Public interests, private rights and the "constitution" of GATS

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This paper aims at a critical examination of the impact of the General Agreement on Trade in Services (GATS) on the supply of and access to "public" services. It places the analysis into a larger framework of the concept of public services on the one side and contemporary "constitutional" approaches to WTO law on the other side. The paper does not yet provide a comprehensive analysis of the issues, but intends to stimulate discussion and debate by advancing different propositions. This intention determines the format of the paper, which contains twelve theses. I begin with a discussion of different approaches to the concept of "public services" (1.). Based on a "public interest" approach I suggest that access to public services is a public entitlement or social right (2.) and that guaranteeing universal, equal and affordable access to public services requires regulatory flexibility (3.) I will then turn to GATS and argue that the agreement reflects, but does not solve the potential conflict between liberalisation and regulation of services (4.). Because this leaves room for different interpretative approaches to GATS I discuss the influential ordo-liberal constitutional approach to WTO law (5.) and reject it in favour of an approach based on the protection of human rights (6.) The third part of the paper addresses five specific issues, which are relevant for the regulatory impact of the agreement, especially concerning access to public services. These issues include the coverage of GATS and the exception provision for services supplied under governmental authority (7.), the potential impact of the Market Access and National Treatment obligations on services regulation (8.), the connection between GATS and privatisation

(9.), issues of the protection of foreign direct investment under GATS (10.) and the possibilities of governments to maintain universal access to basic services in light of GATS obligations (11.). In concluding, I will argue that even though the GATS can be construed on a private rights approach to services supply the modalities of the access to services in the public interest depend on the national politics towards GATS (12.).

I. Public services between changing concepts and unchanging needs

1. The concept of a public service should be based on social policy and not on economic theory

Many people have a general idea about the notion of "public services" counting utilities (water, sewage and energy), primary and secondary education, health and social services among them. Some would also include communications services (postal and basic telephone services), public transportation, higher education or radio and television broadcasting. However apart from a general intuition, the exact elements of this concept are not clear.[1]

I submit that there are two general approaches to the notion of public services, which have overlapping implications, but are based on fundamentally different theoretical concepts. The first approach is based on the economic concept of public goods. Standard economic theory assumes that most goods and services should be supplied through market processes and that government intervention is only needed in cases of market failures such as positive or negative externalities. Public goods are typical examples of positive externalities. Their consumption is *non-rival*, because the consumption of one person does not leave the next person with less to consume, and their supply is *non-excludable*, because it the service supplier cannot exclude those consumers of the good

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[1] For an overview see Carol Harlow, Public Service, Market Ideology, and Citizenship, in: Mark Freedland and Silvana Sciarra (eds.), Public Services and Citizenship in European Law (1998), p.50-51; Elisanda Malaret Garcia, Public Service, Public Services, Public Functions and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context, in: Freedland/Sciarra (eds), p. 57-59 and Colin Scott, Services of General Interest in EC Law, 6 ELJ (2000), 310-325 at 312.

who do not pay.[2] Economic theory assumes that markets cannot efficiently provide public goods, which is why government regulations in form of subsidies or direct government supply of the public good are necessary. Therefore, only services, which cannot efficiently be provided through the market because of their non-rival and non-excludable characteristics, are considered "public services" and necessitate government regulation. However, there is a fundamental fallacy of the economic concept of public goods. It assumes the unmarketablility of certain goods and services as a natural and unchangeable property of the commodity.[3] Yet the marketablilty of a commodity is a variable feature. It not only depends on the technological, but also on legal possibility to exclude others from consuming the commodity. The scope of "private" and "public" goods depends on the existence, characteristics and allocation of private property rights in a particular legal regime. In theory, any public good can be turned into a marketable commodity. Even the classical public good of internal security can be commoditised as shown by attempts to outsource and privatise police functions. *Anatole Anton* rightly points out: "It is a political decision whether to convert a public good to a private good."[4]

It is therefore more useful to base a concept of public services on a broader political understanding of services in the common or general interest.[5] Pursuing a "public interest" is indeed the "raison d'être" of state involvement in the supply services.[6] The idea that the special nature of certain services is based on the public interest can be traced back to the common law doctrines of "common callings" and of "businesses affected with a public interest".[7] Both doctrines assumed that certain services provided by private businesses affecting the public in general needed special regulations concerning non-discriminatory access and reasonable pricing. Similar approaches can be found in the French public law doctrine of "service public", which perceives a public service as a "task of function of general interest"[8] and in the European legal concept of "services in the general (or general economic) interest", which are considered a shared value of the

[2] A. G. Ogus, Regulation - Legal Form and Economic Theory (1994), 33-34.
[3] Anatole Anton, Public Goods as Commonstock, in: Anatole Anton/Milton Fisk and Nacy Holmstrom (eds.), Not for Sale: in defense of Public Goods (2000), 8-11.
[4] Anton, 9.
[5] Economic theory describes this sometime with the notion of "merit goods".
[6] Scott, supra.
[7] Dawn Oliver, Common Values and the Public Private/Divide, 201-205.
[8] Malaret Garcia, 62.

European Union.[9] The European Commission defines services of general interest "as market and non-market services which the public authorities class as being of general interest and subject them to specific service obligation".[10]

This definition highlights that the public or general interest is determined by a particular society in a distinct historical, social and economic context based on the values of that society.[11] For example, the law of common callings applied to innkeepers and ferrymen[12], because these services were of great public interest at the time when the doctrine was developed. Today though both services are still important, other services are perceived of greater public interest. The majority of European societies, for example, see health services or education as services in the public interest. It is important to realize that the notion of the public interest involves value judgments, which may be different in different parts of the world and at different moments in time. The concept of public service is hence dynamic and varies over time and space[13] or is "in a constant state of flux".[14] However, despite the variable character of the "public interest", it generally reflects fundamental human needs, such as health, shelter and communication.

2. Access to public services is a public entitlement and not a contractual right.

Because public services are based on the recognition of basic human needs, the issue of access to these services is of fundamental importance. Many of the current debates about the future role and shape of public services can be discussed in terms of access to the service. For example, discussions about the introduction or increase of student fees in higher education focus on the issue of access of students from less-affluent backgrounds to colleges and universities. In the course of privatisation and liberalisation of telecommunication, energy and railways services it is often discussed and questioned whether private businesses operating in competitive markets can guarantee that their

[9] Article 16 ECT. See generally Erika Szyszczak, Public Service Provision in Competitive Markets, Yearbook of European Law (2001) at 35.
[10] European Commission, 'Services of general interest in Europe', Communication from the Commission COM(1996)443, [1996] OJ C 281, p. 3.
[11] EC Commission, supra, footnote 1.
[12] Oliver, 201.
[13] Helmut Cox: Entscheidungskriterien und Prinzipien für öffentliche Dienstleistungen, in: ibid (ed.), *Öffentliche Dienstleistungen in der Europäischen Union* (Baden-Baden: Nomos, 1996) at 22.
[14] Malaret Garcia, at 60 quoting *Hariou.*

service is accessible in all areas of a country. In the same way, the debate about how to secure the water supply of poorer urban and rural population groups in developing countries can be understood as a debate about access to water.[15]

Access to public services should be universal, equal and affordable. Universal means that the supply of the service should be guaranteed in all regions of a country. Equal means that the supply should not depend on differences in the ability to pay. Affordable means that all service consumers should be able to consume the service. These conditions of access to public services are reflected in the French doctrine of "Lolland's law" according to which public services must be provided "uninterruptedly throughout the whole of the geographical area concerned, to all users at uniform prices and must comply with standards of quantity and quality set by the administration." This is referred to as the trinity of continuity, equality and adaptability.[16] Similar notions can be found in the EC concept of services of general interest.[17]

On a more fundamental level, universal, equal and affordable access to public services can be understood as a public entitlement. Entitlements to public services can be based on different constitutional or public law concepts: They can be conceived as constitutional "social rights" derived from the concept of the constitutional "social state"[18], from the notion of citizenship or based on basic human rights.[19] Public entitlements can be claimed by individuals regardless of their market powers and can be seen as an expression of the solidarity between different members of the body politic. They can be contrasted with private contractual (or property) rights. If access to public services is understood as a private contractual right, it is determined by the terms and conditions of the contract between service supplier and consumer. A key factor in such a contract is the ability to pay for the service. In fact, a contractual access to a service will be determined by the laws of demand and supply and can therefore not guarantee equality and affordability of access. Understanding access to public services as an entitlement implies universality, equality and affordability, because an entitlement does not depend on the ability to pay.

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[15] See e. g. George Clarke/Scott Wallsten, Universal(ly) Bad Service, Providing Infrastructure to Rural and Poor Urban Consumers, Policy Research Working Paper 2868, World Bank, July 2002 and CIEL, Water Traded, August 2002.

[16] Malaret Garcia, 68.

[17] EC Commission, supra, para. 8.

[18] See e. g. Spanish and German constitutional law Malaret Garcia, 72-75.

3. Guaranteeing universal, equal and affordable access to public services requires effective and flexible government regulation

The legal and institutional regimes of public services were transformed considerably during the last couple of decades, a development often described as deregulation or regulatory reform.[20] Traditionally many public services were provided on the basis of a public monopoly by the government or other public entities. In recent years, many former government monopolies were privatised and replaced by regulatory regimes emphasizing competition between different - usually private - service providers. Similarly many services provided by the government directly were contracted out to private companies or hybrid forms such as public-private partnerships. In general there was a "transfer of responsibility form the public to the private sector" [21], which has also been described as a shift from the welfare state to the regulatory state.[22]

Despite these regulatory changes guaranteeing universal, equal and affordable access to public services remains a key government responsibility, because unregulated markets are not able to provide public services on this basis. There are a number of different regulatory options of governments to guarantee universal, equal and affordable access.[23] If governments do not want to provide the service directly or through independent public agencies they can allow private companies to supply the service, but submit them to tight regulatory controls, for example by setting fixed prices or requiring that the private service supplier meets certain standards, such as a universal supply obligation. An important regulatory element to ensure universality, equality and affordability is the possibility to cross-subsidise. Cross-subsidisation refers to a mechanism, where a universal price is charged and the surplus gained by supplying the service to one particular segment of society or area of the country is used to finance the supply to the

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[19] See Report of the High Commissioner.

[20] Robert Howse/J. Robert Prichard and Michael J. Trebilock, Smaller or Smarter Governments?, 40 University of Toronto Law Journal (1990), 498-541 and Giandomenico Majone, *Regulating Europe.*

[21] Gunther Teubner, After Privatisation? The Many Autonomies of Private Law, 51 Current Legal Problems (1998), 393; Scott, above note, at 325.

[22] Majone, above.

[23] See Scott 316-322 for a useful categorization.

elsewhere.[24] Cross-subsidisation is hence based on the solidarity between regions and groups.

Economists sometimes argue that governments should ensure access to public services by leaving the supply entirely to private markets, but subsidising consumers so that they can buy the service at market prices.[25] However, this solution is difficult to practice, because it is costly to determine the right amount of the subsidy and because many governments, especially in developing countries, do not have the funds available to subsidise large parts of their population. Furthermore, subsidising the consumer and leaving the supply to the market is not compatible with the notion of a service in the public interest. If a service is in the public interest, it should be provided according to those public interests and it should not be left to the discretion of the market whether and how the service is supplied. The deliberations so far showed that access is a fundamental and unchanging element of public services, which requires government regulation. The choice of regulatory instruments to guarantee universality, equality and affordability of access are subject to changes. These changes reflect changing political and social consensus and ideologies. Governments need regulatory space to guarantee universal, equal and affordable access to public services. Such regulatory space can come under pressure through requirements of liberalisation of trade in services as codified in the GATS.

II. Construing GATS: Liberalisation of services and the protection of human rights

4. GATS reflects, but does not solve the potential conflict between liberalisation of trade in services and regulations of services.

International trade in services involves a host of complex issues. The complexity begins with the notion of a "service". Services can be defined with reference to intangibility or invisibility ("A service is something you cannot drop on your foot"), the transitory or non-durable character of the service or the simultaneity of production and consumption.[26] An important difference between a good and a service is the relationship between the

[24] Ogus, above, 269-270.
[25] Clarke/Wallsten, 12-20.

producer and the consumer. In a modern post-industrial economy most consumers of goods do not have much contact with the producer. However, service supplier and service consumer have frequent contact with each other. In fact, the interpersonal proximity is a key factor of the provision of a service.[27] This is especially visible in such public services as health and education.

Another similarly complex issue concerns the concept of trade in services. How do you trade a service across borders? GATS defines trade in services as the supply of a service in any of the so-called four modes of supply: Cross-border supply (movement of the service e. g. via telephone or internet, Mode 1), supply by consumption abroad (movement of the consumer, Mode 2) and supply through the presence of juridical (Mode 3) or natural (Mode 4) persons of one country providing the service in another country (movement of the supplier). GATS applies to all governmental measures affecting trade in services in these four modes. Since the four modes differ greatly and may be affected by a large number of different national governmental regulations and measures, it is clear that the scope of GATS is quite broad.

The third problematic issue of international trade in services is the definition of a barrier or obstacle to trade in services. Traditionally obstacles to trade in goods were measures imposed at the border, either custom duties or import restrictions.[28] Increasingly trade in goods is also affected by national regulations and many high profile cases at the WTO show the importance of these national regulations for international trade.[29] Because of the nature of trade in services, barriers to this trade are usually not border measures, but national regulations. Often these regulations are not aimed at the international supply of services at all, but only at the national level. In GATS terms, these regulations are called "domestic regulations". If they have the potential to affect trade in services, they could be considered as trade distorting. Liberalising trade in services may hence imply a reduction of these regulations and can cut deeply into the national regulatory fabric.[30] The impact

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[26] Trebilcock/Howse, Regulation of International Trade, 272-273.
[27] Hoekman/Kostecki, Political Economy of the World Trading System, 238
[28] Cottier/Mavroidis (eds), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law.
[29] Japan – Alcoholic Beverages, Chile – Alcoholic Beverages, Thailand – Cigarettes (?); EC – Asbestos, EC – Sardines.
[30] Eeckhout, Constitutional Concepts, 223.

of trade liberalisation on national regulation may well become one of the central issues for the future of the international trade system.

The potential conflict between trade liberalisation and national regulation is reflected in the object and purpose of the GATS. Object and purpose of a treaty are based on the intention of the parties to the treaty as expressed in the terms of the treaty itself or as deducted from such additional sources as the history of the negotiations or subsequent practice.[31] A useful reference point for the intention of the parties is the preamble of the agreement.[32] In this respect the second, third and fourth paragraphs of the GATS preamble are worth recalling[33], articulating the wish of the Members to "establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation", their desire to an "early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations" and their recognition of *"*the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right".

It is clear from these paragraphs that the progressive liberalisation of trade in services is the overall object and purpose of GATS. WTO Members whish to establish a multilateral framework to expand trade in services under conditions of transparency and progressive liberalisation and desire the early achievement of such liberalisation of trade in services. At the same time WTO members recognize the right to regulate and to introduce new regulations especially in the light of particular needs of developing countries. The recognition of this right was reiterated in subsequent decisions of the WTO membership such as the so-called Telecommunication Reference Paper, the Negotiating Guidelines of 2001[34] and the Declaration of the Doha Ministerial Conference.[35] The text of the

[31] See Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention).
[32] Sinclair, The Vienna Convention on the Law of Treaties, 130-131. This approach is supported by WTO jurisprudence see *Canada – Terms of Patent Protection,* Report of the Appellate Body of 18 September 2000, WT/DS170/AB/R, para. 59.
[33] The other paragraphs mention the importance of trade in services and the special role and needs of developing, especially least-developed, countries.
[34] Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93, 29 March 2001, para. II.5.
[35] Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, Para 7

preamble therefore suggests that while trade liberalisation is the GATS' primary objective, the right to regulate and to introduce new regulations may be an important limitation to liberalisation policy. Even though the potential conflict between trade liberalisation and national regulation is reflected in the object and purposes of GATS, it does not answer the question of how this conflict should be solved. Should GATS strike a "careful balance" between liberalisation of trade in services and national regulation? Or is the main purpose of GATS trade liberalisation and the right to regulate only as reminder that liberalization often needs regulation?

5. The ordo-liberal "constitutional" approach to WTO law builds on the protection of private property rights and does not adequately reflect the need of public interest regulation

The answer to this question depends very much on the general approach to WTO law the interpreter takes.[36] Traditionally GATT panels have favoured trade liberalisation over regulatory policies as shown by the notoriously famous *Tuna/Dolphin* panel reports.[37] Panels and the Appellate Body of the WTO have applied a more cautious and balanced approach. They have tried to base their interpretation of WTO law as much as possible on the ordinary meaning of certain provisions and have not relied extensively on the purpose of particular agreements or the WTO in general.

This is in sharp contrast to the constitutional approach to GATT/WTO law, which is based on a distinct ordo-liberal perspective.[38] According to this approach WTO law serves constitutional functions, because it limits discretionary governmental policies, which would otherwise violate basic rights.[39] It is assumed that inefficient governmental policies not only reduce economic welfare, but also violate constitutional principles such as the separation of powers, rule of law and individual rights. International agreements,

[36] Armin von Bogdandy, Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship, 5 Max Planck Yearbook of United Nations Law (2001), 609-647 at 651.
[37] Daniel Esty, Greening the GATT (1990), p. 29-32.
[38] For a good overview of contemporary "constitutional" approaches of WTO law see Deborah Cass, The "Constitutionalization" of International Trade Law, 12 EJIL (2001), 39-76 at 40-44
[39] Ernst-Ulrich Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law (1991). For a critique of Petersmann's approach see Hoswe/Nicoliadis, in Porter et. al (eds) and Krajewski, JWT 2001.

especially the WTO agreements are seen as constitutional safeguards against discretionary governmental policies ("second line of constitutional entrenchment").[40] The proponents of this approach argue that WTO agreements are based on the same liberal values as democratic constitutions. As *Ernst-Ulrich Petersmann,* one of the key proponents of this theory puts it: "The 1994 Agreement Establishing the World Trade Organization (WTO) is the most ambitious attempt in history at promoting welfare-increasing policies through international guarantees of freedom, non-discrimination and rule of law in the ever more important field of worldwide economic relations. In many respects, such as the protection of individual rights (e.g., of access to courts and intellectual property rights) and the establishment of a mandatory global dispute settlement system, it goes beyond the postwar `UN Constitution' for the conduct of foreign policies."[41] The main constitutional "tool" this approaches proposes is the direct applicability of WTO law in domestic courts enabling individual citizens to challenge national laws and regulations and to base court actions on an alleged violation of WTO law.

Petersmann originally focused only on the freedom to trade or the rights of consumers and producers. In recent contributions he broadens his perspective and bases his constitutional approach on a general human rights perspective.[42] He also accepts that international organisations, especially the WTO suffers from a lack of democratic legitimacy. However, the underlying philosophy of the approach remains unchanged. It is built on the assumption that international peace and democracy can be achieved through economic integration and through the protection of market freedoms and on a fundamentally sceptic view of the ability of parliamentary governments to protect civil rights and liberties. Even though *Petersmann* acknowledges the democratic deficit of

[40] Jan Tumlir, Reference.

[41] Ernst-Ulrich Petersmann, The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization, 6 EJIL (1995), 161-221 at 161.

[42] Ernst-Ulrich Petersmann, The WTO Constitution and Human Rights 3 JIEL (2000), 19-25; ibid., Human Rights and International Economic Law in the 21st century, 4 JIEL (2001), 3-39 and ibid., Time for a United Nations "Global Compact" for Integration Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, 13 EJIL (2002), 621-650.

WTO law and calls for greater parliamentary influence at the WTO[43], he remains critical of the role and function of national parliaments.[44]

The concept of basic or human rights advocated by the ordo-liberal constitutional approach is based on a narrow economic understanding of private contractual or property rights.[45] It does not recognize that the non-discrimination principle of WTO law only protects companies engaged in international trade. Other rights, especially entitlements to public services are not protected by WTO rules as I will show in the last section of this paper. In fact there are potential clashes between market freedoms and entitlements to public services. *Petersmann's* claim that these rights can be easily reconciled or that market freedoms can be transformed into universal fundamental rights is based on simplistic assumptions.[46] In short the ordo-liberal constitutional approach is not an adequate approach to address the possible conflict between trade liberalisation and service regulation, because it focuses simply on the liberalising effect of WTO agreements and does not sufficiently consider the potential restrictions these agreements may have on rules and regulations set in democratic processes.

6. GATS should be construed in light of the protection of human rights and in deference to national regulatory choices

A more suitable approach to the potential conflict between national regulation and liberalisation of trade based on a comprehensive and universal understanding of human rights can be found in the recent report of the United Nations High Commissioner for Human Rights on "Liberalisation of trade in services and human rights".[47] According to

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[43] Petersmann, The WTO Constitution, 35.

[44] This is indicated by a quote from Mark Twain preceding one of his recent works: "No man's life, liberty, or property is safe when the legislature is in session", Petersmann, The WTO Constitution, at 3.

[45] Sol Piciotto, Private Rights vs. Public Standards in the WTO, Manuscript, Lancaster University Law School, 2001, http://www.lancs.ac.uk/staff/lwasp/solhome.htm (30 August 2002), p. 11 and Robert Howse, Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann, 13 EJIL (2002), 651-659.

[46] Howse, 654.

[47] United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "Liberalisation of trade in services and human rights", Report of the High Commissioner, 25 June 2002, E/CN.4/Sub.2/2002/9. The Report was endorsed by the Sub-Commission in Resolution 2002/11 on 14 August 2002. See http://www.unhchr.ch/ (visited on 30 August 2002).

this report, a human rights approach to trade law begins with the recognition of the universal application of human rights as codified in international covenants and agreements. It also assumes human rights as customary international law with *erga omnes* applicability. All WTO members have therefore the obligation to promote and protect human rights and this obligation extends to the negotiation and implementation of trade rules. Moreover, the fundamental nature of human rights requires that the promotion and protection of human rights are understood "as objectives of trade liberalisation, not as exceptions".[48]

A human rights approach to trade law also emphasises the difference between the non-discrimination principle of trade law and the non-discrimination principle of human rights law: "While trade law seeks non-discrimination in the application of laws between nationals and non-nationals and between non-nationals of other WTO member States, the human rights principle of non-discrimination is designed to achieve justice and equality between all individuals, whatever their status".[49] This requires taking into account the need of individuals, especially the needs of the more vulnerable parts of society. In fact, the non-discrimination principle of human rights law may even require affirmative action in support of promoting the human rights of the poor and marginalized.[50]

An important consequence of this is the primary responsibility of the state to ensure human rights, especially in the process of liberalisation. A human rights approach to international trade law would therefore reject the idea that human rights can be promoted primarily through market forces. This is in stark contrast to the approach of *Petersmann*, who suggests that liberalisation and market freedoms can be the driving forces of human rights protection.[51] In their book "International Economic Law with a Human Face" *Weiss* and *de Waart* point out: "Liberalized global markets alone cannot be expected to secure human rights world wide, let alone to extend it to all those people which have hitherto been deprived of their benefits".[52]

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[48] Liberalisation of trade in services and human rights, above at 8.
[49] Liberalisation of trade in services and human rights, above at 9.
[50] Liberalisation of trade in services and human rights, above at 26.
[51] Petersmann, EJIL 2002, 629-631.
[52] Weiss/de Wart, Introduction in: Friedl Weiss/Erik Denters and Paul de Waart (eds), International Economic Law with a Human Face, 1998.

Moreover, states also have the obligation to ensure that private entities including transnational corporations "do not deprive individuals of their economic, social and cultural rights".[53] While it is accepted that liberalisation and the realisation of human rights need not to move into different directions, the High Commissioner points out, that "the adoption of any deliberately retrogressive measure in the liberalisation process that reduces the extent to which any human right is protected constitutes a violation of human rights".[54] This is especially the case if liberalisation policies result in a deprivation of the access to basic services for the poorest and most vulnerable parts of the society. In general, a human rights approach focuses and assesses the impact of trade law on human rights. A specific a human rights approach to GATS therefore assesses the impact of the agreement on the right to education, to health and to development.[55]

The High Commissioner identified the following issues arising from GATS in light of a human rights approach to trade law[56]: First, the broad scope of GATS and the risk of constraining Governments from taking actions to promote or protect human rights. Secondly, the right to regulate services, which may be a "duty to regulate under human rights law", if such regulations are required to promote and protect human rights. Thirdly, the danger that a stringent "necessity test" will make services regulations ensuring human rights protection difficult. Fourthly, the importance of subsidies, especially the possibility to use "cross-subsidization" to ensure the access of the poor and marginalized groups of the population to education, health and sanitation services.

Consequently a human rights approach to trade law seeks to interpret GATS law so that the equal access to basic services is guaranteed and that GATS is compatible with human rights. Such an approach requires that GATS law be interpreted in deference to national regulatory policies and regimes to ensure the political space and the necessary flexibility for the states to fulfil their human rights obligations.[57] This coincides with recent approaches to WTO law advanced by scholars like *Robert Howse* or *Armin von*

[53] Liberalisation of trade in services and human rights, above at 10.
[54] Liberalisation of trade in services and human rights, above at 10-11.
[55] Liberalisation of trade in services and human rights, above, at 16-19
[56] Liberalisation of trade in services and human rights, above at 24-26.
[57] Liberalisation of trade in services and human rights, above at 30.

Bogdandy.[58] Based on such a perspective I will consider some of the more detailed issues involving GATS and the universal, equal and affordable access to public services.

III. The impact of GATS on the regulation of public services

7. Most public services are covered by GATS

An important issue concerns the scope of the GATS, especially the question whether GATS covers measures affecting the supply of public services, an issue that is subject to a vivid public debate.[59] The sectoral coverage of the GATS depends on the meaning of Article I:3(b)(c) of the agreement.[60] According to Article I:3 (b) the agreement does not apply to measures affecting services supplied in the exercise of governmental authority. WTO or governmental officials often cite this provision rejecting claims that GATS threatens public services.[61] However, it is not enough to read the exemption for services supplied in the exercise of governmental authority, because this term is further defined in Article I:3 (c) GATS. A service supplied in the exercise of governmental authority is a service, which is neither supplied on a commercial basis nor in competition with one or more service suppliers. Hence, the notions of "commercial" and "in competition" determine the sectoral scope of GATS.

An interpretation of these terms must be in "accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose."[62] The ordinary meaning of "commercial" has two connotations: On the one side, it can refer to the exchange of goods (and services) for money without considering whether the transaction will render a profit. In this case the supply of water at a very low

[58] Howse/Nicolaidis and von Bogdandy, above.

[59] See WTO, GATS – Fact and Fiction (2001), World Development Movement, The GATS debate (2001) and Sinclair/Grieshaber-Otto, Facing the Facts: A guide to the GATS debate, Canadian Center for Policy Alternatives (2002).

[60] "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."

[61] See recently "Director-general of WTO and chairman of WTO services negotiations reject misguided claims that public services are under threat", WTO Press Release of 28 June 2002. PRESS/299, available at http:/www.wto.org/ (5 July 2002).

rate could be regarded as commercial, because it involves an exchange of a service for money. On the other side, commercial could be understood as relating to profit-seeking activities. In that case a public entity providing a service for a certain price, but prohibited from making a profit could be considered supplying a service on a non-commercial basis. The second understanding seems to be the more appropriate in light of the rest of the GATS, especially if the definition of "commercial presence" in Article XXVIII:(d) GATS is considered. Commercial presence is defined as "any type of business or professional establishment". Businesses or professional establishments are usually set up to make a profit. It can therefore be argued that the ordinary meaning of "commercial" in the context of GATS refers to profit-seeking activities. Consequently, services supplied on a commercial basis are services supplied on a profit-seeking basis. "Competition" can be understood as a situation where one producer targets the same market than at least one other producer. A number of questions arise in this context: It is obvious that competition exists between two suppliers who provide the same service to the same group of consumers. For example, two service suppliers offering passenger rail services on the same route are competing. However, what if the services are not exactly the same? For example, do two suppliers covering different parts of the rail network compete with each other? Does a company offering long-distance bus transportation compete with rail operators on the same route? Similar questions arise in many sectors: Do public and private schools provide the same service "education"? Even if they do not provide the same service, do they nevertheless compete with each other? Arguably the distinction between "like" and "directly competitive and substitutable products" according to Article III:2 GATT can be used to interpret "competition". Based on this distinction, it can be argued that two services are supplied in competition if they have common end-uses as shown by elasticity of substitution.[63] Therefore services are supplied "in competition" if there is a certain degree of elasticity of substitution between them. This interpretation of "commercial" and "in competition" shows that the sectoral scope of GATS does not exclude particular service sectors because of their nature or because of their "public interest". Rather, non-competitiveness and non-commerciality determine

[62] Article 31(1) Vienna Convention.
[63] *Japan – Alcoholic Beverages,* Panel Report at 6.22 and 6.28

whether a service sector is covered by GATS. These characteristics depend on the legal and political framework in which the service is provided. If a government chooses to provide a particular service as a public non-profit seeking monopoly it can be assumed that this particular service is not covered by GATS. If, however, governments choose to introduce elements of commercialisation and competitiveness into public services, they may *de facto* submit them to the GATS disciplines. As one commentator rightfully observed: "Deregulation and liberalisation reduces the coverage of the GATS exemption with respect to governmental services."[64]

At this point we can link back to the issues discussed at the beginning of this paper and show the significance of the recent moves towards commoditising and privatising public services. Most public services today are not supplied exclusively by the government or a public entity and many are supplied on a profit-seeking basis, especially if they are provided through public-private partnerships or private financial initiatives. These new forms of financing public services often involve profit seeking on the part of the private partner. But even outside such hybrid financing arrangements elements of commercialisation can be found: For example, if UK universities charge overseas students higher fees than domestic or EU students, universities are arguably making a "profit" from educating foreign students and "cross-subsidize" the education of domestic students.[65] Consequently, it is safe to assume that most public services are covered by GATS.

It is important to note that this interpretation cannot effectively be challenged on the basis of the human rights approach outlined above, because the wording of the agreement limits any interpretative attempts to introduce such elements as "public interest" or regulatory flexibility. I will return to possible strategies of WTO members to fulfill their human rights obligations concerning universal, equal and affordable access to basic services at the end of this paper.

[64] Werner Zdouc, 'WTO Dispute Settlement Practice in relation to GATS', 2 J Int'l Econ L (1999), 295-346 at 321, note 85.

[65] Steven Kelk/Jess Worth, 'Trading it all away: How GATS threatens UK Higher Education (Draft version) at 3.3.

8. Market Access and National Treatment obligations have the potential to considerably limit national regulatory space.

GATS disciplines can be divided into general and specific obligations.[66] General obligations apply to all services and include Most-Favored Nation treatment, transparency and procedural obligations. Specific obligations only apply to those sectors, which are specifically committed to these obligations and only subject to any limitations or specifications made in connection with these commitments. Specific obligations include Market Access and National Treatment. General obligations are less problematic from a national regulatory perspective: Most-Favored Nation treatment (Article II) requires non-discrimination between two or more foreign services or service suppliers. Since national regulations usually only apply to national services and service suppliers it is unlikely that a national regulation will discriminate between two foreign service suppliers. The other general obligations are mostly of procedural and institutional nature, which is why their impact on the content of national regulations is not too large. However, market access and national treatment obligations can have a considerable impact on regulatory regimes. The market access obligation (Article XVI) requires a WTO member to "not maintain or adopt either on the basis of a regional subdivision or on the basis of the entire territory" quantitative or qualitative restrictions on market access. Article XVI:2 GATS contains a list of quantitative and qualitative restrictions which violate the market access obligation and which must therefore be abolished if they are not explicitly listed in the schedule of specific commitments. The Scheduling Guidelines illustrate which measures are potentially a violation of the market access obligation: Licenses based on economic needs tests, annual quotas for service suppliers (such as doctors), government monopolies and nationality requirements for service suppliers.[67] Furthermore, limitations concerning the value of transactions or the number of service operations, requirements regarding the type of legal entity or joint venture and limitations on the participation of foreign capital are also defined as limitations to market access. This list shows that a variety of instruments often used to provide public services such as government monopolies or numerical quotas must be abolished if a service sector

[66] For an overview see Trebilcock/Howse and Arup.
[67] Scheduling Guidelines, para 12.

is fully committed to market access. WTO members may maintain measures limiting market access if they specifically list them in their schedule. In this context it is important to point out that changing a schedule is extremely difficult. It involves consultations with other Members and negotiating compensatory adjustments in the schedules (Article XXI).

National treatment (Article XVII) requires non-discrimination between foreign and domestic services and service suppliers. At first sight this obligation seems unproblematic from a national regulatory perspective, because most national regulations contain standards and requirements applicable to all services and service suppliers regardless of their origin. However, the national treatment obligation is problematic from the perspective of subsidies, because subsidies are often restricted to national service suppliers. In the absence of any specific rules on subsidies in GATS, the national treatment obligation also covers subsidies. Therefore any subsidies only paid to national service providers violate the national treatment obligation unless they are specifically listed in the schedules of specific commitment.[68]

Furthermore, the national treatment obligation of GATS has a potential impact on national regulations, because it not only applies to overtly discriminatory measures, but also to those measures which are considered "*de facto*" discriminatory".[69] The exact scope of *de facto* discrimination remains unclear.[70] *De facto* discrimination refers to a certain government measure, which affects the "conditions of competition" in favour of the domestic services supplier without overtly discriminating against the foreign supplier (Article XVII:3). This indicates a potentially far-reaching impact of GATS. Explanatory footnote 10 of the GATS suggests that so-called "inherent competitive disadvantages" should not be considered when determining the *de facto* discriminatory effect of a measure. However, the meaning of this phrase is also unclear.

If any national regulation, which makes it *de facto* more difficult for a foreign service supplier to compete, would be considered a violation of national treatment, many national regulatory measures could be an infringement of GATS. For example, do high national

[68] The EC has lists subsidies in the public sector as an explicit limitation to its national treatment commitment, see EC – Schedule of Specific Commitments.
[69] Zdouc, JIEL 1999, 334-344.
[70] Eeckhout, 232-235.

quality standards, which are more easily fulfilled by domestic suppliers, affect the conditions of competition in favour of the domestic supplier? because of the potentially far reaching scope of national treatment, interpretation of GATS suggesting a narrower scope are important from a national regulatory perspective.

Eeckhout suggests that *de facto* national treatment should be construed as "indirect discrimination": Only if there is "a clear difference in treatment, a distinction operated by the regulatory measure in issue" should the measure be considered as discriminatory.[71] Another approach would be to call for a renewed consideration of the "aims and affect" test, which determines the discriminatory nature based on the purposes of the measure. However, the Appellate Body rejected this approach in *EC – Bananas.*[72] I would like to suggest an approach based on the importance of the schedules of specific commitments. It can be argued that only measures which can theoretically be scheduled as limitations to national treatment should be considered as discriminatory measures within the meaning of Article XVII. Otherwise a WTO Member would be deprived of the right to keep discriminatory measures by scheduling them. Based on this thought it could be argued that only measures with a foreseeable discriminatory effect should be considered *de facto* discrimination.

It is not clear whether WTO dispute settlement organs would accept this or any other limited interpretation of national treatment. However, it should be kept in mind that a broad understanding of *de facto* discrimination would possibly affect a large number of regulatory measures. Therefore an approach to GATS based on human rights and on deference to national regulatory choices should opt for a narrow interpretation of national treatment.

[71] Eeckhout, 233.

[72] This approach was rejected by the AB, *EC – Bananas,* Report of the AB, para. 241. See also Zdouc, 340-342.

9. GATS does not require privatisation, but it mandates liberalisation of public monopolies and prohibits nationalisation of a service industry in a fully committed sector.

An important issue concerns the connection between GATS disciplines and privatisation. WTO defendants repeatedly claim that GATS does not require privatisation of public services.[73] This is correct if privatisation is understood from a strict legal perspective as the change of public to private ownership. There are no GATS provisions addressing the issue of public or private ownership. [74] However the general relationship between WTO law and the "ownership" issue is not very well researched. Though there seems to be a general intuition that WTO law is "ownership neutral", it is accepted that WTO law envisages a market economy. It is also not clear whether the special disciplines on public enterprises and public monopolies in GATT and GATS do not put a presumption of WTO law-inconsistency on public ownership.

Even if the ownership neutrality of WTO law is accepted, the wider context between GATS and privatisation must also be taken into account. The first point to note is that GATS mandates the liberalisation of public monopolies. I use the term "mandates" to point out that again from a strict legal perspective GATS does not require the liberalisation of public monopolies. As pointed out above (public) monopolies are inconsistent with the market access obligation. However, since this obligation only applies to sectors specifically committed to this obligation and only subject to the limitations and specifications of this commitment, the obligation to abolish a public monopoly only applies if a sector is fully committed to market access. Hence it is difficult to argue that GATS actually requires the liberalisation of public monopolies. However, the goal and objective of GATS is to achieve progressively higher levels of liberalisation of trade in services. In fact it is the mandate of GATS to achieve higher levels through progressive rounds of negotiations (Article XIX). The goal of these negotiations is to eventually achieve full commitments in all sectors including those sectors where public monopolies still exist. It is therefore safe to conclude that GATS mandates the liberalisation of public monopolies.

[73] WTO Secretariat, 'Facts and Fiction', p. 9.
[74] Mattoo, in: Cottier/Mavroidis (eds.) State-Trading, p. 43.

Liberalisation of public monopolies is often connected with privatisation of governmental monopolies as shown by the privatisation of telecommunication, postal and railway services in Europe. Indeed in most cases privatisation took place before liberalisation.[75] Historic experience suggests that liberalisation of a public monopoly coincides with privatisation. Therefore even if GATS does not require the privatisation of public services, the dynamics of the agreement put public monopolies and publicly owned service suppliers under the pressure to be abolished.

Another important connection between GATS obligations and privatisation concerns the (re)nationalisation of a service industry. In the debate about regulatory space for public services and GATS obligations, some have raised the question whether GATS disciplines prohibit the re-nationalisation of a liberalised and privatised sector. The importance of this question became visible in the recent re-nationalisation of water supply in Cochabamba, Bolivia.[76] If nationalisation were understood in a pure legal sense of transfer of ownership from private companies to a public owner, it would seem that GATS obligations do not affect this transfer in the same way as they do not affect the transfer from public to private ownership. However, it is possible that expropriation of an individual foreign service supplier could be regarded as a nullification and impairment of expected benefits according to GATS Article XIII:3. Scope and application of nullification and impairment in the GATS framework are still unclear and it remains to be seen how WTO dispute settlement organs will adjudicate nullification and impairment claims under GATS. Nevertheless it is possible that a WTO member could claim nullification and impairment if a service supplier from this member, who invested in another member (i. e. supplied a service through commercial presence) in a fully committed sector of another member was expropriated. Arguably this nullifies and impairs the expected benefits of market access of the former WTO member.

More fundamentally, nationalisation of an entire service industry has a direct effect on Market Access. After nationalisation of an industry, the service is usually provided by a public entity operating on a monopolistic basis. This monopoly is again inconsistent with the market access obligation if the sector is fully committed to market access. Therefore

[75] See Majone, above.
[76] "Liberalization of Trade in Services and Human Rights", above at 23.

nationalisation of a sector, which is fully committed to market access, constitutes a violation of GATS obligations. Even if it would not be regarded as a strict violation, it could possibly again be seen as a nullification and impairment of expected benefits. In both cases, GATS commitments effectively "lock" in any privatisation and liberalisation of a former publicly owned service sector.

10. GATS protects foreign direct investment without granting a private right to establishment to investors.

The next question I would like to address concerns the "right to establishment". Does GATS confer a right to establishment for foreign investors in services? A right to establishment can be defined as a right of a foreign service supplier - either a private or judicial person - to enter a particular market by setting up an establishment under the same conditions as the domestic service suppliers. For example, Article 43 ECT defines the freedom of establishment as "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms (…) under the conditions laid down for its own nationals by the law of the country where such establishment is effected (…)"[77]

In the context of GATS it is important to recall that the agreement defines trade in services *inter alia* as the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member" (Mode 3). Commercial presence is defined as "any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service." Mode 3 can therefore be seen a form of foreign direct investment in services. In fact, most commentators agree that GATS functions as an agreement protecting foreign direct investment.[78] National treatment prohibits WTO members from treating foreign investors less favourably than domestic service suppliers.

[77] See also ECJ, Case 107/83, *Klopp,* [1984] ECR 2971.

[78] Christopher Arup, *The New WTO Agreements, Globalizing Law Through Services and Intellectual Property*, at 127 and Pierre Sauvé and Christopher Willkie, 'Investment Liberalisation and GATS' in Sauvé/Stern (eds.) GATS 2000, 331-363.

Market access is supposed to ensure effective market entry chances. As pointed out above, GATS could even protect investments against expropriation, if expropriation could be seen as a nullification and impairment of an expected market access benefit. Assuming that a WTO member committed a service sector fully to the market access and national treatment obligations, it seems indeed possible to suggest that GATS confers a right to establishment.[79]

Yet there are a number of objections to this assumption. First, the extent and scope of the market access and national treatment obligations are not entirely clear. It should be noted that GATS does not grant market access, but only prohibits those limitations on market access which are specifically mentioned in Article XVI:2 GATS. It is possible that certain government measures effectively prevent foreign investors from entering a market without violating Article XVI.[80] A crucial question is also whether Article XVII (national treatment) applies only to post-establishment activities or also to the establishment act itself.[81] If national treatment only applies to post-establishment activities, WTO members could maintain discriminatory measures, which are not listed in Article XVI on market access, such as high discriminatory taxes preventing effective market access. It could be argued that the wording of Article XVII ("all measures affecting trade in services") indicates a broad scope of the national treatment obligation.[82] However, the negotiating history and the general approach to national treatment obligations in other treaties suggest that national treatment in GATS is limited to the post-establishment phase.[83] Consequently, GATS does not require non-discriminatory treatment of foreign investors at the point of market entry.

Secondly, the market access and national treatment obligations of GATS are not unconditional. They only apply to those sectors, which are listed in the schedules of specific commitments and only subject to the specifications and limitations mentioned in those schedules. Hence, WTO members remain free not to grant market access or national treatment to foreign investors. For a right of establishment, however, there would have to be an unconditional obligation to treat foreign and domestic investors in the same way. For

[79] See Peter Muchlinski, Multinational Enterprises and the Law (1999), at 252-253.
[80] Arup, supra, 120-121.
[81] Mattoo, National Treatment in the GATS, 31(1) JWT (1997), 113-119.
[82] Mattoo, supra.

example, in *Reyners,* the European Court of Justice held that Article 52 ECT was directly applicable, i. e. conferring a right of establishment on a national of an EC Member, because "Member States no longer have the possibility of maintaining restrictions on the freedom of establishment".[84]

Thirdly and fundamentally, GATS does not confer rights to private individuals. It is an agreement, which obliges and entitles its Members, mostly sovereign nations. The WTO Agreements are not directly applicable and individuals cannot base any rights on these agreements. This is not only the position of the ECJ[85], but has also been recognized by the WTO Dispute Settlement organs. In the *Section 301* case the Panel made this explicitly clear:

> "Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals."[86]

The fact that WTO law does not confer rights to private individuals is also reflected in the nature of the WTO dispute settlement, which is a state-to-state mechanism. Unlike some bilateral or regional investment treaties, the DSU does not allow for so-called state-investor proceedings. Consequently, GATS does not confer a private right to establishment, despite the fact that it does contain provisions protecting foreign direct investment in services.

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[83] Mattoo, supra.
[84] Case 2/74, *Reyners,* [1974] ECR 631, 649, Rec. 12.
[85] ECJ, Portugal/Council.
[86] *United States – Sections 301-310 of the Trade Act 1974*, Report of the Panel, WT/DS152/R, 22 December 1999, para. 7.72 (footnote omitted).

11. Governments can ensure that entitlements to public services are not threatened by GATS at three levels: national regulatory regimes, definition of the sectoral scope of GATS and limitations on commitments.

Based on the considerations developed above, I would like to return to the underlying fundamental question: How can governments ensure their human rights obligations and guarantee the universal, equal and affordable access to basic services in light of their GATS obligations? I suggest that there are three broad approaches.

First, governments could try to limit the sectoral scope of GATS on public services. As pointed out above, this is difficult in light of the narrow wording of Article I:3(b)(c) GATS. However, it should be remembered that the fact that most public services are covered by the sectoral scope of the agreement is not just a result of the wording of GATS, but also of political decisions to "commercialise" public services or to subject them to competition. This is obvious in services which used to be supplied by government monopoly providers on a non-profit making basis and which were then privatised and liberalised, such as telecommunication services throughout Europe or railway services in the UK. However, government policies can also introduce elements of competition and commercialisation in sectors, which are still thought as "public". For example, the decision of a national health service to send patients not only to public, but also to private hospitals, i. e. to "purchase" hospital services from private and public hospitals, can lead to competition in the health services sector. In the same way, the decision to provide hospital services only through public hospitals based on a national health plan would reduce or end such competition.

Secondly, if governments are not inclined to change their current liberalisation and privatisation policies, but would nevertheless ensure more flexibility concerning the regulation of public services, they could try to agree on a common broader understanding of the scope of GATS. This would either require a change in the GATS text, a new agreement clarifying the scope of GATS or an authoritative decision on the interpretation of GATS according to Article IX (2) of the Marrakesh Agreement establishing the WTO. According to this provision, the Ministerial Conference or the General Council can adopt authoritative interpretations of WTO agreements. However, these approaches face the

difficulties of achieving consensus between the WTO members. In fact, no WTO member has so far even suggested a clarification of the sectoral scope of GATS.

Thirdly, governments can attempt to limit at least the impact of the market access and national treatment obligations on their public services sectors by either not scheduling certain sectors or by scheduling limitations and specifications to those commitments. For example, members can schedule horizontal limitations concerning public services or public utilities.[87] Members can also exclude subsidies to public services from the application of the national treatment principle, either horizontally or as part of the sectoral commitments.[88] This would allow them to continue subsidizing national service suppliers with a universal supply obligation. Another possibility is to specifically exclude publicly financed services from the coverage of market access and national treatment by only committing privately financed services as the EC did in education services.[89] This option, however, raises the question of how to determine when the supply of a service is publicly financed. In light of such hybrid financial arrangements as public-private partnerships or private party funding this option may indeed raise more problems than it attempts to solve. Nevertheless, careful scheduling seems the most realistic way for WTO members to retain regulatory space for public services regulation.

IV. Conclusion

12. Bringing it all together: GATS and the access to basic services between public interests and private rights

At the end of this paper, I shall try to link the conceptual approaches to public services and to the GATS with the more specific issues discussed in part III of the paper. I have shown the broad scope of GATS and the implications of market access and national treatment on government regulation in services. It should be clear that the object of GATS is not to introduce new regulations, but to liberalise trade in services. Obviously,

[87] See the EC – Schedule listing the following a horizontal limitation on market access in mode 3: "Services considered public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators."
[88] EC- Schedule, 5

often liberalisation also needs regulation, especially competition laws. Nevertheless, it can be argued that key elements of GATS reflect and partly reinforce a particular neo-liberal approach to services regulation. Such an approach perceives access to private services as a private contractual right and the supply of the service as depending on market processes.

However, the analysis of the impact of GATS on the regulation of public services also showed that much of this impact depends on how GATS is perceived and how governments use it. Even though GATS effectively puts restraints on governments discretion to regulate the supply of public services there are some options, which governments may choose to preserve the flexibility they need to protect regulatory systems guaranteeing universal, equal and affordable access to basic services from the disciplines of GATS. However, these options require a substantial amount of political interest and power to actual protect such systems. Whether or not governments have the interest and political will to do so often remains open. Government policies at national and regional levels are the crucial element of regulating public services and guaranteeing universal, equal and affordable access to basic services. GATS itself can be used to further liberalise services markets, but the scope of the agreement and the impact of many of its disciplines on public services depend on national policies.

It is therefore important to look at the political economy and ideology of these policies in the context of GATS. I suggest that the perception of the access to public services can be a key to such an analysis. Is access to these services construed as a private right, hence subject to contractual terms and market conditions or as a public entitlement based on the economic and social human rights of the individual? Perceived as a private right, access to basic services would require the creation and allocation of property rights through privatisation and liberalisation of public service monopolies and regulation ensuring competitive market conditions. Liberalisation trade in services through GATS disciplines can support these processes. GATS – like other international economic agreements – can especially be used to overcome domestic resistance against privatisation and liberalisation. In fact, many commentators suggest that this domestic function is a key purpose of international agreements.

[89] EC – Schedule on education services.

Perceived as a public entitlement, access to basic services needs more than just competitive markets. Because of the requirements of universality, equality and affordability special government regulations are necessary. Providing the service through direct governmental supply is not the only option. Applying universal service obligations and allowing cross-subsidisation in combination with price-control through independent regulators may be another option. Both options are not incompatible with GATS obligations. However, governmental choices and regulatory policies may come under pressure if GATS is not perceived from a human rights perspective of international law, but from a ordo-liberal constitutional perspective emphasising private market rights over government obligations to protect the human rights, especially of the poor and most vulnerable parts of society.