AK EUROPA

May 2013

AK Position Paper

Transatlantic Free Trade Agreement (TAFTA) – Free Trade Agreement of the EU with the USA

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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, communityand 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.

Rudolf Kaske
President

Werner Muhm
Director

The AK position in detail

1. Transparency instead of exclusion of the European public

From the point of view of the BAK it is difficult to understand that a document of great public interest has been classified as "restricted" and shall therefore only be accessible to a restricted circle. In the present case, this is neither appropriate from a negotiation policy point of view nor with regard to the protection of the justified interests of third parties.

On the contrary, this kind of European policy only provokes democratic unease, which citizens all too often associate with "the EU". At the same time, it would be little realistic to assume that the document and its entire content would have been created without the proactive involvement of important interest groups and of the business side. In any case, any approach, which is aimed at changing key political orientations (without any need for secrecy) out of the public eye, cannot be reconciled with the requirements of so-called "good governance".

The BAK therefore urges the EU Commission, to make important documents of public interest, such as the drafts for negotiating mandates to the EU Commission, available for a broad public debate.

2. General comments on the main contents of the planned Free Trade Agreement

Following the final report of the High Level Working Group on Jobs and Growth from 11 February 2013, it was recommended to open negotiations for a Free Trade Agreement of the EU with the United States. The subject of the negotiations shall be the liberalisation **of agricultural products, industrial goods, services, of public procurement and investments** as well as a regimentation of **intellectual property rights**. Due to the low **tariffs** in most areas (according to the EU Commission an average of 4 %), tariff reduction will be far less significant for **non-tariff barriers (NTB)**, which are typical for well-developed industrial nations. It is the aim to eliminate or harmonise resp. mutually recognise these.

Both trading partners affirm that they consider the WTO negotiations as the most important level of negotiation. Nevertheless, the United States and the EU have started some years ago to negotiate **bilateral Free Trade Agreements** (FTA) with a growing number of third countries. The EU is currently negotiating with over seventy countries; the bilateral FTA of the EU with South Korea has been in force since 2012; the negotiations with Columbia and Peru have been finalised; however, the ratification process has not yet been completed. So far, however, the numerous bilateral activities have not yet resulted in a revival of the WTO's Doha Agenda (DDA). On the contrary, more and more bilateral agreements have been initiated worldwide. The result is dwindling resources and interest in individual countries in the Doha Round. This **undermines** the hope of bringing the **Doha Agenda** with its over 20 agendas a significant step forward during the 9th WTO Ministerial Conference, which will take place in December 2013 in Bali. The Doha negotiations have been stalling for twelve years.

Bilateral Free Trade Agreements have to comply with WTO rules and thereby essentially go beyond the liberalisations existing within the scope of the WTO. Due to the fact that a preferential agreement of the EU with the United States makes conditions between both trading blocs more attractive than those with the rest of the world, it is to be expected that instead of generating new trade flows, bypass trade will increase. What is certain, however, is that an EU-US FTA will result in the **relative unfavourable treatment of all third countries**.

The Free Trade Agreement, which was announced by US President Obama and EU Commission President Barroso in February, shall safeguard and create millions of well-paid jobs. Improved market access by tariff reduction and dismantling other trade barriers is praised as the key to growth and wealth, in particular by the EU Commission. Even if it is undisputed that foreign trade policy in respect of third countries has contributed to growth in the European Union, the political promotion of these agreements always over emphasizes **export-induced growth**, whilst possible negative consequences for employment through increasing imports hardly gets a mention.

On the one hand, it is the aim to remove existing tariffs or to let them successively expire in sensible areas. However, they are only still high in for example traditionally protected areas, such as agriculture. On the other hand, **non-tariff barriers (NTB)**, which are above all typical for well-developed industrial nations, shall become the main thrust of the liberalisation. The EU Commission estimates that the value of the currently existing non-tariff barriers in tariff equivalents is 10 to 20 %. It is the objective to ideally eliminate or at least to reduce or harmonise resp. mutually recognise customs procedures and so-called "behind the border" measures through all sectors. In concrete terms, these refer to technical provisions of machinery and equipment, safety standards and emission standards for motor vehicles, Sanitary and Phytosanitary Measures (SPS) in the agricultural sector as well as certifications or procedures for product approvals. Pharmaceutical products from the EU for example, have to be tested again in the US to be approved, even though they have already been approved here. Hence, unnecessary costs and administrative delays shall be avoided due to "superfluous" regulations. The liberalisation project of this NTB area gives rise to the fear that important provisions and regulatory systems will be relaxed or even abolished. National regulations in all possible areas might be interpreted as trade restrictive and could therefore be open to comprehensive deregulations. The BAK is therefore requesting a thorough review, involving all social partners, to ensure that the high level of health and safety standards as well as the protection of the environment will be maintained for **consumers and employees** on both sides.

The BAK urges to approach free trade negotiations with caution. This concerns in particular the **agricultural sector** and **food production**. For years, different standards in the food sector have resulted in trade disputes between the EU and the United States, for example in respect of treating poultry in the US with chlorite or of the procedure to spray meat with lactic acid to reduce the germ load. Apart from that, EU consumers are opposed to using gene technology and hormones in particular in respect of food (e.g. genetically modified corn or hormone treated meat). Concerning

food, the current higher EU standards must be maintained for the protection consumers' health; they must not be allowed to be watered down. In particular, the industry is time and again proposing to exclude agriculture, as this part will be subject of the longest negotiations by far. Nevertheless, the BAK in particular regards the traditionally protectionist agricultural sector as a positive aspect of the negotiations, in so far as here possible preliminary work concerning the agricultural negotiations can be done at WTO level. The BAK considers agricultural products to enjoy the largest scope for tariff reductions. From our point of view, sensible products in the EU, which are in any case internally supported and promoted by export subsidies, should not in addition remain subjected to high tariffs. Apart from that, the BAK demands an overall tariff reduction for fair trade products. Promoting trade with products, which comply with social and environmental minimum standards, strengthens quality competition and support a sustainable production method. On the one hand, the exemption from customs duty and thereby the relatively more favourable treatment compared to conventionally produced products provides an incentive for complying with and developing social and environmental criteria in the EU and the US; on the other hand, consumers of these products would also benefit from lower prices.

Given the fact that various attempts of the EU to broker a rapprochement with the US on trade issues have failed so far, it seems highly unlikely that the aimed at completion of the negotiations by autumn 2014 will be achieved. There have been several attempts over the past decades by the European Union and the United States to improve the link between the two Industrial blocks via trade and investments; most recently by the initiative of the **Transatlantic Economic Council (TEC) and prior to this by negotiations in respect of Transatlantic Economic Partnership Agreement (TEP)**. The fact that mutual demands and concessions did not produce not even remotely acceptable results on both sides meant that the negotiations fizzled out. Economic structures, which are too similar and regulation cultures, which are too different, characterise the two largest economies. Apart from that, it has almost never been possible to keep to the announced timeframes for trade negotiations – the EU's negotiations with Canada have already been going on for almost four years.

3. Chapter on trade and sustainable development

Implementation of labour standards and current trade union situation in the US

From the point of view of employees, one of the most important issues concerns the compliance with minimum labour standards to prevent the so-called "race to the bottom" – the competition to cut wages and reduce living standards. However, so far, the US has **ratified only two of the eight ILO minimum labour standards**: the Abolition of Forced Labour Convention (No 105, 1957) and the ban on Worst Forms of Child Labour Convention (No 182, 1999). The BAK regards in particular the two trade union rights – Freedom of Association and Protection of the Right to Organise Convention (No 87, 1948) and the Right to Organise and Collective Bargaining Convention (No 98, 1949) – as more fundamental and not least from a distribution policy perspective a special concern. Apart from that, the US has not yet ratified the Forced Labour Convention (No 29, 1930), the Equal Remuneration Convention (No 100, 1951),

the Discrimination (Employment and Occupation) Convention (No 111, 1958) and the Minimum Age Convention (No 138, 1973).

In its report on the Annual Survey of violations of trade union rights, the **International Trade Unions Confederation** (ITUC) 2012[1] describes the current trade union situation in the US as follows: "The employer community in the US is extremely hostile to unions, and because employers are given wide latitude to oppose unionisation efforts and penalties for illegal retaliation against union supporters are weak, workers face enormous obstacles in forming unions. The percentage of private sector workers in unions has fallen to less than 7%, and although currently 37% of public sector workers are union members, elimination or curtailment of public sector bargaining rights is high on the agenda of conservative Republicans, who currently control the U.S. House of Representatives and the majority of state legislatures and governorships."

The so-called **"right-to-work" laws**, which have been implemented in about half of the US Federal states, are also a controversial issue. In Ohio, the opposition derailed the anti-trade union law by holding a referendum. The laws directly target the finances of trade unions. Based in the system in the United States, union contributions were traditionally negotiated by management and trade union and laid down in collective agreements. Once the "Right-to-work" law has come into force, all contributions shall become voluntary payments. In spite of this, trade unions shall represent the interests of all employees in a company, including those, who do not pay any contributions. The short-term consequence is that the number of members and thereby the income of trade unions dwindled in all Federal states, where the law had been implemented. However, in the long term, wages and associated with it employers' health insurance and pension contributions will also fall. However, the law also resulted in an increasing reduction of the protection of workers. According to a study of the "Center for American Progress", employees in "right-to-work" states earned on average US$ 1,500 p.a. less than employees in other states. The BAK is very concerned about this kind of competition, which is based on financially starving US trade unions, and the direct consequences of wage dumping for US American employees – and subsequently for European employees. Because the EU also sees a steady rise of corporate interests, which are based on competition for lower wages at the expense of a fairer distribution of income and social peace.

1 http://survey.ituc-csi.org/USA.html?id_edi=336&print=yes

Concrete demands set out by the BAK for the sustainability chapter

One of the possible benefits of a Transatlantic Free Trade Agreement is the opportunity to strengthen the elements for working and environmental standards in the planned Chapter for Sustainable Development and to provide an example for future agreements.

- According to sustainable development, future Free Trade Agreements have to give equal consideration to **social and environmental objectives and to economic interests**. Both the EU and the United States have to ensure coherency in all their policy area – including trade policy – and comply with their international obligations, in particular in view of Human Rights

and United Nations, ILO and OECD Conventions. Hence, the Free Trade Agreement of the EU and the United States has to be structured in such a way, that these agreements are not violated. Both parties have to ensure that **all eight ILO Minimum Labour Standards will be ratified, implemented into national law and complied with**. The BAK therefore urges the EU Commission to make the compliance with these international obligations a condition for the Free Trade Agreement coming into force. The compliance with these minimum standards must be ensured by independent monitoring. In case of violations of these minimum standards, the dispute resolution procedures of the Free Trade Agreement have to be applied as a last resort.

Apart from that, it has to be ensured that the level of ambition of a sustainability chapter conforms to the level of development of a highly developed industrial country as the United States. For this reason, the EU Commission should also demand the ratification, the implementation and the application of **ILO 155 Occupational Safety and Health Convention** and the so-called "ILO Priority Conventions" (**122 Employment Policy Convention, 81 and 129 Labour Inspection Convention and 144 Tripartite Consultation Convention**).

Finally, the implementation of the so-called **Decent Work Agenda**, which was established by the ILO Declaration on Social Justice for a Fair Globalization, has to be aimed at as a longer-term perspective. The concept of decent work (Decent Work Agenda) includes, apart from the basic principles and rights at work (ILO Minimum Labour Standards), ILO Conventions concerning Productive and Freely Chosen Employment, Social Security and Social Dialogue.

- **Reporting duty on the implementation status of labour standards**: the governments of both contracting parties shall regularly report on the progress made concerning the implementation of all obligations entered into the Agreement. Apart from obligations, which are included in der ILO Declaration on Fundamental Principles and Rights at Work, this may also refer to other understandings mentioned above.

- **Non-lowering of Standards Clause (resp. Upholding Levels of Protection Clause)**: This provision shall ensure that existing social and environmental standards are not lowered to attract foreign investors.

- **Sustainability impact assessments** – Content, involvement of social partners and follow up: provisions on sustainability impact assessments should be included as well as on measures, which are taken based on the result of these assessments. Sustainability impact assessments should take all relevant aspects of the social and economic impact of the agreements into account. These include access facilities to high-quality public services and the application of different strategies, including trade-related strategies to achieve industrial development. Employee and employer representations as well as non-governmental organi-

sations have to be involved in evaluating the sustainability impact assessment on effects of the Agreement. A follow-up process has to be laid down after the sustainability impact assessment.

- **Forum for the exchange of information between governments and social partners**: A forum for trade and sustainable development should be established, which on the one hand enables the exchange of information on the implementation of the Agreement between government representatives of the partner countries and employee/employer organisations and NGOs on the other. A clearly defined appropriate balance between these three constituents should prevail in this forum. It should meet at least twice a year and give its members the opportunity to publicly discuss social issues and problems.

- **Ensure reaction by governments to complaints of the social partners**: it is important that governments will be obliged to react to officially submitted communications of their social partners by taking action. This should become a mandatory mechanism, which gives recognised employee/employer organisations and NGOs on both sides of an FTA the opportunity to submit such demands for action. Such complaints should be dealt with within a defined period (e.g. two months) and become part of a permanent follow-up and review process to ensure that governments are dealing effectively with complaints.

- **Independent experts shall assess complaints and draw up recommendations**: if complaints by a government are not satisfactorily dealt with by the other party, they should be assessed by independent and qualified experts. Relevant recommendations by experts have to be part of a determined speedy process to ensure that assessments are not only used for reports and recommendations, but also result in provisions on follow-up and revision. This shall keep up the pressure on governments to avoid violations of workers' rights in their areas. At last one independent expert should be an ILO representative.

- **The dispute resolution procedure must also be applied to the sustainability chapter**: it should be made clear that the same implementation provisions apply to the chapter on trade and sustainable development as for all other provisions of the Agreement. Hence, the stipulations of this chapter are in particular subject to the same dispute resolution treatment as all other elements of the Agreement.

- **Preventing continuous violation of minimum labour standards by imposing fines**: In the event that during the consultation procedures between governments and social partners as well as non-governmental organisations and even after the recommendations of independent experts no positive change as regards to labour law-related obligations have taken place within a reasonable time, monetary fines have to be imposed

at the end of the dispute resolution procedure. These should be high enough to act as a sufficient deterrent. The revenue from these fines should be used to improve social standard working conditions in those sectors and areas, where the relevant problems occur. In this context, technical and administrative support in cooperation with international organisations, in particular the ILO, should be provided to remedy any deficits.

- **Ensuring compliance with environmental agreements**: in order to justify the name of this chapter on trade and sustainable development, multilateral environmental agreements must also be ratified, implemented and applied alongside social standards. The environmental agreements, which were selected within the scope of the Generalized System of Preferences of the EU (GPS+), are also a valid template for bilateral free trade agreements. These are as follows: Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides.

- A sustainability chapter with relevant provisions for the protection of **Human Rights** (in particular the accession to the International Covenant on Economic, Social and Cultural Rights) should be linked to the Agreement. Embedding Human Rights in form of a so-called "Essential elements" clause is a minimum requirement. As regards content it should at least be in accordance with the wording of the Free Trade Agreement of EU and Columbia. The reference to Human Rights must not exclusively be made in the preamble, but has to be stipulated in a separate article.

4. Services

The negotiations have to be conducted on the basis of a **positive list approach** (according to the current GATS standard, liberalisation obligations have to be listed specifically) and may not be based on the adoption of far more offensive NAFTA approaches under any circumstances. In this context, the possible use of a negative list approach ("list it or lose it") and the incorporation of so-called stand still and ratchet clauses (which automatically lock-in future liberalisation measures and therefore contain an "autonomous built-in dynamic" towards liberalisation) have to be fiercely objected. In this context, we refer to the strenuous demand that the application of a negative list approach in the EU-Canada-Free Trade Agreement (CETA) must not be used as a precedent for follow-up agreements[2].

2 see European Parliament resolution of 8 June 2011 on EU-Canada trade relations, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0257&language=EN&ring=B7-2011-0344

Instead, the agreement **must leave enough policy space** to react on negative liberalisation experiences and to meet democratic demands for (re) regulation (e.g. in case of remunicipalisation). Therefore negotiators should establish a simplified modification procedure for once made liberalisation commitments and ensure sufficient regulatory flexibility.

In any case, the binding **exemption of public services** from the negotiating mandate – and thus from the scope of the Agreement – has to be ensured. The EU Commission must not open the market for these essential components of the European Welfare and Social Model. The BAK is also opposed to demands on the US to open their markets in this sector. Early assurances are required to prevent the EU Commission from making another attempt to backtrack on already established standards of protection and regulatory scope for public services (such as the level of protection and the scope of existing horizontal exemptions in the GATS-schedules of the EU: "public utilities"-clause and "subsidy reservation" for public services). This has to be ensured in negotiation guidelines by adding the following statement: "Under no circumstances the agreement should limit the ability of competent authorities at a national, regional and local level to regulate, provide and finance public services. In any case the Commission must safeguard the scope of the already existing horizontal exemption clauses on public utilities and subsidization". In this context, the issue does not only concern safeguarding existing, but also future policy space. This objective is in contrast to an exhaustive listing of public service providers at local and national level in possible commitment schedules as well as to a restriction of the existing horizontal exemption for "public utilities"[3].

Apart from that, the envisaged **expansion resp. deepening of "regulatory disciplines"** (as part of so-called "rules negotiations") should be viewed extremely critically. These negotiations could lead to a fundamental **restriction of national and local regulatory autonomy**. Here too, it is vital to ensure the scope for laying down high-quality social, consumer protection and environmental policy standards at an early stage, whereby the issue of universal service obligations is particularly sensitive. It is absolutely necessary to protect the regulatory autonomy to lay down relevant standards against an overstated interpretation of the current standard provision "not more burdensome than necessary" and any necessity tests.

Experiences of crisis over the past years show that a **comprehensive evaluation of recent liberalisations of financial services is also a special requirement**, which needs to be ensured, particularly in connection with the EU-USA negotiations. Against this background, we are opposed to further liberalisations and possible "standstill clauses", which undermine corresponding revisions. In 2009, the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System emphatically stressed the sensitivity of this issue:

3 see AK Position Paper "Services of General Interest in Bilateral Free Trade Agreements" – Reflection Paper of the European Commission, March 2011, http://www.akeuropa.eu/en/publication-full.html?doc_id=170&vID=43

"[A]ll trade agreements need to be reviewed to ensure that they are consistent with the need for an inclusive and comprehensive international regulatory framework which is conducive to crisis prevention and management, countercyclical and prudential safeguards, development, and inclusive finance. Commitments and existing multilateral agreements (such as GATS) as well as regional trade agreements, which seek greater liberalization of financial flows and services, need to be critically reviewed in terms of their balance of payments effects, their impacts on macroeconomic stability, and the scope they provide for financial regulation"[4]. In general, the **necessary (re)regulation of the crisis prone financial sector must not be restricted by any liberalisation obligations**.

Apart from that, **the binding compliance with national labour, social and collective agreement provisions must be stipulated**. In the context of an international legal vacuum to pursue violations, any further provisions on mode IV (temporary movements of natural persons) must be subject to the condition that an effective international cooperation of the legal authorities is ensured. In case of non-compliance it should be possible to use the general dispute settlement mechanism and to impose sanctions in the form of substantial fines. **At any case, it is essential to retain the destination country principle and to insert the so called "Labour Clause" in the agreement.**

4 Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, September 2009, http://www.un.org/ga/president/63/commission/financial_commission.shtml

5. Public procurement

The BAK is critical of **an unfettered liberalisation of procurement markets**. In particular in the wake of the economic crisis, it is the responsibility of the public sector to strengthen a sustainable orientation of public procurement. The latter has to **orientate itself on the highest level of environmental and social standards** and must be based on complying with minimum standards as regards the protection of workers, as included among other in ILO Core Labour Standards, Labour Clauses (Public Contracts) Convention, 1949 (No 94), Protection of Wages Convention, 1949 (No 95), Minimum Wage Fixing Convention, 1970 (No 131) and Maternity Protection Convention, 2000 (No 183). The prevailing fixation on the criterion "price" proves to be inadequate to raise the international level of labour, social and environmental standards in procurement. The **Austrian provisions on social and environmental considerations** in award procedures must not be undermined under any circumstances. Here, the public sector has to act as a **"role model" for sustainability**. The BAK is also in favour of the EU being granted the same exemptions from market access resp. from national treatment for industrial and regional policy reasons in respect of award procedures vis-à-vis the US. The EU shall effectively assert these reciprocal exemptions. **In any case, public services (and relevant contracts and concessions) have to be excluded from the scope of the Agreement.**

6. Investments

The BAK has already repeatedly explained its critical to adverse position on particular investment protection provisions (see for example the BAK Position Paper on the Investment Package of the European Commission[5] as well as the BAK Position Paper on "Demands of AK with regard to investments and investment protection in general"[6]). Not least due to the recent highly critical excesses in respect of international investment arbitration cases, we feel the need in view of the negotiating mandate with the United States to once again stress our concerns:

To start with, it has to be pointed out that the US has a well-developed legal system, comparable to the EU Member States. Hence, from our point of view, there is no convincing argument which would support the need for negotiations with the US in respect of investment protection. The BAK supports **equal treatment of European and US investors** before (national) courts and rejects any discrimination of domestic investors compared to enterprises with a seat in the United States. Negotiations on qualified investor protection are **only justified in respect of partners that show major democratic deficits and a lack of legal certainty**; in cases like this it is required to provide Austrian or European investors respectively with appropriate legal certainty for their invested capital. The socio-political costs which might result from investment protection obligations with the United States cannot be estimated and therefore bear no proportion to the possible one-sided benefit for individual business actors. These concerns are reinforced by the extremely vague terminology which is typical for investment protection provisions.

The BAK demands in detail:

- **No international investor-state dispute settlement procedure**

The BAK supports the notion that the planned Free Trade Agreement of the EU and the United States shall not contain any international investor-state dispute settlement procedure. We believe that the dispute settlement mechanisms between states provided for in bilateral free trade agreements, or state-state dispute settlement procedures within the scope of the WTO are also sufficient for investment protection. The procedural privileging of investors would not achieve the aimed at "**level playing field**".

An investor-state dispute settlement mechanism would enable investors to challenge actions and measures by recipient countries directly before international arbitration courts, without having to use the administrative and legal avenues in the recipient country first. Vice versa, states and their citizens are not able to take investors before international arbitration courts.

In addition, arbitration court practice is lacking transparency and stands in contrast to EU policy on guaranteeing access to information. There is a great reluctance to open such arbitral procedures to witness statements and statements of third parties. Apart from that,

5 http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_138.pdf.

6 http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_121.pdf.

one has to doubt the sufficient independence of the arbitrators in general, who have a tendency to assume different roles from case to case (depending on the litigation funder, they are in some cases representing the prosecution and in other cases the defence). This has not least resulted in extreme and often conflicting interpretations of investor rights.

In any case, according to the national treatment principle, the foreign investor must first exhaust domestic law, before he calls upon a dispute settlement mechanism between states or one of the common arbitral procedures ("Calvo Doctrine"). Convening an arbitration court, where appropriate, should therefore only be possible as a last resort.

- **Enshrining right to comprehensive regulatory powers**

A specific clause has to be added which determines the right of the EU and its Member States to implement "regulations" in the broadest sense ("**right to regulate**"). This clause should also functionally ensure that public policy objectives are exempt from the scope of the Agreement, not least in order to remove them from the ruling competence of arbitrators.

Public policy objectives (social, environmental, security, public health and safety) have to include in any case the rights of employees, fundamental and human rights including women's and minority rights, financial market regulation, industrial and tax policy. At the same time, it has to be ensured that the state's ability to intervene will also be maintained as regards future socio-political developments.

Furthermore, the restriction to **"legitimate" public policy objectives**, which is typically added in this context, has to be addressed. The term "legitimate" has to be deleted as it restricts the options of regulatory measures aimed at the realisation of public policy objectives.

The restriction to **non-discriminatory measures** would be equally problematic. Due to the wide range of possible interpretations of discrimination bans (possibly by taking indirect forms of discrimination into account), it would, in the opinion of the BAK, be appropriate, firstly, to specify discrimination as "direct resp. intentional discrimination" and, secondly, to ensure a respective **reversal of the burden of proof** in favour of public policy objectives.

- **Restricting the scope**

The BAK requests to generally exempt sensible sectors such as education, health, culture, services of public interest and public transport as well as policy areas such as labour and social issues, environment, financial market regulation and tax policy from the scope of the investment protection chapter.

The scope of agreements generally includes assets of any kind including intellectual property rights. The BAK believes that the new EU investment policy should be based on a clear and narrow definition of foreign direct investments, which promotes sustainable investment behaviour and in particular sustainable investments as regards social and environmental aspects in recipient countries. We are opposed to granting all types of investment the same high le-

vel of protection. **Portfolio investments** have to be exempt from the scope as these represent pure financial transactions and possibly short-term speculations, which are not foreign direct investments in the actual sense. Reference must also be made to the manifold and sometimes even unorthodox bailout measures for Member States and banks in the Eurozone. By including portfolio investments, US creditors might be overtly protected compared to European investors because their (relatively high-interest) economic investment risk would be insured against loss free of charge.

Providing clear obligations for investors within the standards of treatment

- **"Right to regulate" Clause**: Also in the concrete context of the standards of treatment, it must be ensured that Member States will have sufficient policy space to develop legislative, legal and other regulatory measures (see above).

- **Performance requirements**: We reiterate our repeated request that investors' rights must go hand in hand with obligations for investors. Overall, performance requirements have to include concrete approaches of corporate responsibility, such as due diligence, compliance with Human Rights and ILO Core Labour Standards as well as transparency (information duties towards relevant stakeholders and the interested public) and credibility criteria (independent monitoring, inclusion of relevant stakeholders). Such obligations are in accordance with the principle of fair competition and can also in countries such as the US make a significant contribution to ensuring that, for example, all relevant agreements on ILO Core Labour Standards (see above) are at last also ratified by the United States.

- Apart from that, European as well as US investors who want to become the beneficiaries of these investment protection provisions have to be obliged to **comply with the OECD Guidelines for Multinational Enterprises** as multilateral standard as well as with relevant environmental agreements.

Eliminating unfavourable pitfalls from standards of treatment

- **Fair and equitable treatment of investors** may be supported, provided its definition is based on treatment in accordance with international customary law. In contrast, the terms "fair and equitable" are usually used in a vague form, whereby they become a "catch all" clause for the treatment of foreign investors. This is sometimes even made worse as the term "fair and equitable treatment" in some instances explicitly encompasses the ban of unreasonable, arbitrary or discriminatory measures. Using such an exclusively investor-friendly specification would upgrade the principle, which at first glance appears to be inconspicuous and a matter of course, to a kind of prohibition of restrictions, comparable to the ruling of the ECJ on market freedoms of the Internal Market.

Such wording has already enabled investors to challenge a wide range of regulatory measures before international arbitration courts, including measures that have a clear public purpose. We therefore request a clarification of "fair and equitable" so that this rule cannot be asserted by investors in case of non-discriminatory measures which are taken in good faith and in the public interest, resp. that such measures are unambiguously rated as fair and equitable treatment. In this context, we also request the reversal of the burden of proof in favour of the public interest.

- **The national treatment clause** must be clarified in such a way that a claimant can only refer to this right if he or she can prove intentional or direct discrimination respectively.

- In the light of recent decisions by international investment arbitration courts, it has become necessary to totally reassess the **most favoured nation treatment clause**. The clause permits investors to "import" obligations for recipient countries from other agreements ("forum shopping"). As regards regulatory measures, the result is an incalculable risk for Member States that action might be brought against them by investors from third countries. The number of lawsuits and arbitral awards over the last decade definitely have repercussions for socio-political developments. The policy space in recipient countries – also in Europe (see the case Vattenfall vs. Germany) – is visibly shrinking if governments do not want to take a litigation risk. Hence, exemptions have to be defined also in respect of the most favoured nation clause.

- **Protection against expropriation**: As already documented in several position papers, the BAK demands that an agreement shall **only** cover **direct expropriations**. Only then can it be ensured that generally valid social and economic policy measures, including tax regulations, are protected against excessive interpretation. The compensation clause also requires comprehensive clarification: Reduced or lost future profits of investors due to regulatory measures in the public interest must not institute compensatory payments.

- Apart from that, another tendentious business-oriented orientation of the Agreement, according to which investors and investments could obtain for example **full protection and security** based on the Agreement with the US, should also be avoided. In view of the BAK, such principles do not contain any actual meaningfulness, as they do not describe **what** this protection would specifically entail. At the same time, they reinforce the tendency to interpret the agreements at the expense of public interests by aiming at structurally enshrining the subordination of public interests.

- Apart from that, we believe that **no umbrella clause** should be included in the Agreement with the US which would make the inclusion of all private law agreements between an investor and the relevant

state into the scope of the Agreement possible.

- In view of the BAK, free transfer of capital funds should also be viewed critically, in particular if pure portfolio investments are also covered by the Agreement. The **free movement of capital** can only be provided with restrictions, which are standard in other contracts (retention of financial stability, capital controls, admission requirements, etc.).

7. Intellectual property rights

A last point concerns the particularly controversial regulations of Intellectual Property Rights IPR in Free Trade Agreements. The Free Trade Agreement with the US also aims at agreements on intellectual property rights. Against the background of the negative experiences with ACTA and the fact that the US is a contractual state of ACTA, the implementation of **ACTA "through the backdoor"** should not be encouraged. Hence, the BAK takes a very critical stance in respect of including regulations on intellectual property in the Free Trade Agreement.

The inclusion of IPR provisions in the Free Trade Agreement may basically also mean a **"cementing" of the existing acquis**, with would bind the EU and the Member States to certain standards. This has a counterproductive effect on a "restructured" balanced copy right law in a digital environment, which is currently also a requirement within the scope of public discussions on copyright law. This is another important reason not to include to the regulation of intellectual property rights in Free Trade Agreements.

Apart from the holders of interests of strong property rights, which can also enforced abroad, the **interests of the public** (e.g. information access, maintaining fundamental rights such as data protection, privacy) have to be maintained and exchange of interests has to be aimed at.

Should regulations on IPR be negotiated nevertheless, a maximum level of the required transparency must be ensured during the entire negotiation processes. It has to be ensured that the social partners affected and the civil society will be able to actively participate during the negotiation process. Their concerns in respect of possible negative consequences from the Agreement have to be included in the discussion and decision-making process.

Should you have any further questions please do not hesitate to contact

Eva Dessewffy
Tel: + 43 (0) 1 501 65 2711
eva.dessewffy@akwien.at

and

Frank Ey
(in our Brussels Office)
T +32 (0) 2 230 62 54
frank.ey@akeuropa.eu

Bundesarbeitskammer Österreich
Prinz-Eugen-Strasse, 20-22
A-1040 Vienna, Austria
T +43 (0) 1 501 65-0
F +43 (0) 1 501 65-0

AK EUROPA
Permanent Representation of Austria
to the EU
Avenue de Cortenbergh, 30
B-1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73