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Stellungnahme

Öffentliche Anhörung

zum

a) Gesetzentwurf der Bundesregierung

Entwurf eines Gesetzes zu dem Umfassenden Wirtschafts- und Handelsabkommen (CETA) zwischen Kanada einerseits und der Europäischen Union und ihren Mitgliedstaaten andererseits vom 30. Oktober 2016

BT-Drucksache 20/3443

b) **Vorschlag für einen Beschluss des Rates über den Abschluss des umfassenden Wirtschafts- und Handelsabkommens (CETA) zwischen Kanada einerseits und der Europäischen Union und ihren Mitgliedstaaten andererseits**

KOM(2016)443 endg.; Ratsdok.-Nr. 10970/16

c) **Vorschlag für einen Beschluss des Rates über den im Namen der Europäischen Union in dem mit dem umfassenden Wirtschafts- und Handelsabkommen (CETA) zwischen Kanada einerseits und der Europäischen Union und ihren Mitgliedstaaten andererseits eingesetzten Gemischten Ausschuss für die gegenseitige Anerkennung von Berufsqualifikationen hinsichtlich der Annahme eines Beschlusses über ein Abkommen über die gegenseitige Anerkennung von Berufsqualifikationen von Architekten zu vertretenden Standpunkt**

KOM(2022)343 endg.; Ratsdok.-Nr. 11525/22

am 12. Oktober 2022

Die Interpretationserklärung des Gemischten CETA-Ausschusses: Transformativer Wandel oder Greenwashing?

Zusammenfassung des juristischen Gutachtens von A. Arcuri und F. Violi, „The CETA Joint Committee Draft Interpretative Decision: Transformative Change or Greenwashing?“, Oktober 2022, Download unter power-shift.de/ceta-gutachten-2022. Diese Zusammenfassung wurde erstellt von PowerShift.

Trotz massiver Protestbewegungen auf beiden Seiten des Atlantiks trat das Handels- und Investitionsschutzabkommen zwischen der EU und Kanada (CETA) 2017 vorläufig in Kraft. Noch nicht in Kraft ist jedoch der besonders umstrittene Investitionsschutz, mit dem Investoren Staaten beispielsweise für Klima- oder Umweltschutzmaßnahmen vor einem internationalen Schiedsgericht verklagen können. Dieser Investitionsschutz wird erst wirksam, wenn CETA von allen EU-Staaten ratifiziert wurde. In ihrer handelspolitischen Agenda hat sich die Bundesregierung Ende Juni darauf geeinigt, das Abkommen schnellstmöglich zu ratifizieren – unter einer Bedingung: Eine Interpretationserklärung soll vorher sicherstellen, dass der Investitionsschutz eingegrenzt und seine „missbräuchliche Anwendung“, verhindert wird. Klagen gegen Klimaschutz sollen dadurch nicht mehr möglich sein.

Doch das Gutachten, das die Rechtswissenschaftlerinnen Alessandra Arcuri und Federica Violi von der Universität Rotterdam im Auftrag von PowerShift angefertigt haben, zeigt: Das Vorhaben der Bundesregierung ist zum Scheitern verurteilt. **Die CETA Interpretationserklärung würde Klagefälle gegen Klimaschutzmaßnahmen oder gegen andere Maßnahmen, die für die Bewältigung der ökologischen Krise nötig sind, nicht verhindern.**

Denn **einerseits geht die Erklärung nicht weit genug**. Sie geht explizit nur auf Klimaschutzmaßnahmen ein und lässt Maßnahmen zu anderen drängenden Problemen wie beispielsweise dem Gewässerschutz oder Pestiziden unerwähnt. Andererseits **enthält sie weiterhin viele sehr unbestimmte Begriffe**. Beispielsweise können Klimaschutzmaßnahmen weiterhin als „indirekte Enteignung“ angesehen werden, wenn ihre Auswirkungen „völlig unverhältnismäßig“ und „eindeutig unangemessen“ erscheinen. Die Entscheidung, auf welche Maßnahmen dies zutrifft, obliegt den Schiedsrichter*innen des CETA Schiedsgerichts, die damit weiterhin einen sehr großen Interpretationsspielraum haben. Beispiele aus der Geschichte der Investitionsschiedsgerichtsbarkeit zeigen, dass die Rechtstandards des Investitionsschutzes durchaus unterschiedlich angewendet und ausgelegt werden. So urteilte ein Schiedsgericht im Fall Rockhopper vs. Italien kürzlich, dass die Nicht-Erteilung einer Genehmigung für ein geplantes Ölförderprojekt einer Enteignung des Investors gleichkäme. Das Schiedsgericht sprach Rockhopper 250 Millionen US-Dollar Entschädigung zu. Die rechtliche Grundlage war der Energiecharta Vertrag. Trotz der Interpretationserklaerung kann es nicht ausgeschlossen werden, dass auch das CETA-Schiedsgericht in Zukunft zu einem ähnlichen Urteil käme. Des Weiteren bedeutet die Verabschiedung einer verbindlichen Interpretationserklärung nicht zwangsläufig, dass sie von den Schiedsgerichten auch

durchgängig angewendet wird. So wurde beim Nordamerikanischen Freihandelsabkommens ein ähnliches Auslegungsinstrument in mehreren Schiedsgerichtsverfahren angefochten.

Zudem ändert die Interpretationserklärung nichts an den strukturellen und grundlegenden Problemen des CETA Investitionsschutzes: Er erstreckt sich weiterhin auf alle – nicht nur auf nachhaltige – Investitionen, er enthält weiterhin nur Rechte, aber keine Pflichten für Konzerne, und schreibt auch nicht vor, dass bei Klagen zunächst der nationale Rechtsweg ausgeschöpft werden muss.

Die einzige Möglichkeit, das Risiko klimabezogener Klagen unter CETA vollständig auszuschließen, besteht daher darin, den Investitionsschutz aus dem Abkommen zu streichen. Dies könnte über eine Vertragsänderung, ein Umsetzungsabkommen oder ein Anwendungsprotokoll erreicht werden, ohne dass dadurch neue Verpflichtungen entstehen oder die anderen Teile des Abkommens beeinträchtigt würden. Kanada könnte für einen solchen Vorschlag offen sein, da das Land bereits fortschrittlichere Investitionsschutzstandards als CETA verfolgt.

The CETA Joint Committee *Draft Interpretative Decision*: Transformative Change or Greenwashing?

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04 October 2022

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The dangers of ratification

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada has provisionally and partially entered into force in 2017. As all EU Member States, also Germany has to ratify the agreement for it to fully enter into force. This is because CETA is a mixed agreement that includes an Investment Chapter (Chapter 8) with an investor-state state dispute settlement (ISDS) mechanism (Ch. 8(F)), which 'removes disputes from the jurisdiction of the courts of the Member States.'[3]
ISDS has been criticized for its potential to curb environmental policy and, more generally, to erode democracy.[4] Several EU Member States have not yet ratified CETA, while others ratified it, despite widespread popular opposition. For example, the Dutch Parliament approved CETA with an extremely narrow majority.[5] This is concerning. Should CETA Investment Chapter

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2 PowerShift e.V., Greifswalder Str. 4, 10405 Berlin, https://power-shift.de
3 See CJEU Opinion 2/15, para. 292.
4 K. Tienhaara et al*, Investor-state disputes threaten the global green energy transition*, in *Science* 4637 (2022); D. Schneiderman, *Constitutionalizing Economic Globalization*, (Cambridge University Press 2008).
5 In 2020, the Dutch Lower Chamber voted in favour of the Agreement, with a margin of only 3 votes (72 for; 69 against). Later that year, CETA could not be approved because of a lack of majority in the Senate. Rather than subjecting it to the vote of the Senate, the Dutch government postponed the vote. In July 2022, the Dutch Senate

enter into force, it could cost billions to taxpayers, and it could delay climate policy. ISDS has been mentioned in the last IPCC Report as an obstacle to the energy transition.[6] While bad laws can easily be repealed, **it would be virtually impossible to dispense with the effects of CETA**. The extremely complicated process of terminating the Energy Charter Treaty (ECT) should be a warning. In fact, even if the treaty were terminated (something extraordinarily difficult to achieve), the Investment Chapter **'shall continue to be effective for a period of 20 years after the date of termination**.'[7] Before approving of a Treaty that once ratified will be with us to stay, it is of high importance to ponder its risks. Ratifying CETA in its current status, without a large popular backing, can be seen as highly anti-democratic, given its quasi-constitutional import.

Not a fix

In a move to allegedly try and remedy some deficiencies of the CETA Investment Chapter, on August 29, 2022, the Government of Germany and the European Commission have agreed on a Draft Decision on the Interpretation of certain terms in Chapter 8, including terms relating to the Fair and Equitable Treatment (FET), Expropriation and Climate Change (hereinafter the Decision). One question is whether such Decision could prevent investment disputes against climate change policy. **The Decision can neither stop climate-related investment disputes, nor disputes concerning other environmental measures necessary to address the ecological crisis**. This is for at least **two sets of reasons**. First, while the Decision does clarify some words in meaningful ways, it is unavoidably under-comprehensive. Second, the Interpretation does not and cannot possibly address some of the most fundamental problems of Chapter 8 that are not strictly related to substantive standards.

1. Draft Decision on Interpretation on FET and indirect expropriation

The rules on FET and indirect expropriation have been often invoked by investors to counter public interest regulation and have been criticized as lending themselves to abuses. The Decision on Interpretation aims at constraining the scope of these rules, so as to minimize ways by which investors could deploy them to fight climate policy and environmental regulation. Despite good intentions, it is highly implausible that the clarifications in the Decision will deter investors to challenge climate and other environmental policy measures taken by governments. In fact, the proposed text, albeit very thoroughly drafted, unavoidably retains a certain degree of ambiguity. This is partly because FET and indirect expropriation are by their very nature open-ended norms. **The only way to remedy this open-endedness is to scrap them entirely from the treaty text, something which cannot be done through interpretation.** Take for example this wording in the leaked Decision on Interpretation, aimed

approved CETA, again with a rather thin majority (40 for; 35 against), for an overview see https://www.somo.nl/dutch-senate-approves-ceta-with-a-very-small-majority/.

6 IPCC 2022, AR6 WGIII, Chapter 14-81.

7 This is the so-called sunset clause, included in Article 30.9 (2) CETA, which reads*: '…*in the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date.'

at further delineating the rules on expropriation: 'In light of the need for an effective and progressive response to the urgent threat of climate change, the Parties reaffirm that non-discriminatory measures of a Party that are designed and applied to combat climate change or to address its present or future consequences do not constitute indirect expropriation unless the *impact* of a measure or series of measures would appear *wholly disproportionate* in that it would be perceived as undeniably unreasonable in light of its purpose.' **What does 'wholly disproportionate' mean in practice? And how is the 'impact' to be assessed? In fact, radical and much needed measures to combat climate change, in order to be effective, ought to have enormous impact on the fossil fuels industry.** As a side note, it is worth recalling that the fossil fuel industry has deliberately worked to obtain favourable regulatory frameworks, instigating doubts on sound science, and occasionally harassing the scientific community.[8] Looked at from a socio-historical perspective, what may be perceived as radical environmental measures are simply measures restorative of environmental justice.

It is entirely plausible that different arbitrators will apply and interpret terms such 'impact' and 'wholly disproportionate' differently.[9] In one of the first ISDS cases where a proportionality test was articulated, *Tecmed v Mexico*, the company which had violated environmental laws by discharging prohibited toxic waste was awarded damages because in the view of the Tribunal the lack of a permit renewal was not proportional to the violation.[10] In that case, proportionality was short-hand to justify toxic waste colonialism. This type of anti-environmental reading of the law is not an exception and has been espoused by numerous Tribunals, including most recent ones such as *Eco Oro v Colombia*,[11] *Bilcon v Canada*[12] and *Rockhopper v Italy*.[13] The fact that the members of the Tribunal in CETA are not *required* to be experts of environmental law or human rights (as briefly discussed below) suggests that this type of reading can be reproduced by arbitrators in CETA, despite the good intentions underpinning the Decision.

The Decision does pay attention to measures relating to climate change, which is laudable given the urgency of implementing climate policy. Yet, what does such a text entail for measures not directly designed to combat climate change? The ecological crisis is not only related to climate change. As of 2022, as humanity, we have exceeded 6 of the 9 planetary

8 Alice Bell, *Sixty years of climate change warnings: the signs that were missed (and ignored)* (2021). https://www.theguardian.com/science/2021/jul/05/sixty-years-of-climate-change-warnings-the-signs-that-were-missed-and-ignored; N. Oreskes, E.M Conway, *Merchants of doubt: How a handful of scientists obscured the truth on issues from tobacco smoke to global warming* (Bloomsbury Press 2010).

9 For an analysis showing how the application of a proportionality analysis has yielded different outcomes see A. Arcuri, F. Violi, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives*, in J. Chaisse, L. Choukroune, S. Jusoh, (eds.), *Handbook of International Investment Law and Policy* (Springer 2021) pp 1-27; for a critical stand on proportionality as a balancing criterion see D. Davitti, *On proportionality, again: Domesticating international investment law and managing vulnerability*, in *Investment Treaty News*, 23/03/2021. https://www.iisd.org/itn/en/2021/03/23/on-proportionality-again-domesticating-international-investment-law-and-managing-vulnerability-daria-davitti/.

10 *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 – Award (29 May 2003), see in particular par. 149.

11 *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 – Decision on Jurisdiction, Liability, and Quantum (9 September 2021).

12 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04 – Award on Jurisdiction and Liability (17 March 2015).

13 Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14.

boundaries.[14] This means that we have to urgently act also on other questions, including chemicals, pesticides, the protection of freshwaters, etc. Yet, the Decision on Interpretation refers only to climate action, endorsing what has been labelled as 'carbon tunnel vision'.[15]
A general exception like Article XX of GATT 1994 would have been the bare minimum (although not sufficient) to address the risks to environmental policy posed by the Investment Chapter in CETA. However, the agreement does not even have that bare minimum. It is to be recalled that the CETA general exception does not apply to Section D of Chapter 8, where the standards of FET and Expropriation are regulated.[16] The Decision leaves this unfortunate wording unaltered. In practice, even explicit treaty language aimed at safeguarding police powers has not proven sufficient to limit arbitrators' interpretative 'discretion'.[17] In *Eco-Oro*, for example, the Tribunal has concluded that even if the relevant GATT-like general exception applies, compensation for the investor might still be required (in the context of the FET claim),[18] negating the very point of including such clauses in BITs. In *Bear Creek*, arbitrators have not only failed to apply the relevant police power provision; they have also interpreted the general exception as applicable only if the governmental measure is aimed at addressing the investor's legal fault.[19] Arbitrators have thus succeeded in unduly narrowing the effect of provisions aiming at safeguarding important public policies.

The recent award in *Rockhopper v Italy* is further illustrative of the limits of the Decision on Interpretation. In this case, a UK oil and gas company sued Italy for failing to issue a permit for off-shore drilling, in a field situated 6,5 km off the pristine coast of the Adriatic Sea. Despite the fact that Rockhopper never obtained the production concession, the arbitration Tribunal found that the Italian State expropriated Rockhopper. Rockhopper, which invested allegedly $40 million,[20] has been awarded 190 million US$ plus interest (so approximately US$ 250 million) in compensation.[21] The case was funded by a third party, costing zero to Rockhopper. What is interesting in this case is how the law is applied and interpreted by arbitrators. The Tribunal has arguably magnified the property rights of the investors, while paying lip service to the precautionary principle. Irrespective of the details of the case, one point is noteworthy. The concept of property can be stretched in many ways. An arbitrator could understand the law as assigning a property right, while a different lawyer can find exactly the opposite. The question to be posed is: could the CETA Tribunal come to the same – arguably anti-environmental conclusion – of the Rockhopper Tribunal? The answer is, yes it could. In fact,

14 https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html.
15 https://www.sei.org/perspectives/move-beyond-carbon-tunnel-vision/.
16 See Art. 28.3 CETA, which provides that the general exception in Art. XX of the GATT 1994 applies only to Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment).
17 J. B. Heath, *Eco Oro and the twilight of policy exceptionalism*, in *Investment Treaty News*, 20 December 2021, available at https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/#_ftn13, L. Sachs, L. Johnson, E. Merrill, *Environmental Injustice: How Treaties Undermine Human Rights Related to the Environment*, in *La Revue des Juristes de Sciences Po*, no. 18, p, 90, January 2020. Available at https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/71.
18 See the discussion in J.B. Heath, supra fn 17, *Eco Oro*, supra fn 11, para 830 and 836.
19 See L. Sachs, L. Johnson, E. Merrill supra fn. 17 at 100.
20 This figure has been mentioned by Sam Moody president of Rockhopper in 2017 during a presentation to the stakeholders, available at https://www.youtube.com/watch?v=Kb_9ymza7Bg&t=1158s (last visited 30-09-2022).
21 https://www.climatechangenews.com/2022/08/24/british-company-forces-italy-to-pay-e190m-for-offshore-oil-ban/.

the CETA Tribunal will have to assess whether a public policy measure is 'manifestly excessive';[22] this criterion is open-ended and can be coopted by industry-friendly arbitrators. The Decision on Interpretation tries to clarify this jargon by adding that manifestly excessive is to be understood as 'manifestly disproportionate to its intended policy objectives in that it would be perceived as undeniably unreasonable in light of its purpose.' Yet again, this clarification does not remove the ambiguity and the discretion of arbitrators to apply the norm in different manners.

Finally, it is worth noting that the fact that a binding interpretative decision is adopted does not per se mean that it will be applied consistently by arbitral Tribunals. A similar instrument, the FTC Note of Interpretation on the Fair and Equitable Treatment Standard under NAFTA Article 1105, was challenged by way of different arguments in various NAFTA disputes.[23]

2. The structural problems

The major objection to the Decision on Interpretation though is that no attempts at clarifying, tweaking or 'tinkering around the margin'[24] can revert the discrepancy between the investment chapter in CETA and the goals of meaningfully tackling climate change (or any other public policy area, for that matter).[25] The investment regime in CETA reproduces the assumption that the international investment law system furthers public interest by enhancing development and the rule of law.[26] In this light, the interpretative efforts in the Decision aim at 'saving' the purported benefits, while addressing potential externalities. Yet, this assumption has been progressively put in question, with empirical studies showing evidence to the contrary.[27]

The Decision on Interpretation does not and cannot fix the most fundamental problems of CETA Chapter 8. An investment Chapter genuinely interested in preserving, if not encouraging, sound environmental law would protect 'only sustainable investments', as suggested by the Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation.[28] However, there is no trace in the Investment Chapter of such provisions. Likewise, Chapter 8 does not establish rules on investors' obligations, nor does it specifically provide for the possibility of state counterclaims. Other glaring deficiencies include the lack of a rule on the exhaustion of domestic legal remedies and a stringent regulation of third-party funding.

22 See Annex 8-A (3) CETA.

23 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Wolters Kluwer 2013).

24 J.B. Heath, supra n. 17.

25 M. Dietrich Brauch, *Climate Action Needs Investment Governance, Not Investment Protection and Arbitration*, Columbia Center on Sustainable Investment [CCSI] (blog), 15 March 15 2022, available at https://ccsi.columbia.edu/news/climate-actionneeds-investment-governance-not-investment-protection-isds.

26 A. Arcuri, F. Violi, supra fn 9.

27 See, for example, J. Pohl, *Societal benefits and costs of International Investment Agreements*. OECD Working Papers on International Investment 2018(1):19; M. Sattorova M, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018).

28 https://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf.

Finally, despite important innovations in relation to the procedures to resolve disputes, such as the establishment of an appeal mechanism, too little is done to ensure that the epistemic community of arbitrators is sufficiently well trained in environmental law. For example, Art. 8.27 (4) of CETA provides that 'It is desirable that [Members of the Tribunal] have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.' The problem is that this group of arbitrators has across the board displayed disregard for the body of international, European and domestic environmental law.

In conclusion, the only way to completely remove the risk of climate-related claims is to scratch ISDS from the agreement. As of today, most EU countries have no investment treaties with Canada. If Chapter 8 (F) entered into force, it would enable Canadian investors (as well as US ones with substantial business in Canada) to deploy ISDS against all EU Member States. From this vantage point, portraying CETA as 'modernizing ISDS' is misleading, as CETA's Investment Chapter establishes a system of investor-state disputes, where there wasn't one.[29] And one that cannot certainly be labelled as progressive.

There is an alternative

Political parties are often cornered with the argument that there is no other alternative to ratifying CETA. Moreover, the decision not to ratify is at times framed as anti-Canadian. Who could not agree to an agreement with Canada? This rhetoric is misleading on various accounts, and it obscures alternatives.

Most importantly, there is a valid and legally viable alternative to ratify CETA in its current status,[30] that would potentially allow scratching ISDS completely or at least tackling (some of) its shortcomings. Treaty parties could already resort to a formal amendment pursuant to art. 30.2 of CETA, which arguably falls under provisional application. Short of a formal amendment, a similar result might be achieved, for example, via an implementation agreement or an application protocol that provides for the *non*-application of Chapter 8 (or Chapter 8(F) only). An implementation agreement of this kind would not introduce new obligations for treaty parties. In fact, it would re-expand the regulatory autonomy of States and could thus be approved with more agility. Furthermore, renegotiation is physiological for treaties. The Decision itself introduces a draft review clause that requires parties to review CETA Chapter 8 'on the basis of available evidence and bearing in mind changing international circumstances' within 5 years after entry into force. It is unclear why parties would wait 5 years to review a system that has consistently shown its shortcomings. It would be much more

29 More precisely, there is no BIT with the overwhelming majority of EU Member States, including Germany. Only a handful of EU Member States have a BIT with Canada

30 For an articulate legal analysis, see extensively A. Arcuri, F. Violi, S. Paulini, S. Triefus*, Investment Law in Corona Times: How Myths Fuel Injustice*, Verfassungsblog, 17 June 2020, available at https://verfassungsblog.de/investment-law-in-corona-times-how-myths-fuel-injustice/ and F. Violi, *Formal and informal modification of treaties before their entry into force: What scope for amending CETA?,* in *Questions of International Law,* 41 (2017), pp 5-33, available at http://www.qil-qdi.org/wp-content/uploads/2017/08/02_CETA_Violi_FIN-2.pdf.

cumbersome and politically difficult to reopen negotiations for a formal amendment after the conclusion of the ratification process for all EU Member States. In light of the urgency of the 'changing international circumstances', the 5-year timespan post entry into force might be too late. In short, domestic Parliaments should be aware that not ratifying CETA in its current status because of ISDS is a valid alternative and would not 'kill' the other Chapters in CETA. Legally it is possible to do so and it is up to the political will of the Parties.

Closely related to the above, and in contrast to the anti-Canadian rhetoric, it is plausible to expect that Canada is open to a CETA without ISDS. In fact, Canada has already endorsed a more progressive stance towards ISDS and investment protection than what is found in CETA. In some cases, it has rejected ISDS altogether. For example, in the USMCA, Canada has largely 'pulled the plug'[31] on the practice of investor-state dispute settlement with the US.[32] Even its 2021 Model BIT - while maintaining ISDS - includes substantive standards that are more advanced than CETA Chapter 8 (even when read in combination with the proposed Decision). For instance, the Canadian Model BIT does away with explicit reference to legitimate expectations in its minimum standard treatment clause, while the CETA Decision dedicates numerous paragraphs in an attempt to clarify and circumscribe a concept that is highly problematic and ambiguous. Furthermore, contrary to CETA Annex 8-A(3), the Canadian model BIT does not include a reference to 'manifestly excessive' impact of non-discriminatory measures in its indirect expropriation clause and includes a clear and explicit obligation for investors to comply with domestic law.

Ultimately, the question is why we should settle for an underachieving agreement in the midst of a significant trend to move away from the current ISDS system. Suffice it to think of the calls for withdrawal from the ECT, whose ISDS system is widely considered as an obstacle to tackling the climate change crisis, even by institutional actors like the IPCC and IMF. Why spend time and effort in trying to clarify standards that are intrinsically open-ended and subject to discretionary interpretation per se, when efforts could be channeled e.g. to radically rethink the system of international investment law in ways that are genuinely supportive of climate change and environmental policy? It is startling that politicians in the progressive camps fail to recognize these issues and continue to vote-as-usual, as unaware of the enormous challenges posed by the ecological crisis. Progressive environmental policy does not need regressive agreements and progressive politicians ought to recognize the there is an alternative.

31 https://www.iisd.org/articles/usmca-investors.

32 The USMCA, which is the successor of the NAFTA, does not establish a generalized ISDS mechanism between Canada and the US. Investor-State arbitration is retained in very limited circumstances.