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(Revised version)

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

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A. Draft Resolution

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.

Amendment 1
Tabled by the Committee on Social Affairs,
Health and Sustainable Development

In the draft resolution, at the end of paragraph 3, insert the following words: "However, foreign investors in the European Union are already protected in three ways – by the European Court of Human Rights, European law and domestic law."

Sub-amendment 1 to amendment 1
Tabled by the Committee on Legal Affairs
and Human Rights

In Amendment 1, after the words "in domestic law" insert the following words: "in EU 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.

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 among themselves;

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 specialised law offices. The parties' submissions and the final rulings often remain confidential, which reduces the predictability of outcomes;

5.3. arbitration proceedings following the rules developed by the World Bank's International Center 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;

Amendment 2
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, at the end of paragraph 4, insert the following words: "However, the European Court of Human Rights and European law also protect foreign investors in Europe and no cases have occurred where these, alongside domestic contract and public law, have allowed discriminatory practices against inward investors."

Amendment 3
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, at the end of paragraph 5.1, insert the following words: ", but the primary investor in the vast majority of these cases has been the European Union in smaller third countries that do not have the triple-lock investor protection of European Court of Human Rights, European law and domestic contract and public law;"

Amendment 4
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, at the end of paragraph 5.2, insert the following words: "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;"

Amendment 5
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, at the end of paragraph 5.3, insert the following words: ". There are a number of competing arbitration systems that have not had the benefit of transparent iterative evolution similar to that of the delivery of justice in public law in mature democracies;"

Sub-amendment 1 to amendment 5
Tabled by the Committee on Legal Affairs and Human Rights

In Amendment 5, after the words "have not", insert the word "yet".

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 Investment Court System 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 re-nationalisation 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.

Amendment 6
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, at the end of paragraph 5.4, insert the following words: ". However, international trade between the European Union, Canada and the United States is well established under existing protections;"

Amendment 7
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, paragraph 6.1, replace the words "It would" with the following words: "However, foreign investors in Europe are already protected in other ways – by the triple lock system of the European Court of Human Rights, European law and domestic law. The proposed ICS would".

Amendment 8
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, at the end of paragraph 6.1, insert the following words: "Once implemented, such arrangements would persist for twenty years without being open to change or improvement by the European Parliament or member States, irrespective of whether judgments and financial penalties were in conflict with the imperatives of public health, environmental sustainability and rights at work;"

Amendment 9
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, at the end of paragraph 7, insert the following words: "However, the Assembly considers that, in developed countries such as the United States, Canada and member States of the European Union, ISDS clauses and a permanent, multilateral ICS are not necessary to protect foreign investors."

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. 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. The Assembly therefore calls on the European Union to actively pursue, in their ongoing and future negotiations of international investment agreements, including the Transatlantic Trade and Investment Partnership (TTIP), the establishment of an ICS to gradually replace traditional ISDS mechanisms. It welcomes the inclusion of the ICS in the recently signed Comprehensive Economic and Trade Agreement (CETA) with Canada. The future ICS should be in line with human rights and the rule of law, and should in particular:
- 9.1. 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 holdings of the Court are made public and that the judges are impartial and independent;

Amendment 10
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, paragraph 8, at the end of the third sentence, insert the following words: ", which should be limited to a reasonable timeframe".

Amendment 11
(If adopted, amendment 16 falls)
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, replace paragraph 9 with the following paragraph:

"The Assembly therefore calls on the European Union not to pursue, in their ongoing and future negotiations of international investment agreements with developed countries, including the Transatlantic Trade and Investment Partnership (TTIP), the establishment of an ICS to gradually replace traditional ISDS mechanisms. It regrets the inclusion of the ICS in the recently signed Comprehensive Economic and Trade Agreement (CETA) with Canada. CETA and TTIP must only be agreed if they are in line with human rights and the rule of law, and should, in particular:"

Amendment 16
(Falls if amendment 11 is adopted)
**Tabled by Mr Henk OVERBEEK, Ms Petra De
SUTTER, Mr Joseph O'REILLY, Ms Sílvia
Eloísa BONET, Baroness Doreen E. MASSEY**

In the draft resolution, replace paragraph 9 with the following paragraph:

"Members of the Assembly disagree on the need for ICS between developed countries but agree that, if ICS were pursued, it should be in accordance with the European Convention on Human Rights (ECHR), and, in particular, must fulfil the following conditions:"

Amendment 12
**Tabled by the Committee on Social Affairs,
Health and Sustainable Development**

In the draft resolution, paragraph 9.1, replace the word "follow" with the following words: "ensure that legal proceedings around investment continue to follow".

- 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 such human rights as the 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 as "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 the 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/ICS remedies, in order to prevent "treaty shopping";

Amendment 13
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, paragraph 9.2, replace the words "such human rights as the" with the following words: "human rights, including social rights,".

Amendment 14
Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, replace paragraph 10.1 with the following paragraph:

"ensure, in the creation of an ICS, that the human rights and rule of law considerations set out above are fully taken into account and that the final judgments of the existing system of public and commercial law consistent with the European Court of Human Rights and European law are promptly and fully implemented at the national level;"

Amendment 17
Tabled by Mr Henk OVERBEEK, Ms Petra De SUTTER, Mr Joseph O'REILLY, Ms Sílvia Eloísa BONET, Baroness Doreen E. MASSEY

In the draft resolution, after paragraph 10.4, insert the following paragraph:

"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;"

Amendment 18

Tabled by Mr Henk OVERBEEK, Ms Petra De SUTTER, Mr Joseph O'REILLY, Ms Sílvia Eloïsa BONET, Baroness Doreen E. MASSEY

In the draft resolution, after paragraph 10.4, insert the following paragraph:

"ensure that, under ICS, companies can only sue for actual damages incurred;"

- 10.5. 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.

Amendment 15

Tabled by the Committee on Social Affairs, Health and Sustainable Development

In the draft resolution, replace paragraph 10.5 with the following paragraph:

"review whether any existing ISDS clauses in international investment agreements that they have entered into are eligible for change and, if so, assess their appropriateness and bring them into line with the best practices foreseen for the future ICS."

Amendment 19

Tabled by Mr Henk OVERBEEK, Ms Petra De SUTTER, Mr Joseph O'REILLY, Ms Sílvia Eloïsa BONET, Baroness Doreen E. MASSEY

In the draft resolution, after paragraph 10.5, insert the following paragraph:

"ensure that ICS and ISDS mechanisms are (re-)constructed in a way that binds them to implementing the European Convention on Human Rights and the rulings of the European Court of Human Rights."