FTA

FOREIGN TRADE ASSOCIATION

FTA POSITION REGARDING THE WTO INVESTMENT AGREEMENT

By calling for negotiations on a new Investment Agreement, the WTO-members have committed themselves to the promotion of foreign investments in a climate of legal security, predictability and transparency for all parties involved.

The FTA welcomes this step and is ready to help create a modern and liberal multilateral agreement, providing the following indispensable principles:

- ➔ Asset-based definition of 'investment'
- ➔ Strong and effective protection against expropriation or similar instruments
- ➔ Definition of the term 'expropriation'
- ➔ Negative-list approach regarding the pre-establishment conditions
- ➔ Transparency, non-discrimination and MFN-treatment as overall principles
- ➔ Free transfer of all funds, related with an 'investment'
- ➔ Full extension of the WTO dispute settlement procedure on all provisions

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Foreign investment has traditionally been an industry-related issue. But world economy is changing. The European trading sector, facing increasing competition in decreasing domestic markets, searches its way into third countries with lower labour costs and promising consumer structures. This investment flow benefits everyone: Increasing turnover, higher profits and less dependence on the economic situation at home strengthens the investors while third countries achieve long-term commitments, lasting assets and sustainable development without dept obligations. The inter-dependence between trade and foreign investment becomes quite obvious regarding the big retailers who gain up to 75 % of their total turnover abroad.

But foreign investment does not only have positive effects on economy. Close and various business relations have also a positive impact on the political relationships between the countries involved.

In order to "…secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment,.." the WTO-Ministers agreed in Doha on taking up negotiations after the Fifth Ministerial Conference and create a multilateral investment framework "…that will contribute to the expansion of trade.." (Art. 20 DDA).

The FTA welcomes the launch of negotiations on a multilateral investment framework by the WTO.

It will in fact lead to a more stable and transparent climate for foreign investment worldwide. It will in addition lead to the reduction of foreign investment constraints, a freer investment environment and consequently a greater investment flow in the future, the main asset on our way to economic growth and social security.

Core Elements of a WTO Investment Agreement

The FTA believes that the WTO should focus on the following issues in order to achieve an agreement to the benefit of all parties involved.

Scope and Definition

A legal framework, binding more than 140 WTO-members, must focus on principles and clear definitions, in order to create international standards, investors can rely on. Considering the Investment Agreement as an instrument contributing to the expansion of trade (Art. 20 Doha Ministerial Declaration), it must provide a free investment climate with as little constraints as possible.

The scope of this new WTO-agreement should therefore be a wide one. But it is also very important not to overburden it with details.

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It should not suffocate the developing countries, which are in need of a balance between their own national developing policies and their commitments under the WTO. Important issues like social standards must and should be dealt with in other appropriate frameworks. Remembering the failure of the MIA-negotiations, the WTO-members must now concentrate on the main principles for investment.

Following the above-mentioned need for a wide-scoped WTO Investment Agreement, FTA promotes an asset-based definition of 'Investment'. This seems to be in the interest of the member states, regarding the fact, that most of the BITs in force follow this principle. The agreement must encourage and protect any investment flow. Not only should cross-border investments with long-term aims be included, but also joint ventures, strategic alliances, real property, intellectual property, trademarks, BOT-projects, legal rights (like licenses) and any other form of participation in a company (like shares, bonds, etc.).

'Investor' should be any entity behind the above-mentioned 'investment'.

Investment Protection

One of the first questions an investor will check before stepping abroad will be, whether he runs a risk of being expropriated.

A WTO Investment Agreement must deal with this worst-case scenario and provide strong and effective protection against any kind of expropriation or instruments with the same effect.

Expropriation and similar instruments must be categorised as a very rare exception to the rules, acceptable only under very narrow conditions (for public purpose only, guarantees of prompt, adequate and effective compensation, paid in freely convertible currencies).

It is not sufficient to deal with this question exclusively in the framework of BITs. In order to link every WTO-member with every other member, another 7.500 BITs would have to be negotiated. This means, that at present, a large number of potential host-countries (for example China) cannot guarantee proper protection despite the existence of 1800 BITs.

The WTO-agreement now offers the chance to provide investors from WTO-member states with at least a clear definition of expropriation and instruments with a similar effect. Regarding the fact, that both terms can easily be interpreted in various ways, an investor, relying on investment protection, might face bad surprises because a host-state follows an unusual definition of expropriation and is not willing to compensate for loss of property, as initially expected.

The FTA strongly encourages the WTO to complete the list of negotiated items by adding the two important aspects: protection against and definition of expropriation.

<u>Pre-Establishment Conditions</u>

Art. 22 of the Doha Ministerial Declaration calls for "modalities for pre-establishment commitments based on a GATS-type, positive list approach". This will imply, that foreign investors cannot invest in the host-country, unless the specific sector is enumerated in a positive list.

Despite the great interest any country has in the attraction of foreign investment, it might be more difficult for a government to decide on a positive list, than to exclude some sectors in a negative list. The amount of sectors, open to foreign investment, will be smaller within a positive list approach and will increase much slower, as updates will depend on further negotiations. This is detrimental to the main target of the Investment Agreement: It will hinder investment instead of promoting it. It will involuntarily encourage protectionist decisions. And it will lead to an imbalance between those developing countries, that are experienced and ready to open up their markets and others, that are not capable or aware of the need to react and attract foreign investment. Sectors that are at present open for investment would after the agreement be closed in those countries, that lack the capacities to decide on a positive-list in time.

A free investment climate must follow the principle "anything not forbidden is allowed". Within a negative-list approach, host-countries would grant Investors access to all sectors. Some sectors could completely or partly be excluded. This would give all member states the option to limit foreign investment in specific sectors, according to their needs and development levels.

The FTA therefore promotes a negative list approach.

<u>Transparency and Non-Discrimination</u>

All national provisions affecting the investor's rights or duties in the pre-establishment and post-establishment phase should be published in national official journals, publicly available on the Internet.

The WTO-agreement should contain protective clauses against hidden taxes, retroactive regulations with detrimental effects and disadvantages an investor has suffered, due to corruption within the national authorities.

The foreign investor should in the post-establishment phase enjoy national and MFN-treatment, but should also be able to be treated more favourable than local enterprises (for example regarding taxation). The same principles must apply within the pre-establishment phase, excluding only investments in the negative-list sectors.

The introduction of new national measures with negative effects on investments should be notified in advance to other WTO-parties.

Free transfer of funds

The FTA emphasizes the importance for investors of freedom in transfer of funds.
The WTO-Agreement must include clear provisions guaranteeing investors the freedom to transfer all payments related to an investment without delay and in a freely convertible currency.

Settlement of disputes

Effective dispute settlement mechanisms are essential to secure the benefits of a WTO-agreement on investment. Existing provisions on dispute settlement within BITs are in their variety not sufficient to provide legal security and transparency to all WTO-members, especially not to those without BITs.
The FTA is therefore convinced, that the WTO-agreement must include this issue, favouring a full extension of the WTO dispute settlement procedure to all provisions of the WTO Investment Agreement.

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