3. Alternative models

An alternative to the model proposed above which deviates to a lesser degree from the current model could be the limitation of the exclusion of public services to investor-state dispute settlement (ISDS). For example, a potential clause could read: “The provisions of this section (i.e. the section on ISDS) do not apply if the dispute concerns an investment in public services or a measure regulating, providing or financing public services”. The term public services would need to be defined as suggested above. In this case, government measures regulating and financing public services or activities could not be challenged by foreign investors through ISDS. While the measures could still be considered a violation of the disciplines of the agreement, it would not be in the hands of private companies to raise those claims and pursue them through investment tribunals. However, it should be noted that an exemption of public services or measures relating to public services from ISDS would not exempt them from dispute settlement proceedings between the parties of the agreement. This is also the reason why a mere exclusion of public services and respective government measures from ISDS would not provide the same level of protection as the model clause suggested above.

Another alternative could be the inclusion of a reference to public services in a general exception clause of the agreement. For example, such a reference could read as follows: “A Party may adopt or enforce a measure necessary to regulate, provide or finance public services”.

Again, the term public services would need to be defined as suggested above. This clause would not exempt public services or respective government measures from the application of certain disciplines, but would justify potential violations of the agreement in the same manner as Article XIV GATS. However, as explained above, such a justification clause would rely on the concept of “necessary” which would require the determination of whether alternative and less-trade restrictive measures would be available to the Member State. For example, it could be argued that subsidizing the provision of services to remote areas of a country is less trade-restrictive than providing the service through a public monopoly. Justification or general exception clauses also tend to be interpreted narrowly by dispute settlement mechanisms. Hence, including a reference to public services in a general exemption clause would also not provide the same level of protection as the model suggested here.

VI. Outlook

The model clause developed in this study is primarily aimed at current or future bilateral free trade and investment agreements of the EU. It is based to a certain extent on the logic of the EU’s own concept of public services which relies on Member State’s discretion regarding the determination of public services. It should be noted, however, that the model proposed here can also be used in other trade and investment contexts. The definitions reliance on specific regulatory regimes can easily be applied in other legal and political systems as well. Unlike other proposals, the model presented here does not rely on language or legal concepts which are restricted to the EU context.

As a consequence, the model proposed here could also be used in other ongoing negotiations on services and investment agreements, most notably the negotiations on a plurilateral Trade

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4 See for example Article 28.3 of CETA (version: February 2016) on Exemptions.