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CETA and investment protection reform: winds of change or gentle breeze?

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CETA and investment protection reform: winds of change or gentle breeze?

Bonn, 07.03.2016. Last week, the European Union (EU) and Canada agreed on fundamental reforms to investor dispute settlement mechanism as part of the Comprehensive Economic and Trade Agreement (CETA). In fact, the CETA negotiations concluded two years ago; there was just the legal scrubbing to complete before the signed treaty could move on to the ratification stage. This legal scrubbing is usually a mere formality. However, given the tremendous amount of public criticism within the EU, it was used as an opportunity to fundamentally re-write the investment chapter, which now envisages the establishment of an investment court, including a standing appellate mechanism. While this development is clearly a positive one, the Commission continues to shy away from making comprehensive modifications to the substantive provisions. Whether or not the changes introduced to CETA will spark reforms in the international investment system as a whole is now primarily dependent on Washington's response in the negotiations on the Transatlantic Trade and Investment Partnership (TTIP).

Canada is only the second country after Viet Nam to accept the European proposal for an international investment court system. Given that Ottawa's policy had hitherto been heavily geared towards US ideas of investment protection, this step sends out a clear signal. It was precisely this US model that ignited the dispute in Europe. Flanked by the European Commission, the United States wanted to establish an arbitration mechanism within TTIP at the start of negotiations in 2013. This would enable foreign investors to take governments to private arbitration tribunals not open to the public and sue them for damages. Such mechanisms have certainly been commonplace to date and have already been incorporated into thousands of investment agreements between industrialised nations and developing countries. But mass protests in Germany and other EU countries have forced the European Commission to pull the rip cord. After a broad-based public consultation which drew a whole range of critical responses, the European Commission submitted a revised proposal at the end of last year aimed at reforming the contentious investor-state dispute settlement mechanism.

At the heart of the European Commission's new proposal is the establishment of an investment court. Taking a similar approach to that of the established arbitration mechanism of the World Trade Organization (WTO), the investment tribunal would be run by a pre-determined, internationally accredited group of individuals qualified for judicial office. These persons would be selected at random, and not, as previously, by the parties to the dispute. The proceedings would be open to the public and it is also planned to establish a standing appellate mechanism. Such a tribunal could be expected to issue more balanced rulings and provide a level of continuity in jurisprudence that is lacking in private arbitration courts. This revision of the original draft of the CETA text is a significant step in the right direction. Nonetheless, it would be even more significant to take the same step with TTIP and other free trade agreements in future. The Commission is prepared to do so, but it is doubtful whether the United States would get on board.

By contrast, there has been no progress whatsoever on the protection standards themselves, which investors can invoke in the event of a dispute. In the current EU draft, this section continues to refer to the entitlement of investors to "fair and equitable treatment" and to protection against indirect expropriation. In most cases, the legal action taken by international companies is based on these clauses. It is precisely these undefined legal terms that have been instrumental in giving rise to a situation where international arbitration tribunals have in some instances issued completely opposite rulings in largely identical cases. More recent disputes, such as the legal action taken by Canadian company Bilcon against the Canadian Government with regard to the North American Free Trade Agreement (NAFTA) show that contentious rulings can still be issued even where clauses have been reformed. As an alternative to these ambiguous clauses, investment rules in agreements such as CETA and TTIP should be more heavily geared to the principle of national treatment.

This ship has most likely sailed for CETA, but everything is still on the table with TTIP. However, if even the EU proposal of a TTIP arbitration court fails to overcome US opposition (and there are many indications that this may end up being the case), then it would be better to drop investor protection altogether and conclude TTIP as a pure trade agreement.