

Important Note

The author's original summary, preliminary technical remarks, explanations, comments and notes to this model treaty are in the German language. **The English version of the summary, the preliminary technical remarks, the explanations, comments and notes printed hereunder is only an unofficial preliminary translation and may be used for reference purposes only.**

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Model bilateral investment treaty with investor-state dispute settlement for industrial countries, giving consideration to the U.S.

Summary

This draft bilateral investment treaty addresses areas for reform which have been identified by the European Commission and others in the course of the TTIP consultation process:

- Protection of the state's right to regulate
- Establishment of a dispute-settlement procedure which meets the requirements of the rule of law
- Clarification of the relationship between domestic legal protection and ISDS
- Review of the decisions of the ISDS mechanisms by a second instance

Basically, the draft provides for the following:

1. The substantive standards of protection are defined in a way that does not grant foreign investors further-reaching protection than domestic firms. To this end the standards of fair and equitable treatment and indirect expropriation have been further specified. Additionally, the state's right to regulate is protected by exceptions for public policy. As a result, action by the state would not be subject to greater restraints than those which derive from national, and particularly constitutional, law of a state under the rule of law. A corresponding clause in the preamble puts emphasis on this policy. In order not to grant foreign investors greater protection than domestic investors it could be sufficient to restrict investor protection to the non-discrimination standards of national treatment and most-favoured nation treatment. In a treaty between states with a functioning legal system it could be contemplated to dispense with additional standards of protection.

2. As an instrument of legal protection, it is suggested that the present customary investor-state tribunals are replaced by a bilateral tribunal responsible for the specific treaty (e.g. U.S.-EU Permanent Investment Tribunal) which has a set number of potential judges who are chosen abstractly for an individual case, so that the parties to the dispute have no influence on

the choice of judges. Since the contracting parties nominate the judges, it is also ensured that the panel of judges will not be dominated by large firms of attorneys. Also, the procedures should be transparent, and the code of conduct for the judges should be prescribed by means of rules of procedure. This would ensure that the dispute settlement proceedings are based on the rule of law.

3. Further to this, a standing review body is to be established which is only responsible for the respective treaty and which can undertake comprehensive scrutiny of the law and restricted scrutiny of the facts on which the tribunal's rulings are based.

4. The relationship between legal protection at the domestic level and the international tribunal can either be designed on a subsidiary basis, so that it is first necessary to exhaust national legal remedies before a complaint can be lodged at international level, or on an alternative basis, so that the investor who makes a complaint to the international tribunal has to finally and fully waive its right to legal protection from the national courts.

Preliminary technical remark

The text presented here is intended for a treaty which is devoted exclusively to investment protection and not to trade and investment liberalisation, and therefore it does not contain any provisions on market access. The CETA text has been used as a basis for the scope of application and the material legal standards. Some wordings from the EU-Singapore FTA have also been used. Some of these have been substantially modified. No text was taken as a basis for the procedural section. Rather, wordings have been taken from CETA and other treaties and altered. In some cases, entirely new texts have been drafted.

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Preamble

The parties to the present agreement

AIMING at establishing clear, transparent and predictable mutually advantageous rules to govern their investment relations;

REAFFIRMING their commitment to promote sustainable development and the development of international investment in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

DETERMINED to implement this Agreement in a manner consistent with the enhancement of the levels of labour and environmental protection and the enforcement of their labour and environmental laws and policies, building on their international commitments on labour and environment matters;

ENCOURAGE enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct;

RECOGNIZING that the protection of investments, and investors with respect to their investments, stimulates mutually beneficial business activity;

RECOGNIZING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;

REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security;

REAFFIRMING that foreign investors and investments are protected under domestic law, including constitutional standards of property protection and that this agreement does not provide a higher level of protection to foreign investors than provided by each Contracting Party to its own domestic investors and investments;

RECOGNIZING that the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives such as public health, safety, environment and the promotion and protection of cultural diversity, media freedom and media pluralism; and

AFFIRMING [their commitments as Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and recognizing] that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, preserving their cultural identity, media freedom and media pluralism, including through the use of regulatory measures and financial support.

Explanation

The recitals in the preamble to a treaty are not a legally binding part of a treaty. However, they are of relevance to the interpretation of the treaty, as they set out its objectives.

What we have here are the recitals from the preamble to CETA, supplemented by references to media freedom and media plurality, and without the trade-specific recitals. In an agreement with the United States, the reference to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions should be deleted, since the U.S. is not a contracting party and cannot currently be expected to become one.

An important detail is the point that it is the common understanding of the contracting parties that the treaty does not grant greater material rights to foreign investors than those enjoyed by domestic investors.

Section I - Scope and Definitions

Article 1 - Scope of Application

1. This agreement shall apply to measures adopted or maintained by a Contracting Party in its territory relating to investors of the other Contracting Party and covered investments.
2. This agreement does not apply to measures relating to:
 - a) the rescheduling, restructuring, or conversion in any form of a debt issued by a Contracting Party including debts issued at central, regional and local governments (public debt);
 - b) the resolution or restructuring of a bank and other financial institution which is no longer viable or faces financial difficulties in accordance with the law applying to such resolution or restructuring; and
 - c) procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of goods or the supply of services for commercial sale.

Explanation:

The basis for this is the CETA text. The exclusion of governmental authority and air transport services is only of relevance to the trade section, and is not cited here. Instead, the excluded area is extended to include measures relating to debt relief and bank resolution and restructuring. In this way, investment protection should not apply to a field which is important for measures to tackle economic and financial crises. The exemption for procurement is taken from the EU-Singapore FTA.

Article 2 - Definitions

For the purpose of this Agreement:

applicable law means all legal measures of general application of a Contracting Party.

confidential or protected information means:

- a) confidential business information; or
- b) information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the tribunal.

Contracting Parties means X [Country], the EU and its Member States.

covered investment means, with respect to a Contracting Party, an investment:

- a) in its territory;
- b) made in accordance with the applicable law at that time;
- c) directly owned or controlled by an investor of the other Contracting Party; and
- d) existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter.

disputing party means either the investor that initiates proceedings pursuant to Section IV or the respondent.

enterprise means any entity duly constituted or otherwise organized under the applicable law, of a Contracting Party whether for profit or otherwise, and whether privately-owned or controlled or governmentally owned or controlled, including any corporation, trust, partnership, joint venture, sole proprietorship or association and a branch or representative office of any such entity.

investment means:

Every kind of asset that an investor directly owns or controls that has the characteristics of an investment, which includes a certain duration and the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a) an enterprise;
- b) shares, stocks and other forms of equity participation in an enterprise;
- c) bonds, debentures and other debt instruments of an enterprise;
- d) a loan to an enterprise;
- e) an interest arising from a turnkey, construction, production, or revenue-sharing contract, or other similar contracts;
- f) intellectual property rights;
- g) any other moveable property, tangible or intangible, or immovable property and related rights; or
- h) claims to money or claims to performance under a contract;

For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or an enterprise in the territory of a Contracting Party to a natural person or enterprise in the territory of the other Contracting Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.

For greater certainty, interests arising from a concession in the absence of any substantial economic activity based on the concession, do not constitute an 'investment'

Returns that are re-invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment.

investor means a natural person or an enterprise of a Contracting Party, other than a branch or a representative office, that is making or has made an investment in the territory of the other Contracting Party.

For the purposes of this definition an 'enterprise of a Contracting Party' is:

- a) an enterprise that is constituted or organised under the laws of that Contracting Party and has substantial business activities in the territory of that Contracting Party;
- or
- b) an enterprise that is constituted or organised under the laws of that Contracting Party and is directly or indirectly owned or controlled by a natural person of that Contracting Party or by an enterprise mentioned under a).

For greater certainty, "substantial business activities in the territory of the Contracting Party" excludes activities of shell companies or companies solely holding shares of another company and requires such elements as a recognisable physical presence, actual economic activities in the territory of the Contracting Party and a considerable number of employees in view of the actual economic activity of the enterprise.

For the purposes of this agreement an enterprise is:

- (i) "owned" by an investor of a Contracting Party if more than 50 percent of the equity interests in it is owned by the investor;
- (ii) "controlled" by an investor of a Contracting Party if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;"

locally established enterprise means a juridical person which has the nationality of the respondent and which is owned or controlled, directly or indirectly, by an investor of the other Contracting Party.

natural person means

- a) in the case of X (...); and
- b) in the case of the EU, a natural person having the nationality of one of the Member States of the EU according to their respective legislation, and, for Latvia, also a natural person permanently residing in the Republic of Latvia who is not a citizen of the Republic of Latvia or any other state but who is

entitled, under laws and regulations of the Republic of Latvia, to receive a non-citizen's passport.

A natural person who is a citizen of X and has the nationality of one of the Member States of the EU shall be deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality.

A natural person who has the nationality of one of the Member States of the European Union or is a citizen of X, and is also a permanent resident of the other Contracting Party, shall be deemed to be exclusively a natural person of the Contracting Party of his or her nationality or citizenship, as applicable.

non-disputing Party means either X where the European Union or a Member State is the respondent, or the European Union or a Member State, where X is the respondent.

respondent means either X or, in the case of the European Union, either the Member State or the European Union pursuant to Article 27.

returns means all amounts yielded by an investment or reinvestment, including profits, royalties and interest or other fees and payments in kind.

UNCITRAL Transparency Rules means the UNCITRAL Rules on Transparency in Treaty based Investor-State Arbitration.

Explanation:

The proposed deviations from CETA affect the definition of “investment” and “investor”. The deletion of the wording “other characteristics such as” used in the investment definition of CETA makes the open-ended list of features of an investment an exhaustive list, showing clearly that only typical and traditional investment characteristics count. For this reason, the open-ended term “other kinds of interest in an enterprise” has also been deleted. Furthermore, interests which derive solely from concessions without commercial activities are excluded as a form of covered investment. This appears appropriate in view of the fracking issue.

Under the definition of “investor”, a contracting party cannot itself be an investor. The definition of the term “substantial business activities”, which excludes shell companies, is based on *Pac Rim v El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 4.72.

In line with CETA, the concept of “investment” is broad. However, it would be worthwhile to reflect on whether a narrower definition with an exhaustive list would be sufficient in treaties with industrial countries.

Section II - Standards of treatment

Article 3 - National Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. For greater certainty, this includes quantitative expansions of the production or service capacity in respect of a covered investment, provided that such expansions relate to the same product or service which has been approved or licensed by the host state as a permissible investment in accordance with domestic law and this Treaty at the time of establishment.

2. The treatment accorded by a Contracting Party under paragraph 1 means, with respect to a government in X other than at the federal level, or, with respect to a government of or in a European Member State, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Contracting Party in its territory and to investments of such investors.

3. For greater certainty, treatment accorded by the Member States of the European Union under paragraph 1 does not extend to nationals or juridical persons of the other Party the treatment granted in a Member State to the nationals and juridical persons of another Member State of the European Union pursuant to the Treaty on the Functioning of the European Union, or to any measure adopted pursuant to that Treaty, including their implementation in the Member States. Such treatment is granted only to legal persons of the other Party established in accordance with the law of another Member State and having their registered office, central administration or principal place of business in that Member State, including those legal persons established within the EU which are owned or controlled by nationals of the other Party.

4. For greater certainty, a measure distinguishing between investors based on the private or public nature of their ownership shall not be considered treatment less favourable in the meaning of paragraph 1.

5. This Article shall not apply

- a) to subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees and insurance;
- b) taxation measures including measures implementing international taxation conventions and double taxation treaties; and
- c) audiovisual services and cultural industries.

Explanation

The National Treatment clause in CETA is basically used here, with some additions and modifications. Since this is solely an investment protection treaty, “establishment”, “acquisition” and “expansion” are deleted, since only the post-establishment phase is relevant. However, a mere capacity expansion within an existing approval is covered. In order to clarify this, it is recommended that the National Treatment standard be defined in a way which means that measures which (only) distinguish between public and private property are not regarded as discriminatory. Like the CETA chapter on trade in services, paragraph 3 excludes the possibility for foreign investors to refer to internal market rights of the EU which are only granted if the foreign investor establishes itself in the EU and founds a company under the law of an EU Member State. The exclusion of subsidies from the NT clause derives from the Singapore-EU FTA.

Article 4 - Most-Favoured-Nation Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party and to covered investments, treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. For greater certainty, this includes quantitative expansions of the production or service capacity in respect of a covered investment, provided that such expansions relate to the same product or service which has been approved or licensed by the host state as a permissible investment in accordance with domestic law and this Treaty at the time of establishment.

2. For greater certainty, the treatment accorded by a Contracting Party under paragraph 1 means, with respect to a government in X other than at the federal level, or, with respect to a government of or in a European Member State, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of any third country.

3. Paragraph 1 shall not apply to treatment accorded by a Contracting Party providing for recognition, including through arrangements or agreements with third parties recognising accreditation of testing and analysis services and service suppliers or repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results or work done by such accredited services and service suppliers.

4. For greater certainty, the “treatment” referred to in Paragraph 1 and 2 does not include substantive obligations and investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements including agreements establishing a regional economic integration organisation.

5. This Article shall not apply

- a) to subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees and insurance;

- b) taxation measures including measures implementing international taxation conventions and double taxation treaties; and
- c) audiovisual services and cultural industries.

Explanation

To a large extent, the MFN clauses in CETA are used here, with some additions and modifications. In particular, the exclusion of the possibility to import substantive and procedural standards from other BITs via MFN is important. However, the wording is made clearer here. Also, it is proposed that the restriction of MFN should not be qualified, since this makes the application of the provision more predictable. The exclusion of subsidies from the NT clause contained in the Singapore-EU FTA has been extended to MFN. Since this is solely an investment protection treaty, “establishment”, “acquisition” and “expansion” are deleted in MFN and NT, since only the post-establishment phase is relevant. However, a mere capacity expansion within an existing approval is covered.

Note

In the political arena and the academic debate, there are increasing calls - at least in relation to the U.S. and other industrial countries - for foreign investors to be given the same standard of protection as domestic companies, but no better material protection (cf. the document by the social democratic trade ministers “Improvements to CETA and beyond: Making a milestone for modern investment protection” and Kleinheisterkamp/Poulsen, Investment Protection in TTIP: Three Feasible Proposals, 2014). Some people have suggested that this necessitates the inclusion of a “No greater rights” clause in the treaty in order to ensure that investors do not enjoy better protection than domestic investors.

From a systematic perspective, however, such a provision is neither necessary nor useful. If the aim is to ensure that foreign companies are granted the same protection as domestic companies, it is sufficient for the treaty to define only NT as a standard of protection. Standards of protection like fair and equitable treatment and protection against expropriation are then no longer necessary, since they will have a function if - and only if - the foreign investor is to be granted better or additional protection. For this reason, it makes sense to dispense with the protection standards of fair and equitable treatment and indirect expropriation in a treaty with the U.S. or other countries with a legal system comparable to the German rule of law and only to include non-discrimination standards.

If this is not desired, or not attainable, these standards of protection should in essence not exceed the protection offered by the law of a state under the rule of law. To this end suggestions for specifying the standards have been made hereunder. That this corresponds to the will of the contracting parties not to grant greater protection can be seen from the recital added to the preamble.

Article 5 - Fair and Equitable Treatment

1. Each Contracting Party shall accord in its territory to covered investments of the other Contracting Party and to investors with respect to their covered investments fair and equitable treatment in accordance with paragraphs 2 to 6.

2. A Contracting Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 only where a measure or series of measures constitutes:

- a) denial of justice in criminal, civil or administrative proceedings; for greater certainty, the sole fact that the claim or application of an investor has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice;
- b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- c) manifest arbitrariness; for greater certainty, a measure is manifestly arbitrary if it is not based on a rational reason;
- d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- e) abusive treatment of investors, such as coercion, duress and harassment;

3. The Contracting Parties shall regularly, or upon request of one Contracting Party, review the content of the obligation to provide fair and equitable treatment. The Committee of the Contracting Parties may develop recommendations in this regard.

[4. When applying the fair and equitable treatment obligation, a tribunal may only consider a frustration of the expectations of an investor by a Contracting Party with regard to its covered investment if these expectations were based on a specific legally binding promise to induce the covered investment by the investor made by an authority competent to make such a promise and in accordance with the laws of the Contracting Party. Such a promise cannot waive any binding obligations of the investor contrary to national law and cannot limit the right of a Contracting Party to adopt, maintain or repeal any laws or regulations in accordance with domestic law.]

5. When applying the fair and equitable treatment obligation, a tribunal shall give appropriate regard to the right to regulate of a Contracting Party and leave a margin of appreciation to the respective Contracting Party.

6. For greater clarity, the adoption, change or repeal of measures of general application such as laws, regulations and other general rules shall not be considered a violation of the fair and equitable treatments standard unless the conditions of section 2 are met.

7. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

8. For greater certainty, a Contracting Party's decision not to issue, renew or maintain a subsidy or grant,

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant,

shall not constitute a breach of this article.

Explanation

One of the key problematic legal concepts in FET and indirect expropriation is the reference to “legitimate” expectations. It is therefore proposed that this term not be used. In this case, paragraph 4 should be deleted. If it is not possible to dispense with the concept of legitimate expectations, it should be qualified and oriented to the standard which applies to an assurance under administrative law (Section 38 of the German Federal Administrative Procedure Act). The right to regulate and a margin of appreciation (cf. ECHR case law) should continue to be used as an aid to interpretation. The FET standard for legislative measures is restricted to manifestly arbitrary actions and direct discrimination for manifestly unlawful reasons. Paragraphs 7 and 8 have been taken from the EU-Singapore FTA.

Article 6 - Full Protection and Security

Each Contracting Party shall accord in its territory to covered investments of the other Contracting Party and to investors with respect to their covered investments full protection and security. For greater certainty, ‘full protection and security’ refers to the Contracting Party’s obligations relating to physical security of investors and covered investments.

Explanation

For systematic reasons, this clause has been cast in a separate article.

Article 7 - Expropriation

1. Neither Contracting Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except:

- a) for a public purpose;
- b) under due process of law;
- c) in a non-discriminatory manner; and
- d) against payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with the Annex on the clarification of expropriation.

2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be

paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.

4. The investor affected shall have a right, under the law of the expropriating Contracting Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement').

6. For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with TRIPS, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement does not establish that there has been an expropriation.

7. For greater certainty, a Contracting Party's decision not to issue, renew or maintain a subsidy or grant,

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy or grant; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant shall not constitute an expropriation.

Annex on the clarification of expropriation

The Contracting Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

b) indirect expropriation occurs where a measure or series of measures of a Contracting Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Contracting Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers:

a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

b) the duration of the measure or series of measures by a Contracting Party; and

- c) the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, non-discriminatory measures of a Contracting Party that are designed and applied to protect public welfare objectives, such as protecting health, safety, labour and social policies, consumer protection, the environment, cultural and linguistic diversity, media freedom and pluralism, do not constitute indirect expropriations by themselves.

Explanation

As with FET, it is proposed that the reference to legitimate expectations be deleted, and that the definition be worded more clearly and restricted to certain groups. Also, the clause on the protection of national legislation and measures has been worded more clearly. Unlike in the CETA text, reference is not made to “rare exceptional cases”; rather, it is made clear that non-discriminatory measures to protect health, the environment, etc. *per se*, and thus generally, do not represent indirect expropriation. In fact, additional features (cf. paragraph 2) should be added.

Article 8 - Compensation for Losses

As in CETA

Article 9 - Transfers

As in CETA, with the following addition:

5. The provisions of this Article shall not be so construed as to prevent a Contracting Party from fulfilling in good faith its obligations as a member of a regional economic integration organisation.

6. Provided that measures are consistent with the Articles of the Agreement of the International Monetary Fund, as applicable, nothing in this Article shall prevent a Contracting Party from restricting transfers on a nondiscriminatory basis in the event of serious balance-of-payment and external financial difficulties or a threat thereof if transfers cause or threaten to cause serious difficulties in macroeconomic management, in particular, related to monetary and exchange rate policies.

Explanation

This is the wording from the German BIT which was rendered necessary by ECJ case-law. If the treaty is concluded as a mixed agreement, i.e. if a Member State can also be a party to the dispute, this clause should be included.

The second exception refers to balance-of-payments difficulties and controls on the movement of capital in financial and monetary crises.

Article 10 - Subrogation

As in CETA

Article 11 - Corporate Social Responsibility

The Contracting Parties reaffirm their commitments to encourage enterprises operating within their territories or subject to their jurisdictions to respect internationally recognized standards and principles of corporate social responsibility, which have been endorsed by the Contracting Parties, including the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights.

Explanation

This clause takes up the significance mentioned in the preamble of existing international standards for multinational enterprises, and underpins the guidelines in this regard which have been adopted by the contracting parties.

Section III - Exceptions

Article 12 - General exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures by a Contracting Party necessary:

- a) to protect public security or to maintain public order only, but only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society
- b) to protect human, animal or plant life or health, including environmental measures;
- c) to protect social and labour laws and collective bargaining agreements;
- d) to implement its human rights obligations;
- e) to preserve the diversity of cultural expressions;
- f) for the conservation of living or non-living exhaustible natural resources; and
- g) to secure compliance with laws or regulations including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety.

Explanation

In WTO law, general exceptions have helped to ensure that a balance is struck between trade interests and non-commercial interests. In traditional BITs, this instrument is only found in isolated instances.

Derogation clauses are one way to exceptionally justify the violation of a standard which applies under international law. They thus foster an appropriate balance between state regulation and private commercial interests. That is why both EU and WTO rules contain derogation clauses for all fundamental freedoms and trade law standards (e.g. Art. 36 TFEU or Art. XX GATT), and the courts or WTO panels have no problems with this. There is no reason to assume that this will be different for bilateral investment treaties. The proposed wording is based on Art. XX GATT, supplemented by further public interests. The qualification that the measures have to be necessary takes up the standard of proportionality familiar from WTO law.

Article 13 - National security exception

As in Art. X.05 CETA Exceptions

Article 14 - Taxation

As in Art. X.06 CETA Exceptions

Article 15 - Prudential Carve-out

Nothing in this Agreement shall prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, including:

- a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a Financial Institution, a cross-border financial service supplier or a financial service supplier;
- b) the maintenance of the safety, soundness, integrity or financial responsibility of a Financial Institution, cross-border financial service supplier or financial service supplier; or
- c) ensuring the integrity and stability of a Contracting Party's financial system such as measures in line with common international prudential commitments or in pursuance of the preservation or the restoration of financial stability, in response to a system-wide financial crisis.

Explanations

The wording on the prudential carve-out, which is familiar from the chapters on the liberalisation of financial services, should also be used. It can be specified in greater detail as proposed here.

Section IV - Dispute Settlement

Article 16 - Permanent International Investment Tribunal

1. A [NAME OF THE AGREEMENT] [X-EU] permanent international investment tribunal for the settlement of disputes between the Contracting Parties and between an investor of one Contracting Party and the other Contracting Party is hereby established (the Tribunal).
2. The Tribunal shall be assisted by a Secretariat. The Secretariat shall perform the tasks of the registry of the Tribunal and perform such organisational and administrative tasks as may be necessary for the fulfilment of the duties of the Tribunal.
3. The seat of the Tribunal shall be X (e. g. Washington, D.C.) and Brussels.

Note

Disputes between the contracting parties and investor-state disputes should no longer be decided by ad-hoc tribunals whose arbitrators are selected by the parties, but exclusively by a permanent bilateral international tribunal. However, the tribunal is not in session permanently, but only when a case is pending. In order to make it clear that the tribunal is only responsible for the specific treaty, the name of the treaty or the name of the contracting parties can be used in its title, i.e. for example TTIP or EU-U.S. Permanent International Investment Tribunal.

The tribunal's secretariat should serve as a registry and give administrative and logistical support to the tribunal's decision-making bodies. The staff of the secretariat should not have any material decision-making functions. The precise tasks and composition of the secretariat should be stipulated in the Rules of Procedure (Art. 21). It is possible for the contracting parties to have the tasks of the secretariat carried out by officials of the national ministries.

Article 17 - Jurisdiction

1. The Tribunal shall have the exclusive competence to decide legal disputes between the Contracting Parties and between a Contracting Party and an investor of the other Contracting Party arising directly out of a covered investment.
2. A dispute between an investor and a Contracting Party must be based on a claim that the relevant Contracting Party has breached an obligation under this Agreement and that the investor of the other Contracting Party has incurred loss or damage by that breach.

Article 18 - Governing Law

1. The Tribunal shall make its award based on the provisions of this Agreement interpreted and applied in accordance with the rules of interpretation of international law.
2. An interpretation by the Contracting Parties of a provision of this Agreement shall be binding on the Tribunal.

Article 19 - Members of the Tribunal

1. The Tribunal shall consist of any multitude of three as determined by the Contracting Parties.
2. X shall appoint one third of the members of the Tribunal and the EU and its Member States shall appoint one third of the members of the Tribunal. The Contracting Parties shall jointly appoint the remaining third of the members of the Tribunal.
3. Members of the Tribunal shall be persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial office and shall have demonstrated a high level of professional independence and impartiality. They shall be qualified in international law and in domestic public law.
4. The members of the Tribunal shall be independent and impartial. They shall serve in their individual capacity. They shall decide the dispute on a neutral basis.
5. Each member shall be appointed for a period of four years. Reappointment shall be possible for one additional period of four years.
6. The members of the Tribunal shall be available at all times and on short notice. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

Explanation

A tribunal with six, nine, twelve etc. arbitrators is proposed. The composition of the tribunals is based on existing investment tribunals (cf. Tietje, Ein internationales Handels- und Investitionsgericht für TTIP (und CETA)?, Policy Papers on Transnational Economic Law, 2015, p. 5.). One third of the arbitrators is nominated by each of the contracting parties. The remaining third - which includes the chairs of the panel, cf. Art. 20 - is nominated jointly by the contracting parties. This means that the appointment of the arbitrators is exclusively in state (or EU) hands. The states are therefore at liberty to ensure that, when the arbitrators are appointed, large law firms are not able to influence the composition of the tribunal.

Article 20 - Composition of Panels

1. Each dispute shall be decided by a standing panel of three members. Each Panel shall be composed of one member appointed by each Contracting Party of this Agreement and a third member chosen from the members appointed jointly by the Contracting Parties in accordance with Article 19 paragraph 2.
2. Each Panel shall be composed of one President and two ordinary members. The presidents of the panels shall be selected by the Contracting Parties.

Explanation

The panels consist of one arbitrator nominated by the EU, one by the other contracting party, and one chair. The chairs should be selected from the list of arbitrators nominated jointly by both parties.

Article 21 - Rules of Procedure

1. Within six months after the entry into force of this agreement, the Committee of the Contracting Parties shall adopt the Rules of Procedure of the Tribunal and of the Appellate Review Mechanism. These Rules shall specify the form of the submission of the claim as well as the requirements of written and oral proceedings before the Tribunal and the Appellate Review Mechanism. The Rules shall also specify the functions of the Secretariat.
2. The Rules of Procedure for the Tribunal shall establish the rules for the distribution of the cases to the panels in an abstract manner. The distribution can be decided by lot, by the order of the filing of disputes or by any other condition which ensures that cases are distributed without influence from the parties of the dispute. For greater certainty, the parties to the dispute cannot choose the panel or the members of the Panel which will decide the dispute.

Explanation

Since, going by the model proposed here, the tribunal cannot operate on the basis of ICSID, UNICITRAL or other procedural rules for arbitration, it will need its own rules of procedure. For technical legal reasons, it makes sense for a separate committee to be responsible for the designing of the procedure whose members are representatives of the contracting parties. In drafting the procedure, this committee is bound by the competence-related requirements prescribed by Paragraph 2, in line with the principle of the lawful judge.

Article 22 - Code of Conduct

1. A Panel member shall be excused due to lack of impartiality and independence or a conflict of interests. A conflict of interests shall exist inter alia if a Panel member has served as legal counsel to one of the disputing parties in a previous matter.

2. The Committee of the Contracting Parties shall establish a Code of Conduct specifying the conduct of the panel members and the grounds for excusing a Panel member. The Code shall be binding on the members of the Tribunal. In adopting the Code, the Committee shall take the IBA Guidelines on Conflicts of Interest in International Arbitration into consideration.

Explanation

The provision stipulates the legal consequences of restrictions on the independence or the impartiality of members of the tribunal, and requires the adoption of a binding code of conduct.

Article 23 - Small enterprises

The Contracting Parties recognise that access to the Tribunal may be difficult for small enterprises with limited financial means. Within one year after the entry into force of this agreement, the Committee of the Contracting Parties shall develop appropriate remedies. These may include the establishment of a legal aid mechanism or the relaxation of the requirements of Article 29 or a limitation of the right of the respondent to appeal a decision of the Tribunal pursuant to Article 33 for certain claims or certain groups of investors.

Explanation

In order to ensure the effective use of dispute settlement for smaller companies, various possibilities are feasible, such as a legal aid mechanism, a relaxation of procedural rules or an exclusion of the possibility for the state to appeal.

Article 24 - Consultations

1. Any dispute should, as far as possible, be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced.

2. Before an investor submits a claim to the tribunal, recourse shall be held to settling the dispute through consultations or mediation.

3. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations.

Article 25 - Mediation

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing Contracting Party under this Chapter and shall be governed by rules on Mediation adopted by the Committee of the Contracting Parties.

Explanation:

As with CETA, an out-of-court dispute-settlement procedure must be established. The details of the mediation procedure will be stipulated by the committee of the contracting parties.

Article 26 - Determination of the respondent for disputes with the European Union or its Member States

1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim to the Tribunal, the investor shall deliver to the European Union a notice requesting a determination of the respondent.
2. The notice shall identify the measures in respect of which the investor intends to initiate arbitration proceedings.
3. The European Union shall after completion of the respective legal requirements and procedures inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent. The tribunal shall be bound by this determination.
4. If the investor has not been informed of the determination within 50 days of the notice referred to in paragraph 1:
 - a) where the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be respondent;
 - b) where the measures identified in the notice include measures of the European Union, the European Union shall be respondent.
5. The investor may submit a claim to arbitration on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated, on the basis of the application of paragraph 4.
6. Where either the European Union or the Member State is the respondent, pursuant to paragraph 3, neither the European Union, nor the Member State may assert the inadmissibility of the claim, lack of jurisdiction of the tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3.

Explanation

The rules on the distribution of responsibilities are based on the CETA text, but deviate from it in that there is no clause governing assumptions as to whether the investor's application is correct.

Article 27 - Requirements for the Submission of a Claim by an Investor

1. An investor may only submit a claim to the dispute settlement mechanism after all domestic remedies have been exhausted, according to the generally recognised rules of international law. The exhaustion of domestic remedies is not required if such remedies are not available or manifestly ineffective / domestic courts are unable or unwilling to provide legal protection.

ALTERNATIVE

1. An investor may only submit a claim if the investor waives its right and the rights of its locally established subsidiaries to initiate any claim or proceeding with respect to any measure alleged to constitute a breach referred to in its claim to arbitration before a tribunal or court under domestic or international law.

If the investor or its locally established subsidiaries has initiated a claim or proceeding relating to the same subject matter or underlying measure before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, the investor may only submit a claim if it provides a declaration that it has fully and finally withdrawn any such claim or proceeding. The declaration shall contain, as applicable, proof of the withdrawal of any such claim or proceeding.

2. At the time of submitting a claim, the investor shall declare whether he / she received any third party funding in the form of financial donations, grants, guarantees for the claim.

Explanation

The relationship between national and international jurisdiction can be shaped either on a subsidiary or on an alternative basis. Problems arise when investors can take a cumulative approach. That possibility should be excluded. Since it is not possible to have both a subsidiary and a cumulative relationship, paragraph 1 is formulated taking a subsidiary approach in Alternative 1 (exhaustion of local remedies). In Alternative 2 the investor has to forego legal recourse to the national courts, if he intends to file a claim before the international tribunal.

An argument in favour of the subsidiary option is that it corresponds to the traditional principle of international tribunals, i.e. that the matter should not be assessed under international law until there has been a final and binding ruling by the domestic court system. The fact that this can put even the rulings of the supreme national courts to the test is normal in international law. This neither results in a super-appeal nor in a breach of the principle of

res judicata. The standard of the local remedies rule proposed here is in line with the standard of the ECHR and the Rome Statute. Contrary to arguments made elsewhere (Tietje, op. cit, p. 9), a local remedies rule does not require that the treaty be directly applicable. The “self-correction” by the relevant state of the measure which is contrary to international law is also possible on the basis of domestic law, and is the normal case in traditional international law.

The alternative option covers both the investor and its local subsidiaries, in order to prevent these from appealing to the national courts whilst the foreign parent company lodges an international complaint about the same case. At the same time, it not only covers cases in which legal protection is oriented to payment of compensation, but all procedures which challenge the same measure. This would exclude a “Vattenfall II” scenario, which means that an investor cannot claim revocation of a measure in front of a national court and at the same time request payment of damages in front of an arbitral tribunal.

Article 28 - Transparency

1. The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes before the Tribunal with the following modifications.
2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge, the request for consolidation and settlements between the disputing parties shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules. These documents shall be made publicly available as soon as they have been submitted to the other Contracting Party with the exception of confidential or protected information. The documents shall be made publicly available by the Secretariat.
3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.
4. Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.
5. Nothing in this Agreement requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.

Explanation

The clause is based on the CETA text with minor alterations. In particular, it is proposed that conciliation settlements should also be published.

Article 29 - Non-disputing third party

The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement. The non-disputing Party may attend a hearing held under this Section.

Article 30 - Costs and fees

1. Within six months after the entry into force of this agreement, the Committee of the Contracting Parties shall adopt Rules on Costs and Fees of the Tribunal, including a schedule of fees. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. As a rule, the losing party shall bear its own costs, the costs of the dispute and the costs of the other party. The Rules on Costs may include the right of a Panel to order the losing party to pay a punitive fee if its claim was obviously frivolous.

3. The Rules on Costs and Fees shall determine the remuneration of the Members and Presidents of the Tribunal and the Appellate Review Mechanism.

Article 31 - Determination of compensation and damages

Compensation shall be limited to direct losses and may not include loss of future profits. Compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles, taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. Punitive and moral damages are excluded.

Explanation

The level of damages/compensation to be paid has a crucial impact on the scope of restriction on the right to regulate deriving from investment protection. It is therefore proposed that the nature and level of the compensation be restricted, and that various factors be envisaged which must be taken into account in the calculation. The wordings come from the document “Expropriation: A Sequel, UNCTAD Series on Issues of International Investment Agreements II”, UNCTAD 2012, p. 135.

Article 32 - Appellate Review Panel

1. Decisions of the Tribunal are subject to an Appellate Review Panel on appeal by a party to the dispute. An appeal shall be filed within one month of the decision of the Tribunal.
2. The Appellate Review Panel shall be composed of five members. The Members of the Appellate Review Panel shall be jointly appointed by the Contracting Parties. The Members shall serve for a four-year term, and each person may be reappointed once.
3. The Appellate Review Panel shall comprise persons of highest moral character and with a demonstrated high level of professional independence and impartiality. They shall be recognised and respected experts of international law. They shall be independent and impartial. They shall serve in their individual capacity. They shall decide the dispute on a neutral basis.
4. All persons serving on the Appellate Review Panel shall be available at all times and on short notice. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
5. The grounds for appeal shall be limited to the following grounds:
 - a) that the Tribunal had no jurisdiction or manifestly exceeded its powers;
 - b) that there was corruption on the part of a member of the Tribunal;
 - c) that there had been an erroneous interpretation of this agreement;
 - d) that the Tribunal manifestly misinterpreted the facts of the case; and
 - e) that facts which were not known at the time of the decision of the Tribunal would alter the merits of the claim.
6. Article 22 para. 1 shall also apply *mutatis mutandis* to the members of the Appellate Review Panel. All members of the Appellate Review Panel shall be bound by the Code of Conduct.

Explanation:

The grounds for an appeal take up the grounds for an annulment pursuant to the ICSID Convention, with the addition of manifest errors in the application of the law and misinterpretations of the facts, and of new facts. The possibilities for an appeal by the state could be reduced or designed differently for claims of small enterprises with respect to proceedings in accordance with Art. 23.

Article 33 - Decisions

Decisions of the Tribunal shall be final unless a party to the disputes appeals. Decisions of the Appellate Review Mechanism shall be final.

Decisions of the Tribunal shall be immediately enforceable in the Contracting Parties' territory in the same manner as a finally enforceable judgement delivered by their own competent courts. For greater certainty, decisions rendered against a Member State of the European Union shall be enforceable in the territories of all other Member States of the

European Union in the same manner as decisions of domestic courts on the basis of applicable EU law.

Explanation

The decisions by the tribunal are not arbitral awards as defined in the New York Convention. Their enforcement must be specifically imposed. There is no review of enforceability by a national court.

That would mean that the enforcement in France of a ruling made against Germany would take place in line with the EU rules on the enforcement of civil judgements in the EU. There is no need to alter EU law, since the treaty makes the rulings of the tribunal equivalent to rulings by Member State courts.

Section V - Miscellaneous and final provisions

Article 34 - Committee of the Contracting Parties

A Committee of the Contracting Parties is hereby established. It shall meet at least once a year to review the implementation of this agreement and to adopt the Rules stipulated in Articles 21, 22 and 23. The Committee shall also meet at any other time at the request of one Contracting Party. The Committee shall be competent to adopt binding decisions on the interpretation of the provisions of this agreement.

Article 35 - Denial of Benefits

Article 35 - Denial of Benefits

A Contracting Party may deny the benefits of this Chapter to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if:

- a) investors of a non-Party own or control the enterprise;
- b) the denying Contracting Party adopts or maintains measures with respect to the non-Party that:
 - (i.) are related to maintenance of international peace and security; and
 - (ii.) prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments; or
- c) an investment or investor has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

Explanation:

The clause is based on the CETA text.

Article 36 - Entry into force, amendments and duration

1. The Contracting Parties shall approve this Agreement in accordance with their own procedures.
2. This Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other that the procedures referred to in the first paragraph have been completed. The Contracting Parties may by mutual agreement fix another date.
3. The Contracting Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Contracting Parties exchange written notifications certifying that they have completed their respective applicable internal requirements and procedures, on such date as the Contracting Parties may agree.
4. This Treaty shall remain in force for a period of XX years and shall lapse thereafter unless the Contracting Parties expressly agree in writing that it shall be renewed.

Article 37 - Termination

1. This Agreement may be terminated after its entry into force if either Contracting Party gives to the other Contracting Party a prior notice in writing 60 days in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated after 6 months from the date of receipt of such written notice.

[2. Notwithstanding paragraph 1, in the event that the present Agreement is terminated, the provisions of this Agreement shall continue to be effective for a further period of 20 [10] [5] years from that date in respect of investments made before the date of termination of the present Agreement.] [For greater certainty, it is hereby clarified that upon its termination, the Treaty shall not apply in respect of Investments made or acquired after the date of termination of the Treaty.]

In witness whereof (...)

Explanations:

In addition to the usual possibility to terminate the treaty, there is also a sunset clause. As a further variation, the extension to the duration of protection afforded by the treaty beyond its period of validity could be restricted or excluded.