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How to profit from the pandemic

Law firms promote multi-million dollar lawsuits against corona measures. It's time to do away with this parallel legal system

Read this article in German.

On 26 March 2020, Italy's coronavirus death toll surpassed 8,000 – over twice the number seen anywhere else in the world up to that point. On the same day, lawyers from an Italian law firm pondered possible corporate lawsuits against state emergency measures to contain the virus and its devastating economic consequences. Their conclusion: The 'hastily drawn-up and ill-coordinated measures by the Italian government may well fall within the scope of international investment treaties – thus paving the way for expensive damages claims brought by foreign investors against Italy before private arbitration courts.

Worldwide, over 2,600 trade and investment agreements enable foreign investors to sue states before private arbitration courts if they consider their far-reaching rights in the treaties to have been violated. Corporations can claim staggering sums in damages for alleged investment losses – because of expropriation but also indirect damages caused by virtually any form of regulation.

Well-known examples from Germany include the two investor-state lawsuits brought by the Swedish energy company Vattenfall. In the first proceedings for €1.4bn in 2010, Vattenfall obtained an agreement that the government would reduce environmental requirements for the controversial coal-fired power plant in the Moorburg district of Hamburg. Since 2012, a second lawsuit has been brought for €6.1bn in damages for the accelerated nuclear phase-out following the Fukushima nuclear disaster. The legal costs to the federal government of defending this lawsuit alone already amount to €20 million.

A new wave of lawsuits

In the midst of the corona crisis, global law firms are now paving the way

for investor-state lawsuits against measures taken by governments to save lives, contain the pandemic and mitigate its economic consequences. In webinars and publications, they point their clients to the possibility, on the basis of investment agreements, of claiming back their profits lost in the pandemic.

In April 2020, the law firm Ropes & Gray wrote: 'Governments have responded to COVID-19 with a panoply of measures, including travel restrictions, limitations on business operations, and tax benefits. Notwithstanding their legitimacy, these measures can negatively impact businesses by reducing profitability, delaying operations or being excluded from government benefits... For companies with foreign investments, investment agreements could be a powerful tool to recover or prevent loss resulting from COVID-19 related government actions.'

The law firms never tire of emphasising that many of the more than 1,000 investor-state lawsuits filed worldwide have arisen as a result of economic crises such as the Argentine financial crisis in the early 2000s or political upheavals such as the Arab Spring in the early 2010s. The corona pandemic could now trigger another wave of lawsuits.

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It's a wide range of government protection measures targeted by those law firms. For example, foreign utilities could sue countries like El Salvador, Bolivia, Colombia or Argentina for deciding that pandemic households should have better access to water to wash their hands – even if bills cannot be paid. Real estate companies registered abroad could sue countries that protect tenants who cannot pay their rent due to illness or job loss due to the crisis. 'While helping debtors, these measures would inevitably impact creditors by causing loss of income,' stated law firm Shearman & Sterling, explaining the rationality behind possible corona-related lawsuits.

Companies could also approach arbitration courts to contest the measures for developing a low-cost vaccine, such as the price ceilings for medicines and the relaxing of patent protection, as constituting alleged expropriation. This is also the case with regard to fiscal policy measures such as capital controls to curb destabilising cash outflows, as well as debt relief and debt restructuring, which states might be forced to resort to in the context of the corona economic crisis.

Rights for foreign investors

Such corporate suits can have a massive impact on public budgets. The legal costs amount to an average of €5 million per party – but can end up being much higher. Even states that do not lose often need to cover their legal fees. For example, Australia had to pay half of its costs in the Philip Morris anti-tobacco lawsuit, although an arbitral tribunal dismissed the lawsuit for improper conduct by the company. If a government loses, the case becomes even more expensive. By the end of 2018, states had been ordered to pay a total of USD 88bn – 18 times the budget of the World Health Organization for 2020. And this figure only refers to cases in which a claim has been made public.

In a paper on 'investment treaty claims for COVID-19 losses', the law firm Sidley gives one of the reasons why the proceedings can be so expensive for states: under certain circumstances, it is not only the actually invested amounts that can be considered recoverable damages, but also lost future profits. Since other legal systems generally provide for no damages because lost future profits are completely hypothetical, investor-state arbitration awards can be much more lucrative for companies than decisions of ordinary courts.

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Its one-sidedness also makes international investment law a legal system favourable to profit interests. Investment agreements set out rights, but not obligations, for foreign investors. The arbitration courts that interpret them do not follow the ownership compromise that has grown in constitutional law in recent decades, which recognises the social function of property and weighs it up against other social interests. Moreover, arbitral tribunals tend to restrict state decision-making scope more than democratically legitimised courts which, as an expression of the separation of powers and respect for the democratic sovereign, grant governments and parliaments a wide margin of discretion when dealing with complex political issues.

Preventing lawsuits

The need to prevent investor-state lawsuits has rarely been clearer than today, when the international community is struggling not only with a global health crisis, but also with a worldwide economic crisis. That is

why experts such as the US economist and former Harvard professor Jeffrey Sachs are calling for an immediate moratorium on lawsuits – as well as a permanent restriction of investor-state proceedings against Covid-19 emergency measures. A draft international agreement is already under discussion.

Countries such as South Africa, Indonesia and India, which have already terminated some of their bilateral investment contracts, have taken more far-reaching steps. Recently, 23 EU countries, including Germany, have signed a treaty that will end approximately 130 intra-European investment agreements that the European Court of Justice had declared illegal.

Like no other, the corona crisis poses the question of legitimacy concerning a parallel legal system that grants more favourable treatment to some of the wealthiest entities in society. Why are investors and their desire for sparkling profits deserving of greater protection than the state's duty to protect health and an adequate standard of living? What is the justification for a special right by which wealthy economic agents receive more advantageous treatment than all those who are already suffering badly from the pandemic and its consequences?

These questions sum up the blatant injustice of the special lawsuits for corporations. There should be no place for them in this crisis.



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