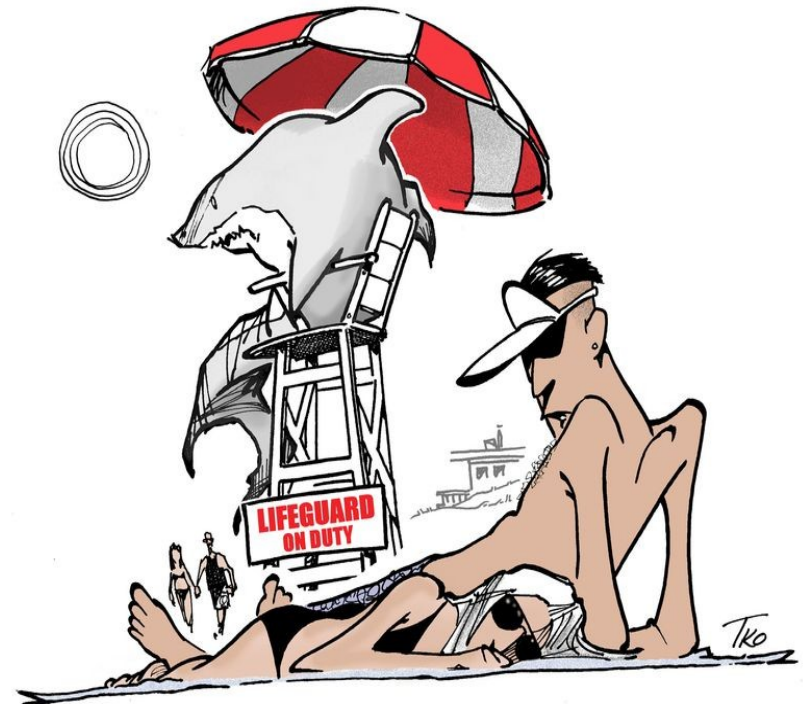
This doesn't change anything because the standards on the basis of which judgements are rendered remain the same.

*Freshfields lawyer Nigel Blackaby on the EU's proposal for an investment court in TTIP, Austrian daily "Der Standard", 2 November 2015*



*Such a mechanism would not solve but rather accentuate the problems connected to ISDS... (eg as a permanent tribunal would be inclined to develop an institutionally backed power strategy).*

*Judge Allan Rosas, European Court of Justice, on the proposed multilateral investment court*



*“So, I’m the only one who sees a conflict of interest here?”*

# Therefore...

- No to the proposed global court for corporations & to any ISDS expansion
- Yes to steps that increase governments' policy-space to tackle climate change & other pressing issues
- Yes to stronger international protections of human rights and the environment
- Yes to binding international rules for corporations with respect to human rights

# Thank you for your attention!

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