

CETA'S INVESTMENT CHAPTER: WHAT PROSPECTS FOR A GREEN TRANSITION?

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ISDS & Env: A cautionary tale

CETA Investor-State Dispute Settlement system
(ISDS): stumbling block for a Green Transition

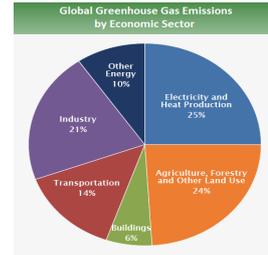
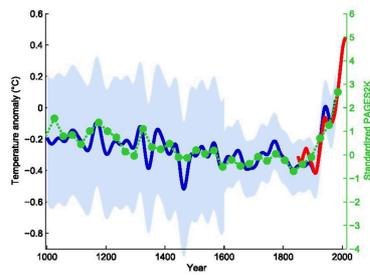
3 Arguments:

- I. Tension btw ISDS & Green Transition
- II. Case law illustrative of the threat of CETA to environmental protection
- III. Challenge the myth that CETA is an 'improvement'



I. Green Transition

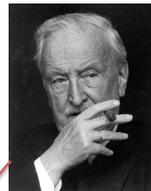
- Climate and other environmental emergencies



TRANSITION

Need to break from the status quo, Change eg phasing-out fossil fuels, reforming agricultural systems, etc.

ISDS as a system to protect capital



Hermann Abs

General Counsel of Royal Dutch Shell

Deutsche Bank
IG Farben



Lord Shawcross

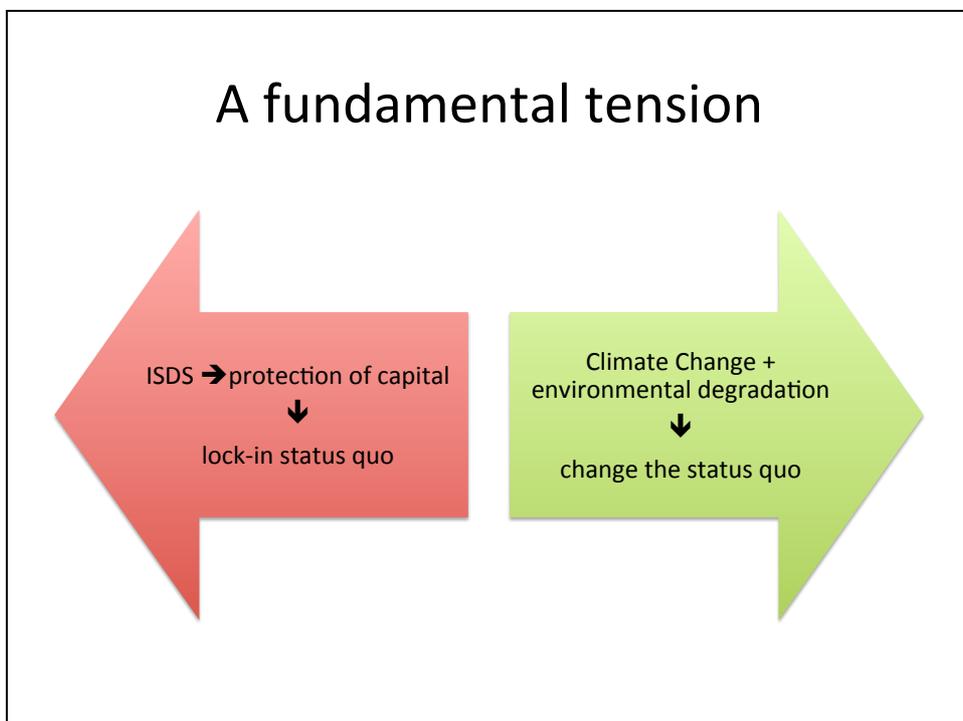
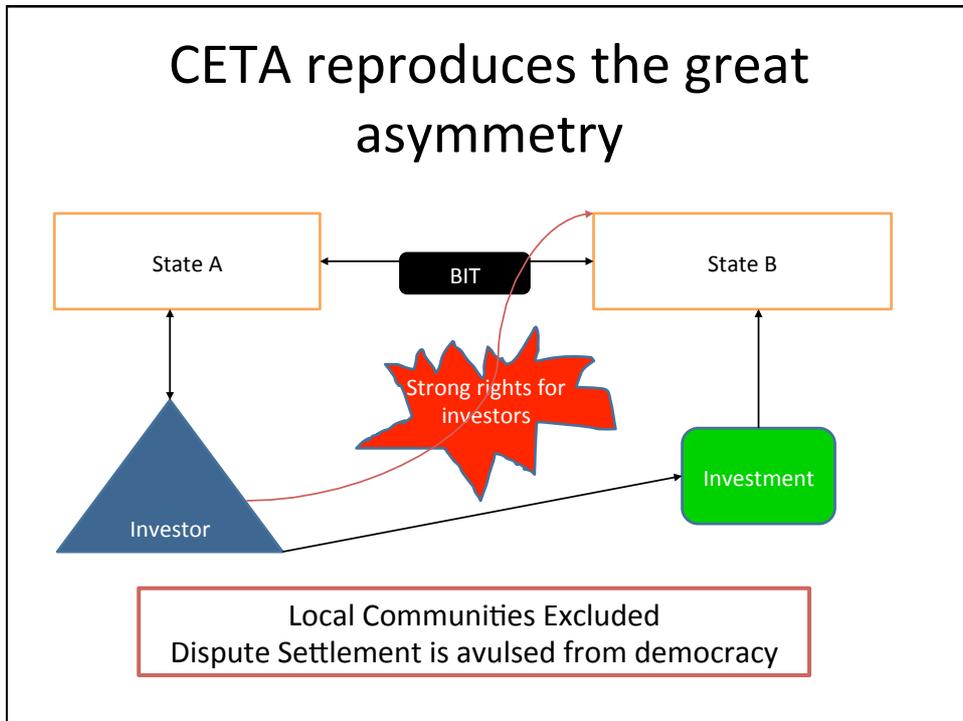
the sanctity of private property

Abs-Shawcross draft Convention on Investments Abroad
'Magna Carta of international commerce'

ISDS to tame decolonialization & preserve the status quo

BITs & CETA

Perrone, *Investment Treaties and the Legal Imagination*, OUP, 2021



II. Case law as illustrative of concrete problems of CETA

II. A textbook case: Tecmed

- Tecmed, first to introduce **proportionality** (similar to right to regulate)
- widely praised!
- Tribunal
 - Mexican decision dismissed as political
 - Tecmed/Cytrar has violated laws, but ... no problem for environment & public health
 - Mexican decision not proportional
 - Expropriation



The untold story of Tecmed

cf. arbitration procedure before the International Court of Environmental Arbitration and Conciliation (ICEAC), 1999

- ascertained several violations and environmental and health hazards for the local people
- NOWHERE mentioned in the Tecmed award

Arcuri and Violi, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives*, in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*, (2021) pp. 1-27.

CETA & the right to regulate: *Much ado about nothing?*

- Radi, ESIL Reflection on right to regulate and ‘exception’ (a la WTO)
- ‘the CETA is not more protective of the right of States to regulate than mainstream arbitration practice on indirect expropriation.’
- CETA ‘codifies’ the ‘approach of most arbitration tribunals’

Recent energy cases

- RWE & Uniper(Fortum) v NL (€1,4 & €1 billion)
 - coal phase-out plan
- And, think back of the ‘all’ the measures needed
 - next to coal phase-outs, laws to revise agriculture (quite relevant to NL, & yes, there are Canadian companies here, eg Viterra, Canada’s largest agri-company, headquartered in Rotterdam)
- Would CETA prevent this type of cases?

3 types of systemic implications for the Green Transition

1. Regulatory chill (Tienhaara)
 - Internalization, Threat & Cross-border Chill
2. Diversion of scarce resources to ‘compensate’ polluters
 - even a win costs money (eg Philip Morris v Australian government \$ 24 million for legal external fees and arbitration costs)
3. Perverse incentives for investors

Fossil fuels & perverse incentives

- decommissioning fossil fuels, fine but 'fair compensation'
- But, is it fair to compensate?
 - eg Uniper argument 'we came encouraged by the government'
- (Full) compensation nullifies the responsibility of investors to assess environmental impacts

CETA, justice & market values

- It is ill-founded to anchor justice to current market values
- Environmental degradation often the product of lobbying and other tactics
 - Naomi Oreskes and Erik M. Conway. *Merchants of doubts*
 - McGarity, Wagner, *Bending Science* (2008)

III. Finally, Is CETA the better than BITs?

- Framing CETA as 'reform' is misguided
- CETA *adds* to the system, does not reform it
 - no BITs between NL & Canada
 - no BITs between most EU countries & Canada
- ISDS is not simply unnecessary, it is toxic to democracy and the environment

To conclude ...

“While slowly slipping away, that future is still within the realm of possibility. It is a matter of what path we choose to follow.”

Michael E. Mann, Scientific American,

April 20, 2018

If the path we want to follow, then CETA
Investment Chapter stands on the way

Additional Readings

- Arcuri, Alessandra, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration', in Sachs, Lisa, Johnson, Lise and Coleman, Jesse (eds.), *Yearbook on International Investment Law and Policy 2018* (OUP 2019).
- Arcuri, Alessandra and Montanaro, Francesco, 'Justice for All? Protecting the Public Interest in Investment Treaties', 59 *Boston College Law Review* 2791 (2018).
- Arcuri, Alessandra and Federica Violi, Human Rights and Investor-State Dispute Settlement: Changing (Almost) Everything, so that Everything Stays the Same, in *Diritti umani e diritto internazionale*, Rivista quadrimestrale, 3/2019, pp. 579-596, doi: 10.12829/95783
- Alessandra Arcuri, Federica Violi, Kyla Tienhaara, David Schneiderman, Laurens Ankersmit, Harm Schepel, Expropriating democracy: on the right and legitimacy of not ratifying CETA, 20 October 2020, *European Journal of International Law blog* available at: <https://www.ejiltalk.org/expropriating-democracy-on-the-right-and-legitimacy-of-not-ratifying-ceta/>
- Arcuri, A. and L. Ankersmit, CETA ondermijnt rechtsstaat en energietransitie, 10 februari 2020, *Opinion*, NRC available <https://www.nrc.nl/nieuws/2020/02/10/ceta-ondermijnt-rechtsstaat-en-energietransitie-a3989906>