

The future of EU international investment policy (Biteau opinion) - Compromises

Paragraph 1 - **COMPROMISE 1** covering AMs 1 (Greens), 2, 31 (S&D), 4 (NI) and 5 & 64(Renew)

1. ***Underlines that investment can and should have a positive impact on sustainable development, including on the environment, human rights, good governance and employment in developing countries (AM 64 Renew); recalls also that investments, especially in extractive industries, logging, tourism and agribusiness operations can have huge impacts on local communities, including indigenous people; (AM 1, Greens)***

Notes with concern the asymmetry of certain international investment agreements (IIA) ***in which investors launch investment cases against States, while governments, workers and affected communities are unable to take transnational corporations that fail to respect human rights, public health (AM 4 NI) or labour and environmental laws to arbitration; highlights that this imbalance can deprive governments of their rights to regulate and protect essential public interests; (AM 1, Greens and 4 NI);***

Highlights that, in order to respond to public concerns, the EU has replaced the ISDS mechanism with Investment Court Systems (ICS) in recently negotiated international investment agreements, including those with Canada, Mexico, Singapore and Vietnam; notes that the agreements also include an appellate mechanism and provisions for the transition from bilateral ICS to a permanent Multilateral Investment Court (MIC); notes that the MIC would be a permanent body with first and appellate instances, and with full-time judges; (AM 2, S&D)

Emphasizes that international investment agreements and the activities of foreign investors must be in line with international and European standards and commitments on human rights, labour rights and environmental law; Notes that IIAs and the investor-state dispute settlement mechanism (ISDS) should not only provide protection for investors, but equally protect states and citizens alike (AM 5 Renew); in that context, believes that a binding and enforceable UN Treaty on Business and Human Rights is needed; reiterates its previous call on the Commission to propose a negotiating mandate for the Union to constructively engage in the process of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) (AM 31, S&D) and to uphold the primacy of human rights over trade interests (AM 1 Greens);

Paragraph 2 - **COMPROMISE 2** covering AMs 9 (NI), 10 (Greens), 11 (EPP), 25 (The Left)

2. Deplores the ***abuse of the investor-state dispute settlement mechanism (ISDS)*** (AM 11, EPP), which gives foreign investors the right to bring claims against governments, ***including on***

measures taken to protect public health, the environment and public interest, without there being an obligation to go through the domestic judicial system first (AM 10, Greens); highlights the risks posed by the high costs of ISDS claims for the public finance of developing countries *which can prevent developing countries to adopt laws and regulations in the public interest because of the high cost of arbitrary procedures and the unpredictability of their result*; (AM 9 NI and 25 The Left, redrafted); stresses that the costs of investment lawsuits have the potential to bring the public budgets of most *developing* countries to breaking point (AM 11, EPP);

Paragraph 3 - **COMPROMISE 3** covering AM 19 (S&D), 21 (Greens), 65, 68, 69 (Renew)

3. *Recalls that the EU investment policy should promote investment that supports sustainable development, including due diligence, and the promotion of the highest standards of environmental, labour and human rights provisions, also when cooperating with third countries* (AM 65, Renew); calls for the EU to *continue working towards alignment of its investment policy with the SDGs, the European Green Deal and the European Climate Law¹, as one of the biggest challenges of the post-Lisbon agenda* (AM 19 S&D); *insists, recalling the widening global investment gap* (AM 69, Renew), *that the future of EU foreign investment policy must take into consideration the consequences of the Covid-19 pandemic by applying an integrated, qualitative and coherent investment policy, in order to achieve sustainable development*, (a bit reformulated, AM 68, Renew)

Paragraph 3 a - **COMPROMISE 4** covering AMs 20 (N.I.), 23, 27 (S&D), 24 (Greens)

3a. *Notes that low- and middle-income countries face massive investment needs to finance their sustainable development strategies; points out that private financial flows in partner countries will be critical to collectively delivering on our global sustainability agenda* (AM 23, S&D);

Calls on the Commission to seek an ambitious consensus in international fora and to support low- and middle-income countries in scaling up their access to sustainable finance by developing a comprehensive strategy and by promoting sustainability-related financial instruments (AM 27, S&D); along this line, *urges to refrain from investments in activities that are harmful for the environment and human rights*; (AM 24 Greens) *and set up industrial capacity in green energy industries and share the technologies that are required for the green industrialisation process* (AM 20 Comin NI);

Paragraph 4 - **COMPROMISE 5** covering AM 29 (Greens)- 30 (NI)- 32, 40, 66 (Renew) - 33 (EPP), AM 62 (ECR), 64 (Renew)

4. *Stresses that investment has a positive impact on growth and jobs, not only in the EU but also in developing countries, but investors must actively contribute to achieving the sustainable development goals of the host states* (AM 62, ECR); to this effect, encourages the EU to *step up its*

efforts to (AM 33 redrafted) review its investment treaties in order to ensure a fair balance between rights and obligations for investors *including binding human rights obligations (AM 30 Comin NI)*, with full respect for *labour rights, corporate social responsibility*, the environment and the rule of law (AMs 30, 32 & 40)); *Encourages the EU and its Member States to negotiate coherent investment agreements and to minimize divergencies where possible (RE 64);*

Stresses that *investors should* support *green, gender-sensitive and inclusive* sustainable investment in the host state (AM 33, EPP), *i.e. by building partnership with local actors' supporting the local economy through technology transfer and by utilising local labour and production*, (AM 29, Greens & 62 ECR); *local firms, SMEs and public services through the exchange of best practices, skills and know how*; (AM 66 Renew), and *in accordance with the OECD Guidelines for Multinational Enterprises on corporate social responsibility*; (AM 30, NI)

Stresses the need to *ensure a policy within the framework of international principles of due diligence and the upcoming European legislation on corporate due diligence in which investors and companies can be held accountable for serious violations of human rights, labour rights and environmental law*; (AM 32, Renew); in particular, stresses the need *to conduct gender-responsive human rights due diligence, in consultation with all relevant stakeholders, including civil society organizations, women's organizations, trade unions and representatives of minorities, local communities and indigenous peoples* (AM 30, NI)

In addition, calls on the EU to ensure that its trade and investment policy respect inter alia EU's obligation to exercise policy coherence for development (AM 66, Renew); *the 2018 UN Declaration on the Rights of Peasants and Other People Working in Rural Areas; the FAO Voluntary Guidelines of Tenure, Land and Forests and for Securing Sustainable Small Scale Fisheries, the UN Declaration on the Rights of Indigenous Peoples, and Free, Prior and Informed Consent, as set out in the ILO Convention 169*; (AM 29, Greens)

Paragraph 5: **COMPROMISE 6** covering AM 36 (NI), 37 (Greens), 38 (S&D), 41 (The Left)

5. ***Recalls its position that the EU and its Member States*** should not sign new investment protection treaties that include the ISDS mechanism (AM 38 S&D, 41 The Left); ***Considers that disputes between investors and states should be subject to democratic principles and the rule of law; in particular, believes that investment trade agreements should require the domestic justice systems to be exhausted before the foreign investor can resort to an arbitral tribunal, as in the case of human rights system*** (AM 37, Greens); ***calls on the EU to provide mechanisms and technical assistance to strengthen domestic legal systems and the rule of law, which would ensure a favourable environment for foreign investment while addressing systemic failures that have a negative impact on sustainable development in partner countries***; (AM 36 NI, redrafted)

Paragraph 6: **COMPROMISE 7** covering AM 45 (Greens) - AM 46 (NI)

6. ***Welcomes some procedural improvements of the Investment Court System like the selection of arbitrators or the establishment of an appeal body*** (AM 46 redrafted) ***notes that foreign investors operating in the EU and EU-based investors operating abroad might still be able to circumvent national legal systems and file lawsuits in international tribunals which can***

endanger public interest measures, (AM 45, Greens); underlines that foreign investment should contribute to bridging gaps to address economic inequality rather than entrenching it further AM 46);

Paragraph 6a: **COMPROMISE 8** covering AM 14, 50 (Greens) and AM 51 (Renew)

Recognises that investor protection remains important in EU investment agreements with developing countries and least developed countries, which carry higher risks for investors and must accordingly be met with adequate and fair protection mechanisms (AM 51 Renew redrafted); Acknowledges that the ICS is an improved alternative to the ISDS, notes with concern that between 2013 and 2018, there have been many claims against African countries; notes that, while European investors initiated the majority of the lawsuits against African countries, that African States have been the main losers in investment arbitration cases; (AM 14, Greens)¹[1];

Paragraph 7: **COMPROMISE 9** covering AM 53 (S&D), AM 54 (Greens) and AM 55 (Renew)

Recalls that developing countries need to preserve and expand their policy space to undertake digital industrialisation; (AM 54, Greens);

Points out that developing countries are commencing digital industrialisation aimed at creating local economic activity; notes that many developing countries are still in the early stages of creating a legal framework for the protection of personal data and ensuring that digital innovation benefits working people; (AM 53, S&D),

Urges the Commission to assess specifically the impact of digital provisions in trade and investment agreements (AM 53, S&D) such as cross-border data transfer, prohibition on processing data locally, elimination of customs duties on digital products, non-disclosure of the source code of software, etc., on developing countries, with the view to avoid restricting their digital industrialisation strategy, their ability to distribute the profits and improve public services (AM 54 Greens);

More broadly, urges the EU to work closely with developing countries to ensure that investment and trade agreements are mutually supportive for the digital industrialisation strategies of the EU and developing countries alike, by supporting employment and the local economy through technology transfer; encourages the exchange of EU sustainable and green technologies to developing countries, as a way to promote sustainable growth (55, Renew redrafted) and to help bridge the digital gap (AM 53, S&D).

¹ : "ISDS in numbers. Impacts of Investment Arbitration against African States", Transnational Institute (October 2019)

