Chapter 2
Revisiting the Impact of GATS on Public Services

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Abstract The impact of the WTO's General Agreement on Trade in Services (GATS) on public services is the subject of intense debates. This chapter analyses the potential effects of the main GATS disciplines, such as most-favoured-nation treatment, market access, national treatment and rules on domestic regulation, on the provision of public services at the national and local level. It also examines the instruments WTO members are afforded by the GATS to mitigate those effects by exempting what they regard as public service from the GATS disciplines. In addition, this chapter examines the GATS overall approach to the notion of public services and its impact on the conceptualisation of public services beyond national borders through regional economic integration.

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2.1 Introduction

The General Agreement on Trade in Services (GATS), the world's foremost agreement on services in terms of membership, constitutes an unavoidable reference in current and, possibly, future negotiations at the bilateral and plurilateral level. Just as Economic Integration Agreements (EIAs) take over ready-made clauses from the GATS or build upon their wording, they also share a more controversial legacy: the allegations of undermining the provision of public services in the countries concerned. The impact of the GATS on public services has been the subject of a lively academic discussion.[1] The purpose of this chapter is to assess, with the benefit of 20 years of hindsight, the impact that GATS has actually had on public services and the role it might play in regional service negotiations.

To this end, this chapter will first analyse the potential effects of GATS' cornerstone trade disciplines (i.e. Most-favoured-nation treatment, market access, national treatment, domestic regulation, etc.) on the provision of public services at the national and local level. Second, this chapter will examine the instruments WTO members are afforded by the GATS to mitigate those effects by exempting what they regard as public service providers from the above trade disciplines. Third, regard will be had to the GATS overall approach to the notion of public services and its impact on the conceptualisation of public services beyond national borders through regional economic integration.

Before delving into that analysis, a definitional note is in order. For the purpose of this chapter, the notion of 'public services' should be regarded as an inherently *domestic* pre-understanding (*Vorverständnis*).[2] To wit, 'public services' should be understood as comprising all activities functional to the pursuit of goals regarded as being in the general interest by a public authority *at the national or local level* and, for that reason, subject to rules different, in whole or in part, from those applying to other services and including elements compulsoriness (such as 'public service' or 'universal service' obligations).[3]

[1] For a comprehensive literature review, see Kulkarni 2009, pp. 247–248.

[2] See, generally, De Ruggiero 1984, pp. 596–597.

[3] See generally Marcou 2004, pp. 7–51; Marcou 2001, p. 386; Brancasi 2003, p. 30.

2.2 The Potential Impact of GATS Trade Disciplines on Public Services

The GATS seeks to pursue economic growth through 'progressive liberalization'. In essence, that agreement lays down a number of trade disciplines whose function is to constrain WTO members' ability to adopt measures affecting the provision of services through the four modes of supply described in Article I(2) GATS.

As noted by Krajewski, however, not all those constraints have the same impact on WTO member's ability to regulate, fund, and operate public services.[4] This section, therefore, will focus on GATS trade disciplines that are most likely to affect the provision of those services at the national and local level, viz. Most-Favored-Nation (MFN) treatment, market access, national treatment, domestic regulation, and a number of other horizontal and sectoral provisions. To that end, examples of public service regulation and support schemes that may be inconsistent with those disciplines will be provided.

Before turning to the specificities of each provision, it must be noted that, in general, GATS trade disciplines are 'import-related',[5] in that they seek to prevent WTO members from restricting supply of foreign services or by foreign suppliers, rather than from placing regulatory constraints on domestic services or service suppliers.[6] Accordingly, as it will be explained in greater detail in the following sections, certain regulatory schemes designed to ensure the availability of public services to domestic users lie outside the scope of the GATS trade disciplines altogether.

2.2.1 Most-Favoured-Nation Treatment

According to Article II GATS, each WTO member must accord to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.

The MFN clause does not interfere with public services so long as only *national* providers supply those services.[7] The picture changes substantially, however, if also *foreign* suppliers are involved in the provision of public services. The MFN stipulates that all like foreign services and like service providers should be on equal footing, thus precluding reciprocity-based arrangements between WTO members.

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[4]See Krajewski 2003, p. 359.

[5]But see *China—Certain measures affecting electronic payment services*, Report of the Panel, WT/DS413/R, para 7.618 ("Nothing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the "export" of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the "exporting" Member's territory").

[6]Krajewski 2003, p. 347.

[7]Adlung 2006, p. 467; Krajewski 2003, p. 359.

Some examples may elucidate that proposition. If WTO member A and WTO member B enable their healthcare professionals to practice in one another's territory (mode 4), the MFN clause requires those WTO members to extend that treatment also to practitioners from every other WTO member. Likewise, if WTO member A reimburses expenses incurred by its nationals for medical treatments undergone in the territory of WTO member B (mode 2) on the basis of reciprocity, it must also cover the costs of medical care received by its nationals in other WTO members. Moreover, the MFN clause prohibits discrimination between suppliers of telecommunication or audiovisual services from different WTO members having a commercial presence in the same WTO member as regards access to the radio spectrum and to network infrastructure.

The MFN principle may also interfere with the regulation of public services provided across the border (mode 1), such as the international postal service.[8] When mail is sent from one country to another, the receiving postal administration charges the sending postal administration for access to its delivery network (the so-called 'terminal dues'). The MFN clause precludes WTO members to apply different terminal dues based on the incoming mail's country of origin.[9]

The liberalization potential of the MFN principle is, however, subject to constraints. First, it only applies to 'like' services and 'like' service providers. Moreover, since the MFN principle is aimed at measures affecting the 'import' of services, each WTO member remains at liberty to treat incoming service recipients from different WTO members in a different manner. Thus, WTO member A may grant preferential access to hospital facilities located in its territory to patients that are nationals of WTO member B, with which a reciprocity arrangement is in place, relative to citizens of other WTO members, which are not bound by an equivalent agreement. Moreover, outbound movements of domestic suppliers are not subject to the MFN clause. Therefore, a WTO member may provide financial assistance only to domestic educators wishing to teach at academic institutions located in WTO members that have tighter cultural or economic links with the former WTO member.

2.2.2 Market Access

Article XVI requires WTO members to refrain from applying six types of measures that may hinder market access: quantitative restrictions (on the number of service suppliers, on the value of service transactions or assets, on the number of

[8]See WTO, Background Paper by the Universal Postal Union, Informal Note from the Secretariat, JOB(02)/17, 4 March 2002.

[9]See Perrazzelli and Vergano 2000, pp. 744–746; Luff 2002, pp. 77–78; T.M.C. Asser Instituut, The Study of the Relationship between the Constitution, Rules, and Practice of the Universal Postal Union, the WTO Rules (in particular the GATS), and the European Community Law, Final Report, prepared for the European Commission. http://ec.europa.eu/internal_market/post/doc/activities/tmc-asser-final-report-300604_en.pdf. 30 June 2004, p. 79. Accessed 20 October 2014.

operations or quantity of output, and on the number of natural persons supplying a service) as well as limitations on forms of legal entity, and on the participation of foreign capital.

The obligations flowing from Article XVI may interfere with regulatory arrangements commonly adopted by national and local governments in the field of public services, notably special and exclusive rights. WTO members may entrust the provision of public services to a limited number of providers to achieve cost efficiency (e.g., in the case of natural monopolies or natural oligopolies) or to allocate scarce resources (such as the broadcasting spectrum). Moreover, exclusive rights may enable public service providers to operate in conditions of economic equilibrium by offsetting profitable activities (e.g. courier services) against unprofitable ones (e.g. the universal postal service). By the same token, in concession contracts, the concessionaire's exclusive right to exploit the works or services constitutes its consideration for the provision of those works or services in addition or as an alternative to payment. Yet, those schemes may fall within the mischief of Article XVI:2(a), insofar as they limit the number of service providers, thus hindering market access.[10]

Article XVI may also preclude public ownership requirements, as well as restrictions on foreign investment in the share capital of public service providers. Economic theory has shown that under conditions of contract incompleteness public ownership may prove more efficient than regulation of private firms.[11] Several WTO members have thus discontinued the privatization trend of their utilities or even reversed it, through remunicipalisation of certain essential services. Some WTO members have also imposed foreign equity ceilings in the field of audio-visual, education and postal services.[12] However, those measures may be inconsistent with Article XVI:2(f), which outlaws restrictions on foreign capital and investment.

Moreover, the GATS provision on market access may bar WTO members from regulating the legal form of public service providers.[13] In several countries, for instance, higher education institutions may only be constituted as non-profit organizations.[14]

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[10]Choudhury 2012, p. 78; Krajewski 2003, p. 360.

[11]See Laffont and Tirole 1993, p. 644.

[12]WTO Council for Trade in Services, Education Services, Background Note by the Secretariat, S/C/W/313, 1 April 2010, para 78; WTO Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/310, 12 January 2010, para 67; WTO Council for Trade in Services, Postal and Courier Services, Background Note by the Secretariat, S/C/W/319, 11 August 2010, para 77.

[13]A. Ostrovsky, E. Türk and R. Speed, GATS and Water: Retaining Policy Space to Serve the Poor. Center for International Environmental Law 3–4. http://www.ciel.org/Publications/GATS_5Sep03.pdf. 5 September 2003, pp. 3–4. Accessed 20 October 2014.

[14]APEC, Measures Affecting Cross-Border Exchange and Investment in Higher Education in the APEC Region. http://aplicaciones2.colombiaaprende.edu.co/mesas_dialogo/documentos/mesa80/21113MeasuresAffectingCrossBorderexchangeanfinvestmentinHEintheAPECregion.pdf. May 2009. Accessed 20 October 2014.

Other WTO members have placed restrictions on the type of legal entity through which audio-visual services can be provided.[15] In many jurisdictions, likewise, only natural persons can only provide notary services.[16]

2.2.3 National Treatment

Article XVII GATS requires WTO members to accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

Several measures employed by national and local governments in respect of public services may come into conflict with that provision. The most relevant example is state aids accorded to public service providers. Those subsidies can either be addressed to the supplier (e.g. university funding based on the number of enrolled students) or to the recipient (e.g. tax deductibility of medical treatments) of the service.

As to the former, while Article XVII GATS requires that foreign service suppliers established in a WTO member (modes 3 and 4) be granted the same financial incentives as their domestic counterparts,[17] WTO members are under no obligation to extend subsidies to suppliers located in the territory of other members,[18] whose services are either consumed abroad (mode 2) or provided on a cross-border basis (mode 1). This means that while a domestic university and a foreign university established in the same WTO member are entitled to receive the same funding per enrolled student,[19] no funding is due to universities established abroad for tuition provided to students from the above WTO member.[20]

In contrast, recipient-based subsidies should be extended also to services provided to domestic consumers by foreign suppliers either abroad (mode 2) or on a cross-border basis (mode 1).[21] Accordingly, patients of a WTO member should be entitled to deduct medical treatments received in another WTO member at the

[15]WTO Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/310, 12 January 2010, para 67.

[16]WTO Council for Trade in Services, Legal Services, Background Note by the Secretariat, S/C/W/318, 14 June 2010, para 58.

[17]Choudhury 2012, p. 77 (noting that, as a result of the obligation to extend subsidies on a national treatment basis, states may be unable to use subsidies altogether).

[18]WTO Trade in Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, 28 March 2001, para 16.

[19]Cf. Krajewski 2003.

[20]Adlung 2007, p. 245. (noting that it would be "unreasonable to expect the authorities of an importing country to assess the competitive conditions in committed sectors across all other Members that may have trade interests—and then try to level the 'playfield' *vis-à-vis* each of these Members").

[21]Ibid., p. 246.

same conditions governing deductibility of medical care received domestically. Likewise, if a WTO member grants scholarships to unemployed citizens to attend on-line vocational training courses, also courses provided by foreign suppliers should be eligible for that subsidy.

As in the case of the MFN clause, also the national treatment obligation mainly catches import-related measures. Accordingly, WTO members may accord domestic consumers preferential access to public services provided by domestic suppliers. Reduced transport fares for nationals living in certain parts of a country, therefore, need not be extended to tourists from other WTO members. Likewise, WTO members can set higher tuition fees for foreign students relative to domestic students attending the same courses.[22] Cases like *China—Electronic Payment Services,* however, suggest the 'export' of services by foreign suppliers having a commercial presence in a host WTO member is also subject to the national treatment obligation. If domestic universities in WTO member A receive a subsidy based on the number of enrolled students, also foreign universities established in that WTO member must be eligible for funding, even if they only accept foreign students.

2.2.4 Domestic Regulation

Article VI GATS concerns measures of general application and administrative measures affecting trade in services. Article VI:1 requires that those measures be 'administered in a reasonable, objective and impartial manner'. Article VI:4 provides for that the Council for Trade in Services is to develop disciplines aimed to ensure that qualification requirements and procedures, technical standards, and licensing requirements be: (a) 'based on objective and transparent criteria' (e.g. the competence and the ability to supply the service); (b) 'not more burdensome than necessary to ensure the quality of the service'; (c) as far as licensing procedures are concerned, 'not in themselves a restriction on the supply of the service'. Although to date those disciplines have only been adopted in the accounting sector,[23] pursuant to Article VI:5 GATS Members are required, in all sectors where they have undertaken specific commitments, not to apply their licensing and qualification requirements and technical standards in a manner inconsistent with the three criteria laid down in Article VI:4 GATS, that nullifies or impairs the

[22]WTO Council for Trade in Services, Education Services, Background Note by the Secretariat, S/C/W/313, 1 April 2010, para 76.

[23]See WTO Working Party on Professional Services, Report of the Working Party on Professional Services to the Council for Trade in Services, S/WPPS/3, 4 December 1998 and WTO Trade in Services, Decision on disciplines relating to the Accountancy Sector, S/L/63, 15 December 1998. The accounting disciplines essentially lay down a standstill obligation: '3. Commencing immediately and continuing until the formal integration of these disciplines into the GATS, Members shall, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines.'

scheduling member's commitments, and that could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

Many public service and universal service obligations imposed by WTO members in the form of, notably, licensing requirements may fall short of the above necessity test, focusing exclusively on the 'quality of the service'.[24] Indeed, virtually all public service and universal service obligations can be regarded as 'burdensome' and most of them pursue general interest goals (e.g. affordability, continuity, equal treatment, universal access) other than service quality. For instance, ferries that are required to guarantee service to an island every day of the year may not provide a service as comfortable as that provided by commercial companies that only operate at the peak of the tourist season. A licensing requirement for commercial hospitals to reserve a certain number of beds to customers to be treated on a *pro bono* basis can hardly be described as necessary to ensure the 'quality of the service'.[25] It is noteworthy that in the only area where GATS disciplines on domestic regulation were adopted, i.e. accountancy services,[26] the necessity test based on the 'quality of the service' has been replaced by a more openly defined criterion, viz. the fulfilment of a 'legitimate objective'.[27]

Some authors, however, have taken the view that the impact of Article VI:5 GATS on WTO members' ability to impose universal service and public service obligations is, in fact, very limited.[28] Indeed, a WTO member challenging a regulatory measure by another member on the basis of Article VI:5 GATS must also prove that it amounts to a 'nullification or impairment' of the scheduling member's commitments and that it could not have reasonably been expected when those commitments were made. In essence, Article VI:5 boils down to a 'standstill-clause', which only applies to regulatory measures introduced after the adoption of a member's specific commitments and not foreseen or anticipated in those commitments.[29] Even the amendment of existing regulatory measures would escape the ban under Article VI:5, unless it can be regarded as a substantial departure from the original content of those measures.

[24]See, generally, Trachtman 2003, pp. 57, 68. For a summary of the arguments in favor and against the necessity test laid down in Article VI:4(b) GATS, see Krajewski 2008a, pp. 186–187.

[25]Assuming that such requirement is framed as a licensing requirement, it is submitted that it might still be justified as a measure necessary to protect human health under Article XIV(b).

[26]WTO Working Party on Professional Services, Report of the Working Party on Professional Services to the Council for Trade in Services, S/WPPS/3, 4 December 1998 and WTO Trade in Services, Decision on disciplines relating to the accountancy sector, S/L/63, 15 December 1998.

[27]Adlung 2006, pp. 481–482.

[28]See ibid., p. 481. (observing that the provisional application of Article VI:4 GATS 'lacks teeth').

[29]Krajewski 2008a, p. 194.

2.2.5 Other GATS Obligations

A number of other GATS obligations may also have an impact on the regulation of public services by WTO members. The rules on statutory monopolies[30] and exclusive service suppliers[31] laid down in Article VIII GATS are a case in point, insofar as WTO Members often bestow special or exclusive rights upon their public service providers. Article VIII:1 GATS requires every WTO Member to ensure that its monopoly suppliers do not act inconsistently with the MFN treatment and, if applicable, with specific commitments (national treatment, market access and additional commitments). The goal of that provision is not only to prohibit trade-restrictive conduct on the part of monopoly suppliers as such, but also to prevent WTO members from 'privatising protection', i.e. circumventing their obligations and commitments under the GATS by acting through their exclusive suppliers.[32] Thus, just like the MFN principle precludes a WTO member from applying different terminal dues to mail originating in different countries, Article VIII:1 GATS requires that member to ensure that its monopoly postal service provider does not accord priority to the delivery of letters from one WTO member over letters from other WTO members.[33]

Article VIII:2 GATS requires WTO members to ensure that their monopoly suppliers do not abuse of their position outside the scope of their monopoly rights in markets where they compete with other firms. Therefore, if a WTO member has entrusted the operation of postal services to a public monopolist but has undertaken liberalization commitments in courier services, the postal monopolist cannot leverage its market position to foreclose competition on the liberalized segment. The scope of the notion of 'abuse of monopoly position' is, however, still unclear. For instance, it is still open to debate whether Article VIII:2 GATS requires monopoly suppliers to grant access to facilities they control that are essential to operate in another sector,[34] such as the rail network in the case of rail transport services.

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[30]The provisions under Article VIII do not seem to apply to natural monopolies (unless they are backed by legal monopoly rights), as apparent from the definition of a 'monopoly supplier' under Article XXVIII(h) (referring to any public or private person which 'in the relevant market … is authorized or established formally or in effect by that Member as the sole supplier of that service'). See Adlung 2006, p. 473; Bigdeli and Rechsteiner 2008, p. 216.

[31]See Article VIII:5 GATS ('The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory').

[32]*Cf. Japan—Measures Affecting Consumer Photographic Film and Paper (United States v Japan)*, Report of the Panel, WT/DS44/R, adopted 22 April 1998 (highlighting the 'risk that WTO obligations could be evaded through a Member's delegation of quasi-governmental authority to private bodies').

[33]Bigdeli and Rechsteiner 2008, p. 211.

[34]See the discussion in ibid., p. 216.

An access obligation, instead, is clearly laid down in Section 5(a) of the Annex on Telecommunications, which requires WTO members to ensure that any service supplier of any other member is accorded 'access to and use' of public telecommunication transport networks and services on 'reasonable' and 'non-discriminatory' terms and conditions for the supply of a service included in that member's schedule of commitment. Thus, if a WTO member has undertaken commitments in the banking service sector—which requires access to telecommunications services to be provided effectively on a cross-border basis—foreign providers of banking services of must be granted access to the telecommunication network of that WTO member.[35] As clarified by the panel in *Mexico—Telecoms,* the same also holds true if a WTO member has undertaken commitments in the basic telecommunications service sector.[36]

A number of WTO members took on additional commitments in the field of basic telecommunications services under the so-called Reference Paper: as per Section 2(2) thereof, those members must ensure that their major suppliers enable interconnection under non-discriminatory terms, in a timely fashion at cost-oriented rates, and upon request, at points in addition to the network termination points offered to the majority of users; Section 3 of the Reference Paper further requires scheduling WTO members to prevent their major suppliers from engaging in certain anti-competitive practices, such as cross-subsidisation, using information obtained from competitors with anti-competitive results and refusal to grant technical information about essential facilities to other suppliers. In an extremely controversial passage of the *Mexico—Telecoms* report, the panel ruled that also a governmental measure requiring horizontal price-fixing between providers of telecom services must be regarded as an anti-competitive practice prohibited by the Reference paper.[37]

2.3 GATS Public Service Exemptions

The GATS offers WTO members several solutions to preserve their power to regulate, support, and operate public services. Indeed, just like other EIAs, the GATS includes several 'public service exemption clauses' (or 'public service exemptions'), i.e. provisions that can be relied upon to take certain activities considered to be in the general interest outside the scope of the agreement's trade disciplines.

As far as the notion of 'public service exemptions' is concerned, two caveats are in order. First, the expression 'public service' only indicates one of the *potential* uses of those clauses, regardless of their *intended* use by the drafters or

[35]See Burri Nenova 2007, p. 843.

[36]See *Mexico—Measures Affecting Telecommunications Services (Mexico-Telecoms)*, Report of the Panel, T/DS204/R, paras 7.273–7.288.

[37]See *Mexico—Measures Affecting Telecommunications Services (Mexico-Telecoms)*, Report of the Panel, T/DS204/R, para 7.234.

their *typical* use by the parties, institutions or dispute settlement bodies. Second, the word 'exemption' is employed in its broadest sense of an EIA provision that causes another EIA provision to become inapplicable. That notion, therefore, should be understood as including derogations, exceptions, exclusions, immunities, and carve-outs of all sorts.

Just as with trade disciplines, not all public service exemptions carry the same weight. Their ability to effectively protect public services from the trade disciplines laid down in an EIA is a function of, at least, four variables: (i) the exemption's *subjective scope*, i.e. the EIA parties to which the exemption applies; (ii) the exemption's *objective scope* (or 'exempted sectors'), i.e. the services or activities covered by the exemption; (iii) the exemption's *affected rules*, i.e. the EIA trade disciplines which, by virtue of the exemption, become inapplicable; and (iv) the exemption's *conditionality*, i.e. the requirements or criteria that must be met in order to trigger the exemption clause.

The subjective scope of EIA exemption clauses usually includes all EIA parties, in accordance with the principle of reciprocity.[38] This, however, is not always the case. For instance, parties can make reservations to an EIA to exclude its application to certain activities or sectors. Alternatively, EIA provisions may be framed in a way so that they only apply (or do not apply) to matters included in each party's list, as exemplified by the six annexes to the NAFTA. In these cases, EIAs can be said to include 'individual' public service exemption clauses, insofar as they only affect the applicability of EIA provisions to one of its parties.

From the perspective of their objective scope, public service exemptions can be classified into 'horizontal' and 'sectoral', depending on whether they cover all or some of the services that would otherwise be caught by the affected EIA provision(s). EIA drafters can employ different drafting techniques to define the objective scope of an exemption clause. One is referring to the exempted sectors by recourse to *generalklauseln* (i.e. generic expressions to be clarified at the stage of implementation or dispute resolution, such as 'governmental authority') or criteria (e.g. features common to all exempted sectors, such as being provided 'on a non-commercial basis'). Another is the so-called 'list-approach', consisting in an express enumeration of the exempted sectors (negative-list approach) or, conversely, of the sectors subject to the agreement (positive-list approach).

Having regard to the affected rules, public service exemptions can be divided into 'total' and 'partial': total exemptions determine the non-applicability of all trade disciplines set out in the relevant EIA; partial exemptions, instead, preclude the application of one or more specific EIA provisions, but are without prejudice to other provisions of the relevant EIA.

Public service exemptions, moreover, can be 'conditional' or 'unconditional' depending on whether their applicability is contingent on the fulfilment of one or more given requirements. Generally, conditionality serves the purpose of limiting the scope of permissible public intervention in the exempted sectors. This is the

[38]See, generally, Parisi and Ghei 2003, p. 93.

case, for instance, of public service exemptions subject to a proportionality test, whereby public intervention is allowed so long as it does not exceed what is necessary to achieve the relevant public interest goal.

The GATS contains a number of provisions that may be relied upon to exempt public services from its trade disciplines. Regard will be had, first, to the 'individual' public service exemptions laid down in the GATS, then to exemptions applying to all WTO members, either across all sectors or only in specific sectors.

2.3.1 Individual Exemptions

The structure of the GATS affords each WTO member considerable discretion to tailor to its needs the application of the agreement's trade disciplines. This remarkable flexibility, which has been aptly nicknamed the '*à la carte*' application of the GATS,[39] is achieved by allowing WTO members to adjust the scope of GATS trade disciplines in three different ways.

First, each WTO Member can define the *sectoral coverage* of GATS obligations. Every WTO member can exempt any service sector from the MFN treatment by listing that sector in its list of Article II exemptions (negative-list approach). Specularly, market access, national treatment, and additional commitments only apply to sectors included in each Member's schedule of specific commitments (positive-list approach). Moreover, other GATS provisions known as 'conditional obligations', notably those concerning domestic regulation, only apply to sectors where specific commitments are undertaken. While WTO members usually refer to the sectors and subsectors listed in the WTO Secretariat's Services Sectoral Classification List (SSCL) for the purpose of drafting their schedules of commitments and MFN exemptions, they can further fine-tune the scope of GATS obligations by employing custom-made sub-sectoral classification or definitions.

Second, for each service sector, WTO Members can determine the *modal coverage* of their specific commitments. Thus, a WTO member may undertake a market access commitment on the cross-border provision of a service but no commitments on the consumption abroad of the same service. Likewise, WTO members may undertake commitments affecting also the provision of a service through commercial presence or the presence of natural persons.

Third, for each sector and mode of supply, WTO members can determine their *level of commitment*, which can range from no commitment ('unbound') to full commitment ('none'). In between those extremes, WTO members can schedule partial commitments, that is to say commitments subject to horizontal or sectoral limitations.

The following sections will show how WTO members have employed those three layers of flexibility to remove several activities that are customarily regarded as public services from the scope of GATS trade disciplines.

[39] See, generally, VanGrasstek and Sauvé 2006, p. 837.

2.3.1.1 Sectoral Scope

A survey of WTO members' schedules of specific commitments via the I-TIP portal[40] shows that some activities traditionally regarded as public services, such as human health services and social services, attracted a lower number of commitments (respectively 26 and 18 commitments) than services that are usually provided on a commercial basis, such as hotel and restaurant services (139 commitments) and professional services (102 commitments). Moreover, within each sector, segments that are generally regarded as unprofitable attracted fewer commitments than commercially viable segments, as in the case, respectively, of postal services (13 commitments) and courier services (60 commitments).

WTO members instead appeared less reluctant to assume MFN obligations in public service sectors. Education and postal services, for instance, attracted as little as one MFN exemption each.[41] Moreover, in spite of a potential inconsistency between the Universal Postal Union Convention provisions on terminal dues and Article II GATS, no WTO member has scheduled MFN exemptions regarding terminal dues. This seems to confirm that the MFN clause is—or at least is perceived as—less intrusive than other GATS obligations *vis-à-vis* the regulation and financing of public services.

WTO members have also extensively relied on custom-made service subcategories. In the field of education services, for instance, several members have circumscribed their commitments either by source of funding (e.g. 'privately funded education services') or by programme of study (e.g. 'secondary education services […] excluding compulsory education'). Likewise, in the postal and courier services sector, 7 out of the 13 members that have undertaken commitments have restricted them to specific postal products (e.g. 'parcels', 'items above 500 grams', 'letters up to 350 grams', etc.).

2.3.1.2 Modal Scope

WTO members have also taken advantage of their prerogative to differentiate between modes of supply to protect what they possibly regard as the most vulnerable segments of certain public services from the application of GATS trade disciplines.

In the education sector, for instance, countries have appeared more ready to liberalize cross-border provision (e.g. distance learning) and consumption abroad (i.e. study abroad by their nationals) than the provision of those services through commercial presence (e.g. establishment in their territory of foreign academic

[40] http://i-tip.wto.org/services/.

[41] WTO Council for Trade in Services, Postal and Courier Services, Background Note by the Secretariat, S/C/W/319, 11 August 2010, para 17; WTO Council for Trade in Services, Education Services, Background Note by the Secretariat, S/C/W/313, 1 April 2010, para 69.

institutions, satellite campuses or joint ventures with domestic institutions) or the presence of foreign educators.[42]

In the health sector, instead, WTO members were more inclined to liberalize consumption abroad (i.e. domestic patient mobility to foreign healthcare providers) and commercial presence (the establishment of foreign health institutions in their territory),[43] than cross-border provision (e.g. telemedicine, distance processing of laboratory samples etc.), partly due to doubts as to the technical feasibility of that mode of provision.[44] Moreover, most countries have chosen not to accept commitments concerning the provision in their territory of health service by foreign natural persons.[45]

2.3.1.3 Level of Commitment

Also the levels of commitment by WTO members among the various service sectors seem to suggest certain patterns. Several WTO members, notably developing countries, have made full commitments on cross-border, consumption abroad and provision through commercial presence of health services, possibly with a view to attracting foreign healthcare providers as well as their skills and expertise.[46] Most WTO members, instead, have only assumed partial commitments with regard to the provision of health services by foreign professionals.[47] While some members have merely extended their horizontal limitations to health services,[48] other members have scheduled sector-specific entries, e.g. adding nationality and residency requirements.[49]

Horizontal limitations by some WTO members sometimes contain direct references to public services or related legal notions. The EU, Montenegro and, with some minor differences, Russia have qualified their market access commitments under mode 3 in all sectors by specifying that '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'. Similarly, Canada stipulated that the 'supply of a service, or its subsidization, within the public sector is not in breach' of its national treatment commitments. The Dominican Republic, moreover, stated that

[42]Choudhury 2012, p. 210.

[43]Ibid., p. 270.

[44]WTO Council for Trade in Services, Health and Social Services, Background Note by the Secretariat, S/C/W/50, 18 September 1998, paras 52–53.

[45]Choudhury 2012, p. 271.

[46]WTO Council for Trade in Services, Health and Social Services, Background Note by the Secretariat, S/C/W/50, 18 September 1998, para 51.

[47]Ibid., para 57.

[48]Horizontal limitations are qualifications to a WTO member's commitments in all service sectors. Horizontal limitations must not be confused with Horizontal exemptions, which for the purpose of this chapter are defined as exemptions applicable to all WTO members.

[49]WTO Council for Trade in Services (fn. 49), para 57.

registration of foreign investment is 'totally prohibited in public services, such as drinking water, sewage and postal services'.

Sector-specific limitations can be employed to provide an additional layer of protection to certain public service arrangements. In the field of education, for instance, Japan specified that only non-profit foreign institutions may provide education services in its territory; Sierra Leone stipulated that foreign educators must hold certain academic qualifications and obtain prior approval from the Ministry of Education; China made access to its territory by foreign teachers and lecturers conditional upon receiving an invitation by or securing employment at a Chinese education institution. Telecommunication services have also attracted a varied pattern of sector-specific limitations, such as exclusive rights, economic needs tests, restrictions on the type of legal entity, restrictions on foreign equity, routing and commercial presence requirements, etc.[50]

2.3.2 Horizontal Exemptions

Apart from the individual exemption clauses resulting from the '*à la carte*' application of the GATS liberalization provisions, that agreement contains a number of public service exemptions that can be regarded as 'horizontal', in that they apply to all WTO Members. In this section, regard will be had to horizontal public service exemptions, both of an unconditional nature (i.e. the exemption for services supplied in the exercise of governmental authority and that for government procurement) and subject to conditionality (i.e. the general and security exceptions).

2.3.2.1 Services Supplied in the Exercise of Governmental Authority

The exemption clause for 'services supplied in the exercise of governmental authority' (hereafter: 'governmental services') set out in Article I:3(b) GATS is horizontal, total, and unconditional.[51] As most WTO Members' governments are directly or indirectly involved in the provision, financing, or organization of public services, Article I:3(b) GATS might appear as the GATS public service clause *par excellence*. The myriad exemption clauses in FTAs mirroring the language of Article I:3(b) GATS further add to the relevance of that provision. The objective scope of Article I:3(b) GATS, however, has given rise to considerable controversy.[52] Article I:3(c) GATS defines

[50]WTO Council for Trade in Services, Telecommunication Services, Background Note by the Secretariat, S/C/W/299, 10 June 2009, para 24.

[51]Article I:3 GATS ('For the purposes of this Agreement … (b) 'services' includes any service in any sector except services supplied in the exercise of governmental authority; (c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.').

[52]See Howse and Türk 2002, pp. 1, 3 (noting that the exact scope of the Article I:3(b) GATS is 'far from clear').

'services supplied in the exercise of governmental authority' as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.

The wording 'on a commercial basis', according to some legal commentators, should be interpreted as meaning 'with a view to making a profit'. That construction is supported by the definition of 'commercial presence' in Article XXVIII:(d) GATS, which refers to 'business or professional establishment', i.e. activities that are usually set up to make a profit.[53] The supplier's profit intention can be inferred from several elements, such as recourse to marketing and advertising.[54] Other authors,[55] however, argued that businesses and professional establishments under Article XXVIII:(d) GATS also include juridical persons, which are defined in letter l) of the same article as 'any legal entity duly constituted or otherwise organized under applicable law, *whether for profit or otherwise*' [emphasis added]. Moreover, as highlighted by the *Canada—Renewable Energy* panel, 'loss-making sales can be, and often are, a part of ordinary commercial activity'.[56] Thus, the meaning of the expression 'on a commercial basis' cannot be restricted to 'profit-seeking', but should also include non profit-seeking activities, whenever they are provided for remuneration.[57] Yet, according to that approach, public hospitals and even courts and tribunals would not be eligible for exemption, insofar as patients and plaintiffs are often required to pay charges or fees, sometimes of a symbolic amount, aimed at preventing excessive demand or at cost reduction. Other commentators, therefore, opined that the notion of 'commercial basis' implies some measure of strategic economic behaviour on the part of the service provider, i.e. taking into account the preferences of potential users and the availability of potential substitutes.[58] But making the 'commercial' nature of an activity dependant upon how well it is run does not.

The expression 'in competition with one or more service suppliers', in turn, evokes a typical antitrust law question: how should the relevant market for the services concerned be defined? Some authors, establishing a parallel with the notion of

[53]See Krajewski 2003, pp. 341, 351; Leroux 2006, pp. 345, 349 (noting that this interpretation is also supported by the definition of 'commercial presence' in Para D.2. of the Understanding on Commitments in Financial Services).

[54]Marchetti and Mavroidis 2004, pp. 511, 531.

[55]Adlung 2006, pp. 455, 463.

[56]*Canada—Certain Measures Affecting The Renewable Energy Generation Sector* and *Canada—Measures Relating To The Feed-In Tariff Program*, Report of the Panel, WT/DS412/R and WT/DS426/R, 19 December 2012, 7.151 (discussing the notion of 'commercial resale' for the purpose of Article III:8(a) of the GATT 1994).

[57]But see Krajewski 2008b, pp. 199–200 (arguing that the definition of juridical persons in Article XXVIII:1 GATS refers to the service supplier, whereas Article I:3(c) GATS focuses on the service itself).

[58]Adlung 2006, p. 463; Zacharias 2008a, pp. 64–65.

'like products' within the meaning of Article III:1 GATT, contended that regard must be had to all substitutable services,[59] as well as, possibly, potential competition.[60] Therefore, courts could be regarded as competing with arbitral tribunals in the market for legal services. Moreover, the question has been raised whether competition from other modes of supply should also be taken into account. According to this reading,[61] even national healthcare monopolists would not qualify for exemption, for so long as patients can travel to other WTO Members, foreign healthcare providers may be regarded as competitors.[62]

Other commentators thus suggested that the meaning of 'in competition' should be restricted to a notion of 'one-way competition'.[63] According to that approach, which relies on the definition of competition provided by the panel in *Mexico-Telecoms*,[64] a service is supplied 'in competition' only if the provider concerned acts competitively, 'striving for custom' against other suppliers.[65] Therefore, the governmental services exemption would cover cases where a supplier, such as a public school or hospital provides a service pursuant to a public service or universal service obligation, rather than because it seeks to increase its revenues by attracting more consumers. Under that perspective, the presence of competing suppliers, such as private schools or hospitals operating in the same relevant market, would be irrelevant.[66] The practical application of that criterion, nonetheless, appears problematic: how much 'loving neglect' is required on the part of a service provider to be regarded as *not* acting 'in competition'? National regulatory schemes often offers incentives to public service providers to increase the quality and quantity of their output, yet even so can those providers be regarded as 'striving for custom'? Paradoxically, according to the 'one-way competition' approach, the best candidates for exemption would be the least efficiently managed public services—an outcome which is clearly at odds with GATS welfare enhancement goals. Besides, it is perhaps no coincidence that market definition for the purpose of antitrust law in virtually

[59]See *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8-11/AB/R, paras 6.22 and 6.28.

[60]Van de Gronden 2013, p. 127.

[61]See Leroux 2006, pp. 345, 384.

[62]See Adlung 2006, pp. 454–465.

[63]See VanDuzer 2004, p. 388.

[64]*Mexico—Measures Affecting Telecommunications Services* ('*Mexico-Telecoms*'), Report of the Panel, T/DS204/R, para 7.250.

[65]*Mexico—Measures Affecting Telecommunications Services* ('*Mexico-Telecoms*'), Report of the Panel, T/DS204/R, para 7.230 (citing the *The Shorter Oxford English Dictionary*, 3rd edition, (Clarendon Press, 1990), Vol. II, p. 382: 'The word "competition", in its relevant economic sense, is in turn defined as "rivalry in the market, striving for custom between those who have the same commodities to dispose of"').

[66]VanDuzer 2004, p. 412.

all jurisdictions focuses on demand-side substitutability (and, in some cases, on supply-side substitutability), rather than on a firm's competitive intent.[67]

Another source of uncertainty is whether the two criteria under Article I:3(c) GATS define the notion of governmental services inclusively. If they do, as suggested by the verb 'means',[68] then all services provided on a commercial basis or in competition with other suppliers may be subject to the GATS, whatever their nature.[69] That could be the case of notaries, insofar as they compete with each other for clients and, in several jurisdictions, provide their services for a fee.[70] Other authors, instead, have taken the view that the wording 'governmental authority' has an autonomous meaning and that it contributes to define the scope of the governmental services exemption along with to the two criteria under Article I:3(c) GATS.[71] According to this view, services provided on a non-commercial basis and in a non-competitive environment are still subject to the GATS if they are supplied by private companies having no governmental involvement, such as certain religious institutions.[72]

In an earlier contribution on the GATS notion of public services,[73] it has been submitted that the wording 'governmental authority' should be understood as antithetical to the expressions 'on a commercial basis' and 'in competition'. Accordingly, governmental services should comprise those activities that are so inherently connected to the notion of 'governmental authority' as to be ontologically incompatible with those of 'commerce' and 'competition'.[74] It has also been

[67]See, e.g., European Commission notice on the definition of relevant market for the purposes of Community competition law, *OJ* 1997 C 372, para 13; U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (19 August 2010, available at: http://ftc.gov/os/2010/08/100819hmg.pdf) p. 7; UK Competition Commission and the Office of Fair Trading, Merger Assessment Guidelines, (OFT1254, September 2010, available at: http://www.oft.gov.uk/shared_oft/mergers/642749/OFT1254.pdf), Section 5.2. See also International Competition Network, Draft Report on Merger Guidelines and Market Definition, (available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc562.pdf) para 1.17 ("In virtually all of the Guidelines, the process of defining the product market begins with … demand side substitutability").

[68]See Leroux 2006, pp. 345, 348 (arguing that the use of the verb 'includes' rather than the verb 'means' would have opened a different interpretative scenario).

[69]See Krajewski 2003, pp. 347–349.

[70]See also WTO Council for Trade in Services, Legal Services, Background Note by the Secretariat, S/C/W/43, 6 July 1998 (noting that while in some countries notarial services may be regarded as provided in the exercise of governmental authority, notaries often supply their services on a commercial basis and should thus be covered by the GATS).

[71]See, e.g. *United States—Continued Dumping and Subsidy Offset Act of 2000,* Report of the Appellate Body, WT/DS217/AB/R, WT/DS234/AB/R, para 271 (holding that the 'internationally recognized interpretive principle of effectiveness should guide the interpretation of the WTO Agreement, and, under this principle, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility').

[72]Krajewski 2003, p. 353; Zacharias 2008a, p. 61.

[73]Arena 2011, p. 502 et seq.

[74]Cf. Leroux 2006, pp. 345, 352 (stating that the exercise of governmental authority 'has little to do with commerce') and p. 362 (arguing that the notion of competition 'is generally absent in the case of the exercise of governmental authority').

argued that such a 'connection' should be of a functional, rather than an institutional, nature, on the model of Article 5 of the International Law Commission ('ILC') Articles on Responsibility of States for Internationally Wrongful Acts,[75] which holds States accountable for wrongful acts by entities that exercise 'elements of governmental authority', viz. that are entrusted with 'certain public or regulatory functions' and act in that capacity.[76] The choice of a functional approach is supported by the wording of Article I:3(b)–(c) GATS, which refers to '*services* supplied in the exercise of governmental authority' rather than to 'service *suppliers*', and by Article 5(c)(i)–(ii) of the Annex on Financial Services, which defines 'public entity' (for the purposes inter alia of the sector-specific governmental service exemption clauses under Article 1(b)(i) and (iii) thereof) focusing on the functions rather than on the public or private character of the entity concerned.[77]

Still, even according to that interpretation, the scope of the governmental service clause would be extremely narrow, and would only cover *acta jure imperii* and the so-called '*fonctions régaliennes*',[78] i.e. activities inherent to core sovereignty functions exercised by WTO members such as regulation, supervision and enforcement.[79] As a consequence, the vast majority of public services would still lie outside the scope of the governmental services exemption,[80] thus making that exemption clause of limited practical relevance.

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[75]International Law Commission, Articles on State Responsibility, annexed to UN General Assembly Resolution no. 56/83, UN Doc. A/CN.4/L.602/Rev.1 (2001) (recalled by resolutions no. 59/35 and 62/61). Those Articles were previously published (along with a detailed commentary by the ILC) as International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', Yearbook of the International Law Commission, 2001/2, Part Two, 42.

[76]See Commentary to Article 5 of the Draft Articles, para 5.

[77]Article 5(c)(i)–(ii) of the Annex on Financial Services ('"Public entity" means … an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or … a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.').

[78]'Fonctions régaliennes' include those 'regal' functions that belong ontologically to the State, such as lawmaking, judicial adjudication, national security, monetary policy, and diplomacy. See, generally, Hauriou 1929, p. 116; Pontier 2003, p. 194.

[79]See *Canada–Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body, WT/DS103/AB/R, WT/DS113/AB/R, para 97 ("The essence of 'government' is … that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions").

[80]See Krajewski 2003, pp. 341, 350.

2.3.2.2 Government Procurement

Pursuant to Article XIII GATS, 'laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale' are exempt from MFN, national treatment and market access obligations.

This horizontal, partial, and unconditional exemption is relevant to the topic of public services because it may cover purchases made by firms entrusted with the operation of those services. A public hospital, therefore, can chose to contract out laboratory testing only to national providers or to providers from a specified foreign country.[81]

The material scope of the exemption is delimited by four criteria, which are not defined by the GATS and thus have given rise to a number of uncertainties. The notion of 'procurement' consists in the acquisition of services for consideration by any contractual means,[82] including management contracts (i.e. entrusting a private company with specific tasks, such as billing, meter reading etc.) and, possibly, Build-Operate-Transfer contracts (i.e. requiring a private company to build a public facility, such as a bridge or a motorway, to operate it for a specified time, and ultimately revert it to the government).[83] 'Governmental agencies', in turn, include central and local governmental entities[84] and, according to the unadopted GATT panel report in *United States—Procurement of a Sonar Mapping System,* also private entities in the presence of certain linking factors such as payment by the government, government possession etc.[85] To be eligible for exemption, moreover, services must be procured 'for governmental purposes' and 'not with a view to commercial resale or with a view to use in the supply of services for commercial sale'. In this respect, one commentator suggested that procurement of maintenance services by a company supplying water would be subject to the GATS if that company charges its users for water supply.[86] Another commentator, instead, took the view that the main aim of that provision is preventing WTO members from relying on procurement 'as a pretext to by and resell particular […] services with a view to affording them a competitive edge over alternative suppliers'.[87]

Moreover, it is not clear whether measures concerning procurement by entities supplying governmental services within the meaning of Article I:3(b)–(c) GATS

[81] See Kulkarni 2009, pp. 245–283, 252.

[82] Arrowsmith 2003, p. 100.

[83] Zacharias 2008b, pp. 279–280.

[84] WTO 1995, Analytical Index: Guide to GATT Law and Practice, p. 191.

[85] *United States—Procurement of a Sonar Mapping System*, Report of the Panel, GPR.DS1/R, (unadopted), paras 4.5–4.13.

[86] Zacharias 2008b, p. 281.

[87] Adlung 2006, p. 466 (footnote 28).

are always covered by the exemption under Article XIII GATS.[88] While the two negative requirements dealing with 'commercial resale' under the last-mentioned provision seem to reflect the 'commercial basis' criterion under Article I:3(c) GATS, it still has to be seen to what extent 'governmental purposes' and 'governmental agencies' are akin to 'governmental authority' under that Article. The expression 'governmental agencies', in particular, seems to imply an institutional approach, focusing on subjective features such as the public ownership or control of the service provider concerned or, alternatively, to its subjection to public law.[89] But the question is still open.

2.3.2.3 General and Security Exceptions

Articles XIV and XIV bis GATS can be regarded as total and conditional exemptions in that they allow WTO Members to adopt national measures at variance with any GATS obligation so long as those measures meet the conditions laid down in those provisions.[90] In view of the similarity of the language used in Article XIV GATS and Article XX GATT on the one hand, and in Article XIV bis GATS and Article XXI GATT on the other, a wealth of Appellate Body and panel reports can be taken to elucidate those conditions.[91] This section, therefore, will only attempt to illustrate how Articles XIV and XIV bis GATS can be employed to exempt national public service arrangements from the GATS in sectors where liberalization commitments have been undertaken.

Article XIV GATS may come into play in the field of public healthcare reimbursement schemes and universal service obligations. Arguably, Members that have undertaken commitments in the healthcare sector can still justify similar regulatory schemes on the basis of Article XIV(b) GATS, allowing measures 'necessary to protect human, animal or plant life or health'.[92] Indeed, WTO case law suggests that WTO members have a broad margin of discretion in defining what

[88]See, generally, Adlung 2006, p. 474.

[89]See Musseli and Zarrilli 2005, p. 571 (arguing that the procurement of energy services by a national oil company is subject to GATS obligations).

[90]In the case of Article XIV GATS, requirements are laid down both in the *chapeau* and in paras (a)–(e) of that Article; in that of Article XIV bis GATS, instead, regard must be had only to its paragraphs.

[91]See *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R, para 291 (holding that previous decisions under Article XX GATT are relevant for the interpretation of Article XIV GATS owing to the similarity of the language used in those provisions).

[92]Cf. WTO Council for Trade in Services, Health and Social Services, Background Note by the Secretariat, S/C/W/50, 18 September 1998, para 7 (posing the question whether Article XIV might 'provide legal cover' for policy intervention in the health services sector by to deal with the migration of qualified personnel abroad).

constitutes health and what is their desired level of protection.[93] However, the necessity requirement under that provision, as well as the additional requirements under the *chapeau,* should ensure that public service arrangements are designed and implemented—to paraphrase the Appellate Body in *US-Shrimp*—so as to strike a fair balance between intervention 'rights' and liberalization 'duties'.[94]

Article XIV bis GATS, in turn, could provide protection in the field of national security in addition to that granted by Article I:3(b)–(c) GATS. Indeed, even thought the suggested interpretation of the exemption under Article I:3(b)–(c) GATS would cover core sovereignty functions such as national defence, the functional application of that carve-out would leave out ancillary services, such as the operation of military recreational facilities. WTO Members seeking to regulate those activities could nonetheless rely on Article XIVbis(b)(i) GATS, enabling Members to 'take any action [they] consider necessary' to protect their 'essential security interests' relating inter alia to the supply of services for the 'provisioning of military establishments'. Once again, the necessity requirement laid down in that provision should prevent abuse.

2.3.3 Sectoral Exemptions

Sectoral exemptions apply to certain service sectors, such as maritime transport, air transport, and telecommunications, which are traditionally regarded as public services in several jurisdictions. The rules affected by those exemptions are remarkably different: while the air transport services exemption precludes the application to those services of all GATS provisions, the exemption for maritime transport only takes those services outside the scope of the MFN provisions. The telecommunications exemptions, instead, only affect the application of the sector-specific obligations laid down in the Annex on Telecommunications and in the Reference Papers. Moreover, while the two telecommunications exemptions are subject to necessity tests, the exemptions for air transport services and maritime services are unconditional.

2.3.3.1 Air Transport Services

The exemption set out in Article 2 of the Annex on Air Transport Services (ATS Annex) is sector-specific, total, and unconditional. It applies to measures affecting 'air traffic rights' and 'services directly related to the exercise of traffic rights'. The relationship between that exemption and public services is self-evident, as air transport is an important network industry, which in many countries is regarded as a public service and is subject to heavy government regulation, public ownership, and

[93]See *European communities—Measures affecting Asbestos and Asbestos-containing products*, Report of the Appellate Body, WTO/DS135/AB/R, para 168. See also Cottier et al. 2008, p. 313 et seq.

[94]Cf. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, para 156.

widespread governmental subsidization.[95] Moreover, international aviation is subject to a dense network of bilateral treaties, based on the doctrine of airspace sovereignty, the right to restrict cabotage (i.e. transport between domestic destinations) to national airlines, and the exchange of air traffic rights on the basis of reciprocity.

Unlike the exemption for governmental services, the exemption for air transport services does not cover the whole sector, but only certain types of intervention in that sector, i.e. air traffic rights, which are defined in para 6(d) of the ATS Annex. Paragraph 3 of the ATS Annex further restricts the scope of the exemption by setting out three categories of services that are subject to the GATS: (i) 'aircraft repair and maintenance services'; (ii) the 'selling and marketing of air transport services'; and (iii) 'computer reservation system' services. The exemption laid down in the ATS Annex, instead, also covers 'services directly related to the exercise of air traffic rights', an expression that is not defined by the ATS Annex and whose boundaries are not entirely clear. While it is clear that the exemption does cover the so-called 'hard rights' (e.g. traffic and route rights, the designation of rights, capacity controls and pricing), there is no consensus as to whether it also applies to the so-called 'soft rights' (e.g. currency exchanges, ground and baggage handling, catering, marketing, and airport usage). According to one view, those services cannot be regarded as 'directly related' to air traffic rights and thus fall within the scope of the GATS. Others have argued that para 3 of the ATS Annex sets out an exhaustive list of air transport services that are covered by the GATS, so all other services should be regarded as eligible for exemption.

The ATS Annex provides yet another layer of protection by stating that the GATS is without prejudice to pre-existing bilateral and multilateral agreements. The GATS therefore only takes precedence over agreements that came into effect after 1 January 1995, subject to the broad exemption laid down in the ATS Annex. This seems to confirm that not only the drafters of the GATS were unwilling to replace the complex network of bilateral agreements in place in the field of air transport with a single multilateral agreement,[96] but also that they wanted to afford WTO members a broad margin of discretion to continue regulating international aviation as they most saw fit.

2.3.3.2 Maritime Transport

Maritime transport is operated as a public service in several WTO Members due inter alia to the strategic role of ports as essential facilities. The Annex on Negotiations on Maritime Transport Services (the NMTS Annex) provides for a sector-specific, partial, and unconditional public service exemption.

The material scope of the exemption includes 'international shipping', 'auxiliary services' and 'access to and use of port facilities', but the NMTS Annex does not define any of those expressions. International shipping, in essence, consists in

[95]For an overview, see Köbele 2008, pp. 600–607.

[96]Lehner 1995, pp. 436, 446.

the transportation of cargo on board a vessel from one country to another.[97] Auxiliary services include cargo storage and handling, warehousing, container station and depot services.[98] Port services and facilities, in turn, include pilotage, towing and tug assistance, provisioning, fuelling, garbage collection, port captain services, navigation aids, emergency repairs, anchorage, berthing etc.[99]

Turning to the rules affected by the exemption clause under scrutiny, regard must be had, first and foremost, to the MFN clause, whose application to the maritime transport sector is suspended until the conclusion of the trade negotiations. In other words, as long as the trade talks are on-going, WTO members can maintain measures that are at variance with the MFN treatment principle without listing an exemption under Article II GATS, as they would be required to for other service sectors. WTO members that have scheduled specific commitments in the area of maritime transport must apply those commitments on an MFN basis, but may improve, modify, or withdraw those commitments before the conclusion of the negotiations without offering compensation, as Article XXI GATS requires for the modification of schedules.

Those provisions are hardly related to the public service aspects of maritime transport, but rather reflect the on-going lack of consensus in trade negotiations: suspending the MFN regime was perceived as a lesser evil relative to WTO members listing a multitude of Article II exemptions, which would have further hindered the trade talks.[100] For the same reason, in spite of the increased flexibility afforded by the NMTS Annex, few WTO members undertook commitments in the maritime transport sector.[101]

2.3.3.3 Telecommunications

Among the remaining GATS public service exemptions, regard must be had, in particular, to Section 5(e)(i) of the Annex on Telecommunications and Section 3 of the Reference Paper.

According to the former, the 'access to and use' obligation under Section 5(a) of the Annex on Telecommunications may be subject to conditions 'necessary … to safeguard the *public service responsibilities* of suppliers of public telecommunications transport networks and services, in particular their *ability to make their networks or services available to the public generally*' (emphasis added). The rationale underlying that provision is that telecommunications networks and services are subject to capacity

[97]C. Fink, A. Mattoo and I.C. Neagu IC, Trade in international Maritime Services: How Much Does Policy Matter? World Bank Policy Research Working Paper No. 2522. http://siteresources.worldbank.org/EXTEXPCOMNET/Resources/2463593-1213975515123/03_Fink.pdf. January 2001, p. 6. Accessed 27 February 2015.

[98]Parameswaran 2008, p. 674.

[99]Ibid.

[100]Parameswaran 2008, pp. 668–669.

[101]WTO Council for Trade in Services, Maritime Transport Services, Background Note by the Secretariat, S/C/W/315, 7 June 2010, para 139.

constraints: the duty to provide access to and use of those networks and services to foreign service providers must, in some circumstances, yield to responsibilities such as ensuring universal access, the interoperability of public telecommunications services, or compliance with international standards for global compatibility.[102] The Annex on Telecommunications, therefore, attempts to strike a fair balance 'between the needs of users for fair terms of access and the needs of the regulators and public telecommunications operators to maintain a system that works and that meets public service objectives'.[103]

As per Section 3 of the Reference Paper, each Member has 'the right to define the kind of universal service obligation it wishes to maintain' in the telecommunications sector. Those obligations are not regarded as per se anti-competitive, provided that they are, first and foremost, 'administered in a transparent, non-discriminatory, and competitively neutral manner'. In essence, universal service obligations must be made publicly available, must not penalize certain operators *vis-à-vis* others and must not distort competition between different suppliers.[104] Since universal service obligations are also 'measures of general application affecting trade in [telecommunications] services', they must 'be administered in a reasonable, objective and impartial manner' pursuant to Article VI(1) GATS.[105] To be eligible for exemption, moreover, universal service obligations must not be 'more burdensome than necessary for the kind of universal service defined by the Member'. The wording of that provision reminds of that of Article VI:4(b) GATS, but unlike that provision, which only recognizes the 'quality of the service' as a legitimate goal, Section 3 of the Reference Paper allows for a broader range of general interest objectives to be factored in.[106]

2.4 GATS 'Agnostic' Approach to the Notion of Public Services

Sections 2.2 and 2.3 above analysed the potential impact of GATS trade disciplines on public services and the discretion that GATS public service exemptions afford WTO members to exclude those services from the scope of liberalization. The focus of the present section is, instead, conceptual, in that it seeks to examine the GATS approach to the *notion* of public services.

As public services have for a long time been provided and regulated at the national or local level, a number of different domestic legal notions have been

[102]Section 7(a) Annex on Telecommunications.

[103]WTO, Explanation of the Annex on telecommunications, available at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm.

[104]Gao 2008, p. 742.

[105]Ibid., p. 743.

[106]See Arena 2011, pp. 514–515.

developed. Transnational economic integration, however, and notably positive integration through the harmonisation of national regulatory schemes relating to public services has, in certain cases, brought about the development of novel public service concepts and categories. The most striking example, in that respect, is the EU notion of 'services of general interest', which, although not originally envisaged in the Treaty of Rome, emerged over time through the practice of the European Commission, the jurisprudence of the European Court of Justice, and the writings of legal commentators.[107]

Is there a GATS notion of public services? Is that agreement conducive to the development of a global notion of public services? In order to answer those questions, regard must be had to whether the GATS does or does not recognise the specificity of those services and of the goals they pursue.

2.4.1 The GATS Indifference to Public Service Goals

As a rule, GATS trade disciplines apply to all 'measures affecting trade in services' regardless of the nature of the service and aim of the measure. As outlined in Sect. 2.3, several GATS provisions allow WTO members to exempt what they regard as public services from those obligations, but asserting the public service nature of those activities is hardly ever a requirement for exemption.

The GATS '*à la carte*' application provides a clear illustration of GATS agnosticism *vis-à-vis* public services: WTO members, indeed, are under no obligation to state the goal they pursue in scheduling an Article II exemption or in refusing to undertake commitments in a given sector. Ensuring universal access to a given services or sheltering domestic suppliers from foreign competition are equally acceptable aims: the GATS, simply, asks no questions.

The agnosticism characterizing the GATS approach to public services is further highlighted by the privilege vested in WTO Members to employ their own classification systems in their schedules of specific commitments.[108] The EU schedule, for instance, stipulates that 'services considered public utilities at a national or local

[107]See, e.g., Nistor 2011, p. 228 et seq.; Karayigit 2009, p. 575; Neergaard 2009, pp. 17–50.

[108]WTO, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991. As WTO Members are not required to adopt the SSCL as a basis for scheduling their commitments, any two Members may refer to the same sector employing different expressions. But see *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (The Appellate Body upheld the panel's finding that the US schedule must be interpreted as including gambling and betting services based on WTO nomenclature, reflecting that erroneous scheduling can limit the policy space of Members. The Appellate Body also found that the measure did not meet the requirements of the public moral defence, since it did not place this ban on domestic operators, leading to an unjustifiable and arbitrary discrimination.).

level may be subject to public monopolies or to exclusive rights granted to private operators',[109] thus setting out a *renvoi* to an inherently protean legal category.

Moreover, as noted above, according to some commentators the public service nature of 'services supplied in the exercise of governmental authority' does not come into play for the purpose of the exemption set out in Article I:3(b) GATS: what really matters is that the non-commercial basis and non-competition criteria set out in letter (c) are met. The same holds true for the exemption laid down in the ATS Annex: although air transport services are regarded as public services in several jurisdictions, the exemption applies regardless of the aims pursued by WTO members in the management of air traffic rights or directly related services. Likewise, international shipping, auxiliary services and access to and use of port facilities are temporarily exempted from the substantive and procedural provisions relating to MFN regardless of the policy objectives WTO members may seek to pursue with regard to those services.

In sum, the GATS simply does not recognise the specificity of public services and does not seem to take their goals into any account: as a matter of fact, what have been so far referred to as 'public service' exemptions can be employed to pursue a broad range of different objectives, even of a protectionist nature (as in the case of economic needs tests).[110]

That general trend, however, is not without exceptions. Articles XIV and XIV bis GATS can be invoked to justify measures pursuing a number of specific aims, which do not explicitly include (but might impliedly encompass) public service goals. Article XIII only applies to measures governing procurement of services purchased 'for governmental purposes'. Likewise, Section 5(e)(i) of the Annex on Telecommunications and Section 3 of the Reference Paper expressly recognise, respectively, 'public services responsibilities' and 'universal service obligations' as worthy of protection. Most importantly, those provisions set out substantive requirements (and, in the case of Section 3 of the Reference Paper, also procedural safeguards) to ensure that such measures are effectively applied to pursue general interest goals. However, while those provisions can be regarded as a deviation from the GATS agnostic trend, they are of limited relevance: in Articles XIV and XIV bis GATS enable WTO members to pursue broader public policy goals; Article XIII can, at best, cover the procurement of public services rather than their provision by WTO members or their suppliers, Section 5(e)(i) of the Annex on Telecommunications and Section 3 of the Reference Paper have a rather narrow objective scope—and, in the case of the Reference Paper, also a limited subjective scope.

[109]GATS, European Communities and their Member States Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 2.

[110]See Marchetti and Mavroidis 2004, pp. 519–520 (arguing that the economic needs tests can be employed 'to serve a purpose other than restricting access on a non-discriminatory basis, i.e., to restrict access in a discretionary manner').

2.4.2 The Indeterminability of the GATS Concept of Public Services

The autonomy WTO members enjoy under the GATS in drafting their schedules of commitments is not conducive to a spontaneous convergence towards a common notion of public services. Rather, as shown by the language of several schedules, WTO members have taken advantage of that autonomy to reassert their own legal notions and classifications relating to public services.

Although most schedules are based on the SSCL rather than custom-made service subcategories, no GATS notion of public services can be inferred from the sectoral distribution of WTO members' commitments. While it has been observed that activities traditionally regarded as public services at the domestic and local level have attracted, by and large, fewer commitments than other services, it would be erroneous to assume that all sectors with few commitments are related to activities provided in the general interest. For instance, real estate services, which are commonly regarded as a commercial activity, attracted fewer commitments (31) than typical public services, such as primary education (40) and hospital services (52). As stated above, WTO members must not disclose the policy objectives they pursue when drawing up their schedules, so the reasons for not undertaking commitments in a given service sector can be imponderable.

The WTO Secretariat, in turn, has so far been unable to promote convergence around a common GATS notion of public services. Although the Secretariat has referred to the governmental services exemption in a number of background notes,[111] it has no authority to provide a binding interpretation of GATS provisions or of the legal notions employed in WTO Members' schedules.

By the same token, a general GATS notion of public services cannot be gleaned from the other public service exemptions laid down in the agreement. The material scope of the governmental services exemption is still unclear and it has not been the subject of dispute settlement. In that respect, the Chairman of the Group of Negotiations on Services, in a statement of December 1993, added that 'it is assumed that participants would refrain from taking issues arising in this area to dispute settlement but would try to settle them through bilateral consultations'.[112] Equally ambiguous are the expressions employed in Article XIII GATS to frame the boundaries of the government procurement exemption. In any case, as noted above, that exemption would only cover the procurement of public services by WTO members, not their provision.

Turning to conditional exemptions, it has been suggested that the security exception under Article XIV bis GATS could protect public service regulatory

[111]But see Leroux 2006, p. 357 (arguing that the WTO Secretariat's background notes 'raise more questions than answers' as to the scope of the exemption for governmental services).

[112]Multilateral Trade Negotiations the Uruguay Round, Group of Negotiations on Services, Informal GNS Meeting—10 December 1993, Chairman's Statement, MTN.GNS/49, 11 December 1993.

schemes in the area of national security, in particular in the case of ancillary services. However, it still has to be seen whether that provision can be put to that use. It has also been argued that the general exceptions under Article XIV could be relied upon to safeguard universal service obligations in sectors characterized by a strong general interest ethos, such as healthcare, but again that hypothesis has not yet been validated by any panel or Appellate Body report. Besides, as noted in the previous section, not all measures pursuing the general interest objectives listed in Article XIV can be regarded as relating to public services: a notion of public services inferred from Article XIV GATS would thus be excessively broad.[113]

The remaining public service exemptions provide no further guidance in the quest for a GATS notion of public services. The exemption for Maritime Transport, as discussed above, merely reflects the difficulty to reach consensus in that area through trade negotiations. The exemption set out in the ATS Annex, instead, has wide-ranging effects and a sufficiently clear-cut coverage, but is entirely agnostic as to the aims pursued by WTO Members in managing air traffic rights.

Section 5(e)(i) of the Annex on Telecommunications and Section 3 of the Reference Paper actually seem to constitute expressions of a GATS notion of public services, albeit limited to the field of telecommunications. Indeed, as discussed in the previous section, both provisions recognise the general interest goals that underlie the imposition of certain performance requirements on telecoms operators (i.e. public service and universal service obligations) and accordingly grant those services a special legal status by exempting them from the regulatory provisions set out, respectively, in the Annex on Telecommunications and in the Reference Paper. Nonetheless, due to the limited attention WTO dispute resolution organs have so far devoted to Section 5(e)(i) of the Annex on Telecommunications and Section 3 of the Reference Paper[114] and to their narrow scope of application, those provisions can hardly constitute a template for the development of a general GATS notion of public services.

2.4.3 The GATS Impact on the Emergence of a Global Notion of Public Services in Non-WTO Contexts

According to Article V GATS, WTO members are entitled to conclude EIAs providing for the preferential liberalization of trade in services provided that those agreements comply with a number of requirements. First, EIAs must have a

[113]For instance, imposing qualification requirements as a prerequisite for the access to the medical profession can be regarded as a measure necessary to protect human health within the meaning of Article XIV(b) GATS. It does not follow, however, that all medical doctors can be regarded as providers of a public service.

[114]But see, *Mexico—Measures Affecting Telecommunications Services ('Mexico-Telecoms')*, Report of the Panel, T/DS204/R, para 7.327 (holding that rates charged for the access to and use of public telecommunications transport networks are not 'conditions' within the meaning of Section 5(e) of the Annex on Telecommunications).

substantial sectoral coverage. Second, EIAs must eliminate substantially all discrimination between or among the parties through proscription of existing discriminatory measures or prohibition or new or more discriminatory measures. Third, EIAs must facilitate trade between their parties and must not raise the overall level of barriers to trade in services *vis-à-vis* third parties.

The 'substantial coverage' requirement may have an impact on the development of regional notions of public services. With reference to the equivalent provision set out in Article XXIV GATT 1994, the Appellate Body in *Turkey—Textiles* ruled that, while that expression 'is not the same as *all* the trade', it is 'something considerably more than merely *some* of the trade'.[115] Accordingly, while an EIA exempting some public services, such as primary education or public healthcare, appears in line with the 'substantial coverage' requirement,[116] doubts arise whether an EIA setting out an across-the-board exemption for public services would still comply with the above requirement.

Moreover, while EIA provisions are not required to comply with the MFN obligation enshrined in Article II GATS—because it is in the very nature of EIAs to accord preferential treatment to select trading partners—it is doubtful whether EIAs can also depart from other GATS trade disciplines that are relevant to the regulation and funding of public services, such as the ones on transparency and domestic regulation.[117] That EIAs must comply with the principle of national treatment, instead, is expressly stipulated in Article V:1(b), which requires those agreements to provide for 'the absence or elimination of substantially all discrimination' in the sectors they cover.

The impact of the requirements set out in Article V GATS on the actual content of bilateral and plurilateral EIAs must not be overestimated. As a matter of fact, deviations from Article V requirements and GATS-minus commitments abound.[118] With particular reference to public services, some EIAs embody detailed provisions relating to subsidies, government procurement, domestic regulation and some relatively broad public service exemptions.[119] Accordingly, some commentators have rejected the 'hierarchical' or 'top-down' relationship between EIAs and the GATS that Article V GATS purports to establish.[120]

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[115] *Turkey—Textiles*, Report of the Appellate Body, WT/DS34/AB/R, para 48 (italics in the original).

[116] See Cottier and Molinuevo 2008, p. 132.

[117] See WTO Committee on Regional Trade Agreements Twenty-Seconds Session, Note on the meetings of 29–30 April and 3 May 1999, WT/REG/M/22, 4 June 1999, paras 17 and 18; WTO Committee on Regional Trade Agreements, Synopsis of 'Systemic' Issues Related to Regional Trade Agreements, Note by the Secretariat, WT/REG/W/37, 2 March 2000, para 33.

[118] See Adlung and Miroudot 2012.

[119] See Krajewski 2006; M. Krajewski, Public services in bilateral free trade agreements of the EU. http://www.epsu.org/IMG/pdf/PublicServicesFTAs_FinalVersion.pdf. Accessed 20 October 2014.

[120] See Fabbricotti 2010.

Still, even if Article V GATS does not constitute a peremptory constraint for bilateral and plurilateral negotiations on trade in services, the language of GATS provisions undoubtedly represents a 'focal point' around which trade negotiations tend to converge. Indeed, GATS-like public services exemptions abound in EIAs.[121] The governmental services exemption laid down in Article I:1(b)–(c) GATS appears in several EIAs, including the most elaborate and detailed ones. Considering that the language of that exemption still remains unclear, WTO members could have drafted and employed clearer public service exemption clauses for their EIAs. The circumstance that, in most cases, they have failed to do so suggests that GATS agnosticism *vis-à-vis* public services can, at least to some extent, hinder the emergence of a global notion of public services through regional economic integration.

2.5 Conclusions

The purpose of this chapter was to assess the impact of the GATS on public services. To that end, regard has been paid, in Sect. 2.2, to the potential incidence on those services of GATS trade disciplines, i.e. MFN treatment, market access, national treatment, domestic regulation, and a number of other provisions. That assessment yielded disparate results. The MFN obligation was found not to be relevant to the provision of public services so long as they are supplied by national providers, but to preclude arrangements between WTO members based on the principle of reciprocity, such as access to the radio spectrum or reimbursement of medical treatment received in select foreign countries. Instead, it has been observed that market access commitments may impede the granting of special and exclusive rights, a common form of entry regulation employed in the provision of public services, as well as other relevant requirements such as those on public ownership, legal form and foreign investment. Possible inconsistencies have also been detected between the GATS principle of national treatment and the funding of domestic public service providers. If a WTO member undertakes national treatment commitments in a given service sector, it is not required to grant its supplier-addressed subsidies also to providers of like services established in other WTO members, but must extend its recipient-based subsidies to like services provided to domestic consumers by foreign suppliers either abroad (mode 2) or on a cross-border basis (mode 1). Also the provisional application of domestic regulation requirements was found to be potentially incompatible with public service and universal service obligations, insofar as the necessity test based on the 'quality of the service' laid down in Article VI:4(b) GATS may be unable to accommodate the broader policy goals (e.g. affordability, continuity, equal treatment, universal access) pursued by public service and universal service obligations. The rules on statutory monopolies and exclusive service providers as well as the sector-specific provisions set out

[121]For a survey and an in-depth analysis of GATS-like public service exemptions, see Krajewski 2011, p. 17 et seq.

in the Annex on Telecommunications and in the Reference Paper were also found to have implications on the regulation and operation of public services.

Against the background of such a potentially far-reaching impact on public services, Sect. 2.3 sought to examine the discretion the GATS grants WTO members to exempt what they regard as public services from the above trade disciplines. In particular, it has been observed that WTO members enjoy a remarkable discretion in adding 'individual' public service exemptions to the agreement. A survey of WTO members' GATS schedules revealed that activities that have traditionally been regarded as public services attracted fewer commitments in terms of sectoral and modal scope, as well as lower levels of commitment. The exemption for 'services supplied in the exercise of governmental authority', instead, was found to have a minor impact, due to its narrow material scope. Account was taken to the autonomy afforded to WTO members by Article XIII GATS in the procurement of public services. Regard was also had to how general and security exceptions could be employed to cover regulatory measures concerning the operation of public services. Other sector-specific public service exemptions were surveyed, such as the ones for air transport services and maritime services and the ones laid down in the Annex on Telecommunications and in the Reference Paper. The overall conclusion of that assessment is that, in spite of the potentially far-reaching effects of GATS trade disciplines on public services, WTO members are afforded ample opportunities to tailor those effects to their needs.

Section 2.4 examined the GATS approach to the notion of public services, an approach that was described as inherently 'agnostic'. Most GATS provisions were found not to recognise the specificity of those services or of the goals they pursue. As a consequence, the provisions WTO members can rely on to exempt what they regard as public services from liberalization can actually be employed to exclude other services or to pursue other policy goals, including protectionist ones. Therefore, a GATS notion of public services could not be established. It could neither be gleaned from a survey of WTO members' schedules nor from the interpretation of GATS public service exemptions. Moreover, regard was had to the impact of GATS on the emergence of a global notion of public services through bilateral and plurilateral economic integration agreements (EIAs). While the hierarchical relationship envisaged by Article V GATS between that agreement and EIAs hardly reflects the reality of international practice, it was submitted that GATS agnosticism *vis-à-vis* public services may nonetheless constitute a 'focal point' around which bilateral and plurilateral negotiations tend to converge, thus hindering the emergence of a global notion of public services.

In conclusion, while the GATS may have a very limited *practical* impact on the provision, regulation, and funding of public services at the national and local level, the agnostic model embodied by that agreement might interfere with the conceptualisation of public services beyond national borders. To paraphrase Victor Hugo, '*On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées*.'[122]

[122]Hugo 1877.

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