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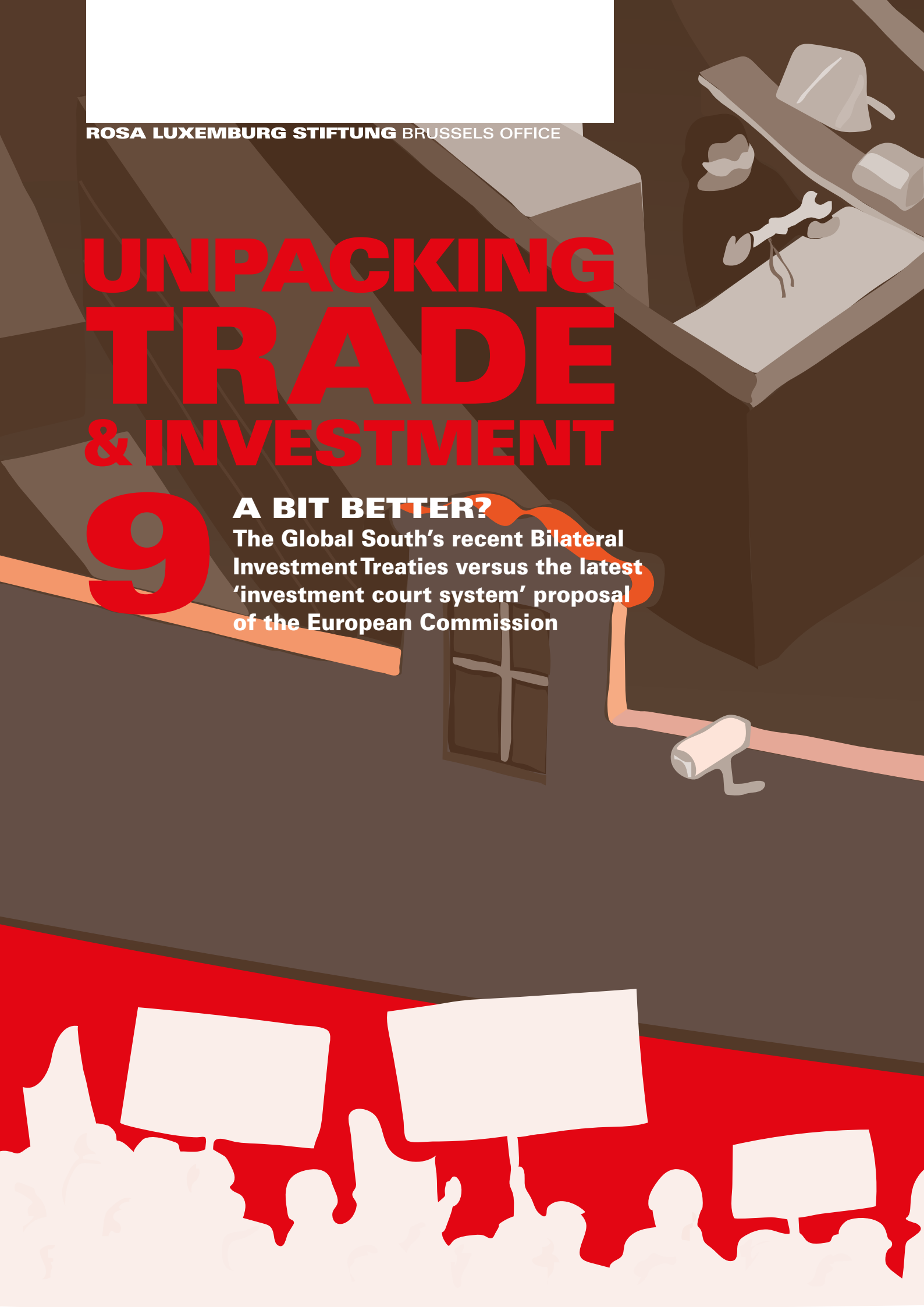
A BIT BETTER?

The Global South's recent Bilateral Investment Treaties versus the latest 'investment court system' proposal of the European Commission



9 A BIT better? The Global South's recent Bilateral Investment Treaties versus the latest 'investment court system' proposal of the European Commission

Christiane Gerstetter

Discussions on reforming the international investment regime have been ongoing for a number of years. In some countries of the Global South, growing concern over investment protection agreements and the privileges they give investors has led to a changed approach towards investment agreements. In the context of negotiations such those on the Transatlantic Trade and Investment Partnership (TTIP), the issue of investment protection has also begun to receive more public attention in at least some EU countries (e.g. Germany).

HOW DOES THE CURRENT SYSTEM FOR INVESTMENT PROTECTION LOOK LIKE?

Today, more than 2,500 investment agreements are in force, the majority of them bilateral.[1] Therefore, while reference is made to the "international investment regime", there is actually no uniform and coherent system, but a patchwork of treaties with significant differences between them. While the agreements diverge in detail, there are also similarities. Generally, they include obligations for host states to treat or not treat investors in a certain way; only few of them also contain clauses relating to the obligations of investors. Among the core obligations on host states are normally the following:

An obligation not to discriminate against foreign investors, i.e. not to treat them worse than domestic ones

A prohibition on expropriations

A clause mandating the fair and equitable treatment (FET) of investors – usually interpreted to mean, among other things, that "legitimate expectations" of investors are protected.

1 See UNCTAD's international investment agreements navigator, **http://investmentpolicyhub.unctad.org/IIA**

Most investment agreements contain other provisions as well, but the prohibition on expropriations and the FET clause are those that investors routinely rely on when bringing claims (usually for monetary damages) against a host state. The opportunity for investors to bring claims directly against the host state before an arbitration panel if they consider that the host state has violated its obligations is another common feature of many investment agreements. Often, investment agreements do not contain a detailed set of procedural rules for these proceedings, but refer to an existing set of (multilateral) provisions in this regard, most frequently the Convention on the Settlement of Investment Disputes[2] and the UNCITRAL Arbitration Rules.[3] Regardless of which rules are used, the basic format of these investor-state dispute settlement (ISDS) procedures is the same: three ad hoc arbitrators that the parties agree on[4] decide on the claim by investors.

WHY IS THE CURRENT ISDS SYSTEM CRITICISED?

There is wide agreement that the current ISDS system is fundamentally flawed in procedural respects. This is linked to the fact that arbitration panels are called upon to assess measures taken by host states, often for public policy purposes, which is normally the task of national or international courts. As a consequence, there is a widespread sense that investment arbitration tribunals should comply with at least some standards that judicial institutions are normally expected to fulfil or, alternatively, an entirely different system from the present one needs to be created.

The most important points of criticism are:

The fact that proceedings and, depending on the rules governing a particular dispute, the final decisions are not public varies from what normally applies to national and international courts. Keeping findings secret obstructs the creation of a uniform and predictable jurisprudence, which is normally seen as an important element of the rule of law. The public and law-makers cannot develop an informed view on whether it is politically desirable for a given country to maintain international investment agreements if decisions are kept secret.

The fact that those acting as "judges" in one case may represent states or companies as legal counsel in another creates conflicts of interest. A person representing parties in another case may be inclined to favour legal interpretations that would be beneficial for his/her clients in future or other ongoing cases. In national legislation, attorneys are usually barred from being judges and vice versa. Moreover, the community of those chosen as arbitrators is very small.[5]

2 Text available at **http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/**. The Convention creates an institution for settling such disputes, called ICSID and is therefore referred to as ICSID Convention.

3 Available at **http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html**

4 To be more precise, each party appoints one arbitrator and if they cannot agree on a third one there is a procedure for how the third one is appointed.

5 For example a study by the NGOs Corporate Europe Observatory and Transnational Institute finds that "15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes", see Eberhard, P. and Olivet, C. (2012) "Profiting from the Injustice", CEO/TNI, **http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf**, p. 8.

Decisions by arbitration tribunals are only subject to legal review by a second instance to a very limited degree; this is different from what is normally the case for national courts and even for some international tribunals (such as the dispute settlement mechanism of the World Trade Organisation WTO). This means that errors of law can scarcely be corrected.

These shortcomings also need to be seen against the fact that international investment agreements are – like other international agreements – often vaguely worded. This means that arbitrators have considerable scope for interpreting the text in a manner they consider suitable.

More fundamentally, it is questionable whether it is appropriate to grant investors an avenue for judicial recourse that domestic investors do not have and why such opportunities do not exist (e.g. to address corporate misbehaviour). This question is particularly salient in the context of investment agreements between states with relatively well-developed judicial systems that function according to rule of law principles. Here, it can be argued that foreign investors are sufficiently protected by being able to use national courts and ISDS is not needed.

THE EU PROPOSAL FOR AN INVESTMENT COURT

In November 2015, after a controversial public debate, the EU published a proposal for rules on ISDS that it seeks to include in its future agreements, notably TTIP.[6] The proposal has already been included in the EU's recent, not yet ratified, agreements with Canada (CETA) and Vietnam.

In comparison with the existing ISDS system, it contains a major innovation, namely the creation of a public investment court with two instances. The judges are – in equal measure – to be from the US, the EU and third countries and to be agreed upon by the parties. They are to be paid a defined fee for their work, including a fee per day worked. There are rules aimed at avoiding conflicts of interest and forbidding the judges to act as "counsel or as party-appointed expert or witness in any pending or new investment protection dispute". Moreover, the UNCITRAL Transparency Rules[7] are to be applied to these disputes. These rules stipulate that many documents related to investment disputes must be published, including submissions by the parties, expert reports and witness statements, as well as the decisions of the tribunal. Also, hearings are in principle to be public. Under the EU's proposed system, investors can still directly resort to an international system for the settlement of disputes, without having to resort to a national court first. However, they are barred from pursuing their claims before a national court and at the international level simultaneously. In light of all these aspects, the EU proposal is a significant improvement as compared to the existing ISDS system and addresses the above shortcomings, at least partially.

6 See European Commission, EU finalises proposal for investment protection and Court System for TTIP, Press release of 12 November 2015, **http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396**

7 Available at **http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf**

Yet civil society groups[8] and academics[9], still criticise the EU proposal. Reasons are, among others, that the proposal still contains some undesirable substantive clauses and does not preclude a risk of negative impact from ISDS cases on public policy regulation.[10] Procedurally, some hold the view that the standards for the selection and behaviour of the judges fall short of corresponding national requirements and do not fully prevent conflicts of interest. Moreover, the issue that foreign investors are given privileges that domestic investors (or citizens) do not have, is not solved. The EU's proposal does not include mechanisms for e.g. victims of corporate human rights violations or environmental offences to hold investors judicially accountable, either. In sum, while the EU's proposal addresses some of the shortcomings of the present system for settling investment disputes, it still has a number of shortcomings and thus does not constitute a radical departure from the idea that foreign investors should have the opportunity to hold state parties in an investment agreement accountable for violations through an international judicial mechanism.

APPROACHES OF COUNTRIES OF THE GLOBAL SOUTH

Earlier than the EU, some countries of the Global South took action in relation to international investment treaties. Notably, Ecuador, Venezuela and Bolivia have renounced the ICSID Convention, signalling strong political opposition to this Convention. In recent years, some countries of the Global South, including Bolivia and South Africa, have taken the more radical and the so-far unusual step of terminating a number (but not all) of their bilateral investment treaties. However, given that investment agreements usually include some "survival clauses" – meaning that core provisions of the agreement will remain in force for a period of e.g. 10 years after termination – the effect of such termination is not immediate.

A more elaborate approach than simply terminating investment agreements is that taken by Brazil. Having been very cautious for a long time towards bilateral investment agreements, Brazil has recently signed (but not yet ratified) several agreements with other developing countries (e.g. Mexico).[11] In terms of dispute settlement, these agreements do not contain an ISDS mechanism. Instead, parties have to create a so-called ombudsman, i.e. a domestic institution that investors can turn to with requests and questions. In addition, there is also state-to-state dispute settlement. A state can bring a claim if it feels that an investor from its own country has been treated illegally by the respective other party. There is a provision requiring parties to transfer any monetary compensation obtained to the investors whose rights were violated. Therefore, this approach is a middle way between giving the investors far-reaching rights through ISDS and giving them no rights at all under an international investment agreement (which will happen in the long term if countries terminate their BITs).

8 See for example "Investment Court System put to the test: New EU proposal will perpetuate investors' attacks on health and environment", April 2016, **http://corporateeurope.org/international-trade/2016/04/eu-investment-proposal-won-t-prevent-corporate-attacks-health-and**

9 See for example Krajewski, M. and Hofmann, R. T. (2016) Der Vorschlag der EU-Kommission zum Investitionsschutz in TTIP, Friedrich-Ebert-Stiftung, **http://library.fes.de/pdf-files/wiso/12379.pdf**, van Harten, G. (2015) Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP, Osgoode Hall Law School, Legal Studies Research Paper Series No. 16, **http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2717607_code2200076.pdf?abstractid=2692122&mirid=12**

10 A study by several NGOs concludes that several more prominent cases that investors brought under existing agreements "could still be launched and likely prosper" under the system proposed by the EU, see Cingotti, N., et al. (2016) "Investment Court System put to the test", Friends of the Earth et al., **http://corporateeurope.org/sites/default/files/attachments/icstest_web.pdf**, p. 4.

11 See for an overview UNCTAD, Brazil, **http://investmentpolicyhub.unctad.org/IIA/CountryOtherlias/27#iiaInnerMenu**

COMPARISON AND ASSESSMENT OF APPROACHES

The EU's recent proposal for an investment court system provides significant procedural improvements as compared to the existing ISDS system. However, it maintains the right of investors to have recourse to an international dispute settlement mechanism, and therefore does not constitute a fundamental departure from the idea of investor-state dispute settlement as such, including some of its potential negative impacts. By contrast, some countries of the Global South have turned away more radically from the present ISDS system by terminating some of their investment agreements or withdrawing from the ICSID Convention. Brazil's approach constitutes a middle way, offering some protection to investors through investment agreements, but without the controversial investor-state dispute settlement.

INDEX OF ACRONYMS

ACP African, Caribbean and Pacific
ACTA Anti-Counterfeiting Trade Agreement
AGOA African Growth and Opportunity Act
AGP Agreement on Government Procurement
AMS Aggregated Measures of Support
AoA Agreement on Agriculture
APEC Asia-Pacific Economic Co-operation
ARA Advisory Referendum Act
ASEAN Association of Southeast Asian Nations
BIT Bilateral Investment Treaty
BRICS Brazil, Russia, India, China, and South Africa
CAP Common Agricultural Policy
CDS Credit Default Swaps
CETA Comprehensive Economic and Trade Agreement
CSI Coalition of Services Industries
DDA Doha Development Agenda
DDR Doha Development Round
DFQF Duty-Free, Quota-Free
EAC East African Community
ECIPE European Centre for International Political Economy
EGA Environmental Goods Agreement
EAHC East African High Commission
EPA Economic Partnership Agreement
ESF European Services Forum
FAN Friends of Anti-Dumping
FAO Food and Agriculture Organization
FET Fair and Equitable Treatment
FTA Free Trade Agreement
FTAA Free Trade Area of the Americas
FTAAP Free Trade Area of the Asia-Pacific
GATS General Agreement on Trade in Services
GATT General Agreement on Tariffs and Trade
GFC Global Financial Crisis
GDP Gross Domestic Product
GVC Global Value Chain
GI Geographical Indication
GM/GMO Genetically Modified/ Genetically Modified Organism
GEMC Group of European Mining Companies
GPA Agreement on Government Procurement
GSC Global Services Coalition
GSP General Preferencial Scheme
GSP+ General Preferencial Scheme Plus
GVC Global Value Chain
ICESCR International Covenant on Economic, Social and Cultural Rights
ICS Investor Court System
ICSID International Centre for Settlement of Investment Disputes
IIA International Investment Agreements
IMF International Monetary Fund
IFC International Finance Corporation
IP Intellectual Property
ISDS Investor-State Dispute Settlement
ITA Information Technology Agreement
ITUC International Trade Union Confederation
JEC Joint EPA Council
LDC Least Developed Countries
LVC Local value chain
MA Market Access
MAI Multilateral Agreement on Investment
MERCOSUR Southern Common Market *Mercado Común del Sur (es)*
MFN Most Favoured Nation
MTA Mega Trade Agreement
NAFTA North American Free Trade Agreement
NAMA[1] Friends of Ambition; also
NAMA[2] Non-Agricultural Market Access
NATO North Atlantic Treaty Organization
NIEO New International Economic Order
NMB Nairobi Ministerial Declaration
NSG Nuclear Supplier Group
NTB Non-Tariff Barriers
OECD Organisation for Economic Co-operation and Development
OPEC Organisation of Petroleum Exporting Countries
OTC Over the Counter
OWINFS Our World Is Not for Sale
PAP Processed Agricultural Product
RCC Regulatory Cooperation Council
RCEP Regional Comprehensive Economic Partnership
RMI Raw Material Initiative
RoO Rules of Origin
RTA Regional Trade Agreement
RVC Regional value chain
S&D Special and Differentiated Treatment
SACU South African Customs Union
SAP Structural Adjustment Program
SCM Subsidies and Countervailing Measures Agreement
SDG Sustainable Development Goals
SDT Special and Differential Treatment; also S&T
SOE State-Owned Enterprises
SP Special Products
SPP Sustainable Public Procurement
SPS Agreement on the Application of Sanitary and Phytosanitary Measures
SSG Special Safeguard
SSM Special Safeguard Mechanism
SUNS South North Development Monitor
SVE Small and Vulnerable Economies
TAFTA Transatlantic Free Trade Agreement
TBT Agreement on Technical Barriers to Trade
TFA Trade Facilitation Agreement
TFEU Treaty of the Functioning of the EU
TiSA/TISA Trade in Services Agreement
TNC Transnational Corporations
TPP Trans-Pacific Partnership
TRIMS Agreement on Trade-Related Investment Measures
TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP Transatlantic Trade and Investment Partnership
UDHR Universal Declaration of Human Rights
UNECA United Nations Economic Commission for Africa
UNEP United Nations Environment Program
UNCITRAL United Nations Commission on International Trade Law
UNCTAD United Nations Conference on Trade and Development
UPOV International Union for the Protection of New Varieties of Plants
VCLT Vienna Convention on the Law of Treaties
WTO World Trade Organization

Rosa-Luxemburg-Stiftung,
Brussels Office
Avenue Michel-Ange 11
1000 Brussels, Belgium
www.rosalux.eu

AUTHOR Christiane Gerstetter
DESIGN Ricardo Santos
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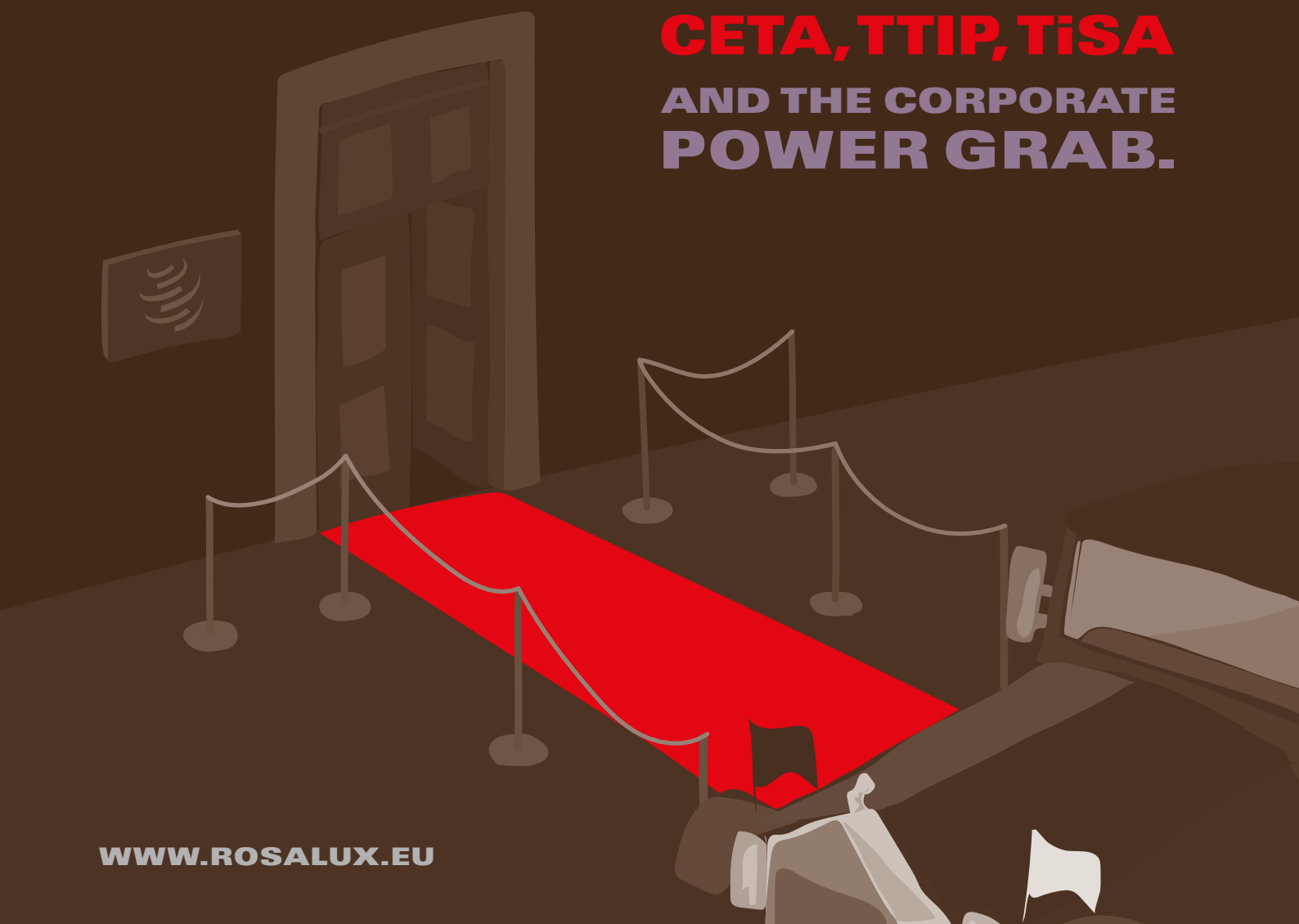

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