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MODEL CLAUSES FOR THE EXCLUSION OF PUBLIC SERVICES FROM TRADE AND INVESTMENT AGREEMENTS

**Study commissioned by the Chamber of Labour Vienna
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I. Introduction and aim of the study

The impact of international trade agreements on public services has been a controversial subject for a number of years. Generally, the obligations of trade agreements have the potential to limit the ability of governments to choose freely between different regulatory instruments and techniques for the organisation and provision of services considered to be essential for the general public such as network communications, energy and water distribution, education, health and social services. While this impact has been discussed with regards to the GATS quite extensively (Krajewski 2003; Adlung 2006, Arena 2011 and Arena 2015), the analysis of other trade agreements in this context has been limited.

However, the current negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US and the negotiations of twenty-three WTO Members of a plurilateral Agreement on Trade in Services (TiSA) as well as the recent conclusion of the trade agreement between the EU and Canada (CETA) led to a renewed debate about public services and trade agreements (European Commission 2015; Grudzielsky 2015; Social Platform 2015). In addition, since CETA and TTIP also contain chapters on investment protection, the impact of investment agreements on public services also became an issue of concern. While the mechanisms of investment protection agreements differ from those of trade agreements, they may nevertheless also have limiting effects on governments' abilities to organize, provide and finance public services (Krajewski 2015a).

In light of the recent controversy and considering that one of the European Commission's negotiating goals in the TTIP and other negotiations is to develop "golden standards" in these agreements, it might be worth to develop new instruments to prevent negative impacts of trade and investment agreements on public services. The potential conflicts between trade and investment agreements and public services have long been recognized and various instruments to mitigate this conflict have been discussed (Krajewski 2011). One such instrument could be the complete exclusion of these services from the scope of trade and investment agreements or from the most contentious parts and provisions of these agreements. This study therefore develops and explains model clauses which could be used in international trade and investment agreements to exclude public services from the scope of these agreements in their entirety in a legally reliable manner. The study is based on the assumption that it would be best for the protection of public services if trade and investment agreements – or the most contentious parts of these agreements – would not apply to public services. The

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study will therefore not discuss model clauses or other options which could be used to limit the impact of trade and investment agreements or certain provisions of these agreements to public services. Comprehensive analyses of all legal instruments protecting public services in trade agreements can be found in previous studies (Krajewski 2015b and Krajewski 2011).

The study is organized in three main parts: Section II will provide a short overview of the current model of the European Union towards public services in trade and investment agreements and will explain its legal consequences. Subsequently, section III will analyse the main flaws of this approach and will develop arguments why the complete exclusion of public services from trade and investment agreements could be seen as a “golden standard” for safeguarding the provision and organization of public services in in the EU. The main part of this study, section IV will then develop a model clause for the exclusion of public services. It will be shown that the major challenge is the definition of the notion of public services in a manner that does not preclude the future development of new public services and new models of providing or organizing them. The last section, section V, will address potential challenges and criticism of the proposed model clauses and will briefly assess alternatives to the proposed model clauses.

II. The current EU model of protecting public services in trade agreements

Since the conclusion of the GATS in 1994 and in all subsequent trade agreements the EU has followed a specific model of protecting public services. The model combines a general exemption of services supplied in the exercise of governmental or official authority with various instruments which limit the impact of specific commitments. The latter include the so-called “public utilities”-clause.

1. Exclusion of services supplied and activities carried out in the exercise of governmental authority

GATS and many free trade agreements signed by the EU contain a clause which excludes services supplied in the exercise of governmental authority from the scope of the chapter on trade in services. Similarly, activities carried out in the exercise of governmental authority are excluded from the chapters on investment liberalisation. These activities are therefore neither subject to specific commitments nor to general obligations of the respective chapters. All public services which are not covered by this exemption clause are subject to all obligations of the respective agreement or chapter.

The most prominent example is Art. I:3 (b) GATS which excludes services supplied in the exercise of governmental authority from the notion of “services” in the meaning of the agreement and therefore from the application of GATS. The term service “supplied in the exercise of governmental authority” is defined as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers” (see e. g. Art. I:3 (c) GATS). CETA, the EU-Singapore Free Trade Agreement and a draft of the EU proposal for the TiSA core text also contain these exception clauses.

The term services supplied in the exercise of governmental authority is usually understood in a narrow sense (Leroux 2006: 352). WTO Members agreed in a 1998 meeting of the Council

for Trade in Services that “the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly” (WTO 1998). It is generally agreed that the term only covers those governmental activities which are considered as core sovereign functions (Arena 2011:505). Services which are supplied for any form of remuneration or by more than one service supplier could potentially be regarded as supplied on a commercial basis or in competition with one or more service suppliers. Consequently, many public services, including social, health, educational services as well as network-based and universal services are not covered by this exemption clause.

2. Limitation of commitments in certain sectors

The second element of the EU approach protecting public services are limitations of sector-specific commitments. For example, the EU did not submit drinking water services to the GATS obligations of market access and national treatment and therefore excluded these services from the scope of these obligations. Similarly, the EU included drinking water services in its Annex II reservations of the CETA which also excludes commitments in this sector. It should be noted, however, that a limitation of commitment does not preclude the application of the investment protection part of the agreement to the sectors not covered by the commitments. In other words, investor protection applies regardless of the scope of the specific commitments.

Another technique used by the EU in this context are limitations of the scope of the commitments to privately funded activities. Prominently, the EU used this technique concerning education and health services. In earlier trade agreements such as GATS, the EU did not further define the notion “privately financed” which gave rise to a number of questions including the percentage of public or private financing which was required to exclude the service from the scope of commitments. In recent agreements including CETA the EU’s commitments contained a clarification by referring to “services which receive public funding or State support in any form, and are therefore not considered to be privately funded.” The broad term public funding or State support in “any form” suggests that even a small contribution to the service by the public purse excludes them from the application of the specific commitments. However, some uncertainties remain: For example, could services financed through mandatory public insurance schemes such as health services be considered as publicly funded?

Excluding publicly-funded services from specific commitments is a public service exception clause of an intermediate level of protection. It applies to national treatment and market access obligations and therefore offers a lower level of protection than the exception for services in the exercise of governmental authority which applies to all provisions of an agreement. At the same time, it offers a higher level of protection than the “public utilities”-clause which only applies to parts of the market access obligation.

3. “Public utilities”-clause

The so-called “public utilities”-clause is one of the most important instruments of the EU in the context of trade agreements and trade negotiations (European Commission 2015). According to this clause “services considered as public utilities at a national or local level

may be subject to public monopolies or to exclusive rights granted to private operators.” Accordingly, the EU and its Member States maintain the right to establish or maintain monopolies or to grant exclusive rights to service providers in public utilities. The “public utilities”-clause only applies to commercial presence and covers only parts of the market access obligation, in particular the prohibition of monopolies and exclusive service suppliers.

The clause was first used in the EC’s GATS schedule in 1994 and has been used in free trade agreements of the EU ever since. The EU also used this clause in its Annex II reservations in the CETA with Canada and in the schedules of the EU-Singapore FTA. In the latter agreement an explanatory footnote states that since “public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical. To facilitate comprehension, specific footnotes in this list of commitments will indicate in an illustrative and non-exhaustive way those sectors where public utilities play a major role.” Following this approach, many sectors or subsectors listed in the schedules of specific commitments contain a footnote which states that the horizontal “public utilities”-clause applies. Mostly, the respective services fall into the categories of energy activities and services, transportation, social and health services and cultural services. Interestingly, education services are not marked with a reference to the “public utilities”-clause.

The term “public utilities” has no specific meaning in international trade or EU law. The ordinary meaning of the term public utilities is unclear and requires additional means of interpretation to determine its contents. It is therefore understandable that the European Commission considered the term “public utilities” as ambiguous in its “Reflections Paper on Services of General Interest in Bilateral FTAs” published in February 2011 (European Commission 2011: 4).¹

III. Key challenges of the current EU model

The current EU model for the protection of public services in trade agreements as described above is subject to a number of challenges which will be discussed in this section. It should be noted, however, that despite these challenges there have been no concrete disputes or actual legal challenges to the provision of public services on the basis of the GATS or bilateral trade agreements following the GATS structure. Yet, this is not necessarily an indication of the quality of the model.

1. Exclusion of investment protection from the model

The current EU model for the protection of public services was developed in the context of trade agreements and only applies to the trade in services and investment liberalization chapters of trade agreements, but not to investment protection. Specifically, the model limits the impact of liberalization commitments including market access and non-discrimination, but does not exclude public services from investment protection including investor-state-dispute settlement.

¹ For a critical assessment of that paper see Krajewski (2011).

Neither the CETA chapter on investment protection nor the EU's proposal for an investment protection chapter in TTIP contain any special references to public services, services supplied in the exercise of governmental authority, public utilities or publicly financed services. For example, the exclusion of "activities carried out in the exercise of governmental authority" in the CETA chapter on investment is limited to the sections on establishment of investments and non-discriminatory treatment, but does not extend to the section on investment protection. It is hence safe to conclude that the current EU model offers no protection for public services with regards to investment protection.

This can be explained with the limited experience of the EU regarding investment protection agreements. The EU's competence in this field was only established by the Treaty of Lisbon in 2009. CETA, the EU-Singapore FTA and TTIP are hence the first trade agreements which contain an investment protection chapter. In addition, the potential negative impact of investment protection agreements has not yet been discussed and analysed extensively. However, there have already been some investor-state dispute settlement cases which related to investments in the field of public services (Krajewski 2015a).

2. Ambiguous terminology

The current EU model relies on various terms whose meaning is either unclear or too narrow to effectively protect public services. It combines functional, sectoral and hybrid definitions and uses terms which are not necessarily linked with each other. This leads to uncertainties when determining the exact scope of the different provisions. While the term "services supplied in the exercise of public authority" is comparatively easy to interpret and understand, the notion of "public utilities" and the concept of "publicly financed" are less clear as explained above. They have no specific meaning in international law and no equivalent term in EU law. Even though there seems to be a relatively large overlap between public utilities and services of general economic interest (SGEI) in the meaning of Article 106 para 2 TFEU the exact relationship remains unclear. It should also be noted that the term SGEI is itself not entirely clear in EU law. This ambiguity has been partly solved in EU law though, because it is generally accepted that the Member States determine if a service is considered a service of general economic interest (see below IV.2.).

In addition to the unclear meanings of key terms used by the EU in its model for the protection of public services, the relationship of the different terms is unclear. In particular, it is unclear if the term "public utilities" and "publicly financed services" may overlap as suggested by the EU schedule of the EU-Singapore free trade agreement.

3. Different levels of protection of public services

The EU's current approach towards public services in trade agreements is not based on a coherent functional model. While the underlying concept of the different layers of protection allows the EU and its Member States to distinguish between different activities and rationales for protecting them from parts or the whole of a trade agreement, the concrete application of the model is problematic. For example, it exempts certain services which are publicly financed from market access and national treatment obligation, but excludes public utilities only from the application of the prohibition of monopolies and exclusive service suppliers.

Consequently, different public services are subject to different obligations and commitments of a trade agreement. This does not provide sufficient regulatory space and flexibility from the domestic regulation perspective.

4. Twenty years of a successful model?

The EU Commission claims that its model offered “20 years of protection that works” (European Commission 2015). It argues that the approach protected public services in the EU for the last 20 years and that since 1995 when the EU signed the GATS and in light of the subsequent trade agreements of the EU Member States have been able to run services like hospitals, schools or water distribution, in the just the same way as before the EU signed these agreements (European Commission 2015).

It is correct to state that so far trade agreements have not formally prevented Member States from providing public services or from organizing them in certain ways. Furthermore, no concrete dispute in this area was ever filed in the WTO or any other dispute settlement forum. However, the often discussed regulatory chill of trade agreements does not necessarily require concrete cases. In addition, if governments engage in policy reforms for public services, they may take their trade obligations into consideration without officially acknowledging this. It can therefore not entirely be excluded that the trade commitments of the EU may have limited the policy choices of Member States concerning public services despite the EU’s approach of protecting public services.

Furthermore, and even more importantly, the fact that the model seems to have been “successful” so far does not guarantee that this will remain the case in the future. It should be kept in mind that the GATS commitments of 1995 de facto reflect at most the status quo regulation and liberalization of public services in the early 1990s. However, the reality of public services has changed significantly since then and the GATS commitments do not reflect the current situation. It is hence not surprising that the GATS commitments which were in fact limited in many cases did not cause any noticeable conflict.

In addition, the trade agreements signed by the EU since 1995 were agreements with developing countries and emerging markets (e. g. Mexico, Chile, South Korea, Peru etc). There are no significant commercial suppliers of public services with a market access interest in the EU in these countries. To the contrary, EU suppliers of public services were interested in market access in these countries. Hence, the EU commitments and the model protecting public services was never put to a real test.

This may change significantly with the signature of CETA and even more so TTIP or TiSA. It is conceivable that commercial suppliers of health, education, transportation or environmental services may have a real market access interest. Consequently, it remains to be seen whether the EU model really protects Member State’s autonomy in regulating, providing and financing public services. Neither the EU nor its Member States should therefore lean back and rely on a model which was developed more than twenty years ago and was never seriously tested.

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.² 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.

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

2. Definition of public services

The greatest challenge for any model clause protecting public services is a clear and comprehensive definition of the notion of public services. There is no generally accepted definition of this concept in EU or international law or in any national legal system. While there is usually agreement that certain services such as health, social, education, energy distribution, electronic and postal communication, public transportation, waste collection, and water distribution are public services, definitions which rely on specific existing public services risk excluding certain activities which may be considered a public service in some legal systems. Furthermore, such definitions only reflect a specific historic understanding of public services and are hence likely to be static. However, the concept of public services is dynamic: Its contents vary of time and space (Krajewski 2003).

In a similar way, definitions such as Article I:3 (c) GATS which relies on the modalities of the provision of services (“on a commercial basis”; “in competition with one or more service suppliers”) are also problematic, because they assume that a certain model of providing public services is the only model worth protecting. Such definitions can therefore also lead to a static understanding of the concept of public services.

The debate about services of general (economic) interest in the EU and the interpretation of that term by the European Commission and the European Court of Justice revealed similar problems with defining the exact scope of the notion of services of general interest or services of general economic interest. In EU law, it is now generally accepted that the Member States determine whether an activity qualifies as a service of general interest and the EU organs only assess if the Member State’s determination was based on a manifest error (European Commission 2013:24). The key factor in determining whether an activity is considered to be a service of general economic interest is therefore the determination of that activity as an activity in the general interest by a Member State.

This approach coincides with Article 1 of Protocol No. 26 on Services of General Interest. Accordingly, one of the values of the EU with regards to services of general economic interest is “the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”.

The determination of an activity as a service of general interest usually requires an official act or a deliberate choice of the respective government or governmental unit and the imposition of special obligations in the public interest for example universal service obligations or the obligation to offer a contract to everyone by the competent authority. This would also be the case if the service is supplied by the government itself based on public interest considerations. It is suggested that a model clause protecting public services in EU trade and investment agreements is built on this concept.

3. Proposals for model clauses

Based on the above, a model clause for protecting public services could read as follows:

“This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services.

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.

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 of 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.”

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.

4. Explanation

a) Definition of public services

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. As explained above, this approach allows for greater flexibility and encompasses different approaches towards public services in the Member States.

However, it should be noted that the deference to Member States is not unconditioned. Member States cannot determine the scope of the agreement or its trade and investment chapter by simply labelling a particular activity as a public service. The determination of an activity as a public service requires specific regulations, a specific legal framework or special regime which includes the delivery of the service by a competent authority. Requiring specific regulatory activities of the Member States’ authorities prevents potential misuse of a broad public services exemption. It is also in line with a modern understanding of the concept of public services which relies on political and hence democratically accountable decisions of competent authorities and not on traditional concepts.

The regulatory regime required by the definition of public services suggested here needs to be imposed on services or service suppliers in the general interest. In other words, public service providers need to fulfil certain requirements imposed on them in order to meet certain predetermined public interests. The definition does not specify which interests need to be met, because these will depend on specific decision in the respective Member State. The general

interest includes the realization of basic rights such as the right to health or education, but the general interest cannot be limited to policies pursuing those rights.

In order to further clarify its concept, the proposed model clause also makes use of an illustrative list of potential regulations, regulatory instruments or goals. The list is not exhaustive and therefore allows for future and different regulatory approaches. The list refers to the most common public service obligations employed by Member States. It clarifies that the definition does not only rely on technical regulations or quality standards, but also includes market access restrictions such as public monopolies or other forms of limiting competition. Universal service or universal access obligations are requirements to supply a service or provide access to services in the same manner and at comparable conditions concerning quality and price throughout a geographic territory. Mandatory contracting schemes or price caps are regulatory instruments which limit the freedom of contract of the service providers. The limitation of the number or services or service suppliers through monopolies, exclusive service supplier schemes such as concessions, quotas, economic needs tests or other quantitative or qualitative restrictions are measures which would normally violate the market access requirements of a trade agreement. The express inclusion of concessions in this definition seems useful, because of the frequent use of these instruments in the organization of public services. Concessions are seen as one form of a regulatory regime of public services. Finally, the mode clause refers to regulations aiming at a high level of quality, safety and affordability as well as equal treatment of users. This is an explicit reference to Art. 1 of Protocol No. 26 on Services of General Interest. It indicates that the regulatory restrictions imposed on public service suppliers usually aim at one or all of these purposes.

The model clause not only covers public services, but also governmental measures aimed at regulating, providing or financing these services. This is important because many challenges of special governmental measures will be raised by or on behalf of commercial service providers who will argue that a particular measure discriminates against them or restricts their market access. For example, if a commercial provider of private education services would argue that special conditions which are given to public education providers are discriminatory, it might not be sufficient for the government defending that measure to argue that public education is not covered by the agreement, but that the specific measure is also not covered by the agreement.

b) Level of protection

The proposed model clause establishes a broad exclusion and applies to the entire agreement or at least to the entire chapter 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.

The exclusion of public services in the proposed clause would be similar to the general exclusion of audiovisual services from the scope of the investment and services chapters in EU free trade agreements. However, the proposed clause would go beyond the audiovisual carve-out by also excluding measures regulating, providing and financing public services.

This seems necessary if the clause should also provide full protection against claims under an investment chapter. The exclusion of public services from the scope of the investment chapter means that an investor or investment does not fall under the ambit of the agreement if the investment concerns public services. For example, if a private investor would be awarded a concession to operate a regional bus line which contains requirements concerning routes, frequencies and price schemes, this concession could be considered a specific regulatory regime and would make the bus service a public service. Hence, the investment would be an investment in the field of public services which are not protected under the investment chapter.

Excluding public services from the investment chapter would not exclude claims from investors in other sectors which are related to public services. If, in the above example, a private bus operator not subject to the requirements of a concession would raise a claim against the granting of the concession, that claim would be unfounded, because it would be a claim against a governmental measure regulating, providing and financing public services because such a measure could not be attacked on the basis of the agreement.³

This would also apply to a claim invoking the so-called umbrella clause. Umbrella clauses extend the scope of the investment protection chapter to specific commitments of a state towards an investor. In practice, these commitments are usually contained in a state-investor contract covering a specific project. Sometimes this can also be part of a concession agreement. An investor relying on the umbrella clause claims a violation of the investor-state-contract as violation of the standards of the investment protection chapter. However, if the measure attacked by the investor would be a measure regulating, providing and financing public services it would not fall within the scope of the investment chapter. Consequently, the investor could not circumvent the exclusion of public services by relying on the umbrella clause, because the investment chapter would not be applicable in the first place.

V. Potential critique of the proposed model clauses and alternatives

The proposed model clause would substantially deviate from the existing EU model. It could be criticized based on two arguments which can, however, be rejected.

1. Unilateral determination of the scope of an international agreement

A first challenge to the model proposed here could be based on the argument that the model allows Member States to unilaterally determine the scope of the agreement by declaring an activity as public service. Arguably, this would be contrary to the general purpose and function of an international agreement: If states would be capable of excluding the application of an agreement through unilateral measures they could easily escape the disciplines of the agreement and therefore defeat its purpose.

³ It should be noted that excluding concessions from the definition of investment in an investment protection chapter of the treaty may not solve this problem. In the case discussed the investment is not the concession itself, but the physical infrastructure or the actual capital invested in the operation of the bus line. Hence an exclusion of concessions although useful in other contexts would not be a sufficient safeguard for public services.

It should, however, be noted that it is not unusual that the scope of application of international agreements partly depends on domestic regulatory frameworks. In fact, even the current model already employs such a possibility, albeit on a smaller scale as the model proposed here. The definition of “services supplied in the exercise of governmental authority” in Article I:3 (c) GATS and similar clauses relies on the non-commercial and non-competitive supply of the service. Both characteristics depend on the respective regulatory framework of the service and are therefore subject to domestic policy choices and decisions. As aptly observed by Zdouc (1999:321) deregulation and liberalization may reduce the number of services that are covered by the GATS exemption clause. In the same way, nationalization policies could increase the number of services that are covered by this clause.

Apart from this observation, it needs to be recalled that the proposed model does not enable governments to simply exempt certain activities or measures from the scope of an agreement or chapter and from the application of its disciplines by labelling an activity as “public service”. As pointed out above, the model clause suggested here requires Member States and their competent authorities to impose regulatory regimes for the provision, organization or financing of public services in order for the proposed model clause to apply. For example, unless the provision of a service is subject to a universal service obligation or a regulation which aims at affordable, equal and quality access to a service, the respective service or a measure regulating or financing the service would not be covered by the exemption clause suggested here. Member States will therefore not be able to determine the scope of the agreement by simply “relabeling” a service.

2. Potential deviation from existing GATS commitments

The proposed model clause would exempt a larger portion of services from the scope of an agreement or services and investment chapter than under the current model, in particular on the basis of Article I:3 GATS. This could potentially lead to a reduction of existing GATS commitments. It could be questioned whether such a reduction or de facto withdrawal of commitments would be a violation of these commitments or whether this deviation could be justified.

The key to the answer of this question is Article V GATS. It contains the requirements of free trade agreements covering trade in services between two or more WTO Members. According to that provision, free trade agreements can be justified if they have substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination. Furthermore, the agreement shall not “raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement”. Based on this, a deviation from GATS commitments is justifiable assuming that the overall level of trade barriers does not increase through the conclusion of the agreement. As shown by Adlung (2015: 627) the additional commitments in regional trade agreements usually outweigh any GATS-minus commitments to a large extent. Even though a detailed assessment of this requirement in the case of TTIP, CETA or TiSA is beyond the scope of this paper, but it is safe to conclude that it seems possible to justify a potential deviation from existing GATS commitments.

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”.⁴ 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

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

in Services Agreement (TiSA). As mentioned above, the current proposals for that agreement rely on the old models of trade agreements addressing public services which have rightly been criticized.

The model clause proposed here could also be used as an element of a reform agenda for the multilateral GATS and could serve as an alternative or amendment to GATS Article I:3 (c). Even though the old GATS model has never been tested in any actual legal proceeding, it is generally agreed that the model is based on an outdated understanding of public services. A model based on the proposal developed in this study would be more attuned to modern concepts of public services which are based on the necessity of regulatory space for democratically legitimized decisions of competent national, regional or local authorities.

VII. Summary

1. The current model of the EU aimed at the protection of public services in free trade agreements does not provide for a full protection of all public services. It does not apply to investment protection, relies on ambiguous terminology and is incoherent. While the model has never been formally tested, it is questionable if it effectively protected public services and even more so if it will do so in the context of TTIP, TiSA or future services and investment agreements.
2. Inserting a clause which would generally exclude public services and government measures aimed at regulating, providing and financing public services from the scope of a trade and investment agreement or a chapter on investment and services would lead to a greater level of protection and could be seen as a “golden standard” in the context of current negotiations and agreements.
3. A clause excluding public services and government measures aimed at regulating, providing and financing public services from the scope of an agreement or a relevant chapter would need to be based on a definition of public services which is sufficiently clear but also flexible enough to address the dynamic and changing nature of public services in various contexts. It is hence suggested to define the term public services with reference to the respective regulatory framework and therefore with deference to Member States’ regulatory autonomy and discretion.
4. A model clause as the one proposed here would not allow Member States to easily determine the scope of the disciplines of a trade and investment agreement unilaterally because it would rely on actual regulations imposed by the competent authorities or on special regulatory arrangements which could include the provision of the services by the authorities themselves hence preventing any misuse. Furthermore, potential deviations from GATS commitments through a clause excluding public services from the scope of an agreement or chapter could be justified if the requirements of Article V GATS are met.
5. The model clause developed in this study could not only be used in the context of current negotiations on free trade agreements of the EU, but could also be applied in plurilateral and multilateral contexts. It is firmly rooted in the conviction that future trade agreements need to preserve more policy space for governmental regulations and activities in the public interest.

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