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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 2151 (2017)[1]

Human rights compatibility of investor-State arbitration in international investment protection agreements

Parliamentary Assembly

1. The Parliamentary Assembly notes that investor-State dispute settlement (ISDS) clauses in international investment agreements or bilateral investment treaties allow foreign investors to sue host States before private arbitration panels set up by the parties whenever a dispute on the application of an international investment agreement arises. It stresses that ISDS has serious implications for human rights, the rule of law, democracy and national sovereignty, which the proposed Investment Court System (ICS) is intended to address:

1.1. ISDS/ICS raises issues regarding fair trial, transparency, equal access to a tribunal, prohibition of discrimination and legal certainty under Articles 6 and 14 of the European Convention on Human Rights (ETS No. 5, "the Convention") and its Protocol No. 12 (ETS No. 177);

1.2. the threat of litigation before non-State dispute settlement mechanisms could discourage governments from taking necessary regulatory measures to uphold the rights of their citizens against foreign multinational companies, for example by strengthening the protection of the environment and social rights ("regulatory chill");

1.3. democracy and national sovereignty are called into question when States are prevented by agreements concluded by previous governments from adapting their legislation and practice to changes in the factual situation or in political priorities.

2. The right to the protection of property (Article 1 of Protocol No. 1 to the Convention, ETS No. 9) also applies to foreigners, including legal persons. Foreign investors can therefore not be denied legal protection on the pretext that they can take into account the risk of expropriation and other political risks in their investment and pricing decisions or that they merely exploit the host States.

3. The Assembly considers that effective protection of foreign investments encourages long-term, sustainable investments which promote economic growth and create jobs. This requires reliable, efficient and neutral dispute resolution mechanisms. The lack of effective legal protection for investments encourages short-term profit maximisation and informal self-protection strategies, including bribery and other forms of interference in the political process in the host countries. However, foreign investors in the European Union are already protected in three ways – by the European Court of Human Rights (the Court), European law and domestic law in European Union member States.

4. It recognises that small and medium-sized businesses needing to defend themselves against discriminatory treatment by host States are at a disadvantage as they do not have a large company's political clout in order to secure bilateral diplomatic protection by their home States.

1. *Assembly debate* on 27 January 2017 (9th Sitting) (see Doc. 14225, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Pieter Omtzigt; and Doc. 14255, opinion of the Committee on Social Affairs, Health and Sustainable Development, rapporteur: Mr Geraint Davies). *Text adopted by the Assembly* on 27 January 2017 (9th Sitting).

5. The Assembly notes that:

5.1. European States have concluded thousands of international investment agreements/bilateral investment treaties with ISDS clauses with third countries and with each other;

5.2. investment arbitration tribunals usually consist of one arbitrator selected by each party to the dispute and a third agreed on by the first two. Arbitrators are often drawn from business circles or specialist law offices. The parties' submissions and the final rulings often remain confidential, which reduces the predictability of outcomes. The parties do not normally have the right of appeal; the tribunals can be inconsistent in their verdicts and may not respect the doctrine of precedent;

5.3. arbitration proceedings following the rules developed by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC) have undergone a number of reforms aimed at, in particular, increasing transparency and the possibilities for third-party intervention. There are a number of competing arbitration systems that have not yet had the benefit of transparent iterative evolution similar to that of the delivery of justice in public law in mature democracies;

5.4. national courts dealing with investment disputes have been accused of bias against foreign investors, being generally reluctant to implement international agreements or too slow and inefficient for the purposes of international business transactions.

6. The Assembly further notes that:

6.1. the ICS proposed by the European Commission is intended to correct the flaws of traditional ISDS mechanisms without entrusting the protection of foreign investors exclusively to the courts of host States. It would consist of a permanent first-instance court and appeals court staffed by judges appointed by participating States. The proposed ICS would follow transparent procedures, allow third-party interventions by representatives of civil society as a matter of right and be subjected to binding interpretations of the underlying agreement laid down by the States Parties;

6.2. proponents of ISDS fear that the future ICS will be too much under the influence of States and their interests, to the detriment of investors. Opponents of ISDS are dissatisfied with the fact that the proposed ICS would still grant foreign investors, as opposed to domestic ones, privileged access to a legal remedy outside the institutional framework of the host State.

7. In view of the above, the Assembly considers that replacing ISDS clauses by a permanent, multilateral ICS would be a reasonable compromise between the status quo, consisting of multiple ISDS mechanisms, and the full renationalisation of investment protection. It would eliminate the most important drawbacks of the existing ISDS mechanisms whilst ensuring that foreign investments, especially those by small and medium-sized companies, continue to enjoy adequate legal protection at the international level.

8. Investment protection is often included in bilateral trade and investment agreements. States can terminate the agreement if it no longer corresponds to their political objectives. In such a case, existing investments continue to benefit from protection for a transitional period, which should be limited to a reasonable time frame. European Union member States are effectively prevented from exercising this option as such agreements are now concluded by the European Union. The Assembly considers that ways and means should be explored to enable European Union member States to choose whether or not to participate in investment protection agreements, for example by including investment protection rules in an optional protocol.

9. Members of the Assembly disagree on the need for an ICS between developed countries, but agree that, if an ICS were established, it would have to be in accordance with the European Convention on Human Rights and meet certain conditions, in particular to:

9.1. ensure that legal proceedings concerning investment continue to follow fair and transparent procedures, in line with Article 6 of the European Convention on Human Rights. In particular, the procedures should ensure that both sides of the dispute and any third parties having a legitimate interest are heard, that the parties' submissions and the findings of the court are made public and that the judges are impartial and independent;

9.2. apply the international investment agreement underlying each dispute in such a way as to avoid undue interference with the States' right to regulate. States should remain free to regulate economic activity in order to protect the environment, public health and safety and human rights, including social rights and freedoms of association, expression and information, as well as the right to privacy, without discrimination between domestic or foreign companies;

9.3. duly take into account the States' obligations deriving from the Convention, in particular as regards the case law of the European Court of Human Rights on the distinction between the deprivation of possessions and the control of the use of property (Article 1 of Protocol No. 1 to the Convention);

9.4. interpret typical features of such international investment agreements, including "fair and equal treatment" and "stabilisation" clauses and the protection of "legitimate expectations", in such a way that the State's right to regulate is not undercut; the interpretation of such clauses should encourage the use by prospective investors and States negotiating investment agreements of due diligence tools such as environmental and human rights impact assessments.

10. The Assembly calls on the member States of the Council of Europe to:

10.1. take an active part in the creation of an ICS and ensure that the above human rights and rule of law considerations are fully taken into account and that the final judgments of the ICS are promptly and fully implemented at national level;

10.2. improve, if need be, their national courts' efficiency and actual and perceived impartiality in such a way as to encourage foreign investors to make use of them more frequently;

10.3. ensure that in existing ISDS cases, filings of notices, briefs, decisions and settlements are always public and available in an online repository;

10.4. lay down strict criteria on the domiciliation of foreign investors to determine their eligibility for ISDS or ICS remedies, in order to prevent "treaty shopping";

10.5. make ICS mechanisms an optional protocol from which exit is possible for individual States with a one-year notice period and a fixed term of protection for existing investments;

10.6. ensure that, under an ICS, companies can only sue for actual damages incurred;

10.7. review all ISDS clauses in international investment agreements that they have entered into, assess their appropriateness and bring them into line with the best practices foreseen for the future ICS;

10.8. ensure that ICS and ISDS mechanisms are (re)constructed in a way that obliges them to implement the European Convention on Human Rights and the rulings of the European Court of Human Rights.