

Projekt Nr. 83/15 des Bundesministeriums für Wirtschaft und Energie

## **Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA**

### **Zusammenfassung**

Der hier vorgelegte Entwurf für ein Investitionsschutzabkommen greift Reformbereiche auf, die u.a. von der EU-Kommission als Ergebnis des TTIP-Konsultationsprozesses identifiziert wurden:

- Schutz des staatlichen Regulierungsrechts („right to regulate“)
- Schaffung eines Streitbeilegungsverfahrens, das rechtsstaatlichen Anforderungen genügt
- Klärung des Verhältnisses von innerstaatlichem Rechtsschutz und Investor-Staat-Streitbeilegung
- Überprüfung der Entscheidungen des Investor-Staat-Streitbeilegungsmechanismus durch eine zweite Instanz

Der Entwurf sieht im Kern folgendes vor:

1. Die materiellen Schutzstandards werden so gefasst, dass ausländische Investoren keinen weiter reichenden Schutz als inländische Unternehmen erhalten. Dazu werden die Schutzstandards der billigen und gerechten Behandlung sowie der indirekten Enteignung weiter konkretisiert. Zusätzlich wird das staatliche Regulierungsrecht durch Ausnahmetatbestände für öffentliche Allgemeinwohlziele geschützt. Im Ergebnis wird staatliches Handeln auf diese Weise keinen größeren Einschränkungen unterworfen sein als den Einschränkungen, die sich aus dem nationalen Recht, insbesondere dem Verfassungsrecht eines funktionierenden Rechtsstaats ergeben. Durch eine entsprechende Präambelerwägung wird dieses Ergebnis unterstrichen. Um ausländischen Investoren keine weiter reichenden Schutz zu gewähren als Inländern könnte es grundsätzlich sogar ausreichend sein, den Investorenschutz auf die Nichtdiskriminierungsstandards der Inländerbehandlung und der Meistbegünstigung zu beschränken. Bei einem Abkommen zwischen Staaten mit funktionierenden Rechtssystemen wäre es daher denkbar, auf weitere materielle Schutzstandards zu verzichten.

2. Als Rechtsschutzinstrument wird vorgeschlagen, die bisher üblichen Investor-Staat-Schiedsgerichte durch ein für das jeweilige Abkommen zuständiges bilaterales Gericht (z. B. US-EU Permanent Investment Tribunal) zu ersetzen, das über eine festgelegte Richterschaft verfügt, deren Zuständigkeit im Einzelfall abstrakt festgelegt wird, so dass die Streitparteien keinen Einfluss auf die Wahl der (Schieds-)richter haben. Da die Vertragsparteien des Abkommens die Richter ernennen, ist auch sichergestellt, dass die Richterschaft nicht von großen Anwaltskanzleien dominiert wird. Zudem sollen die Verfahren transparent sein und

der Verhaltenskodex der Richter durch Verfahrensregeln zwingend vorgegeben werden. Damit würde das Streitbeilegungsverfahren rechtsstaatlich ausgestaltet.

3. Weiterhin soll ein ständiges Überprüfungsorgan errichtet werden, das nur für das jeweilige Abkommen zuständig ist und das eine umfassende Rechtskontrolle und eine eingeschränkte Tatsachenkontrolle der Entscheidungen des Gerichts vornehmen kann.

4. Das Verhältnis zwischen nationalem Rechtsschutz und dem internationalen Gericht kann entweder sukzessiv gestaltet werden, so dass zunächst der nationale Rechtsweg durchlaufen werden muss, bevor auf internationaler Ebene geklagt werden kann oder alternativ, so dass der Investor bei einer Klage vor dem internationalen Gericht auf innerstaatlichen Rechtsschutz endgültig und vollständig verzichten muss.

### **Technische Vorbemerkung**

Der hier vorgelegte Text orientiert sich an einem ausschließlich dem Investitionsschutz und nicht der Handels- und Investitionsliberalisierung gewidmeten Abkommen und enthält daher keine Vorschriften zum Marktzugang. Als Grundlage für den Anwendungsbereich und die materiell-rechtlichen Standards wurde der CETA-Text verwendet. Teilweise sind auch Formulierungen aus dem EU-Singapur FTA eingeflossen. Die entsprechenden Formulierungen wurden teils erheblich modifiziert. Im prozessualen Teil wurde kein Text zu Grunde gelegt. Vielmehr sind die Formulierungen teils aus dem CETA und teils aus anderen Abkommen übernommen und abgewandelt worden. Teilweise sind vollkommen neue Texte entworfen worden.

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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.

## ***Erläuterung***

Die Präambelerwägungen eines Abkommens stellen keinen rechtlich bindenden Teil eines Abkommens dar. Sie sind allerdings für die Auslegung des Abkommens relevant, da sie dessen Ziele darlegen.

Es handelt sich um die Präambelerwägungen des CETA-Abkommens teilweise ergänzt um Hinweise auf Medienfreiheit und Medienvielfalt und ohne die handelsspezifischen Erwägungsgründe. Bei einem Abkommen mit den USA ist der Hinweis auf die UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions zu streichen, da die USA nicht Vertragspartei sind, und derzeit nicht zu erwarten ist, dass sie dies jemals werden.

Eine wichtige Präzisierung bezieht sich darauf, dass das Abkommen nach dem gemeinsamen Verständnis der Vertragsparteien ausländischen Investoren keine weitergehenden materiellen Rechte einräumt als inländischen Investoren.

## **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.

## ***Erläuterung:***

Grundlage ist der CETA-Text. Der nur für den handelsbezogenen Teilbereich relevante Ausschluss von hoheitlichen Maßnahmen („governmental authority“) und Luftverkehrsdienstleistungen wurde nicht aufgenommen. Stattdessen wird der Ausschlussbereich um Maßnahmen im Rahmen von Entschuldungen sowie Bankenauflösungen und –umstrukturierungen ergänzt. Damit soll der Anwendungsbereich des

Investitionsschutzes in diesem für Maßnahmen zur Bewältigung von Finanz- und Wirtschaftskrisen wichtigen Bereich ausgeschlossen werden. Die Ausnahme für Beschaffung stammt aus dem EU-Singapur 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.

### ***Erläuterung:***

Die vorgeschlagenen Abweichungen von CETA betreffen die Definition von Investment und den Investorbegriff. Durch die Streichung des in der Investmentdefinition von CETA verwendeten Begriffs „other characteristics such as“ wird aus der offenen Liste von Eigenschaften einer Investition eine abschließende Liste, die deutlich macht, dass nur typische und klassische Investitionseigenschaften zählen. Daher wurde auch der unbestimmte Begriff „other kinds of interest in an enterprise“ gestrichen. Zusätzlich wird das sich ausschließlich aus Konzessionen ergebende Interesse ohne kommerzielle Nutzung als Form von Investitionen ausgeschlossen. Mit Blick auf die Fracking-Problematik scheint das angezeigt.

Im Rahmen der Definition des Investorbegriffs wird die Investoreneigenschaft einer Vertragspartei ausgeschlossen. Das heißt, dass eine Vertragspartei selbst nicht als Investor auftreten kann. Die Definition des Begriffs „substantial business activities“, der sog. Briefkastenfirmen vom Anwendungsbereich ausschließt, basiert auf *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 Anlehnung an das CETA wurde der Investitionsbegriff weit gelassen. Es wäre jedoch zu überlegen, ob bei Abkommen mit Industriestaaten eine eingeschränktere Definition mit abschließender Liste ausreicht.

## **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.

## ***Erläuterung***

Die National Treatment-Klausel des CETA wird im Kern übernommen, aber ergänzt und modifiziert. Da es sich um ein reines Investitionsschutzabkommen handelt, wird „establishment“, „acquisition“ und „expansion“ gestrichen, da nur die post-establishment Phase relevant ist. Allerdings wird eine bloße Kapazitätsausweitung innerhalb einer bestehenden Genehmigung auch mitefassen. Zur Klarstellung wird empfohlen, den National Treatment-Standard so zu präzisieren, dass Maßnahmen, die (nur) zwischen öffentlichen und privaten Eigentum unterscheiden, nicht als diskriminierend angesehen werden. Absatz 3 schließt – ähnlich wie im CETA Kapitel über Dienstleistungsverkehr – aus, dass sich ausländische Investoren auf die Binnenmarktrechte der EU berufen können, die nur zugestanden werden, wenn sich der ausländische Investor in der EU niederlässt und ein Unternehmen nach dem Recht eines EU-Mitgliedstaats gründet. Der Ausschluss von Subventionen aus dem NT-Schutzbereich stammt aus dem Singapur-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.

### *Erläuterung*

Die MFN-Klauseln des CETA werden weitgehend übernommen, aber ergänzt und modifiziert. Insbesondere der Ausschluss des Imports von materiellen und prozessualen Standards aus anderen BITs durch MFN ist wichtig. Die Passage wird allerdings klarer gefasst. Ebenso wird vorgeschlagen, die Einschränkung von MFN ohne Qualifizierung vorzunehmen, da die Anwendung der Vorschrift so berechenbarer wird. Der Ausschluss von Subventionen aus dem NT-Schutzbereich aus dem Singapur-EU FTA wurde auf MFN ausgedehnt. Da es sich um ein reines Investitionsschutzabkommen handelt, wird „establishment“, „acquisition“ und „expansion“ in MFN und national treatment gestrichen, da nur die post-establishment Phase relevant ist. Allerdings wird eine bloße Kapazitätsausweitung innerhalb einer bestehenden Genehmigung auch miterfasst.

### *Hinweis*

Im politischen Raum und in der Fachdiskussion wird zunehmend gefordert, dass – jedenfalls im Verhältnis zu den USA und anderen Industriestaaten – ausländischen Investoren der gleiche Schutzstandard zugestanden wird wie inländischen Unternehmen, aber kein besserer materieller Schutz (vgl. das Dokument der sozialdemokratischen Handelsminister „Improvements to CETA and beyond: Making a milestone for modern investment protection“ sowie Kleinheisterkamp/Poulsen, Investment Protection in TTIP: Three Feasible Proposals, 2014). Hieraus wurde teilweise abgeleitet, eine sog. „No greater rights“-Klausel in das Abkommen aufzunehmen, um sicher zu stellen, dass Investoren keinen besseren Schutz als inländische Investoren erhalten.

Systematisch wäre eine solche Vorschrift jedoch weder erforderlich noch sinnvoll. Will man erreichen, dass ausländische Unternehmen den gleichen Schutz erhalten wie inländische Unternehmen, ist es ausreichend, wenn das Abkommen als Schutzstandard nur Inländerbehandlung enthält. Schutzstandards wie faire und gerechte Behandlung, sowie Enteignungsschutz sind dann nicht erforderlich, denn sie entfalten eine Funktion eben gerade dann, aber auch nur dann, wenn dem ausländischen Investor ein besserer oder zusätzlicher Schutz zugebilligt werden soll. Aus diesen Gründen ist es empfehlenswert, im Rahmen eines Abkommens mit den USA oder anderen Staaten, die über ein funktionierendes Rechtssystem verfügen, das dem deutschen Rechtsstaat vergleichbar ist, auf die Schutzstandards der fairen und gerechten Behandlung und indirekten Enteignung zu verzichten und nur Nichtdiskriminierungsstandards aufzunehmen.

Wenn dies nicht gewünscht wird oder nicht durchsetzbar ist, sollten diese Standards jedenfalls in der Sache nicht über den Schutzstandard nach dem Recht eines funktionierenden Rechtsstaats hinausgehen. Dazu werden im Folgenden Konkretisierungen der Standards vorgeschlagen. Dass damit der Wille der Vertragsparteien einhergeht, keinen weiter reichenden Schutz zu gewähren, ergibt sich auch aus dem eingefügten Erwägungsgrund in der Präambel.

## **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.

### ***Erläuterung***

Eine der zentralen problematischen Rechtsbegriffe bei FET und indirect expropriation ist der Bezug auf “legitimate” expectations. Es wird daher zunächst vorgeschlagen, auf diesen Begriff zu verzichten. In diesem Fall wäre Absatz 4 zu streichen. Wenn auf den Begriff der legitimate expectations nicht verzichtet werden kann, sollte er qualifiziert werden und an dem Standard orientiert werden, der für eine verwaltungsrechtliche Zusicherung (§ 38 VwVfG) gilt. Weiterhin sollte das right to regulate und ein margin of appreciation (vgl. EGMR-Rechtsprechung) als Interpretationshilfe herangezogen werden. Der FET-Standard bei legislativen Maßnahmen wird auf offensichtliche Willkür und direkte Diskriminierungen aus offensichtlich rechtswidrigen Gründen beschränkt. Absätze 7 und 8 wurden aus dem EU-Singapur FTA übernommen.

### **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.

### ***Erläuterung***

Dieser Standard wurde aus systematischen Gründen in einen eigenständigen Artikel übernommen.

### **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.

### ***Erläuterung***

Ebenso wie bei FET wird vorgeschlagen, den Bezug auf "legitimate" expectations zu streichen, die Definition klarer zu fassen und auf bestimmte Fallgruppen zu begrenzen. Außerdem wurde die Vorschrift zum Schutz nationaler Gesetze und Maßnahmen klarer gefasst. Anders als im CETA-Text wird nicht auf „seltene Ausnahmefälle“ abgestellt, sondern deutlich, dass nicht-diskriminierende Maßnahmen zum Schutz der Gesundheit, Umwelt etc. an sich und damit im Regelfall keine indirekten Enteignungen darstellen. Es müssen vielmehr zusätzliche Merkmale (vgl. Absatz 2) hinzutreten.

### **Article 8 - Compensation for Losses**

Wie CETA

### **Article 9 - Transfers**

Wie CETA mit folgender Ergänzung:

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.

### ***Erläuterung***

Es handelt sich um die Formulierung aus dem deutschen BIT, die durch die EuGH-Rechtsprechung notwendig geworden war. Wenn die Abkommen als gemischte Abkommen abgeschlossen werden, also auch ein Mitgliedstaat Streitpartei werden kann, sollte diese Klausel aufgenommen werden.

Die zweite Ausnahme betrifft Zahlungsbilanzschwierigkeiten und Kapitalverkehrskontrollen bei Finanz- und Währungskrisen.

## **Article 10 - Subrogation**

Wie 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.

### ***Erläuterung***

Die Klausel greift die bereits in der Präambel erwähnte Bedeutung bestehender internationaler Standards für multinationale Unternehmen auf und bekräftigt die diesbezüglichen Richtlinien, die von den Vertragsparteien angenommen wurden.

## **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.

### ***Erläuterung***

Allgemeine Ausnahmetatbestände haben im WTO-Recht dazu beigetragen, dass Handelsinteressen und nicht-wirtschaftliche Interessen ausgeglichen werden können. Dieses Instrument besteht in klassischen BITs allenfalls vereinzelt.

Ausnahmeklauseln sind eine Möglichkeit, die Verletzung eines völkerrechtlichen Standards ausnahmsweise zu rechtfertigen. Sie tragen so zu einem angemessenen Ausgleich zwischen staatlicher Regulierung und den privaten Wirtschaftsinteressen bei. So bestehen im EU- und WTO-Recht auch für alle Grundfreiheiten und handelsrechtlichen Standards Ausnahmeklauseln (z. B. Art. 36 AEUV oder Art. XX GATT), mit denen die Rechtsprechung gut zurechtkommt. Es gibt keinen Grund anzunehmen, dass dies für Investitionsschutzabkommen anders sein sollte. Die vorgeschlagene Formulierung lehnt sich an Art. XX GATT an, ergänzt durch weitere öffentliche Interessen. Durch die Qualifikation, dass die Maßnahmen „necessary“ sein müssen, wird der aus dem WTO-Recht vertraute Verhältnismäßigkeitsstandard übernommen.

### **Article 13 - National security exception**

Wie Art. X.05 CETA Exceptions

### **Article 14 - Taxation**

Wie 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.

***Erläuterung:***

Die aus den Kapiteln zu Finanzdienstleistungsliberalisierung bekannte Formulierung des prudential carve-out sollte ebenfalls übernommen werden. Sie kann wie vorgeschlagen konkretisiert werden.

**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.

***Anmerkung***

Streitigkeiten zwischen den Vertragsparteien und Investor-Staat-Streitigkeiten sollen nicht mehr von ad hoc Schiedsgerichten, deren Schiedsrichter von den Parteien gewählt werden, entscheiden werden, sondern ausschließlich von einem ständigen bilateralen internationalen Gericht. Das Gericht tagt jedoch nicht ständig, sondern nur, wenn ein Fall anhängig gemacht wird. Um deutlich zu machen, dass das Gericht nur für das jeweilige Abkommen zuständig ist, kann der Abkommensname oder der Name der Vertragsparteien im Titel verwendet werden, also z. B. TTIP oder EU-US Permanent International Investment Tribunal.

Das Sekretariat des Tribunals soll als Registratur dienen und die Entscheidungsgremien des Tribunals administrativ und logistisch unterstützen. Die Mitarbeiter des Sekretariats sollen keine eigenen Sachentscheidungsfunktionen haben. Die genauen Aufgaben und die Zusammensetzung des Sekretariats sollten in den Rules of Procedure (Art. 21) festgelegt werden. Es ist möglich, dass die Vertragsparteien die Sekretariatsaufgaben durch Beamte der nationalen Ministerien erfüllen lassen.

## **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.

### ***Erläuterung***

Vorgeschlagen wird ein Gericht mit sechs, neun, zwölf etc. RichterInnen. Die Zusammensetzung der Spruchkörper orientiert sich an bereits bestehenden Investitionsgerichten (vgl. Tietje, Ein internationales Handels- und Investitionsgericht für TTIP (und CETA)?, Policy Papers on Transnational Economic Law, 2015, S. 5.). Je ein Drittel der RichterInnen wird von den Vertragsparteien benannt. Das dritte Drittel – aus dem sich auch die Vorsitzenden der Panels zusammensetzen, vgl. Art. 20 – benennen die Vertragsparteien gemeinsam. Damit bleibt die Bestellung der RichterInnen ausschließlich in staatlicher (bzw. EU-) Hand. Den Staaten bleibt es daher unbenommen, bei der Bestellung der RichterInnen sicher zu stellen, dass der Einfluss großer Anwaltskanzleien auf die Zusammensetzung des Gerichts ausgeschlossen ist.

### **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.

### ***Erläuterung***

Die Spruchkammern setzen sich aus je einem von der EU und der anderen Vertragspartei ernannten RichterInnen und einem/einer Vorsitzenden zusammen. Die Vorsitzenden sollen dabei aus der Liste der von beiden Parteien gemeinsam ernannten RichterInnen gewählt werden.

### **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.

### ***Erläuterung***

Da das Tribunal nach dem hier vorgeschlagenen Modell nicht auf der Grundlage von ICSID, UNICITRAL oder anderen Schiedsordnungen operieren kann, ist eine eigene Verfahrensordnung erforderlich. Aus rechtstechnischen Gründen erscheint es sinnvoll, die Ausgestaltung des Verfahrens einem besonderen Ausschuss zu übertragen, dessen Mitglieder Vertreter der Vertragsparteien sind. . Dieser Ausschuss hat bei der Ausgestaltung des Verfahrens die in Absatz 2 formulierten Anforderungen an die Zuständigkeit, die dem Grundsatz des gesetzlichen Richters entsprechen, zu beachten.

### **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.

### ***Erläuterung***

Die Vorschrift legt die Rechtsfolgen der Einschränkung der Unabhängigkeit bzw. von Befangenheiten der Mitglieder des Tribunals fest und verlangt die Verabschiedung eines verbindlichen Verhaltenskodex.

### **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.

### ***Erläuterung***

Zur Sicherstellung der effektiven Nutzung der Streitbeilegung für kleinere Unternehmen sind verschiedene Möglichkeiten denkbar, wie ein Prozesskostenhilfemechanismus oder Verfahrenserleichterungen oder ein Ausschluss der Berufungsmöglichkeit für den Staat.

## **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.

### ***Erläuterung:***

Wie bei CETA wird hier verpflichtend eine außergerichtliche Streitbeilegung angeordnet. Die weitere Ausgestaltung des Mediationsverfahrens wird dem Ausschuss der Vertragsparteien übertragen.

## **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.

### ***Erläuterung***

Die Regeln zur Zuständigkeitsverteilung beruhen im Kern auf dem CETA-Text, weichen aber insofern ab, als es keine Vermutungsregel bezüglich der Richtigkeit des Antrags des Investors gibt.

### **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.

## ***Erläuterung***

Das Verhältnis von nationaler und internationaler Gerichtsbarkeit kann entweder sukzessiv oder alternativ gestaltet werden. Probleme entstehen, wenn Investoren kumulativ vorgehen können. Dies sollte ausgeschlossen werden. Da sich ein sukzessives und ein kumulatives Verhältnis ausschließen, ist Absatz 1 in der ersten Alternative als “exhaustion of local remedies” (sukzessive Variante). In der zweiten Alternative muss der Investor auf den nationalen Rechtsweg verzichten, wenn er vor dem Internationalen Gericht klagen will.

Für die sukzessive Variante spricht, dass sie dem klassischen Grundsatz völkerrechtlicher Gerichtsbarkeit entspricht. Danach soll eine völkerrechtliche Bewertung eines Sachverhalts erst erfolgen, wenn dieser endgültig und abschließend durch die innerstaatliche Gerichtsbarkeit beurteilt wurde. Dass dabei auch höchstrichterliche Entscheidungen nationaler Gerichte auf den Prüfstand gestellt werden, ist der völkerrechtliche Normalfall. Dadurch kommt es weder zu einer Superrevision noch zu einer Rechtskraftdurchbrechung. Der hier vorgeschlagene Standard der local remedies-Regel entspricht dem Standard des EGMR bzw. des Statuts von Rom. Anders als teilweise vertreten (Tietje, a.a.O., S. 9) setzt eine „local remedies“-Regel keine unmittelbare Anwendbarkeit des Abkommens voraus. Die „Selbstkorrektur“ der völkerrechtswidrigen Maßnahme durch den betroffenen Staat ist auch auf der Grundlage des innerstaatlichen Rechts möglich und im klassischen Völkerrecht der Normalfall.

Die alternative Variante erfasst neben dem Investor auch dessen örtliche Tochtergesellschaften, um zu verhindern, dass diese innerstaatlich klagen, während die ausländische Mutter in der gleichen Sache international klagt. Gleichzeitig erfasst sie nicht nur Fälle, in denen der Rechtsschutz auf Schadensersatz gerichtet ist, sondern alle Verfahren, die sich gegen die gleiche Maßnahme richten. Das „Vattenfall II“-Szenario wäre damit ausgeschlossen, d.h. ein Investor kann nicht vor einem nationalen Gericht auf Aufhebung der Maßnahme klagen und zusätzlich vor einem Schiedsgericht auf Schadensersatz.

## **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.

### ***Erläuterung***

Die Vorschrift orientiert sich am CETA-Text mit kleinen Abweichungen. Es wird insbesondere vorgeschlagen, auch Vergleiche zu veröffentlichen.

### **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.

### ***Erläuterung***

Die Höhe des Schadensersatzes bzw. der zu zahlenden Entschädigung hat entscheidende Auswirkungen auf den Umfang der Beeinträchtigung des right to regulate durch den Investitionsschutz. Es wird daher vorgeschlagen, die Art und die Höhe des Schadensersatzes zu begrenzen sowie verschiedene Faktoren, die bei der Berechnung zu berücksichtigen sind, vorzusehen. Die Formulierungen stammen aus der Schrift „Expropriation: A Sequel, UNCTAD Series on Issues of International Investment Agreements II“, UNCTAD 2012, S. 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.

### ***Erläuterung:***

Die Berufungsgründe greifen die Gründe für eine Annullierung nach der ICSID-Konvention auf, ergänzen diese jedoch um offensichtliche Irrtümer bei der Rechtsanwendung und Sachverhaltsermittlung sowie auf neue Tatsachen. Die Berufungsmöglichkeit für den Staat

könnte bei Klagen von Small Enterprises im Verfahren gemäß Art. 23 besonders ausgestaltet oder eingeschränkt werden.

### **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.

### ***Erläuterung***

Die Entscheidungen des Tribunals sind keine Schiedssprüche im Sinne der New Yorker Konvention. Ihre Vollstreckbarkeit muss eigens angeordnet werden. Eine Überprüfung der Vollstreckbarkeit durch ein nationales Gericht findet nicht mehr statt.

Die Vollstreckung eines gegen Deutschland ergangenen Urteils würde demnach in Frankreich nach den EU-Regeln zur Vollstreckung zivilrechtlicher Urteile in der EU erfolgen. Eine Änderung des EU-Rechts ist nicht erforderlich, da das Abkommen die Urteile des Tribunals mitgliedstaatlichen Gerichtsurteilen gleichstellt.

## **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**

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.

***Erläuterung:***

Die Klausel beruht auf dem 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 (...)

### *Erläuterung*

Das Abkommen wird nicht nur mit der üblichen Kündigungsmöglichkeit, sondern auch mit einer sunset-Klausel versehen. Als weitere Variante könnte die Erweiterung der Schutzdauer des Abkommens über die Dauer seiner Gültigkeit begrenzt oder ausgeschlossen werden.