



September 2010
AK Position Paper

Investment Package of the European Commission:
Towards a comprehensive European international
investment policy;
Transitional arrangements for bilateral investment
agreements

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social, educational, economical and consumer issues both, on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour, social insurance and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 – amongst others unemployed, persons on maternity (paternity) leave, community and military service – of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

With the entry into force of the Lisbon Treaty on 1. December 2009, the individual EU Member States have transferred the competence to negotiate international agreements on Foreign Direct Investments (FDI) to the EU. With its Communication and Regulation, the European Commission has initiated the discussion on the future European Investment Policy. The Austrian Federal Chamber of Labour (AK) welcomes this initiative. It provides the opportunity to reconsider the policies of individual Member States in the spirit of the Lisbon Treaty and to reconcile the future European Investment Policy with the comprehensive goals of the Union in order to ensure policy coherence.

The key issue of the European Investment Policy is the continuation and development respectively of the existing Bilateral Investment Protection Agreements (BITs) of the Member States. They provide the investors of the individual Member States in the host country with a legally binding level of protection, which - as the experiences of the last decade have shown - were frequently at the expense of both public interest and the population.

The AK thinks that the current BITs of the EU Member States are both inappropriate and unbalanced. The agreements are exclusively orientated towards the economic interests of transnational enterprises. The AK has not only repeatedly criticised this

fact in positions on the Austrian BITs sample text, but also in the AK position on „EU Future Trade Policy“. That is why the existing BITs cannot be used as blueprints for the future approach of the EU in international investment agreements.

The AK position in detail

Hence, we suggest

- that all **current BITs negotiations** of the EU Member States **are held** whilst the political framework of a new and improved EU Investment Policy is defined.
- that a fixed **expiry date (Sunset Clause)** is determined **for all existing BITs** of the EU Member States. According to this, these agreements would expire at a certain date, provided they were not revised in terms of a greater balance between the protection of public and private interests as well as with regard to the protection of economic, social and ecological interests.
- that the EU Commission carries out a thorough **impact assessment of the BITs** of the EU Member States as well as of the international **investor-state arbitration**. Thereby, the consequences of the investment agreements should be analysed with regard
 - to the **policy space** of governments concerning the promotion of viable development, social justice, but also gender equality and in respect of
 - the **fulfilment of obligations from international conventions** and agreements on labour and human rights, gender equality as well as

- environmental and climate protection
- that **broad public consultations** are held to gain widespread acceptance for the political scope of the future EU Investment Policy.

In its Regulation concerning the transitional agreements for BITs, the European Commission exclusively pursues goals in the interest of investors, namely the **continuation of the current EU law and legal certainty and the maximum protection for EU investors**. It does not seem to be interested in overcoming the lack of transparency in case of investment arbitration proceedings and determining and avoiding any negative social, ecological and human rights impact of the existing BITs of the EU Member States.

The AK **criticises the one-sided political approach of the European Commission**. Europe must scrutinize the developments of the past decade with regard to International Investment Law as well as investment policy and practice to ensure that it does not repeat the mistakes of the EU Member States when structuring new investment agreements investment chapters in free trade agreements.

That is why a **new generation of investment agreements** has to be developed, which promotes social and

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ecological sustainable investments and transforms the complex European network of bilateral investment agreements into a more **transparent, foreseeable and balanced system**. Deficits of the existing regime have to be eliminated and an international investment policy must be developed, which **strikes a balance between the rights of investors and their duties** and which supports positive investment behaviour by promoting sustainable investments as well as EU targets in respect of development, social, ecological, human and women's rights.

As decisions made by arbitration courts of the last decade with regard to numerous investor-state complaints demonstrate, the provisions of the existing BITs do not have the capacity of undermining the development and a policy in the public interest as well as the rights of local communities. The focus on investment protection, which dominates the current model for investment agreements must be reviewed and revised.

In its Communication, the European Commission addresses important issues, such as investment protection standards and sustainability. It also recognises the problems of the existing regime. It does, however, not draw the necessary conclusions for solving these problems. The AK supports the Commission in developing a new generation of investment agreements at European level in the interest of the civil population. In order to meet this requirement the new model for investment protection must comply with the following standards:

- The new regulations concerning the political **coherence in the foreign policy** of the EU within the scope of the Lisbon Treaty, Article 208 TFEU (Treaty on the Functioning of the European Union), according to which the implementation of the millennium targets and the reduction of poverty as overarching foreign policy objectives of the Union have been defined, must be complied with. Apart from that, investment agreements, as recently emphasised by the UN Special Rapporteur on Economics and Human Rights, should reconcile the rights of investors with the policy space of states to allow the protection and the promotion of **human rights** - another horizontal goal of European foreign policy. Both contracting parties must be obliged to implement human rights effectively within the meaning of „duty to protect“. In connection with the state's obligation to exercise diligence with regard to complying with human rights, the contracting parties, in their capacity as the sending country of foreign direct investments, must urge multinational enterprises to adhere to their due diligence, to comply with human rights at any time and at any place („duty to respect“).
- In addition, the EU has committed itself to the agenda of the International Labour Organisation (ILO) for **Decent Work**. Investment agreements should contribute to the creation of decent work and to the effective implementation

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of the **Core Labour Standards** as well as other central decent work components.

- The new EU Investment Policy should be based on a clear and **narrow definition of foreign direct investments**, which promotes positive investment behaviour and social-ecological sustainable investments in the recipient countries basically excludes portfolio investments. In view of the fact that the Treaty of Lisbon places Foreign Direct Investments (FDI) within the EU's area of responsibility, that, however, there is no clear definition of FDI, a careful approach is needed to bind investments to the productive industry and to control any possible negative consequences. Currently, portfolio investments do also fall within the scope of most BITs. This enables private European finance companies to place their purely financial transactions, investments and speculations in recipient countries under the protection of investment agreements.
- In the light of recent decisions made by international investment arbitration courts, the impact of certain regulations such as the **Most Favoured Nation Rule** (Most Favoured Nation treatment) for example, must be reappraised. These decisions allowed investors to „import“ obligations for recipient countries from other concluded agreements. These developments limit the policy space in recipient countries - also in Europe - without compensating the recipient states for their lost regulatory space.
- Another cause for concern is the vague language used in the agreements, which is vulnerable to far reaching and questionable interpretations, in particular in view of the **expropriation regulations** and to „catch all“ clauses, which determine the **„fair and just“ treatment** of foreign investors. These clauses made it possible for investors to attack a broad range of regulatory measures before international arbitration courts, including measures that pursue a clear public purpose.
- In the public interest, a comprehensive **„Right to regulate“ clause** must clearly give measures and regulations priority over financial interests, in particular with regard to foreign direct investments.
- We think that **future European Investment Protection Agreements** should not contain any international investor-state dispute settlement procedures, but should be replaced by **state-state dispute settlement mechanisms within the scope of the WTO**. Investors are currently able to contest actions and measures by recipient states directly before international arbitration courts without having to exploit first any administrative and legal paths in the recipient country. Vice versa, states and their citizens have no possibility to take investors to such international arbitration courts.

Apart from that, the agreements provide investors with this protection and rights, independent of the fact whether they are actually contributing to the national development of the recipient country in a relevant and positive manner. In addition, the practice of arbitration courts suffers from a lack of transparency and it is contrary to the EU policy on guaranteeing access to information. There is a great reluctance to open such arbitration procedures to witness statements and statements of third parties. And one must fundamentally doubt the sufficient independence of judges who have a tendency to assume different roles, depending on the case (depending on the principal, they represent the prosecution or the defence). This has resulted in broad and often contradicting interpretations of investor rights.

The contracting parties must commit themselves not to undermine social and environmental standards in order to attract foreign investments.

- The AK is clearly against extending investment protection to the pre-investment phase.
- The contracting parties must commit themselves **not to undermine social and environmental standards** in order to attract foreign investments. Such a commitment must apply to the entire territory to avoid special economic zones.
- A comprehensive review and consultation process must guarantee a broad discourse on foreign direct investments and their economic impact: regular sustainability reports have to analyse the impact of foreign direct

investments in the host country and discuss these against the background of economic developments in a transparent manner for the benefit of the interested public. The social partners must be involved in the consultations. The social partners as well as non-governmental organisations (NGO) should also have access to a complaints procedure to be set up to be able to bring forward complaints concerning social or environmental problems.

- **The OECD Guidelines for Multinational Enterprises** must be integrated **in the agreements** as a reference document for **Corporate Governance**.

Market access regulations for investments are already a firm component of European Free Trade Agreements with third countries. The AK has repeatedly pointed out that investments, independent of the fact whether they should be allocated to the service or production sector, **have to be subject to the regulations of the Sustainability Chapter of Free Trade Agreements**.



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