

Model clauses for the exclusion of public services from trade and investment agreements

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Outline

- The current EU model
- Challenges of the current model
- Core elements of a model clause
- Textual proposal
- Potential critique
- Alternative, less ambiguous models

The current EU model

- Exclusion of services supplied in the exercise of governmental authority
- Limitation of commitments in certain sectors
 - subsectors: e.g. drinking water
 - publicly-financed education and health services
- „Public utilities“ clause

Challenges of the current EU model

- Public services protection limited to trade and investment liberalisation → investment protection not covered
- Ambiguous terminology
- Different levels of protection for different services
- „Twenty years of protection that works“?

Core elements of model clauses

- Clear definition of public services / services of general interest
- Adequate level of protection
- Legally binding
- Avoiding language referring level of protection to interpreters of agreement („Nothing in this agreement shall be interpreted“)

Textual proposal

- “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 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 users.”

Potential critique

- Unilateral determination of the scope of international agreement
- Potential deviation from existing GATS commitments

Alternative, less ambiguous models

- Exclusion of public services from ISDS
- Reference to public services in general exception clause

The top of the slide features a blue-tinted background image. On the left, there is a silhouette of a building's roofline with several statues. On the right, there is a large, faint circular seal containing the word 'ACADEMIA' and a profile of a man's head.

Thank you very much for your attention!

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