IV. Model clauses for the exclusion of public services

As shown above, the EU model can be criticized, because it does not apply to investment protection, because it relies on unclear terminology and because it does not protect all public services in the same manner. A model clause for the full and legally safe protection of public services therefore needs to avoid those flaws.

1. Core elements

Model clauses for the protection of public services in EU trade and investment agreement need to be built on three core elements: First, they require a clear definition of the concept of public services in a manner which encompasses the variety of models for these services which exist throughout Europe and taking into account the “diversity between various services” and “the differences in the needs and preferences of users that may result from different geographical, social or cultural situations” as mentioned in Protocol No. 26 on Services of General Interest. The definition of the notion of public services determines the substantial scope of the model clause.

Second, model clauses need to provide an adequate level of protection. As seen above, a model clause should not just apply to core trade liberalization obligations or only parts thereof, but to the entire chapter on services and investment or the entire agreement. At least, they should exclude investor-state dispute settlement from applying to disputes arising in the context of public services.

Third, model clauses need to be of a sufficiently binding legal quality. They should not be mere interpretative guidelines and therefore leave the determination of the scope of the agreement or its chapters in the hands of trade or investment tribunals deciding a specific dispute. For example, a provision like Art. 1201.3 NAFTA which holds that “[n]othing in this Chapter shall be construed to: (…) (b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter” is not an exception from the substantive obligations, but serves as context for interpreting these obligations (VanDuzer 2015: 118).

Similarly, Article 2 of the EU’s proposal on investment protection for TTIP stating that “[t]he provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives” is also not a clear carve-out for regulations in the public interest, but could be understood as an interpretative guideline. Contrary to this, clauses which specifically state that (the provisions of) a chapter do not apply to certain activities or functions are legally binding and unambiguous exemptions.

Model clauses should also avoid terms and language which would allow treaty interpreters to insert their own value judgements, for example the notion of “necessary” (see also Van Harten 2015:7). Furthermore, they should not relate to the notion of interpretation, e. g. “Nothing shall be interpreted as” as suggested by the Social Platform (2015). Provisions like these do not provide sufficient legal clarity as they only refer to the interpretation of norms, but not to the norms themselves.

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2 The concepts of substantive scope and level of protection are further developed in Krajewski 2011, 2015b.