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Towards comprehensive reform of investment protection

From a regime of privileges to a level playing field

A study from the International Cluster of the Greens/EFA Group

This study develops proposals for a reform of EU investment protection agreements and investment protection chapters in EU Free Trade Agreements. The current approach of the EU of focussing predominantly on the reform of the dispute settlement mechanism by replacing the traditional investor state dispute settlement model through arbitration (ISDS) with an Investment Court System (ICS) falls short of a fundamental reform and may in fact exacerbate the problems of investment protection, which are rooted in the substantive parts of the agreement. At the core of these problems is the fact that investment protection agreements or chapters typically contain standards of protection which are only available to foreign investors and which may therefore lead to a disproportionate weight of foreign investors' interests, having a negative impact on domestic political compromises as a result.

The study therefore suggests limiting the substance of investment protection to the principles of non-discrimination (national treatment and most favoured nation treatment) and to compensation for expropriation, as these standards serve to provide a level playing field between foreign and domestic investors. The problematic standard of fair and equitable treatment (FET) – regardless of how narrow it is defined – should be avoided. Furthermore, the study suggests incorporating general and broad exception clauses which serve to protect public policy spaces in a much more effective and nuanced manner than the so-called “right to regulate”-clauses, which usually only contain language that has little practical effect. Concrete textual proposals are attached to the study. The language of these builds on existing EU investment protection chapters in the free trade agreements with Canada (Comprehensive Economic and Trade Agreement, CETA).

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Anna Cavazzini

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