Mr. C. Khosravi[1]

CETA and its Investor-State Dispute Settlement System: Blessing or Threat to Sustainable Development?

Webinar organized by the Dutch Association for Environmental Law and the Special Interest Group Environmental Law of the European Law Institute on the 23rd of April 2021

M en R 2021/66

Inspiration for this webinar[2] is due to the different conversations occurring in the Dutch Parliament for the ratifications of CETA and other countries equally. Members of these parliaments felt uninformed to be able to participate sufficiently in these conversations. Some states hold CETA to be the Gold Standard whereas others consider this to be 'GreenWashing'. The webinar, therefore, is to provide some clarification for this polarizing trade deal.

1. Harm Schepel, Outsourcing the rule of law: CETA in light of the development of international investment law

International investment law originally provided protection to international investors who were no longer protected by the colonial rule. Multinational companies sometimes even wrote the basic documents from which international investment law was birthed. Investment law consists of a 'spaghetti bowl' of bilateral investment treaties that exempt from becoming international custom. On paper due to the nature of treaty law these bilateral treaties formally require reciprocation, however in reality reciprocity is not enforced or practiced all that strictly.

The trade-off here is that developing countries commit to international standards of protection and they outsource the dispute settlement procedures to international ad hoc tribunals for increased flow of Foreign Direct Investment (FDI). However, there is no concrete evidence that this trade off stimulates more foreign direct investment.

The exceptions to bilateral treaties are the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), signed for fear of risks in Mexico and in post-communist countries respectively. This shifted the trend from bilateral to multilateral. The rationale for multilateralization is not necessarily for state-to-state relations but more so for state to economy in general.

CETA should be thought of in the same light of multilateralization rationale. So why does Canada want CETA, for classical reasons such as fear of judicial corruption? Revolution? Discrimination? Most likely not as this view of investment protection is archaic. Is it perhaps to set a new standard, since CETA is very progressive in the context of investment treaties? But if the rationale was to set a new standard, it should be between developed and developing states, not developed to developed.

The text itself brings up classical fears like discrimination of race, gender, etc. Why only investors and not tenants? Why then is CETA a thing? Because investors want to be insured vs political risk, a democratically legitimate decision for environment for example.

Standards of protection can be relative (Non-discrimination – National Treatment, Most Favoured Nation; most states don't have an issue with this) or absolute (Foreign investors must be treated well and consistently regardless of how domestic investors are being treated). Investor-State Dispute Settlement (ISDS) provides direct access for private parties to an international tribunal applying international law against a State.

Former EU Trade Commissioner Cecilia Malmström said that in the EU, all investors (domestic and foreign) are subject to the same laws and have the same rights and obligations and nothing concluded will change or has changed that. This is not true as even EU legislation suggests otherwise. CETA applies greater rights to Canadian investors than it affords to the EU investors. CETA only protects EU companies with Canadian investors. Therefore, the Dutch Government must treat some Dutch companies better than other Dutch companies on the basis of the nationality of the shareholders.

2. Wybe Th. Douma, CETA: Gold Standard or GreenWashing?

The EU goal of sustainable development is fundamentally integrated into EU law, both internal to the EU and external. The EU is explicitly committed to ensuring sustainable development in its international relations, when deploying external actions like concluding trade agreements but also where the effects on the exporting countries of imported goods are concerned.

How did EU integrate sustainable development into its trade policies? In 1999 the EU started to assess the economic, social, and environmental impacts of proposed new trade agreement through Trade Sustainability Impact Assessments (TSIA). In practice, the economic aspects remain the main concern. The social and environmental aspects remain 'non-trade concerns'. Third parties make the assessments and individuals can only bring forward arguments to

1 Cavin Khosravi is studying international and European law. He is an intern at European Environmental Law Consultancy.

2 The whole webinar can be seen on YouTube: https://www.youtube.com/watch?v=eYAr4tgONHQ.

this third party. The EU Commission is supposed to react through a position paper. The TSIA and Commission reaction to it should guide EU negotiators. This was not respected for CETA: no position paper was produced before the end of the negotiations. In the EU-Mercosur negotiations, the TSIA was not even finalised before negotiations were over; this was correctly labelled as 'maladministration' by the EU Ombudsman.

Since 2008, EU trade agreements include trade and environment provisions. They contain vague rules and do not include enforcement mechanisms with sanctions. CETA forms no exception here. The TSIA for CETA clearly identifies that more EU-Canada trade will increase CO_2 emissions, and sets out that no ISDS is necessary between parties with well-developed legal systems. In spite of that, CETA was presented without indicating specific steps against more CO_2 emissions, and with classic ISDS rules. Behind closed doors these old style ISDS rules were improved and presented under a new name, the Investment Court System (ICS). ICS arbiters can still award Canadian investors compensation from EU states that adopt non-discriminatory environmental legislation, if they consider the effects of these measures to form indirect expropriation measures that are disproportionate for the investor.

The Dutch Government has stressed that there is no need to expect such claims under CETA as we never saw such claims. That is a misrepresentation of facts. Under existing Bilateral Investment Treaties (BITs) the Dutch are investing in developing countries. No investors means no claims against us. Instead, the Dutch investors bring claims against these countries. Canadians invest billions in the EU and in the Netherlands and will most definitely be inclined to bring claims under ISDS, as they have been doing against a multitude of other countries. For now, CETA is provisionally applied for certain parts, but not for the ICS part. Only if all EU member states agree can CETA, including ICS, enter into force.

CETA contains three Sustainable Development chapters. It is notably set out that parties are not allowed to reduce protection levels to improve trade, however for other reasons you may do so. It is very difficult to prove that you are doing it to encourage more trade. The chapters are exempted from recourse to the general dispute settlement rules. In case of disagreement, an Experts Panel can only issue recommendation; there is no sanction if these recommendations are not abided by. The Dutch government claims that this is a form of enforcement, which is stretching what is normally understood by enforcement, to say the least.

In the Classic USMCA there were at least sanctions but in CETA there is no sanction.

In conclusion, CETA does not form a gold standard. When it was negotiated, the TSIA guidelines were not observed. Its Sustainable Development chapters do not contain sanctions so can't be enforced. While in practice, that might not pose too many problems where Canada is concerned, but it definitely forms no gold standard for other treaties like EU-Mercosur. The current president of Brazil would not be impressed by a mere recommendation to stop deforestation. The new US-Mexico-Canada (USMCA) free trade agreement that will replace NAFTA does contain sanctions and forms a better gold standard in this respect. Last but not least, the Precautionary principle as used in the EU is not sufficiently warranted under CETA. In sum, by merely aiming at minimising negative effects on sustainable development instead of actually promoting it, CETA does not form a gold standard.

3. Alessandra Arcuri, CETA's Investment Chapter: What prospects for a Green Transition?

The main thesis of this contribution is that CETA is a serious stumbling block for a Green Transition.

This thesis is substantiated with 3 main arguments.

1) First, there is a fundamental tension between ISDS and the Green Transition. To understand this tension, we should reflect on the essential meaning of a green transition and I conceptualize ISDS for what it essentially is, an instrument to preserve a hyper-capitalist economic system.
2) Second, it is fair to assume that under CETA, past ISDS cases with problematic implications for environmental protection, are equally plausible.
3) Finally, I will address the counter-argument that, even if ISDS is flawed, CETA is the best possible reform.

1) Urgency of the climate situation shows that we need a change in primary outputs of emissions (e.g. in agriculture and energy). ISDS is designed to protect status quo but the climate situation requires a shift from the status quo. This is no coincidence because ISDS has been originally designed to protect capital. As well illustrated by Nicolas Perrone in his new book *Investment Treaties and the Legal Imagination*, OUP, 2021, the international investment law system originates in the work of groups of individuals closely connected to the business community. Two of the grandfathers of the ISDS system as we know it today were Herbert Abs and Lord Shawcross. The former was director of important corporations, such as IG Farben and was a member of the board of directors of the Deutsche Bank. Shawcross on his part was member of the board of directors of Royal Dutch Shell. The so-called Abs-Shawcross draft, which has been labelled the Magna Carta of international commerce, was developed in the sixties to guarantee stability of the investment with strong protection of newly created rights for foreign investments. It has not gone unnoticed that this project was contextual to the process of decolonization, where 'decolonial thinking' saw foreign investors as 'a form of neo-imperialism.' The ISDS then originates in an attempt to tame the process of decolonization. The Abs-Shawcross draft later became the template of virtually all BITs.[3] And, while CETA is milder in the formulation of some norms, traces of the Abs-Shawcross draft are still very present.

3 See also https://blog.oup.com/2015/09/history-of-icsid-law/.

CETA reproduces a great asymmetry, with strong rights for the investors, whereas local communities are excluded, having no rights. The latter can at best be heard through amicus curiae. Such a system undermines basic dynamics of democracies.

2) An illustrative case showing the marginalization of the environment is the ISDS Tecmed case. As is well known in this case, Mexico did not renew a licence to operate a hazardous waste landfill in the municipality of Hermosillo, in the state of Sonora, Mexico of a Spanish company (Tecmed) because this company violated a set of environmental laws. While the Tribunal conceded that such violations of law occurred it concluded that they were minor and not likely to pose a threat to the environment and health of the local people. The Tribunal further decided that Mexico's decision was political. To come to its main conclusions, the Tribunal resorted to a proportionality test. Interestingly, under a different arbitration proceeding, it was concluded that Tecmed did in fact pose a threat to environment and health for local people. However, in the ISDS case, there is no mention of such other proceedings, and the Tribunal seems to neglect questions of environmental justice.
It can now be counter-argued that CETA has a much-improved text, but here is the thing. Yes, CETA has an improved text, which includes explicit reference to the right to regulate and an exception.[4]

To get closer to home, two cases have been recently launched against the Netherlands. In the first German energy company RWE has launched a complaint, claiming, € 1,4 billions, for compensation in relation to the decision of the Dutch government to phase-out coal-fired power production by 2030. For the same phase-out plans, the German utility Uniper has launched a dispute on the basis of the Energy Charter Treaty reportedly claiming € 1,1 billion in compensation. Would the likelihood of such types of 'anti-environmental' cases be mitigated under CETA? The answer is NO. CETA includes rules on Fair and Equitable Treatment and indirect expropriation that lend themselves well to be used in such cases.
The point to be made here is that the right to regulate, while a welcome clarificatory jargon, is not a radical innovation. It is an emanation of the 'police power' doctrine. CETA codifies a process which most arbitration tribunals already use and therefore it is not as progressive as it claims to be.

There are 2 types of systemic implications:
1) Regulatory Chill:
   - Internalization, Threat & Cross-border Chill.
   - Diversion of scarce resources to compensate polluters (even a win costs money (e.g. in Philip Morris v Australian government $ 24 million for legal external fees and arbitration costs).
2) Perverse incentives for investors (nullifies diligence in assessing environmental impacts).

3) Finally, framing CETA as a reform is misguided as it doesn't reform, it just adds, since there are not a lot of BITs between EU MS and Canada therefore it just adds (and none between NL and Canada).
ISDS is not simply unnecessary, it is toxic to democracy and the environment and there is no evidence that it encourages trade.
CETA is an impediment to the Green Transition.

4. Jerfi Uzman, Constitutional aspects of CETA: what role for parliament (and the courts)?

Germany (2016) France (2017) and Ireland (2021) Constitutional courts challenge CETA.
The question Mr. Uzman will delve into is whether the Netherlands will join these countries in challenging CETA vis a vis their constitutions. It is important to note there is currently little chance for any official challenges as the parliamentary process is yet to be finished regarding CETA and the Dutch courts are reluctant to interfere with the process by interjecting challenges in the middle of the process. The main question is whether a procedure against the Dutch state after the legislature has approved CETA, would have any chance of success.
The Dutch Constitution is originally very much a political and not a legal text, which makes it hard to establish a clear violation of the Constitution. Some of the discussion has focused on art. 112 of the constitution, which states that rights under civil law fall within the purview of the judiciary. Mr. Uzman argues that this article, although strictly speaking only applying to the competence of the civil courts, reflects the broader constitutional principle of effective legal protection (see e.g. the 2019 Urgenda judgment of the Dutch Supreme Court). An important element of effective legal protection, is the notion of equal protection of the law. Both the already discussed asymmetry and the fact that the ISDS chapter does not require exhaustion of domestic remedies could be problematic in this respect.
The Dutch government has during its debates regarding CETA in the 2nd Chambers claimed that CETA does not create rights and obligations under national law and therefore is not self-executing. Meaning that Dutch national courts cannot apply CETA and therefore reducing avenues for domestic recourse related to CETA. Though this is the Dutch government's view on what the reality is of CETA, the treaty text claims that there exist various national remedies.
Moreover, the CETA treaty is yet to be approved by parliament, but it is important to note Art. 91 of the constitution which requires any international treaty whose provision[s] conflict with the constitution to be adopted by two thirds majority vote in each of the houses of the States General.

4 CETA text exception: 'For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.'

Mr. Uzman points at the conventional approach, adopted by the government and the Council of State, to interpret art. 91 narrowly. Uzman deems a broader approach to be both possible and desirable. Particularly given the political nature of values enshrined in the Dutch Constitution, and the absence of proper constitutional review by a court, they need to be more fleshed out and to apply them narrowly fails to do that. In the past a 'to be sure' approach of adopting the Act by a two thirds majority anyway was adopted by the First Chamber of Parliament. This approach was criticized by legal doctrine, but Uzman would advocate it as a great device to stimulate constitutional patriotism and it falls in line with the commission's comments regarding constitutional reform about a decade ago. The Narrow approach reads art. 91 to say that only an Act of approval of a treaty which explicitly contradicts a specific constitutional provision must be adopted by 2/3s majority. However, a broader approach, as advocated by Uzman, would encompass not just black letter law but also the principles underpinning them. Therefore, although the narrow approach would definitely lead to the conclusion that there would be no violation of art. 112 (or any other provision of the) Constitution, a broader approach might, in the view of Mr. Uzman, yield tensions between CETA and the principles underpinning the Constitution. The concluding remarks were to remind us that challenging the parliamentary process will prove to be difficult as the supreme court judgements have made it virtually impossible to request a formal statement of the courts about the constitutionality of an Act of Parliament. Mr. Uzman did point at the (remote) possibility of inviting the courts to informally express their constitutional concerns. However, the main point was that because constitutional adjudication is unlikely, Parliament has a sacred duty to guard the Constitution, including its principles, and it should thus not adopt a minimalistic approach.