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AK Position Paper

# Public Consultation on a multilateral reform of investment dispute resolution

## About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 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 Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.**

**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). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske  
President

Christoph Klein  
Director

## Executive Summary

Within the framework of the compulsory impact assessment that must go hand in hand with new dossiers, the Commission has launched a public consultation on the establishment of a permanent investment dispute settlement mechanism. The questionnaire that is presented in the consultation is based on the assumption, that the respondent agrees in principle with the investment dispute settlement regime and that isolated improvements of the investor-to-state dispute settlement mechanism will help legitimise the system itself.

Against the backdrop of an advancing globalisation process that calls for improved international cooperation and particularly improved law enforcement, the BAK will take part in the consultation by giving a more fundamental assessment of the Commission's initiative. Yet, what is needed primarily on the international level are effective enforcement mechanisms for fundamental rights as opposed to the stabilisation and expansion of the rights for corporations. However, human rights must prevail over trade and investment privileges.

## The AK's position in detail

The BAK criticises that

- the scope of the consultation only comprises procedural rules (appointment and remuneration of judges, assumption of legal costs for SMEs by public authorities, arbitration panel including an appeal body or an Appellate Body etc.). Yet, the concept of investment protection treaties with substantial protection provisions for foreign investors should be subject to scrutiny. However, those treaties in themselves fall outside the scope of the consultation.
- Once again, the Commission avoids the fundamental discussion about investment protection for multinational corporations and fails to consider the massive critique that was already expressed within the framework of the Commission's consultation on ISDS and TTIP early in 2014. The Commission ignores the concerns voiced by trade unions, civil society organisations, scholars and other public stakeholders to discuss the negative impacts of globalisation in a fundamental manner.
- "better" procedural rules in international investment arbitration will not solve the underlying problem: ISDS creates a parallel jurisdiction that grants foreign investors special privileges without imposing them any obligations.

### **An institutionalised multilateral investment arbitration court (MIC)**

In the framework of the MIC initiative, the Commission partially addresses some of the critical points regarding private arbitration panels that were repeatedly raised by the BAK and advocates "transparency, consistency, efficiency and impartiality". It was possible to establish the current system of private ad hoc investment arbitration tribunals because compared to a system that is institutionalised, it can be implemented easily and in a bilateral manner. Therefore, there are reasonable doubts whether it is politically feasible to achieve specific amendments to a regime that is fundamentally unsatisfactory. What is more, comparable efforts to reform the system carried out by the World Bank (regarding procedural rules of ICSID) have ended in talk only a few years ago. The current development of terminating bilateral investment protection treaties also contrasts the institutionalisation of ISDS.

## Basic arguments

Based on our general guidelines, we will evaluate the elements of a Multilateral Investment Court (MIC) brought up for discussion:

- The general conditions of globalisation need to be fair in order to resolve the regulatory gap and counter a competition among locations that goes to the detriment of employees. This includes an effective system for the enforcement of human rights (including property rights), social rights and environmental objectives, including in the supply chain. To foster positive investments, property rights of foreign investors must be balanced with corresponding obligations. Those obligations should serve the enforcement of basic European values regarding social and environmental, but particularly human, labour, development and women's rights.
- The BAK questions why international tribunals specifically reinforce and protect the rights of investors. From our point of view, we must make the solution of the major regulatory problems that are related to globalisation a priority. Therefore, social and labour rights, as well as corporate human rights due diligence in the supply chain must be enforced effectively. Furthermore, democratic governments need to defend their regulatory scope for action in order to be able to react adequately to the environmental and human rights challenges in the future.
- The level of legal protection that the investment protection regime grants to investors goes far beyond usual property rights and comprises civil law, general administrative law and social and tax law. The investment protection regime grants a small interest group privileges that discriminate a vast majority of the society (domestic investors, trade unions, employees, consumers and civil society).
- When investors receive a powerful instrument with which they influence and potentially prevent legislative initiatives in the public interest through lawsuits or even the threat of a lawsuit, democratic decision-making procedures are at risk. Particularly, if investors can get high compensation payments at the expense of the tax payer.
- The right to regulate is not protected in the investment protection regime: It is in the responsibility of the tribunal to balance the proportionality of new legislative measures to the far-reaching investment protection regarding potential damages claims. The MIC does not reach far enough and does not dispel the concerns voiced by the BAK; we see therefore the need to concentrate the limited resources for negotiations on more promising reform debates with wide-ranging solutions. As a result, initiatives fostering "global governance" and serving the enforcement of social, human, environmental, health and labour law in the context of international law must be prioritised. This is why the "TNC Treaty Process" in the Human Rights Council and the "Post-2015 Sustainable Development Agenda (UNCTAD) in the framework of the United Nations must be actively promoted.

- The current investment protection regime should expire: bigger emerging countries such as India, South Africa and Indonesia have already terminated their bilateral investment protection treaties (BITs). The substantial rights that those investment protection treaties contained and not the ISDS dispute settlement mechanism primarily triggered the rationale behind those decisions. Other emerging players such as Mexico, Turkey, Peru, the Philippines and Indonesia criticise the substantive rights in bilateral investment treaties and focus currently on a reform of their respective investment protection regime (including model BITs or regional arbitration panels). With respect to the Intra-EU BITs we argue that those do not comply with EU law. An infringement procedure with regard to this issue is currently pending.

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

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