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Alternative Model for a Sustainable Development Chapter and related provisions in the Transatlantic Trade and Investment Partnership (TTIP)

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Executive Summary

In the context of the negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP), the EU Commission tabled an “EU Textual Proposal Trade and Sustainable Development” (EU Proposal) in October 2015. This proposal is based on recent free trade agreements (FTAs) of the EU. While the EU Proposal contains a number of improvements compared to SD chapters in older FTAs, it also displays major deficits. In particular, the EU Proposal lacks binding obligations relating to multinational environmental and labour agreements, specific provisions on human rights and obligations for foreign investors. Furthermore, the EU Proposal excludes the sustainable development obligations from the state-to-state dispute settlement mechanism and subjects them a special mechanism based on consultations only.

The Alternative Model for a Sustainable Development Chapter and related provisions in TTIP (Alternative Model) proposed here addresses the shortcomings of the EU Proposal and proposes a Sustainable Development Chapter along with related norms which would serve as a counterbalance to the parts of the agreement which focus on trade and investment liberalization and the protection of foreign investors. While the Alternative Model does not offer a radically different model it contains significant improvements over the current EU approach. The Alternative Model suggests provisions which would incorporate major Multilateral Environmental Agreements and the core labour standards of the International Labour Organisation. Moreover, the Alternative Model submits the sustainable development obligations of the TTIP parties to the same dispute settlement mechanism as the other obligations of TTIP underlining that sustainable development obligations are not less important than the other provisions.

The Alternative Model mainly focusses on a TTIP chapter on sustainable development and includes some other provisions which are closely related. However, the Alternative Model does not propose an alternative model for the entire TTIP. In fact, a trade and investment agreement between the EU and US which is based on the principle of sustainable development as its primary objective and goal would be an entirely different agreement. It would include completely reformed chapters on standards (Technical Barriers to Trade and Sanitary and Phytosanitary Standards), services liberalisation, regulatory coherence and investment protection to name but the most important elements in need of reform. Such an undertaking would be beyond the scope of this study.

I. Introduction and background

Article 3 paragraph 5 and Article 21 paragraph 2 of the Treaty on European Union (TEU) include sustainable development as one of the major goals of EU external activities. Article 207 paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) clearly states that these objectives also apply to trade and investment agreements of the European Union (EU).¹ As a consequence, all free trade agreements of the EU need to contribute to the goal of sustainable development and should avoid negative effects on sustainable development.²

In line with these obligations, the EU integrates provisions on sustainable development in its more recent bilateral free trade agreements such as the trade agreements with South Korea (2011)³, Central America (2012)⁴ and Colombia/Peru (2012)⁵. The most recent examples are the chapters on trade and sustainable development, trade and labour as well as trade and environment in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.⁶ This follows a global trend in bilateral trade agreements which increasingly contain sustainable development provisions.⁷

Specific provisions on trade and sustainable development are also a negotiating objective of the EU in the ongoing negotiations between the EU and the United States of America aiming at the establishment of a Transatlantic Trade and Investment Partnership (TTIP). In the Council's Directives for the TTIP negotiations (the "mandate"), the Council states that TTIP "will include commitments by both Parties in terms of the labour and environmental aspects of trade and sustainable development."⁸ In particular, TTIP shall "include mechanisms to support the promotion of decent work through effective domestic implementation of International

¹ *Markus Krajewski*, Normative Grundlagen der EU-Außenwirtschaftsbeziehungen: Verbindlich, umsetzbar und angewandt?, 51 *Europarecht* 2016, pp. 239-241. See also *Vivian Kube*, The European Union's External Human Rights Commitment: What is the Legal Value of Art. 21 TEU?, EUI Working Paper LAW 2016/10.

² *Rafel Leal-Arcas* and *Catherine Wilmarth*, Strengthening Sustainable Development through Preferential Trade Agreements, Queen Mary School of Law Legal Studies Research Paper No. 174/2014, p. 8.

³ For an analysis of sustainable development issues in the EU-South Korea FTA, see *Ludo Cuyvers*, The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?, UNU-CRIS Working Papers, W-2013/10, pp. 17 et seq.; *Gracia Marín-Durán*, The European Union and South Korea, The Legal Framework for Strengthening Trade, Economic and Political Relations, Edinburgh University Press, 2013, pp. 124-146.

⁴ For an analysis of sustainable development issues in the EU-Central America Association Agreement, see *Steve Woolcock et al*, The Trade Chapter of the European Union Association Agreement with Central America, Study requested by the European Parliament's Committee on International Trade, 2012, pp. 37-42.

⁵ *Lorand Bartels*, Human Rights and Sustainable Development Obligations in EU Free Trade Agreements, 40 *Legal Issues of Economic Integration* 2013, pp. 297-313. For an evaluation of the EU-Colombia/Peru FTA, see *Thomas Fritz*, The Second Conquest, The EU Free Trade Agreement with Colombia and Peru, FDCL/TNI, October 2010, pp. 18-19.

⁶ For an analysis of sustainable development issues in CETA, see *ALOP et al*, EU Trade Agreements with Central America, Colombia and Peru: Roadblocks for sustainable development, Briefing for MEPs, October 2011; *Aaron Cosbey*, Inside CETA: Unpacking the EU-Canada free trade deal, *Biores*, Volume 8, Number 9, November 2014, available at <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal>.

⁷ *J. Anthony VanDuzer*, Sustainable Development Provisions in International Trade Treaties, in: *Steffen Hindelang* and *Markus Krajewski* (eds), *Shifting Paradigms in International Investment Law*, Oxford 2016, pp. 145.

⁸ Council of the European Union, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, declassified 9 October 2014, para 31.

Labour Organisation (ILO) core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and relevant Multilateral Environment Agreements as well as enhancing co-operation on trade-related aspects of sustainable development.”⁹

Following these directives, the EU Commission tabled a “Textual Proposal Trade and Sustainable Development” in TTIP (EU Proposal) for discussion with the US in the negotiating round of 19 - 23 October 2015. This document was made publicly available in November 2015.¹⁰ An analysis of the EU Proposal indicates that it contains a number of improvements compared to sustainable development chapters in older FTAs. However, the EU Proposal also still contains a number of deficits and shortcomings.

II. Deficits of the EU Proposal for sustainable development in TTIP

The EU Proposal for sustainable development in TTIP builds on and further develops previous approaches. However, the EU Proposal does not overcome the major deficits and shortcomings of the EU approach.

To begin with, the EU Proposal formulates obligations and commitments relating to multinational environmental and labour agreements in a non-binding way. The relevant provisions only contain best endeavour clauses and are mere declarations of intention. It has long been criticised that the sustainable development chapters in EU free trade agreements do not add any additional legal obligations on the parties.¹¹ Moreover, the EU Proposal does not contain a specific chapter on human rights. This is problematic because without binding labour, environmental and human rights treaty obligations trade agreements display a lack of balance between economic and non-economic objectives and principles.¹²

Furthermore, the EU Proposal excludes sustainable development obligations from the state-to-state dispute settlement mechanism and subjects them to a special mechanism based on consultations only.¹³ This weakens the standing of these obligations vis-à-vis the regular trade and investment obligations.¹⁴ It has also been shown that consultation and other soft-law

⁹ *Ibid*, para. 32.

¹⁰ *European Commission*, EU Textual Proposal, Trade and Sustainable Development, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf.

¹¹ See only recently, *Client Earth and Transport and Environment*, Sustainable development and environment in TTIP, Moving from empty language to equal consideration, October 2015, pp. 8-9.

¹² Similarly, *AK Europa*, TTIP: Nachhaltigkeitskapitel (DS 1536/15 vom 30.09.2015), Positionspapier, Oktober 2015, p. 7.

¹³ See also *Bartels*, above note 5, p. 312; *AK Europa*, Stellungnahme zum Entwurf des Erstberichts der Handels-Nachhaltigkeitsfolgenabschätzung der Transatlantic Trade and Investment Partnership (TTIP), Positionspapier, May 2014, p. 8.

¹⁴ *Transport and Environment*, Trade and sustainable development in the Transatlantic Trade Investment Partnership, 2015, p. 3.

mechanisms are usually not sufficient to ensure that the parties observe sustainable development obligations.¹⁵

In addition, the EU Proposal contains no obligations for multinational enterprises or other business entities. Instead, TTIP would only feature a chapter on investment protection which confers special rights to foreign investors.¹⁶ This proliferates the one-sided approach of international investment law which confers special rights on foreign economic actors which are not given to domestic investors. This creates an asymmetric international rights structure since investors would be able to claim rights on the basis of TTIP but would not be subject to corresponding duties.

Finally, the EU Proposal only contains limited and fragmented general exception clauses. Exception clauses in recent EU free trade agreements and in the EU Proposal do not cover all relevant non-trade policies and do not apply to all chapters of the agreement. For example, the exception clauses do not allow the parties to deviate from the agreements in order to protect human or labour rights.¹⁷ Furthermore, the chapter on investment protection is not subject to any general exception clause. This means, that the parties to the agreement could justify deviations from the trade obligations of the agreement, e. g. for environmental reasons, but they could not claim the same justification from the standards of the investment protection chapter.

III. Main elements of the proposed Alternative Model

The main objective of the Alternative Model for a Sustainable Development Chapter in TTIP is to overcome the shortcomings of the EU Proposal mentioned above. To achieve this, the Alternative Model addresses the specific deficits of the EU Proposal as follows:

Firstly, the Alternative Model formulates binding obligations to implement the most important international treaties on labour, environmental and human rights. To this end, the vague and non-binding formulation referring to efforts towards ratification of the eight most important ILO-Conventions is exchanged with a binding obligation to ensure that the domestic laws and policies are in conformity with fundamental labour, environment and human rights agreements. The chapter does not formally require the parties to ratify the treaties, but it creates a factually binding effect. Making labour, environmental and human rights treaty obligations binding is a

¹⁵ *Reingard Zimmer*, Sozialklauseln im Freihandelsabkommen der Europäischen Union mit Kolumbien und Peru, *Recht der Internationalen Wirtschaft* 2011, pp. 625-632.

¹⁶ This has been criticized by a significant number of respondents in the online public consultation held by the European Commission. Respondents considered “(...) that the proposed approach is unbalanced in favour of investors. There is therefore a call from these respondents for stronger investor obligations, in particular in relation to human rights, social and environmental regulations or, more generally, to corporate social responsibility.” See *European Commission*, Staff Working Document, Report Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), January 2015, p. 15.

¹⁷ *Lorand Bartels*, A Model Human Rights Clause for the EU’s International Trade Agreements, study conducted on behalf of the German Institute for Human Rights and MISEROR, 2014, p. 27-28.

necessary first step for balancing non-economic rights with the rights conferred through the free trade agreement. Moreover, the clauses in the respective sections also oblige the treaty parties to implement all obligations arising out of the ratified treaties. The relevant international agreements are specifically listed in the respective agreements. With respect to labour rights the obligation comprises the eight ILO-Conventions covering the core labour rights (Article 4 in Annex 1 below). With respect to environmental law issues, the list covers twenty-four multilateral environmental agreements (MEAs) most often referred to as a baseline (Article 13 in Annex 1 below). Regarding human rights, the chapter refers to the core international human rights treaties (Article 23 in Annex 1 below).

Secondly, the obligations of the Alternative Model are effectively implemented through binding dispute settlement. To this end, the Sustainable Development chapter is subject to the state-to-state dispute settlement mechanism provided for in another chapter of the treaty (Article 29 in Annex 1 below). Importantly, the application of the state-to-state dispute settlement mechanism guarantees the level playing field between all obligations of the parties in the free trade agreement – whether they relate to trade, investment or sustainable development. Older EU trade agreements excluded this option resulting in toothless commitments of the Parties since they could not be enforced effectively.¹⁸ The state-to-state dispute settlement mechanism ensures that either Party can suspend concessions and/or obligations in case of noncompliance with a ruling of the dispute settlement panel.

Thirdly, the Alternative Model proposes binding investor obligations. Foreign investors are obliged to comply with the OECD Guidelines for Multinational Enterprises. These rules give guidance for responsible business conduct in the currently most comprehensive way, including the following aspects: labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights. In case of a breach of the guidelines the so-called denial of benefits clause prohibits that the investor makes use of any of the rights conferred to the investor through the investment chapter in investor-state dispute settlement.¹⁹ The clause on investor obligations is laid down in Article xy (Investor obligations) of Annex 2, which contains additional treaty changes not included in the Sustainable Development Chapter.

Fourthly, the Alternative Model introduces a general exception clause. This contributes to a balance between trade and investment interests on the one hand and non-economic interest such as labour, environmental and social rights on the other hand (See Article xy (General exceptions) in Annex 2 below). Exception clauses provide the opportunity to justify a breach of treaty obligations in exceptional circumstances. Therefore, exception clauses balance the Parties' regulations with private economic interests quite effectively. The suggested exception

¹⁸ The only exception to this policy is the EU-Caribbean Economic Partnership Agreement (Article 204(6); The use of dispute settlement is, however, made conditional upon resorting to a specific consultation mechanism in Article 189 of the agreement).

¹⁹ For a drafting proposal of an investment chapter in a FTA with an industrialised country, see *Krajewski*, Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA, available at <https://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

clause lays down the most important aspects with respect to sustainable development (labour, environment and human rights) and applies the “relationship”-standard. Therefore, regulations of a treaty party could be justified if they relate to sustainable development. The general exception clause should be located in the final provisions of the treaty applying to all aspects of the treaty.

In addition to these changes to the Sustainable Development Chapter and the investment protection chapter of the FTA, all other chapters may contain provisions having effects on sustainable development. Therefore, other chapters need to be brought into accordance with sustainable development goals. This might relate to the chapters on regulatory cooperation, SPS and TBT, for example.

However, the present Alternative Model does not propose an alternative model for the entire TTIP. In fact, a trade and investment agreement between the EU and US which is based on the principle of sustainable development as its primary objective and goal would be an entirely different agreement. It would include completely reformed chapters on standards (Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS)), services liberalisation, regulatory coherence and investment protection to name but the most important elements in need of reform.

Possible reform elements could include a bilateral environmental safeguard clause in the trade remedies section of the trade chapter, the recognition of the precautionary principle in the regulatory cooperation chapter, and reforms of SPS, TBT and regulatory cooperation.²⁰ Such an undertaking would be beyond the scope of this study.

²⁰ See also Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%2BCOMPARL%2BPE-544.393%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>.

IV. Description of Annex 1

The text in Annex I below represents an Alternative Model for a Sustainable Development Chapter covering relevant provisions for sustainable development in a comprehensive free trade agreement (FTA) including an investment chapter negotiated with an industrialized country. Whenever formulations are compiled from relevant elements of existing treaties, a reference is included in a footnote to the clause or the commentary to the clause. The text is based in the latest EU Proposal for a chapter on trade and sustainable development.²¹ Any changes in treaty language are emphasized by underlinings.

Importantly, it should be pointed out that laying down sustainable development clauses in a closed chapter (like this draft) without integrating sustainable development obligations of the Parties into other chapters of the FTA is not enough. A comprehensive approach needs to take into account all details of the treaty. Labour, environmental and human rights protection requirements must be integrated throughout the text of the whole agreement.

The Alternative Model is divided into five sections. An introducing section is followed by four substantial sections covering general rules, labour issues, environmental issues and human rights issues (Sections I-IV). Section V contains horizontal issues, such as a reference to the state-to-state dispute settlement in cases of disputes.

Section I provides clauses framing the context of the Sustainable Development Chapter, specifies its objectives and formulates a general right to regulate clause.

Section II covers sustainable development relating to labour issues by obliging the treaty Parties to ratify and fulfil the most important ILO Conventions.

Section III covers sustainable development relating to environmental issues by obliging the treaty Parties to ratify and fulfil the most important multinational environmental agreements.

Section IV of Annex 1 contains the Parties' obligations concerning human rights. To this end, the clause obliges the treaty Parties to ensure conformity with the most important human rights treaties (nine in total) and to implement all obligations arising out of ratified human rights treaties in their domestic laws and practices.

The horizontal issues covered by Section V include a "not lowering of standards"-clause, an article on transparency, an article on impact assessments and reviews, an article on voluntary sustainability assurance schemes and a clause referring to dispute settlement.

²¹ See footnote 10 above.

Annex 1 – Text of the Sustainable Development Chapter

TRADE, INVESTMENT AND SUSTAINABLE DEVELOPMENT

Comment:

For the sake of clarity, the title of the chapter should indicate that it also refers to investment and not just trade.

Section I – Overarching principles

Article 1

Context

1. The Parties reaffirm their commitment to pursue sustainable development, the dimensions of which – economic development, social development and environmental protection – are inter-dependent and mutually reinforcing, and are committed to promote the development of international trade and investment in such a way so as to contribute to this overarching objective.
2. The Parties recall the Rio Declaration and the Agenda 21 on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and its Follow-up, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want", and the outcome of the UN Summit on Sustainable Development of 2015 entitled "Transforming Our World: the 2030 Agenda for Sustainable Development".
3. The Parties underline the benefit of considering trade and investment-related labour²² and environmental issues as part of a global approach to trade and sustainable development.
4. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to set and regulate its levels of domestic labour and environmental protection, and to adopt or modify relevant policies and laws accordingly. The right to regulate shall be exerted in a manner not inconsistent with the international labour standards and

²² When labour is referred to in this chapter, it includes the issues of employment promotion, social protection, social dialogue, fundamental principles and rights at work, as well as the cross-cutting issues of gender equality and non-discrimination, which are relevant to the strategic objectives of the ILO, through which the Decent Work Agenda is expressed, as agreed on in the ILO 2008 Declaration on Social Justice for a Fair Globalisation.

agreements referred to in Article 4 [Multilateral labour standards and agreements], the environmental agreements referred to in Article 13 [Multilateral environmental governance and rules] and the human rights obligations contained in Article 21 [Human rights obligations].

Comment:

Article 1 sets out the content of the chapter. Its paragraphs do not contain any directly binding obligations, but provide interpretative guidance. Under the generally recognised rules on the interpretation of international agreements, the object and purpose of an agreement is an important interpretative tool. Article 1 underlines the Parties commitments to essential elements of sustainable development by outlining a number of international conventions, declarations and other international documents.

This Article also contains the so-called “right to regulate” clause in paragraph 4 which is part of Article 3 of the EU Proposal. However, as the wording of the clause is not a substantive provision, but a declaration of objectives it would be misleading to place this clause in operative clause.

Article 2

Objectives

Through this chapter, the Parties aim to:

- a) strengthen the positive contribution of this Agreement to sustainable development;
- b) enhance mutual supportiveness among each Party's labour, environmental and trade and investment policies and measures;
- c) uphold the Parties' environmental and labour protection objectives in a context of more liberalised, open and transparent trade and investment relations;
- d) formulate and implement policies that contribute to the achievement of sustainable development goals;
- e) enhance compliance with, and enforcement of, labour, environmental and human rights multilateral agreements and domestic laws;
- f) promote dialogue and cooperation among the Parties on environmental and labour matters of relevance in a trade and investment context, including with regard to third countries;
- g) encourage businesses, social partners, environmental groups and other civil society organisations as well as citizens to develop and implement practices that contribute to the achievement of sustainable development goals;
- h) promote public consultation and participation in the discussion of sustainable development issues arising under this Agreement and in the development of relevant domestic law and policies.

Comment:

This Article sets the objectives of the chapter in terms of the shared desire to develop bilateral trade and investment relations in such a way as to contribute to the overarching objective of sustainable development, the goal to promote dialogue and cooperation between the partners to this end and the aim to build on this framework, and in the substantive provisions address labour and environmental issues of relevance in a trade context, identified as key elements of a shared approach to trade and sustainable development. An important aspect which has been added in this Alternative Model compared to the EU Proposal is the aim of enhancing compliance and enforcement of multilateral agreements relating to a sustainable development of trade and investment policy. The addition in Article 2 (h) is based on Article 22.1(3)(e) CETA. Moreover, lit. (e) was inserted into the list of objectives to stress the need for compliance with, and the enforcement of, labour, environmental and human rights multilateral agreements and domestic laws.

Article 3

General obligations

1. Each Party shall ensure that sustainable development objectives of this Chapter are integrated and reflected at every level of the trade and investment relationship of the Parties.
2. Each Party shall ensure that its domestic policies and laws provide for and encourage high levels of protection in the labour and environmental areas and shall strive to continue to improve those policies and laws and their underlying levels of protection.

Comment:

Article 3 paragraph 1 replaces the previous paragraph 1 of the EU Proposal which has been moved to Article 1 paragraph 4 (see above), because it does not contain a substantive obligation. The new paragraph 1 contains a general obligation and obliges the parties to ensure that sustainable development is recognized in every aspect of trade and investment relations. It is hence a general “catch-all” obligation which would only become operative if the specific obligations of the following articles are not applicable.

Paragraph 2 is maintained. It affirms the aim of each Party to ensure that its domestic environmental and labour, including social laws and policies, provide for and encourage high levels of protection. Furthermore, it sets the objective for each Party to continue to improve those laws and policies and the underlying levels of protection.

Section II – Labour aspects

Article 4

Multilateral labour standards and agreements

1. The Parties recognise the value of global standards and agreements on labour matters as fundamental instruments to promote and achieve decent work for all and stress the need to enhance the mutual supportiveness between trade and labour policies and rules. Accordingly, they agree to promote the development of their trade and investment relations in a manner conducive to the realisation of the Decent Work Agenda, as expressed through the International Labour Organisation (ILO) 2008 Declaration on Social Justice for a Fair Globalisation, in its four strategic objectives:

- a) employment promotion,
- b) social protection,
- c) social dialogue,
- d) fundamental principles and rights at work,

and the cross-cutting issues of gender equality and non-discrimination.

2. Each Party shall ensure that its laws, policies and practices are in conformity with the following conventions and their relevant protocols:

- a) Convention concerning Freedom of Association and Protection of the Right to Organise of 1948 (ILO Convention No 87)
- b) Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1949 (ILO Convention No 98)
- c) Convention concerning Forced or Compulsory Labour of 1930 (ILO Convention No 29)
- d) Convention concerning the Abolition of Forced Labour of 1957 (ILO Convention No 105)
- e) Convention concerning Minimum Age for Admission to Employment of 1973 (ILO Convention No 138)
- f) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999 (ILO Convention No 182)
- g) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 (ILO Convention No 100)
- h) Convention concerning Discrimination in Respect of Employment and Occupation of 1958 (ILO Convention No 111).

In fulfilling this obligation, each Party shall be guided by the respective ILO Recommendations.

3. Furthermore, in accordance with the ILO Decent Work Agenda, as expressed in the ILO Declaration on Social Justice for a Fair Globalisation of 2008, and in accordance with its other international commitments, each Party shall ensure to protect:

- a) health and safety at work, including through relevant policies, systems and programmes, the fostering and promotion of a preventative safety and health culture and the adoption of risk-based and precautionary approaches;
- b) decent working conditions for all, with regard to, inter alia, wages and earnings, working hours and other conditions of work in order to ensure a minimum living wage.

4. Notwithstanding paragraph 2 each Party shall effectively implement in its laws and practices and in its whole territory the ILO Conventions it has ratified.

5. For all areas covered by up-to-date Conventions each Party shall implement its policies in the relevant areas bearing in mind the Recommendations adopted by the ILO, where they exist.

6. The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for arbitrary or unjustifiable discrimination or protectionist trade purposes.

Comment:

Article 4 is the first substantive and concrete obligatory provision of the Alternative Model. It addresses international labour standards. Paragraph 1 refers to the common goals and contextualises these goals in the wider global discourse. It does not add any new element compared to the EU Proposal.

However, paragraph 2 of Article 4 replaces the previous paragraph 2 of the EU Proposal and moves beyond the generally recognised standard. It obliges the parties to ensure that their laws, policies and practices are in conformity with the eight ILO Conventions which relate to the ILO core labour standards. In other words, the provision effectively incorporates these conventions as binding obligations in the agreement. This approach can be contrasted with the EU Proposal which includes obligations for effective implementation in law and in practice of ILO conventions only with respect to those conventions to which either treaty partner is a party. Additionally, it supports ongoing efforts towards ratification of fundamental ILO Conventions.

Paragraph 6 of the EU Proposal was deleted since it deals with the need for an adequate system of labour inspections, which is now dealt with in a separate Article 10.

Article 5

Freedom of association and right to collective bargaining

Article 6

Elimination of forced or compulsory labour

Article 7

Effective abolition of child labour

Article 8

Equality and non-discrimination in respect of employment and occupation

Comment:

Articles 5-8 of the EU Proposal should be maintained as they have an additional value and complement the binding obligations contained in Article 4.

Article 9

Working together on the labour aspects of trade and sustainable development

Comment:

Article 9 of the EU Proposal on cooperation regarding labour aspects of trade and sustainable development at the multilateral level is useful and should be maintained, because it underlines the necessity of a common approach.

Article 10

Enforcement procedures, administrative proceedings and review of administrative action

1. Pursuant to Article 22 [Upholding levels of protection], each Party shall promote compliance with and shall effectively enforce its labour law, including by:

- (a) maintaining a system of labour inspection in accordance with its international commitments aimed at securing the enforcement of legal provisions relating to working conditions and the protection of workers which are enforceable by labour inspectors; and
- (b) ensuring that administrative and judicial proceedings are available to persons with a legally recognised interest in a particular matter who maintain that a right is infringed under its law, in order to permit effective action against infringements of its labour law, including appropriate remedies for violations of such law.

2. Each Party shall fulfil its obligations under subparagraph 1(a) through appropriate government action, such as:

- a) establishing and maintaining effective labour inspection services, including by appointing and training inspectors;
- b) monitoring compliance and investigating suspected violations, including through onsite inspections;
- c) requiring record keeping and reporting;
- d) encouraging the establishment of worker-management committees to address labour regulation of the workplace;
- e) providing or encouraging mediation, conciliation and arbitration services; and,
- f) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour law.

Furthermore, each Party shall ensure that its competent authorities give due consideration, in accordance with its law, to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labour law.

3. Each Party shall, in accordance with its law, ensure that the proceedings referred to in subparagraph 1(b) are not unnecessarily complicated or prohibitively costly, do not entail unreasonable time limits or unwarranted delays, provide injunctive relief, if appropriate, and are fair and equitable, including by:

- (a) providing defendants with reasonable notice when a procedure is initiated, including a description of the nature of the proceeding and the basis of the claim;
- (b) providing the parties to the proceedings with a reasonable opportunity to support or defend their respective positions, including by presenting information or evidence, prior to a final decision;
- (c) providing that final decisions are made in writing and give reasons as appropriate to the case and based on information or evidence in respect of which the parties to the proceeding were offered the opportunity to be heard; and
- (d) allowing the parties to administrative proceedings an opportunity for review and, if warranted, correction of final administrative decisions within a reasonable period of time by a tribunal established by law, with appropriate guarantees of tribunal independence and impartiality.

Article 11

Public Information and Awareness

1. In addition to its obligations under Article xy of the Transparency Chapter [Clause on Publication obligations], each Party shall encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption by public authorities of labour law and standards.

2. Each Party shall promote public awareness of its labour law and standards, as well as enforcement and compliance procedures, including by ensuring the availability of information and by taking steps to further the knowledge and understanding of workers, employers and

their representatives.

Article 12

Cooperative activities

1. The Parties commit to cooperate for the promotion of the objectives of this Chapter through actions such as:

- (a) exchange of information on best practices on issues of common interest and on relevant events, activities, and initiatives;
- (b) cooperation in international fora dealing with issues relevant for trade and labour and employment, including in particular the WTO and the ILO;
- (c) the international promotion and the effective application of fundamental principles and rights at work referred to in Article 4 [Multilateral labour standards and agreements], and the ILO Decent Work Agenda;
- (d) dialogue and information sharing on the labour provisions in the context of their respective trade agreements, and the implementation thereof;
- (e) the exploration of collaboration in initiatives regarding third parties; and
- (f) any other form of cooperation deemed appropriate.

2. The Parties will consider any views provided by representatives of workers, employers, and civil society (organisations) when identifying areas for cooperation, and in carrying out cooperative activities.

3. The Parties may establish cooperative arrangements with the ILO and other competent international and regional organisations to draw on their expertise and resources to achieve the objectives of this Chapter.

Comment:

Articles 10 to 12 are based on CETA provisions (Article 23.5 to 23.7) which should also be included in the TTIP. Article 10 is supplemented by a paragraph 2 further specifying the labour inspection system based on an earlier proposal by Canada in the CETA negotiations.²³

²³ Chapter X+1 (trade and labour), Article 4, CETA Negotiation draft, End Round IX –October 2013, available at <http://eu-secretdeals.info/upload/2014/02/CETA-Sustainable-Development-Labour-Enviro-Jan14.pdf>.

Section III – Environmental aspects

Article 13 (ex Article 10)

Multilateral environmental governance and rules

1. The Parties recognise the value of global environmental governance and rules, including Multilateral Environmental Agreements, to tackle environmental challenges of common concern and stress the need to enhance the mutual supportiveness between trade, investment and environment policies, rules and measures.

2. Each Party shall ensure that its laws, policies and practices are in conformity with the following conventions:

- a) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- b) Convention on Biological Diversity (CBD)
- c) International Tropical Timber Agreement (ITTA)
- d) Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)
- e) International Convention for the Conservation of Atlantic Tunas (ICCAT)
- f) United Nations Fish Stocks Agreement (UNFSA)
- g) International Plant Protection Convention (IPPC)
- h) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
- i) Cartagena Protocol on Biosafety to the Convention on Biological Diversity
- j) Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- k) Montreal Protocol and the Vienna Convention on Substances that Deplete the Ozone Layer
- l) United Nations Framework Convention on Climate Change (UNFCCC)
- m) Kyoto Protocol to the United Nations Framework Convention on Climate Change
- n) Paris Agreement to the UNFCCC
- o) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
- p) Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- q) Stockholm Convention on Persistent Organic Pollutants

- r) Minamata Convention on Mercury
- s) Convention on the Conservation of Migratory Species of Wild Animals (CMS)
- t) Convention on the Law of the Non-navigational Uses of International Watercourses
- u) UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)
- v) UNECE Convention on Transboundary Effects of Industrial Accidents
- w) UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)
- x) UNECE Convention on Long-Range Transboundary Air Pollution

3. Notwithstanding paragraph 2 each Party reaffirms its commitment to effectively implement in its domestic laws and practices the Multilateral Environmental Agreements to which it is a party.

Comment:

Article 13 fulfils similar functions as Article 4. Similar to paragraph 2 of Article 4, paragraph 2 of Article 13 incorporates Multinational Environmental Agreements (MEAs). The list in the Alternative Model is based on WTO MEA list and a proposal by Client Earth and Transport and Environment – it also includes the 2015 Paris Agreement on UNFCCC.²⁴ The functioning of this article would also depend on a sufficiently broad list of MEAs including those which at least one of the TTIP Parties has not ratified.

Paragraph 3 mainly corresponds with the previous paragraph 2 of the EU Proposal. Article 10 paragraphs 3-5 of the EU Proposal were deleted since the new paragraph 2 goes further than any obligation entailed in those paragraphs.

Article 14 (ex Article 11)

Protection, sustainable management and use of biological diversity

This article of the EU Proposal should be maintained.

Article 15 (ex Article 12)

Trade in species of wild fauna and flora and derived products

This article of the EU Proposal should be maintained.

Comment:

Similar to Article 5 to 8, further references are not necessary as the MEAs contained in Article

²⁴ See *Client Earth and Transport and Environment*, Sustainable development and environment in TTIP, Moving from empty language to equal consideration, October 2015, p. 17.

13 are made binding. However, the articles can also be maintained for illustrative purposes.

Article 16 (ex Article 13)

Sustainable management of forests and trade in forest products

This article of the EU Proposal should be maintained.

Article 17 (ex Article 14)

Trade and sustainable management of fisheries and aquaculture products

This article of the EU Proposal should be maintained.

Article 18 (ex Article 15)

Trade in and environmentally sound management of chemicals and waste

This article of the EU Proposal should be maintained.

Comment:

Articles 16-18 refer to specific issues which are not covered by Multilateral Environmental Agreements. They should therefore be maintained in any case.

Article 19

Climate change and green goods and services

1. The Parties reaffirm their commitment to the UN Framework Convention on Climate Change (UNFCCC) and to the Paris Agreement.

2. The Parties will strengthen their cooperation on trade-related aspects of the current and future international climate change regime, as well as means to promote low-carbon technologies and energy efficiency.

3. The Parties facilitate and promote trade and investment in environmental goods and services, such as renewable energy goods and related services and energy efficient products and services, including through, but not limited to

a) addressing nontariff barriers related to such goods and services

b) adopting policy frameworks conducive to the deployment of best available technologies, and

c) promotion of standards that respond to environmental, climate, and economic needs.

Comment:

The Alternative Model suggests to maintain specific articles on biodiversity in addition to the obligation contained in Article 13. In order to ensure that climate change is also addressed, it would be useful also to include a special provision on climate change. The text is based on the EU Sustainable Development position paper of January 2015.²⁵ However, the later EU Proposal did not contain a specific reference to climate change.

Article 20 (ex Article 16)

Working together on the environmental aspects of trade, investment and sustainable development

This article of the EU Proposal should be maintained since it covers helpful consultation and cooperation with respect to environmental aspects. It should cover trade- and investment-related aspects of environmental policies.

Section IV – Human Rights

Article 21

Human rights obligations

1. The parties recognize the fundamental value and importance of human rights as enshrined in the Universal Declaration on Human Rights of 1948 and the Vienna Declaration and Plan of Action of the World Conference on Human Rights of 1993.

2. Each Party shall ensure that its laws, policies and practices are in conformity with the following core international human rights instruments and their respective protocols:

- a) International Convention on the Elimination of All Forms of Racial Discrimination
- b) International Covenant on Civil and Political Rights
- c) International Covenant on Economic, Social and Cultural Rights
- d) Convention on the Elimination of All Forms of Discrimination against Women
- e) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁵ See EU Position Paper Trade and Sustainable Development Chapter /Labour and Environment: EU Paper outlining key issues and elements for provisions in the TTIP, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf.

- f) Convention on the Rights of the Child
- g) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- h) International Convention for the Protection of All Persons from Enforced Disappearance
- i) Convention on the Rights of Persons with Disabilities

3. Notwithstanding paragraph 2 each Party reaffirms its commitment to effectively implement in its domestic laws and practices the international and regional human rights agreements to which it is a party.

Comment:

As mentioned above, the EU Proposal does not contain a specific human rights clause. Article 21 follows the logic of the labour and environment provisions which require the TTIP Parties to ensure that their domestic legal systems are in conformity with existing international agreements. The proposal of Article 21 applies this logic to internationally recognised human rights treaties and sets out relevant binding human rights obligations. It should be kept in mind, however, that the United States have not ratified all human rights treaties, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

Article 20 of the EU Proposal was not incorporated into the Alternative Model for a Sustainable Development Chapter due to the fact that the human rights obligations contained in this Article 21 are binding obligations which go further than the Article on Corporate Social Responsibility and responsible business conduct.

Section V – Horizontal issues

Article 22 (ex Article 17)

Upholding levels of protection

1. Each Party refrains from weakening or reducing the levels of environmental, labour and human rights protection in order to encourage, or in a manner affecting, trade or investment.
2. A Party shall not waive, or derogate from, or offer to waive or derogate from, its laws aimed at protecting the environment, labour and human rights, as an encouragement for, or in a manner affecting, trade or investment.
3. A Party shall not fail to effectively enforce its laws aimed at protecting the environment, labour and human rights in cases where other provisions of this agreement interfere with these commitments.

4. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its laws aimed at protecting the environment, labour and human rights as an encouragement for, or in a manner affecting, trade or investment.

Comment:

As there is a concern that international competition for foreign investment may lead some countries to lower their environmental, human rights and labour standards and that this could lead to a “race to the bottom” in terms of regulatory standards the “not lowering of standards” clause responds to this concern regarding a potential race to the bottom and helps managing the interaction between the investment chapter and national policies.

In addition to the binding commitments of the treaty Parties with respect to human rights, labour rights and the environment included in Articles 4, 13 and 21 in this Alternative Model, a so-called “not lowering of standards” clause complements these clauses and the investor obligations contained in Article xy (investor obligations) in the investment chapter (see Annex II below). The clause refers to the environmental, human rights and labour clauses contained in the Alternative Model and includes a commitment to refrain from relaxing domestic environmental, labour and human right legislation to encourage investment. Moreover, the clause complements Article 3 of the Alternative Model (levels of protection).

Article 22 paragraph 1 exchanges the previous paragraph 1. It discourages “lowering of standards” that is, providing regulatory incentives to investors to the detriment of environmental protection or labour laws. “Not lowering of standards”-clauses seek to ensure the respect of existing environmental, labour or human rights standards and to avoid that States compete for investment by lowering these standards. The immediate addressees of these clauses are the states Parties themselves. The principle is also articulated in the ILO Declaration 2008 on Social Justice for a Fair Globalization.

The clause refers to “its laws aimed at protecting the environment, labour and human rights” instead of “environment and labour laws” as environmental or labour protection can also be elements of other laws.

Paragraph 3 aims at ensuring that obligations resulting from other chapters of the FTA do not hinder the enforcement of environmental, labour or human rights obligations of the Sustainable Development Chapter. The formulation of the paragraph is retrieved from AK Wien and Ludwig Boltzmann Institute, Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements, June 2010 (p. 29).

Article 23 (ex Article 18)

Transparency and public participation

This article of the EU Proposal should be maintained.

Article 24 (ex Article 19)

Impact assessments and review of sustainability impacts

1. The Parties recognise the importance of identifying options to address trade, investment

and sustainable development issues on the basis of a balanced assessment of the likely economic, social and environmental impacts of possible actions, taking account of the views of stakeholders, particularly non-state actors, including social partners and environmental interest groups.

2. The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that the implementation of the agreement does not affect the obligations of the Parties in Article 4, 13 and 21.

3. A comprehensive review of the Agreement shall be undertaken by the Parties not later than five (5) years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement on human rights, labour rights and the environment including the costs and consequences of implementation. The review will be undertaken on the basis of an impact assessment conducted by an independent body with appropriate expertise in the subject of human rights impact assessments, on the basis of transparent information and procedures, taking into account all available and relevant evidence from all sources, especially civil society, and will be appropriately resourced. Human rights, labour rights and environmental impact assessments shall be conducted separately.

4. When conducting the assessment mentioned in paragraph 2, the parties will pay specific attention to developing countries and in particular LDCs with a view to maximising the positive spill-over effects of this Agreement.

5. The impact assessment and a report of the review will be published. The parties as appropriate shall amend its provisions and adjust their application as recommended by the review of the Agreement.

Comment:

Article 24 establishes a comprehensive system for sustainability assessment and review. Sustainability assessment and review are well-established tools for the promotion of sustainable development goals. Sustainability assessment may help states to implement their obligations to protect human and labour rights and the environment. However, until today, they are barely used in trade and investment agreements, neither as obligations on the treaty Parties nor as due diligence obligations for investors.

Therefore, the obligations contained in Article 4, 13 and 21 are supplemented by the Parties' obligation to undertake impact assessments and a review in each of the legal fields addressed in the Articles.

This clause is partly based on the EU-Cariforum revision clause set out in the Declaration on the Signing of the Economic Partnership Agreement, and the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements.

Article 24 paragraph 4 and 5 were paragraphs 1 and 2 of Article 19 of the EU Proposal.

Article 25 (ex Article 21)

Voluntary sustainability assurance schemes

This article of the EU Proposal can be maintained.

Article 26

Dispute settlement

1. For any matter arising under this Chapter where there is disagreement between the Parties, the Parties shall have recourse to the rules and procedures provided for in chapter xy (Dispute Settlement) as modified by subparagraphs 2, 3 and 4.
2. Panels for disputes which related to the provisions of this Chapter shall have the necessary expertise on environmental, labour or human rights matters as required.
3. In interpreting the provisions of this Chapter, the Panel shall be guided by relevant case law or decisions taken by competent organs to implement the agreements mentioned in Articles.
4. The provisions on the withdrawal of concessions do not apply to this chapter.

Comment:

Whereas the EU Proposal does not include any reference to dispute settlement and thereby effective enforcement mechanisms, the textual proposal for a respective chapter in CETA includes a government consultation mechanism and, if the consultations fail, the opinion of an expert panel instead of referring to the state-to-state dispute settlement chapter.

Either option does not provide for effective enforcement of the obligations of the Parties under the Sustainable Development Chapter.

After the 12th negotiation round with the US the EU recalled that it will develop provisions on procedural aspects including dispute settlement at a later stage once the discussions on the content of the obligations are finalized.

Until today, the EU Proposal does not provide for a structure to bindingly implement the goals of the Chapter. Therefore, the suggested Article 26 refers to the dispute settlement procedures provided for in Chapter xy of the suggested TTIP text. The respective Chapter xy should deal with state-to-state dispute settlement. Further provisions of Chapter xy should provide for sanctions (for example through increasing tariff rates) in case of non-compliance with the decision of the dispute resolution panel. This reference increases the credibility and effectiveness of the Parties' obligations under the Chapter.

The EU Proposal does not suggest an individual dispute settlement procedure relating to the Sustainable Development Chapter only since this undermines the effective enforcement of the Chapter. Article 26 paragraph 2 guarantees that the dispute resolution panel has the necessary SD-relating knowledge in order to resolve the dispute.

Paragraph 2 is based on a similar clause provided for in the Financial Services Annex to the GATS.

V. Description of Annex 2 – Additional provisions

Annex 2 provides clauses which are not directly laid down in the Alternative Model of the Sustainable Development Chapter but in other chapters of the free trade agreement. Most importantly, this concerns clauses on investor obligations and a general exception clause. Since the general exception clause is supposed to be applied to all provisions, it should not be laid down in each chapter but in the final provisions of the treaty. The clause suggested does not only permit measures to protect human health and life, but also (exceptional) measures to protect human rights in a Parties' territory.

Moreover, disputes between foreign investors and their host states have been solved by investor-state-dispute settlement (ISDS) since the mid 1960s. In 2014, the European Commission held a public online consultation which revealed deep criticisms of the existing system, partly on the grounds that it represented an arbitration process. Thereafter, proposals from Germany and France suggested the establishment of a bilateral court. In November 2015, the Commission has also come down for a fundamentally new system and thus confirmed the criticism of the old system of investor-state arbitration. In order to replace the investor-state arbitration system in TTIP with a process more in keeping with democratic rule of law, the Commission proposes an Investment Court System comprising a Tribunal of First Instance with fifteen publicly appointed judges and an Appeal Tribunal (with six judges). In order to ensure its neutrality, the fifteen-member Tribunal of First Instance would be composed of five American judges, five from the European Union and five who are citizens of neither the United States nor the European Union. The Tribunal of First Instance would hear investment cases in divisions of three judges. In a contradiction left unresolved in the proposal, the composition of divisions is to rotate yet remain random. Each division of the Tribunals is to be composed of one US judge, one EU judge, and one "neutral" judge as chair. The Appeal Tribunal would hear cases as a standing panel of six judges: two American, two EU citizens and two neutral.

Although the Commission's proposal for an Investment Court System is in many respects groundbreaking, it revealed criticism as with respect to judicial independence and impartiality, which still need to be solved.

Moreover, other features in dispute settlement chapters might be worth taking into account, such as a clause provided for in the China-Australia FTA (ChAFTA) dated 2015. Article 9.11.4 ChAFTA stipulates that measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under the investor-state dispute settlement section of the FTA. ChAFTA requires a joint decision by the parties who consult on the measure. Whether this approach will be effective to save public welfare regulation however remains to be seen.

- Investor obligations (Investment Protection Chapter)

Article xy

Investor obligations

1. Investors of each Party and their investments shall comply with all applicable domestic measures of the Treaty Party in which their investment is made.
2. Investors of each Party and their investments shall comply with the obligations for business entities embodied in the OECD Guidelines for Multilateral Enterprises and the United Nations Guiding Principles for Business and Human Rights.
3. The Host State may at any time, including after the institution of dispute settlement proceedings in accordance with Chapter xy of this Treaty, deny the benefits of this Treaty to an investor and its investments which has breached its obligations under paragraphs 1 and 2.

Comment:

Most international investment agreements (IIAs) only set out obligations for States, aside from investors' obligation to make their investments in accordance with the host State's laws and regulations. To correct this asymmetry and rebalance the treaty, an investment protection chapter in a FTA could also set out investor obligations.

A "soft" way of doing this would be to include a reference to investor obligations in the treaty preamble. However, we suggest a more far-reaching option by including the obligation to comply with laws and regulations of the host State at both, the entry and post-entry stage, as a separate treaty provision. IIA that have followed this route include the COMESA Investment Agreement (2009, Art. 13) and the SADC Protocol on Finance and Investment (2006, Art. 10).

In addition to mandating compliance with the domestic laws, an investment protection chapter in a FTA should also oblige investors to comply with certain widely recognized principles of business conduct and applicable standards of Corporate Social Responsibility. The Alternative Model refers to the OECD Guidelines for Multinational Enterprises and the UNGP since they are the most comprehensive frameworks with separate obligations for States and enterprises.

While investors' observance of domestic laws can generally be enforced through national courts, including this obligation in an investment chapter could further improve means to ensure compliance (e.g. by way of denying treaty protection to non-complying investors or enabling States to bring counterclaims in ISDS proceedings). A denial of benefits clause is laid down in Article xy paragraph 3 above.

- Exception clause relating to all chapters (in the final provisions of the Agreement)

Article xy

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 related to

- a. 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. protect human, animal or plant life or health, including environmental measures;
- c. secure compliance with the precautionary principle;
- d. protect social and labour laws and collective bargaining agreements;
- e. respect, protect and fulfil human rights;
- f. preserve the diversity of cultural expressions;
- g. protect the conservation of living or non-living exhaustible natural resources; and
- h. 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.

Comment:

A general exception clause contributes to a balance between trade and investment interests on the one hand and non-economic interest such as labour, environmental and human rights on the other hand. Exceptions clauses do provide the opportunity to justify a breach of treaty obligations under exceptional circumstances. Therefore, exceptions clauses balance the parties regulations with private economic interests quite effectively. The suggested exception clause lays down the most important aspects relating to sustainable development (labour, environment and human rights). The general exception clause should be located in the final provisions of the treaty applying to all aspects of the treaty. This proposal for a general exceptions clause is partly modelled after GATT Article XX and the study of Lorand Bartels.²⁶ In contrast to GATT Article XX, measures of the Parties do not need to be necessary to achieve the policies covered by paragraphs (a)-(h) but a relation to the objective is sufficient.

²⁶ *Lorand Bartels, A Model Human Rights Clause for the EU's International Trade Agreements, study conducted on behalf of the German Institute for Human Rights and MISEROR, 2014 p. 37; In the study for the Sachverständigenrat für Umweltfragen, the authors also suggest to implement a general exceptions clause in the investment protection chapter, see Peter-Tobias Stoll et al., Die Transatlantische Handels- und Investitionspartnerschaft.(TTIP) – Regulatorische Zusammenarbeit und Investitionsschutz und ihre Bedeutung für den Umweltschutz, Rechtsgutachten im Auftrag des SRU, 2015, pp. 80-81.*

- Exclusions from the scope of the agreement relating to all chapters (in the final provisions of the Agreement)

Article xy

Exclusion/ carve-out of public services

1. This agreement does not apply to public services and to measures regulating, providing or financing public services.
2. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest.
3. Special regulatory regimes or special obligations include, but are not limited to, universal service or universal access obligations, mandatory contracting schemes, fixed prices or price caps, the limitation of the number or services or service suppliers through monopolies, exclusive service suppliers including concessions, quotas, economic needs tests or other quantitative or qualitative restrictions and regulations aiming at high level of quality, safety and affordability as well as equal treatment of users.

Comment:

The key element of the proposed model clause is the definition of the term public services. The definition does not rely on a sectoral or functional approach, but defers the determination of public services to the competent authorities of the Member States at all government levels. This approach allows for greater flexibility and encompasses different approaches towards public services in the territory of the treaty Parties.

The proposed model clause establishes a broad exclusion and applies to the entire agreement on investment and services. Depending on the structure of the agreement, the latter scope of the exclusion clause would not apply to government procurement and might also not extend to subsidies or domestic regulation if these are addressed in different chapters. This needs to be kept in mind when designing the specific clause.

Alternatively, the scope of application of a trade in services and investment chapter could define “services” or “investment” in such a way that it excludes activities considered to be public services in the above meaning.

This proposal is based on Krajewski (2016).

Literature

AK Europa, Stellungnahme zum Entwurf des Erstberichts der Handels-Nachhaltigkeitsfolgenabschätzung der Transatlantic Trade and Investment Partnership (TTIP), Positionspapier, May 2014, available at https://media.arbeiterkammer.at/wien/PDF/Publikationen/TTIP_nachhaltigkeitsfolgenabschaetzung_05_14.pdf.

AK Europa, TTIP: Nachhaltigkeitskapitel (DS 1536/15 vom 30.09.2015), Positionspapier, Oktober 2015, available at https://media.arbeiterkammer.at/wien/PDF/Publikationen/TTIP_nachhaltigkeitskapitel_Okt_2015_DT.pdf.

AK Wien and Ludwig Boltzmann Institute, Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements, June 2010.

ALOP et al, EU Trade Agreements with Central America, Colombia and Peru: Roadblocks for sustainable development, Briefing for MEPs, October 2011, available at http://www.aprodev.eu/files/Central_America/201110_briefing_fta_eu-ca-colombia-peru.pdf.

Bartels, Lorand, A Model Human Rights Clause for the EU's International Trade Agreements, study conducted on behalf of the German Institute for Human Rights and MISEROR, 2014, available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf.

Client Earth et al., Leaked EU "Sustainable Development" Proposal Fails to Protect Environment from Threats of TTIP, available at https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2015/sustainable_development_proposal_analysis_261015.pdf.

Client Earth and Transport and Environment, Sustainable development and environment in TTIP, Moving from empty language to equal consideration, October 2015, available at https://www.transportenvironment.org/sites/te/files/publications/2015_10_Environment_in_TTI_P_equal_consideration_report_FINAL_new_logo.pdf.

Cosbey, Aaron, Inside CETA: Unpacking the EU-Canada free trade deal, Biores, Volume 8, Number 9, November 2014, available at <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal>.

Cuyvers, Ludo, The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?, UNU-CRIS Working Papers, W-2013/10, available at <http://cris.unu.edu/sites/cris.unu.edu/files/W-2013-10.pdf>.

De Schutter, Oliver, Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Human Rights Council, December 2011, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf.

European Commission, Staff Working Document, Report Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), January 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

Marín-Durán, Gracia, The European Union and South Korea, The Legal Framework for Strengthening Trade, Economic and Political Relations, Edinburgh University Press, 2013.

Fritz, Thomas, The Second Conquest, The EU Free Trade Agreement with Colombia and Peru, FDCL/TNI, October 2010, available at http://fdcl-berlin.de/fileadmin/fdcl/Publikationen/EU_Trade/TheSecondConquest_ThomasFritz_FDCL_TNI_Oct2010.pdf.

Hachez, Nicolas, 'Essential Elements' Clauses In EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?, Institute for International Law and Leuven Centre for Global Governance Studies, KU Leuven, Working Paper No. 158, available at <https://ghum.kuleuven.be/ggs/publications/wp158hachez.pdf>, April 2015.

Krajewski, Markus and Kynast, Britta, Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe, Study commissioned by Hans-Böckler-Stiftung, October 2014.

Krajewski, Markus, Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements, Study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions, February 2016.

Sachverständigenrat für Umweltfragen, TTIP umweltverträglich gestalten, 2016, available at http://www.umweltrat.de/SharedDocs/Downloads/DE/04_Stellungnahmen/2012_2016/2016_02_AS19_TTIP.pdf?__blob=publicationFile.

Scherrer, Christoph and Hänlein, Andreas (eds.), Sozialkapitel in Handelsabkommen, Nomos 2012.

Schmiege, Eva, Handels- und Investitionsabkommen als Beitrag zu nachhaltiger Entwicklung? Lehren aus dem Wirtschaftspartnerschaftsabkommen der EU mit karibischen Staaten, Study commissioned for Stiftung Wissenschaft und Politik, June 2015.

Peter-Tobias Stoll et al., Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Regulatorische Zusammenarbeit und Investitionsschutz und ihre Bedeutung für den Umweltschutz, Rechtsgutachten im Auftrag des SRU, 2015, available at http://www.umweltrat.de/SharedDocs/Downloads/DE/03_Materialien/2012_2016/2016_03_MzU_47_TTIP.pdf?__blob=publicationFile.

Transport and Environment, Trade and sustainable development in the Transatlantic Trade Investment Partnership, 2015, available at https://www.transportenvironment.org/sites/te/files/publications/2015_07_Trade_and_sustainable_development_briefing_FINAL.pdf.

UNCTAD, Investment Policy Framework for Sustainable Development, 2015, available at

http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

Van Duzer, J Anthony et al., Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Country Negotiators, Commonwealth Secretariat, London 2013.

Van Duzer, J Anthony, Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?, in: Krajewski/Hindelang (eds.), Shifting Paradigms in International Investment Law, 2016.

Woolcock, Steve et al., The Trade Chapter of the European Union Association Agreement with Central America, Study requested by the European Parliament's Committee on International Trade, 2012, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433864/EXPO-INTA_ET\(2012\)433864_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433864/EXPO-INTA_ET(2012)433864_EN.pdf).

Zimmer, Reingard, Sozialklauseln im Freihandelsabkommen der Europäischen Union mit Kolumbien und Peru, Recht der Internationalen Wirtschaft 2011.