

VMR Webinar CETA and ISDS
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Outsourcing the Rule of Law- CETA in light of the development of international investment law



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Postcolonial origins

- End of Empire: investment no longer protected by colonial rule but by international investment law.
- Traditionally: BITs signed between capital-exporting nations and capital-importing nations.
- Formal reciprocity, but, well..
- Rationale: insuring non-commercial risk.
- Supposed trade-off: developing countries commit to international standards of protection and outsource dispute settlement in exchange for increased flows of FDI.

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Postsovereign present

- North-north investment protection treaties
- Shift starts with NAFTA and ECT: classic BIT logic meant to be applied to Mexico (NAFTA) and post-communist space (ECT) turns out to be used against and between developed countries.
- Rationale?

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'Multilateralisation'

(Treaty shopping, forum shopping)

Schill:

'a development...that suggests the emancipation of international investment law from transborder investment flows and its development toward a universal framework for structuring the relation between the State and the economy in general.'

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Why CETA?

- Rationale?

Attracting more investment?

Setting 'Gold standard'?

Need to protect Canadian investors from 'targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief', and 'abusive treatment, such as harassment'?

Tying oneself to a mast. It might be worth looking at CETA as a domestic policy measure, an effort to insure capital against political risk.

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The Structure of International Investment Law

Substantive standards of protection:

- Relative: non-discrimination (National Treatment, Most Favoured Nation)
- Absolute: No expropriation without compensation; Fair & Equitable Treatment.

Dispute settlement: direct access for private parties to international tribunals applying international law

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No greater rights

- Cecilia Malmström to Bernd Lange, 15 February 2016

"In the EU, all investors, whether domestic or foreign, are subject to the same laws, have the same rights and obligations, and nothing in the agreements that the EU has concluded or intends to conclude has changed or will change that."

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No greater rights?

- Article 3, Regulation 912/2014
Financial responsibility arising from a dispute under an agreement shall be apportioned in accordance with the following criteria:
 - b) the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State;
 - c) by way of exception to point (b), the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law.

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What is protected?

investment means every kind of asset that an investor owns or controls, directly or indirectly...

Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stocks and other forms of equity participation in an enterprise;
- (c) bonds, debentures and other debt instruments of an enterprise;
- (d) a loan to an enterprise;
- (e) any other kind of interest in an enterprise;

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Conclusion

CETA allows some, but not all, European companies to bring claims against Member States for measures that are tolerated or even required by EU Law.

CETA hence *obliges* the Dutch government to treat some some Dutch companies better than others.

Legal and political pressure to extend CETA standards of protection to non-covered investments inevitable.

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