# Investment Law in Corona Times: How Myths Fuel Injustice

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One of the leitmotivs of the discourse around the pandemic is that 'there cannot be going back to business as usual' (see here and here). Yet, it is business as usual that is alarmingly looming in Corona times. In this context, at least two developments are worthy of note: the first is the much discussed risk of a wave of Covid-related investment claims. The second, possibly less noticed, is that countries are silently expanding the scope of a system that does not adequately strengthen sustainability in economic relations, despite laconic initiatives to this purpose.

## An outbreak of claims?

Since the pandemic began, law firms have been sending out material alerting clients to potential investment arbitration claims against governments in relation to Covid measures. Firms have advised that, for example, government requisition of hospitals and medical equipment could give rise to compensation for direct or indirect expropriation, that restrictions on exports of essential goods could be contrary to the legitimate expectations of investors under the fair and equitable treatment standard, and that delaying tax obligations or providing relief benefits could violate national treatment standards. Paradoxically, investors could also allege that States have not taken *enough* action to protect public health, violating investors' rights to full security and protection.

Examples of measures that could attract million or billion dollar lawsuits include efforts by States in Latin America and the Caribbean to ensure people have access to clean water for hand washing, changes to the operation of Mexico's electricity grid to ensure reliability in circumstances of decreased demand, moratoria on mortgage payments in Spain or bankruptcy proceedings in Belgium, and restrictions on export of personal protective equipment in Europe. It is still too early to know whether Covid measures will trigger as many disputes as these firms are foreshadowing. However, a notice of dispute has already been served on Peru in relation to the suspension of toll collection.

While law firms advise that 'States should seek to ensure that their contemplated measures are consistent with international law in advance to avoid having to deal with a flurry of arbitrations', in reality investment law is drafted in vague terms and the outcomes of disputes are difficult to predict. With battalions of commercial law firms ready to attack, States will likely face difficulties relying on treaty exceptions and customary international law defences. Past experiences have shown us that foreign investors have often obtained damages in relation to state responses to crisis. Investors have privileged access to international arbitration and can bypass domestic courts, which have a more holistic understanding of measures in

context. Of course States do not always lose investment cases, however defending arbitration claims takes resources away from other activities, and the threat of arbitration can lead to the phenomenon of regulatory chill.

Concerns in relation to the coming wave of pandemic-related claims have prompted civil society organisations and academia to call for a moratorium on investment arbitration during the pandemic and its response, noting the need for collective action. The consequence of such an asymmetric legal system is that priorities may be perverted, whereby the stronger and richer in societies will be protected, while the most vulnerable remain most exposed to the health, economic and social costs of the pandemic.

It has recently been suggested that these concerns are unwarranted, if not populist altogether. Some politicians have also quickly dismissed the idea of a moratorium. Rather than containing or pausing the system of international investment law during the Corona crisis, efforts are being made to further expand it. The ongoing process of ratification of CETA is a case in point. In the midst of the lockdown and protests, Luxembourg ratified CETA. The Netherlands is trying to follow suit, despite a highly divided parliament. The rhetoric used to persuade the sizeable group of opposers is that international investment law is necessary, that CETA is not business as usual, and that ratification is ineluctable. As we argue below, the moulding of this 'common sense' (in a Gramscian/Vichian sense) is forged by nurturing a number of myths.

# Debunking three myths about CETA

*Myth #1: CETA Investment Chapter is the golden standard (and if not, it is at least better than the status quo, and in any case necessary to attract FDIs and deliver justice)*

The Investment Chapter of CETA has been heralded as the golden standard. Regrettably, while introducing some notable developments, (e.g. an appeal mechanism and some clarifications of substantive provisions), the CETA Investment Court System (ICS) leaves the elephant in the room largely untouched. The elephant is the asymmetric regime granting investors exceptional rights, with the rest of society being excluded from the system. The establishment of such legal regime of privilege has been widely justified by 'plausible folk theories', most notably the theory that Bilateral Investment Treaties (BITs) attract Foreign Direct Investments (FDIs) and that this is good for the economy of the host country and for the rule of law (echoing the other perilous myth of trickle-down economics). None of these statements, in fact, finds clear support in empirical evidence. Several studies have shown that the empirical evidence that BITs attract FDIs is at best mixed, if not altogether untenable (see here and here). Moreover, it has been shown that the more fundamental questions of whether FDIs positively contribute to the (economic) development of the host country mainly depends on specific circumstances of the country (e.g. good institutions) and on the type of investments (see here). Similarly, the empirical evidence that BITs promote the rule of law is at best mixed, with mounting evidence that good governance is hampered rather than fostered by investment treaties.

The last among these plausible folk theories is that CETA 'will potentially reform the 3,000 existing bilateral investment treaties', as the European Commissioner for Trade Phil Hogan has recently stated. However, this statement is at best inaccurate and at worst misleading. Only a few EU Member States (MS) have BITs with Canada. This means that across the board CETA *adds* to the 3,000 BITs, expanding the reach of international investment law, rather than reforming it. For reforming these 3,000 BITs, further bilateral negotiations are necessary. In this sense, the statement is inaccurate. It is possibly misleading where it obscures the fact that future negotiations could be shaped by more sophisticated models, which take sustainability more seriously than CETA.

For example, investment agreements could be designed to protect only '*sustainable investments*' as suggested in the Model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation. In this way, harmful investments such as those related to fossil fuels would not be protected. Moreover, the general customary rule of international law on exhaustion of domestic legal remedies could be revived and explicitly included in Investment Chapters/Treaties, as suggested by UNCTAD. This would give an opportunity to the domestic judiciary to deliver justice without insulating foreign investments from the domestic legal context. Besides, if it is deemed necessary to resort to arbitration in relation to investment-related matters, all affected actors in society should be granted these rights. The establishment of binding obligations for investors is the first step in this direction. CETA – by not providing any of the above – is far from the golden standard. This brings us to another myth, namely that CETA contains progressive chapters protecting the environment and social rights, which could be seen as 'compensating' the uncorrected asymmetry of its investment chapter.

*Myth #2: Trade and Sustainable Development Chapters in EU trade agreements, such as CETA, meaningfully address sustainability issues*

Recent EU trade agreements address environmental and social issues by incorporating a chapter on Trade and Sustainable Development (TSD Chapter). CETA formally differs from this approach by including a TSD Chapter (Chapter 22) followed by two separate chapters on labour aspects (Chapter 23) and environment protection (Chapter 24) respectively. Despite this formal divergence, the substantive content of these three chapters is analogous to that of the EU trade agreements with only a single TSD Chapter.

In the context of the EU-Vietnam Free Trade Agreement (FTA), the European Commission has appraised TSD Chapters as being 'robust, comprehensive and binding' (see here). CETA, in particular, 'has some of the strongest commitments ever included in a trade deal to promote labour rights, environmental protection and sustainable development', (see here) according to the European Commission. A closer look at the TSD Chapter of EU FTAs (as well as CETA's chapters on labour and environment) reveals, however, that their substantive content is largely unambitious. Provisions on the environment in TSD Chapters typically consist of a wealth of preambular and declarative language as well as commitments that either lack legal bindingness (such as best endeavour commitments and reaffirmations of pre-existing commitments) or commitments too broad to be meaningfully enforceable

(such as cooperation commitments and commitments to take unspecified measures to achieve a general objective).

Further, provisions in the TSD Chapter of EU FTAs (as well as in the labour and environment chapter in CETA) are not subject to the ordinary dispute settlement mechanism of the agreement. TSD Chapters set out a chapter-specific dispute settlement mechanism that is procedurally modelled around the ordinary dispute settlement of the agreement but does not provide for the possibility to impose punitive measures, such as the suspension of trade concessions, in case of proven violations of the parties' commitments. Commitments on labour rights and environmental protection are thus removed from the legal infrastructure of the rest of the agreement and – due to their limited enforceability – effectively subordinated to trade and investment liberalisation commitments. It is worth noting that for Canada this approach constitutes 'somewhat of a regression' seeing that in its other recent FTAs, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-United States-Mexico Agreement (CUSMA) the TSD Chapter is subject to the ordinary dispute settlement and therefore allows for the imposition of punitive measures in the case of violations.

The TSD Chapter of EU FTAs provides for an 'institutional involvement of civil society', but civil society bodies are not actively involved in the TSD Chapter-specific dispute settlement mechanism and – in the course of a dispute – only have a limited consultative role. Unlike investors under CETA's investment chapter, civil society representatives do not have the power to request the initiation of a dispute.

*Myth #3: There is no alternative to ratification*

Despite the troubles with the CETA ICS, ratification is often depicted as ineluctable. The EU Commissioner for Trade, Phil Hogan, has recently stated in the Dutch Senate that if CETA is not ratified by the Dutch Parliament, the whole Agreement is dead and there is no plan B. This sort of presage lingers in the halls of national parliaments (similarly in the EU Parliament with respect to the EU-MERCOSUR deal) and has obfuscated the democratic debate on the ratification of CETA.

It is unquestionable that any modification (in the broader sense) of CETA at this point is complex – also due to its mixed nature – and implies finding some agreement among the signatories (and the parties that have already ratified) to at least address the controversy around the ISDS mechanism provided by the treaty (Chapter 8 Section F). Suggesting, however, that 'non-ratification is too late at this point' relegates national parliaments to irrelevance, putting mixity (if not democracy) into a *de facto* vegetative state. This sort of narrative hollows out the full prerogative of national parliaments not to ratify the agreement. The 'it either stands or falls' argument offers an all-or-nothing, unqualified scenario that precludes even contemplating other alternatives. But alternatives do exist, and it is the function of the political to re-imagine them.

Failing to ratify CETA in its current status can open new avenues for reforming the treaty, one possibly without ISDS. There are some arguments in favour of such a move. First, the ISDS mechanism is arguably not a defining element of

the object and purpose of CETA. Second, Chapter 8 Section F falls within shared competences (see Opinion 2/15) and is not provisionally applied. Third, contrary to what is sometimes argued, investors will not be deprived of the only available legal redress. They will still have access to domestic courts to file their complaints. Investors can also bring their case to their State of nationality, and pledge to activate diplomatic protection or the State-to-State dispute settlement mechanism of CETA.

Should CETA not be ratified, it is still possible to amend the treaty pursuant to Art. 30.2, which arguably falls under provisional application and extends to all sections of CETA. This provision is quite agile and would allow the signatories to intervene directly on the text of Chapter 8 Section F.

Short of formal amendment, the Law of Treaties offers other interesting alternatives that would still allow 'alteration' of Chapter 8 Section F, while formally leaving the text of the treaty as it is. Signatories might for example conclude an 'implementation agreement' or an 'application protocol' with Canada – pursuant to Art. 31(3)(a) VCLT – to either exclude the applicability of Chapter 8 Section F *tout court*, or regulate and 'specify' the implementation of some provisions (e.g. by including the exhaustion of domestic remedies). This could still qualify as a subsequent agreement on the interpretation and *application* of the treaty, instead of a formal amendment. Treaty practice offers many such examples. Such an instrument would *not* imply endorsing new or extended obligations. In fact, it would re-expand the sovereignty of the signatories. Alternatively, since not all Member States have ratified CETA yet and Chapter 8 Section F is not provisionally applied, there might be some room for reservations upon ratification, without compromising the duty of sincere cooperation. From a Law of Treaties perspective, the EU and the Member States that have not ratified CETA might file a reservation excluding or modifying the effects of Chapter 8 Section F provisions. The other Member States should commit to formally accept the reservation. For this to work, Canada should obviously not object to the reservation.

Renegotiation (in a broader sense) is physiological in the context of treaties. Take for example the recent Franco-Dutch non-paper contemplating the possibility to renegotiate existing EU trade agreements in order to update relevant environmental obligations and align them with the Paris Agreement. Or the post-signature USMCA Protocol of Amendment. Or even the Decision – albeit controversial – on the EU-Ukraine Association Agreement instigated by a Dutch Referendum.

The 'preemptive rhetoric' that ratification is inexorable cripples the space for political imagination by suppressing possible alternatives from the realm of the plausible. De Sousa Santos has recently argued that 'the reason there are no alternatives is because the democratic political system has been shaped into abandoning any consideration of alternatives'. As we have shown, alternatives are here. Not ratifying CETA is the prerogative of national parliaments and it could signify the beginning of the construction of a fairer and more sustainable economic order, particularly now that Covid made unthinkable things thinkable. If not now, when?

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