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Recognising the signs of the times – investment protection in the 21st century

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Recognising the signs of the times – investment protection in the 21st century

Bonn, 22 October 2012. On 19 September 2012 the state-controlled Chinese insurance company *Ping An* filed a claim against Belgium before an international court of arbitration. This move followed the nationalisation of the *Fortis* financial group by the governments of Belgium, Luxembourg and the Netherlands in 2008 in the wake of the global financial crisis. In 2007 *Ping An*, China's second largest insurance company, had invested € 1.8 billion in *Fortis*, much of which it lost as a result of the break-up of the insolvent institute. *Ping An* has now brought a claim before the International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, under the Belgo-Chinese investment agreement concluded in 2005.

What the international media are most eager to point out is that this is the first claim filed by a Chinese company before an international court of arbitration. Given the growth of Chinese investment in developing and industrialised countries, however, it was only a matter of time before a Chinese company took advantage of the western-dominated, supranational legal system to protect its investments.

Ping An's claim is thus primarily a harbinger of rapid change in the international investment system. Industrialised countries should adjust their international investment policies to the new situation as quickly as they can.

Traditionally, industrialised countries have concluded investment agreements to safeguard their investments in politically unstable developing countries. Developing countries and emerging economies, on the other hand, have hitherto signed investment agreements with industrialised countries principally with the aim of attracting investment. Accordingly, these agreements have been biased towards the protection of (western) investors. They have left host countries little room to improve the contribution made by foreign investment to inclusive and sustainable growth processes or to prevent major fluctuations of capital inflows and outflows. So far it has mainly been developing countries that have been sued under investment agreements. As *Ping An*'s action against Belgium now shows – another example being the recent claim filed with the ICSID by the Swedish energy group *Vattenfall* opposing Germany's decision to phase out nuclear energy – industrialised countries must immediately set about adjusting to the fact that international investment rules are increasingly being turned against them.

The problem here is not the instrument of investor-state arbitration or the fact that state-controlled companies from developing countries and emerging economies are using such instruments to defend their interests.

Although investor-state arbitration may well be in need of reform to make it more transparent, more predictable and less expensive, it is helping a supranational rule of law to evolve to everyone's advantage.

As more and more companies based in developing countries and emerging economies, whether private or state-controlled, emerge as investors, it is only fair that they, too, should be able to rely on reciprocal investment protection.

All that is in real need of reform are the standards of protection laid down in investment agreements. The aim in this context should not be to throw out such proven standards as the non-discrimination, protection against unlawful expropriation or most-favoured-nation and national treatment. But most of these standards are vaguely worded, which encourages broad interpretation to the investors' benefit. An example of this is the expropriation rules in investment agreements, which contain no reference to the social obligation associated with property that is enshrined in Germany's constitution, the Basic Law, as a matter of course. Following numerous complaints from foreign investors, the countries of the North American Free Trade Agreement began long ago to formulate more detailed expro-

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priation rules with a view to preventing policy measures taken in the public interest from being interpreted as "creeping expropriation".

Another example is the inclusion in investment agreements of capital transfer clauses that guarantee the unhindered transfer of profits and assets from the host country. Even in the event of acute financial crises such investment agreements restrict the use of short-term capital transfer controls. Interestingly, such controls are permitted under the rules of the Wold Trade Organisation and the International Monetary Fund. This example shows that international investment law has so far been able to evolve largely in isolation from other areas of law and that insufficient account has been taken of the need for policy coherence.

In many developing countries of Latin America and Africa opposition to what are perceived to be one-sided investment agreements is already emerging. While complaints by international investors, especially ones based in developing countries and emerging economies, are growing in number, some politicisation of the public debate on foreign direct investment, like that observed in the USA for some years, is also to be expected in Europe. The legitimacy of the global investment regime is at stake.

Reforms of international investment rules should be particularly in Europe's and Germany's own interests, since both derive considerable benefit from foreign direct investment.

The European Union (EU) currently has an opportunity to strike a better balance in investment agreements between the private interests of investors and the interests of the public. The Lisbon Treaty transferred the competence for negotiating investment agreements to EU level, and investment rules are now negotiated within the framework of more comprehensive trade agreements, which enables their policy coherence to be enhanced. Such traditional capital exporters as Germany must now seek balance with Eastern European capital importers in the European Council. And not the least important factor is the opportunity presented by the stronger role played by the European Parliament in the legislative process for it to help to frame a more balanced policy that respects the interests of both investors and host countries.

If the EU succeeds in implementing the necessary reforms and in creating more scope in the new investment agreements for host countries to take policy measures in the public interest, we need not fear growing investment from developing countries and emerging economies or any disputes that may accompany it. And developing countries, too, will benefit from these reforms through the reciprocity of investment agreements.

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