Public services and trade liberalization
Mapping the legal framework

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Abstract

The impact of the General Agreement on Trade in Services (GATS) on public services is subject to a vivid political debate. From a legal perspective, an important issue is the sectoral scope of the GATS and the exact meaning of the term "services supplied in the exercise of governmental authority" in Article I:3(b) GATS. This paper shows that this provision is likely to be interpreted narrowly and that most public services will fall within the sectoral scope of GATS. The reason for this finding lies in the definition of governmental services, which emphasizes the non-commercial basis and non-competitive supply of a service. This definition distinguishes GATS law from the similar provision in Article 45 ECT. WTO members whishing to reduce the impact of GATS on public services can do so through their schedules of specific commitments or seek an interpretation of the GATS, which would give them more regulatory flexibility.

I. Introduction

The last two years witnessed a growing international debate about the benefits and detriments of the General Agreement on Trade in Services (GATS).[1] This may be surprising in light of the limited GATS jurisprudence[2] and the relatively slow start of the GATS 2000 negotiations. However, the current GATS debate grew out of two existing public discourses: It combines issues of the legitimacy of the WTO which emerged after the Seattle Ministerial Conference on the one hand[3] and public concern about the liberalization and privatization of public services such as basic utilities, education, health, transport, telecommunications or postal services on the other hand. In fact public services dominate much of the current debate about

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[1] See WTO, 'GATS – Fact and Fiction' March 2001, available at http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (visited 2 September 2002); World Development Movement (WDM), *The GATS debate* (London: WDM, 2001) and Scott Sinclair/Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate* (Ottawa: Canadian Center for Policy Alternatives, 2002).

[2] Werner Zdouc, 'WTO Dispute Settlement Practice in relation to GATS', 2 J Int'l Econ L (1999), 295-346 is still the most up-date summary of case law involving GATS. The pending Mexican telecommunication case will be the first major GATS case, *Mexico - Measures affecting telecommunications services,* WT/DS204, Request for consultation by the United States submitted on 29 August 2000. The Panel was established on 17 April 2002 and constituted on 26 August 2002.

[3] See Marco Brockers, 'More Power to the WTO?' 4 J Int'l Econ L (2001), 41-65; Robert Howse/Kalypso Nicolaïdis, 'Legitimacy and Global Governance – Why Constitutionalization is a Step Too Far', in: Roger B. Porter et al. (eds), *Efficiency, Equity, Legitimacy – The Multilateral Trading System at the Millennium* (Washington, D. C.: Brookings, 2001), 227-252 and Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' 35 (1) JWT (2001), 167-186. Generally Claude Barfield, *Free Trade, Sovereignty, Democracy – The Future of the World Trade Organization* (Washington, D.C.: AEI Press, 2001).

GATS. Next to the political, economic and social aspects of this debate there are also distinct legal elements. One of the concerns the scope of GATS and the question whether or not public services are excluded from its coverage. Without oversimplifying it can be said that those fundamentally critical of the impact of GATS on public services maintain that GATS does not exclude public services[4], while those defending the benefits of GATS, claim that the agreement contains enough mechanisms to prevent negative effects of the liberalization of public services.[5] The increased public[6] and political[7] interest in this discussion and the legal problems connected with it justify a contribution to the debate form an academic perspective. The paper begins with an enquiry into the concept of "public services" and a brief sketch of different policy approaches to public services in order to provide the broader context (II). The core of this paper contains an analysis of the GATS provisions relevant for public services (III.). I suggest an interpretation of Article I:3(b)(c) GATS, the provision exempting governmental services from the scope of the agreement, based on generally accepted methods of treaty interpretation. I also point to some aspects of the impact of the GATS disciplines of market access (Article XVI) and national treatment (Article XVII) on public services.[8] These findings will be compared with the freedom to provide services under EC law and the exemption for governmental services according to Article 45 ECT (IV.). Based on this comparison I will conclude with some policy considerations and suggestions (V.).

II. The changing concept of public services

1. Public goods or services in the public interest?

The term "public services" does not have a precise legal meaning.[9] In general two conceptions of "public service" can be distinguished[10]: On the one hand, public service can be understood as the entirety of those working in the public sector and the legal regime

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[4] WDM, above note 1, at 34-35 and Sinclair/Grieshaber-Otto, above note 1, at 17-25.

[5] David Hartridge, 'WTO Secretariat hits false attacks against GATS', Speech delivered at the European Services Forum, Brussels 27 November 2000, at http:// www.esf.be/docs/hartridg.doc (visited 21 May 2002) and '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/ (visited 5 July 2002).

[6] See e.g. 'Commerce mondial: alerte sur les services publics ', *Le Monde* (3 October 2000); 'WTO foresees tough talks on opening up pf services provisions', *Financial Times* (16 March 2001); 'Changing perspectives on trade liberalization', *The Guardian* (25 May 2002) and 'OMC, un autre front de liberalization', *Le Monde* (4 June 2002).

[7] 'Municipalities Take on Ottawa's Trade Agenda' *Financial Post (Canada)* (17 September 2001) and Local Government Association (UK), 'The General Agreement on Trade in Services (GATS): Possible Implications for Local Government', April 2002, at http://www.lgib.gov.uk/policy/GATs.pdf (visited 2 September 2002).

[8] A number of important aspects of the impact of GATS on public services cannot be discussed in detail in this paper dues to space constraints. They include issues such as the scope of Article VII GATS (see Aaditya Mattoo, 'Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services', in: Thomas Cottier/Petros Mavroidis (eds.), *State-Trading in the 21st century* (Ann Arbor: UMP, 1998), 35-70) and more fundamentally – the relationship between WTO law and public ownership/privatization. The importance of this issue for public services was already highlighted at the first World Trade Forum on State-Trading in Gerzensee, Switzerland. See Roundtable Discussion, in: Cottier/Mavroidis (eds.), *State-Trading,* at 417-426.

[9] Carol Harlow, 'Public Services, Market Ideology, and Citzenship', in: Mark Freedland and Silvana Sciarra (eds), *Public Services and Citizenships in European Law* (Oxford: Clarendon Press, 1998) at 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) at 312.

[10] Harlow, above note 9, at 49.

governing their employment. On the other hand, public services refer to a specific subset of services provided by or under the control of a public authority, because these services are considered "special" compared to other services. Only the latter coincides with the use of public services in the GATS debate and will therefore concern this paper.
There are two conceptual approaches to this 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, since their consumption is non-rival, because the consumption of one person does not leave the next person less to consume, and their supply is non-excludable, because it is difficult for the service supplier to exclude those consumers who do not pay.[11] Economic theory assumes that markets cannot efficiently provide public goods, which is why regulations, subsidies or direct government supply of the public good are necessary. Basing a notion of public services on the economic concept of public goods means that 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 unmarketability of certain goods and services as a natural and unchangeable property of the commodity.[12] Yet marketabililty of a commodity depends on the technological possibility to exclude others, which may change as technology advances and even more importantly on the legal and political system, especially the existence and allocation of private property rights. Even classical examples of public goods such as national and local security can be commoditized as shown by privatization and outsourcing of police functions and by the introduction of private security services in public places, buildings or even entire streets and areas of a town. In theory, any public good can be turned into a marketable commodity.[13]
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. Pursuing a "public interest" is indeed the "raison d'être" of state involvement in services.[14] 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".[15] Both doctrines assumed that certain services provided by private businesses affecting the public at large 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"[16] and in the European legal concept of "services in the general interest", which are considered a shared value of the European Union.[17] The public interest is determined by a particular

[11] A. G. Ogus, *Regulation - Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994) at 33-34.
[12] Anatole Anton, 'Public Goods as Commonstock', in: Anatole Anton/Milton Fisk and Nacy Holmstrom (eds.), *Not for Sale: in defense of Public Goods* (Boulder, CO: Westview, 2000), 8-11.
[13] Anton, above note 12, at 9.
[14] Scott, above note 9, at 311.
[15] Dawn Oliver, *Common Values and the Public Private/Divide* (London: Butterworths, 1999) at 201-205.
[16] Malaret Garcia, above note 9, at 62.
[17] Article 16 ECT. See generally Erika Szyszczak, 'Public Service Provision in Competitive Markets', 20 Yearbook of European Law (2001) 35-77.

society in a distinct historical, social and economic context based on the values of that society. 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.[18]

2. Regulation and liberalization of public services and the need for flexibility in international trade law

Government regulation of services is a sensitive issue, because of the particularities of services. While many attempts to distinguish services from goods exist[19], it is submitted that the *interpersonal proximity* of service supply is the most important feature of services from a regulatory and policy point of view. Unlike goods, the production and consumption of services often involves direct and close personal contact between the producer and consumer. This is of special importance in two key public service sectors: education and health. Governments regulate services for various reasons. It is often argued that market failures such as natural monopolies, positive and negative externalities and information deficits necessitate regulation.[20] Natural monopolies are frequently associated with the initial set-up of large networks (rail transportation, energy, land-line telecommunication).[21] Further regulatory regimes for public services can be based on social policies and concepts of distributional justice. This is for example the case for basic telecommunications and postal services. Supply of these services on the basis of competition would result in higher service charges in rural and economically disadvantageous regions.

Public services regulation takes different forms. Traditionally, many public services were (and often still are) supplied by the government or a public institution on the basis of a statutory monopoly. This changed dramatically in recent years. Arguably the current debate about the impact of GATS on public services cannot be understood without taking these changes into account. Since the 1980s many former government monopoly suppliers were transformed into private law companies, whose shares were gradually to the public sold so that governments became minority shareholders. [22] Privatization efforts were often accompanied by liberalization policies to prevent the former government monopoly supplier from dominating the market. Special regulatory regimes ensure competition and guarantee that the services are supplied on a universal basis at the same time. In Europe these liberalization policies were often required by EC legislation based on internal market competences of the EC. [23] The actual degree of liberalization throughout Europe varies and the public debate about the consequences of these policies continues.[24]

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[18] Helmut Cox: Entscheidungskriterien und Prinzipien für öffentliche Dienstleistungen, in: ibid (ed.), *Öffentliche Dienstleistungen in der Europäischen Union* (Baden-Baden: Nomos, 1996) at 22.

[19] Michael Trebilcock/Robert Howse, *The Regulation of International Trade,* (2nd ed., London: Routledge, 1999) at 271-273.

[20] Ogus, above note 11, at 29-46.

[21] Guiseppe Bognetti, Europäische Netze und öffentliche Versorgungsunternehmen, in: Cox (ed.), above note 18, at 61.

[22] Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996) at 20-21.

[23] See the overviews in the two Communications for the Commission entitled "Services of general interest in Europe" of 1996 (O.J. C281/3, 26 September 1996) and of 2000 (COM(2000) 580 final, 20 September 2000).

[24] 'Services publics: la France peut-elle tenir tête à Bruxelles?', *Le Monde*, 4 June 2002.

Privatization of public services coincides with general deregulation and liberalization policies in many countries in the last years.[25] These policies are based on the perception that the provision of services through government monopolies or under heavily regulated regimes is less efficient than a provision in a competitive environment. Much evidence suggests that "command- and-control"[26] type regulation often produced wasteful results and left the provision of services sometimes to unaccountable bureaucracies. However practical experiences also show that liberalization and privatization policies have not always led to better and cheaper services.[27] Furthermore, it remains to be seen whether the current liberalization and privatization trends continue or whether the pendulum will swing back towards more direct government intervention.[28] For example, the aftermath of 11 September 2001 already showed a shift in the perception towards government involvement in security services in the US.[29] The debates about the benefits and detriments of privatization and liberalization of public services involve just as many value judgments as the perception of public services in general.

Because of the changing concept of public services and the value judgments involved in the design of the regulatory regimes for public services, national governments need international rules, which allow them to adjust their policies and laws depending on these changing needs. Consequently international trade rules should not restrict the government's right to regulate public services and to introduce new regulations guaranteeing the effective, affordable and accessible supply of public services. In this respect an interpretation of GATS should give high priority to the regulatory autonomy of WTO members. This interpretative approach concurs with concepts of WTO law, which argue for an interpretation and application of WTO law with deference to national regulatory choices.[30] It coincides with the recent call of the United Nations High Commissioner for Human Rights to interpret GATS in light of the human rights implications of liberalization of services and to "ensure that GATS obligations do not constrain governments from taking action to promote or protect human rights", such as access to basic services.[31]

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[25] Robert Howse/ J. Robert Prichard/Michael J. Trebilcock, 'Smaller or Smarter Government', 40 U Toronto L J (1990), 498-541; Robert Howse, 'Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State', 31 Alberta Law Review (1993), 455-492 and Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', 17 J of Public Policy (1997), 139-176.

[26] Howse, above note 25, at 456.

[27] David Hull, 'Services of General Interest in Europe – an evidence-based approach', Written Submission to the European Parliament Committee on Economic and Monetary Affairs, Public Services International Research Unit, February 2001, available at http://www.psiru.org/reportsindex.htm (visited 2 September 2002).

[28] Thomas Cottier/Petros Mavroidis, 'Conclusion: The Reach of International Trade Law, in: ibid (eds.), above note 8, at 404-405.

[29] See 'Meeting the Airport Security Challenge', Report of the Secretary's Rapid Response Team on Airport Security, October 2001, at http://www.tsa.dot.gov/ (visited 14 May 2002).

[30] Howse/Nicolaïdis, above note 3, at 243-248 and 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), at 658-674.

[31] United Nations Economic and Social Council, Commission on Human Rights, Sub-commission on the promotion and Protection of Human Rights, 'Liberalization of trade in services and human rights', Report of the High Commissioner, E/CN.4/Sub.2/2002/9 25 June 2002, available at http://www.unhchr.ch/ (visited 2 September 2002).

III. The impact of GATS on public services

1. The scope of GATS

The impact of GATS on public services depends on the scope of the agreement. Article I:1 of the Agreement holds that GATS applies to "measures by members affecting trade in services." Measures by members include measures by governments or public authorities at all levels and by non-governmental bodies with delegated regulatory powers (Article I:3(a)). The Appellate Body interpreted the word "affecting" broadly in *EC –Bananas* and argued it implies a measure that has "an effect on" trade in services.[32] According to Article I:2 GATS "trade in services" means the supply of a service in any of the four modes of supply. A government measure affecting only the internal supply of a public service would be beyond the scope of GATS. Article I:1, 2 and 3(a) define the regulatory scope of GATS ("all measures affecting trade in services) and the institutional scope ("central, regional and local governments, authorities and non-governmental bodies") respectively. For the purposes of this paper, the sectoral scope of GATS is most relevant.
Services, according to GATS, include any service in any sector, which indicates a broad sectoral coverage of the agreement. However, GATS does not define the term "services" as such. Until now the Appellate Body did not find it necessary to define "services" in abstract terms and took a pragmatic approach indicating which sector was affected in the cases adjudicated under GATS so far.[33] There are only two exceptions from the broad sectoral coverage of GATS: On a specific level, the Annex on Air Transport Services excludes measures affecting air traffic rights and services directly related to the exercise of air traffic rights. On a general level GATS does not apply to measures affecting trade in "services supplied in the exercise of governmental authority". Article I:3(b)(c) GATS reads:

> "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."

There is a fair amount of confusion about this phrase both within and outside of the WTO. While the issue has never been formally discussed in the WTO, Members have raised the question in various WTO bodies and showed a lack of confidence about the meaning.[34]

[32] *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R. 9 September 1997, para. 220. Confirmed in *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, WT/DS142/AB/R, 31 May 2000, para. 158.
[33] *Canada – Automotive Industry*, above note 32: "wholesale trade services of motor vehicles", para. 157; *EC – Bananas,* above note 32: "wholesale trade services", paras. 223-228.
[34] See for example the discussions in the Working Party on GATS Rules on 19 February 1999, S/WPGR/M/20, para. 33 or on 7 July 2000, S/WPGR/M28, para. 27 or in the Council on Trade in Services on 14 October 1998, S/C/M//30, para. 22.

Different publications of the WTO Secretariat also suggest that there is no coherent use of the term within the Secretariat.[35]
The importance of the sectoral scope of GATS and the question whether public services fall within that scope should not be underestimated. Though WTO Members can exclude the application of the market access and national treatment obligation by not committing a service sector or by limiting the commitments[36], the general obligations of GATS (Most-Favored Nation treatment, transparency etc.) apply to all service covered by the agreement. Furthermore, any service covered by the agreement is exposed to the dynamics of further negotiations about liberalization as clearly seen in the Negotiating Guidelines of March 2001, which state that no sector shall be excluded *a priori* from the scope of the negotiations.[37]

2. Interpreting Article I:3(b)(c) GATS
GATS is an international agreement and consequently customary rules of treaty interpretation apply as stipulated in Article 3:2 DSU.[38] It is widely agreed that these rules have been codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties and the Appellate Body applies these rules consistently.[39] The central norm of treaty interpretation is Article 31:1 stating that a treaty shall be interpreted "in good faith 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."
The Vienna Convention incorporates elements of all three traditional schools of treaty interpretation, but puts a greater emphasis on the objective or textual approach.[40] Text and context of the relevant treaty provisions are the centerpieces of the interpretative process.[41] The subjective approach focusing on the intention of the parties and the teleological approach focusing on the object and purpose of the treaty are treated as supplementary means.[42] The rules on treaty interpretation of the Vienna Convention are not meant to be a comprehensive list of interpretative methods.[43] Certain well-established principles of treaty interpretation, such as principles of logic and good sense, the principles of effective interpretation and of *in*

[35] Compare e. g. the remarks in the Background Note on Health and Social Services (S/C/W/50, paras. 37-39), the Background Note on Environmental Services (S/C/W/46, paras 52-53) and the Special Study on Market Access 'Unfinished Business, Post-Uruguay Round Inventory and Issues' (Geneva: WTO, 2001) at 123-124.
[36] See below at 3.
[37] Guidelines and procedures for the negotiations on trade in services, Adopted by the Special Session of the Council for Trade in Services on 28 March 2001, para. II.5, S/L/93.
[38] As Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 AJIL (2001) at 542 rightly points out, there was no need to explicitly subject the WTO agreements to treaty interpretation according to the customary rules of interpretation on light of the undisputable character of the WTO agreements as international treaties.
[39] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, 20 May 1996 and *Japan – Taxes on Alcoholic Beverages*, report of the Appellate Body WT/DS8-11/AB/R, 1 November 1996. See also Gabrielle Marceau, 'A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement', 33 (5) JWT (1999) at 115-128.
[40] Ian Sinclair, *The Vienna convention on the law of treaties* (2nd ed., Manchester: Manchester University Press, 1984) at 114-116 and Malcolm Shaw, *International Law* (4th edition, Cambridge: Cambridge University Press, 1997) at 656.
[41] Context is further defined in Article 31(2) to (4) of the Vienna Convention.
[42] Sinclair, above note 40, at 115-116. See Article 32 of the Vienna Convention on preparatory work and the circumstances of the treaty conclusion.
[43] Sinclair, above note 40, at 117-118.

dubio mitius can be applied in addition to the convention rules, if the circumstances or the treaty text call for it.[44] The principle of *in dubio mitius* is of special relevance if WTO law is to be interpreted in deference to national regulatory choices. It "applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[45]

a) Text and context

The sectoral scope of GATS covers all services, but those supplied in the exercise of governmental authority. Services supplied in the exercise of governmental authority are defined as services, which are neither supplied on a commercial basis nor in competition with other service suppliers. Much of the discussion about the scope of GATS focuses on the meaning of "commercial" and "competition". However, an interpretation of these terms would not be sufficient to determine the sectoral scope of GATS, because the agreement does not define services with reference to these notions. Rather it uses the notion of "services supplied in governmental authority" as an intermediary. Therefore, I begin with the ordinary meaning of "governmental authority", before considering "on a commercial basis" and "in competition".

(i) Governmental authority

"Authority" implies a notion of command and control as well as the power to make decisions binding on others.[46] Government activities exercising authority (*actes d'autorité, hoheitliches Staatshandeln*) can usually be distinguished from the activities of the government as an economic actor (*actes de gestion, fiskalisches Staatshandeln*).[47] The former suggests an element of subordination between the government and the citizens and is usually associated with the application of public law, while the latter implies equal standing and an element of co-ordination between citizens and government usually employing private law.[48]
Consequently it would depend on national public law whether or not services were supplied in the exercise of governmental authority. For example, postal and rail transportation services were defined as "*hoheitlich*" and thus as part of government authority in Germany before the privatization and liberalization of these services.
It should be noted that the ordinary meaning of governmental authority and the notion of public services developed above do not coincide. Public services are not defined as those services, which are supplied in exercise of governmental authority, but as services whose supply is in the public interest. Some observers argue that public services are located exactly between the traditional public law and private law spheres[49] and that the public service sector

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[44] Marceau, above note 39, at 117.
[45] *EC – Measures Concerning Meat and Meat Products (Hormones),* Report of the Appellate Body, WT/DS26/AB/R, 16 January 1998, para 167, note 154.
[46] See e. g. *The Oxford English Dictionary, Volume I* (Oxford: Clarendon Press, 1989), p. 798.
[47] Hartmut Maurer, *Allgemeines Verwaltungsrecht,* (12th ed., München, 1999) at 36-43 and André de Laubadère/Jean-Claude Venezia/Yves Gaudemet, *Traité de droit administratif* (11th ed., Paris: Librairie générale de droit et de jurisprudence, 1990).
[48] Etienne Picard, 'Citizenship, Fundamental Rights, and Public Services', in: Freedland/Sciarra (eds), above note 9, at 88.
[49] Picard, above note 48, at 88.

can be conceptualized as a third sector between public and private sector.[50] Hence, the ordinary meaning of Article I:3(b) GATS would be too narrow to include many public services as we understand them today. However, "governmental authority" could be interpreted more broadly than the ordinary meaning based on the flexible and deferential interpretative approach suggested above. Yet, the definition of governmental authority given in Article I:3(c) effectively excludes such interpretations as I will show immediately.

(ii) Commercial basis

According to dictionary definitions "commercial" can be understood in two ways[51]: On the one side, ii can be understood as referring to an "act of buying and selling" or "exchange of goods" without the expectation or necessity of making a profit. In this case, the supply of water at a very low, subsidized rate could be thought of as an act of "buying and selling". Consequently only services provided for free would be excluded from the sectoral scope of GATS. On the other side, commercial can be understood broader 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 in the exercise of governmental authority.

In determining which meaning of "commercial" should be applied to Article I:3(c) GATS the context of the provision and the uses of "commercial" in other provisions need to be considered. Especially the definition of "commercial presence"(Mode 3) is important. "Commercial presence" is defined in Article XXVIII:(d) GATS as "any type of business or professional establishment …". This definition suggests that "commercial" in the context of GATS implies a notion of profitability, because 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. [52] Consequently, services supplied on a commercial basis are services supplied on a profit-seeking basis. If the supply is not aimed at profitability, the service is not supplied on a commercial basis.

It should be noted that the term "on a commercial basis" refers to the supply modalities of the service and not to the operational basis of the service supplier. A service supplier may operate on a commercial basis, but may chose to supply one particular service not on a commercial basis. Or vice-versa: A service supplier, which generally operates on a non-commercial basis, may supply a particular service on a commercial basis.

The implications of this definition of "commercial basis" for many services provided by governments or public authorities become immediately clear: Even though many public services are traditionally supplied on a non-profit basis, governments increasingly "commercialize" public services. Sometimes the same institution or agency provide services on a commercial and on a non-commercial basis: For example, higher education institutions charging higher fees from foreign students often attempt to make a "profit" from educating foreign students and "cross-subsidize" the education of domestic students. Arguably, the education provided to foreign students is supplied "on a commercial basis", while the education to domestic students is not. Also, some public services are provided through public-private partnerships or private financial initiatives. These new forms of financing

[50] Mark Freedland, 'Law, Public Service, and Citizenship - New Domains, New Regime?', in: Freedland/Sciarra (eds), above note 9, at 1-34.

[51] Oxford Dictionary, Volume III, above note 46, at 552-553.

[52] For a similar approach see Hartridge, above note 5.

public services often involve profit seeking on the part of the private partner or financier of the public service.[53]

(iii) In Competition

"Competition" is usually understood as a situation where one producer targets the same market as at least one other producer.[54] Two key questions arise: Which is the relevant market? When are producers targeting the same market? It should be obvious that a situation of competition exists if two suppliers provide the same service for the same group of consumers. For example, two companies offering passenger rail services on the same route are competing. However, what if the services are not exactly the same? For example, do two companies 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 other 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?

It is submitted that in this context the relationship between "like" service suppliers and service suppliers "in competition" needs to be determined. Arguably an analogy can be drawn between this relationship and the distinction between "like" and "directly competitive and substitutable products" according to Article III:2 GATT. Concerning the latter notion the panel – as confirmed by the Appellate Body – in *Japan –Alcoholic Taxes* held:

> "In the Panel's view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, inter alia, as shown by elasticity of substitution. (…) In this context, factors like marketing strategies could also prove to be relevant criteria, since what is at issue is the responsiveness of consumers to the various products offered in the market."[55]

If a similar understanding would be applied to the notion of competition in the context of GATS Article I:3(c), a service could be supplied in a competitive environment even if the two services are not like. The notion of competitiveness would then be wider than the notion of likeness and the "accordion of likeness"[56] would stretch accordingly in Article II, XVI and XVII GATS. This is intuitive: While it can be argued that passenger rail services compete with bus transportation, insofar as both modes of transportation can be used alternatively for similar purposes, it is difficult to see a "likeness" in the two services given the obvious differences between the two modes of transportation. To conclude, it can be said that a service is supplied "in competition" if there is a certain degree of elasticity of substitution. Such elasticity and its degree must be determined on a case-by-case basis and to quote the *Japan* Panel again "may vary from country to country".[57]

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[53] P.P. Craig, *Administrative Law* (4th ed., London: Sweet and Maxwell, 1999) at 133-136.

[54] Oxford Dictionary, Volume III, above note 46, at 604.

[55] *Japan – Taxes on Alcoholic Beverages,* Report of the Panel, WT/DS8/R, 11 July 1996, paras. 6.22 and 6.28.

[56] *Japan – Alcoholic Beverages,* Appellate Body report, above note 39, Section H.1.a)

[57] *Japan – Alcoholic Beverages*, Panel Report, above note 55, para. 6.28

(iv) Relationship between Article I:3(b) and (c)
Lastly the relationship between Article I:3(b) and (c) needs to be determined. Does Article I:3(c) define inclusively the notion of governmental authority or does the ordinary meaning of "governmental authority" have any additional implication? In other words: Are all services supplied neither on a commercial basis nor in competition with other suppliers excluded from the sectoral scope of GATS? Surely, it would counter-intuitive to suggest that a private company holding a private monopoly and providing a particular service on a non-profit seeking basis, for example because of public relations reasons, would provide a service in exercise of governmental authority. However, the ordinary meaning of Article I:3 (c) GATS seems to suggest just that, because it emphasizes that a service supplied in the exercise of governmental authority means "*any* service" neither supplied on a commercial basis nor in competition. The use of "any" does not imply a distinction between different types of services. However, an interpretation in light of context, object and purpose of the provision would exclude services without any governmental connection or public function from the notion of governmental authority.
Arguably, such an approach would not solve the fundamental conceptual problem of the definition given in Article I:3(b) and (c). Article I:3(c) defines governmental authority with reference to the economic basis and circumstances of the supply and not in respect to the public interest of a service. This makes it impossible to claim that certain services are *a priori* excluded from the scope of GATS because of their nature as public or governmental services. According to Article I:3(c), the question whether a service is covered by GATS depends entirely on the question whether that service is supplied "on a commercial basis" and "in competition with other service suppliers." Even for the classical governmental service of police services, the exclusion from GATS would not depend on the nature of this service as a governmental function, but on the fact that it is neither supplied on a commercial basis nor in competition with other service suppliers.[58] It follows that certain police services, which can also be provided by private security companies are not excluded from the scope of GATS.
The difficulty and pressure on national public services regimes created by the definition of Article I:3(c) GATS can also be illustrated with the example of notaries. Notaries are often considered a branch of legal authority and their registry and certification services are considered public services.[59] Consequently, services supplied by notaries could be seen as services "supplied in the exercise of governmental authority", because they exercise powers of a public office based on statutory conferral. However, notaries also compete with each other for clients and provide their services mostly on a profitable basis.[60] Therefore their services could also be considered as supplied "on a commercial basis and "in competition" hence not falling under Article I:3(b) GATS.

(v) Preliminary conclusion
The interpretation of GATS Article I:3(c) developed so far suggests a wide scope of GATS. The narrow meaning of "governmental authority" is caused by the dependence of the scope

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[58] Hartridge, above note 5.
[59] See e. g. § 1 of the German Notaries Act (Bundesnotarordnung): "Notaries are appointed as independent holders of a public office to certify legal acts (…)".
[60] WTO, Council for Trade in Services, Legal Services Background Note by the Secretariat, S/C/W/43, 6 July 1998, para. 13.

of this term on the circumstances of supply and not on the nature of the service. Especially the notion of competitiveness makes it difficult to exclude any service sectors per se.

b) Further context: Schedules and Annexes to GATS

The following paragraphs will explore some elements of the wider context of Article I:3(b)(c) GATS to determine whether any additional information about its meaning can be gained.

(i) Member Schedules

The schedules of specific commitments form an integral part of GATS (Article XX:3) and should therefore be considered as context of Article I:3(b)(c). Only Bulgaria uses the term „services supplied under governmental authority" in its schedule and stated that commitments in environmental services do not include services supplied in the exercise of governmental authority". A footnote explains that these services are „regulatory, administrative and control services by government and municipal bodies related to environmental issues".[61] Two members use the term "public services" in their schedules. The Dominican Republic listed prior registration of foreign investment as a horizontal limitation, but stated that registration is "totally prohibited in public services, such as drinking water, sewage and postal services".[62] Hong Kong uses the term in its telecommunication commitments, which limit value added services to "public services accessed by its subscribers via, and offered over, circuits provided by public telecommunications transport network services".[63] The EC lists as a horizontal limitation on market access in mode 3 that "services considered public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators."[64]

Even though the schedules are an integral part of GATS, they only represent the intention and practices of individual WTO Members and not of the membership at large. Nevertheless the above mentioned schedules suggest that some WTO members felt that specific limitations were necessary because the exemption in Article I:3(b)(c) was not sufficient to exclude the measures specified in the schedules from the scope of GATS. This shows that at least these members assumed a narrow meaning of Article I:3(b) GATS and a wide sectoral scope of GATS. These examples also show how Members can exempt all or parts of their public services sectors from the application of the market access and national treatment obligation.

(ii) Annex on Financial Services

An interpretation of Article I:3(b)(c) must also consider the definition of governmental authority provided in Article 1 b) of the Annex on Financial Services. Accordingly, services supplied in the exercise of governmental authority are

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[61] The Republic of Bulgaria, Schedule of Specific Commitments, 21 May 1997, GATS/SC/122, p. 21.

[62] Dominican Republic, Schedule of Specific Commitments, GATS/SC/28, 15 April 1994, p. 3.

[63] Hong Kong, Schedule of Specific Commitments, GATS/SC/38, 15 April 1994, p. 13.

[64] European Communities and their Member States, Schedule of Specific Commitments, GATS/SC/31, 15 April 1994, p. 2. An explanatory note states: "Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. (…) Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical."

> "(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
> (ii) activities forming part of a statutory system of social security or public retirement plans; and
> (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government."

Unlike Article I:3(c) GATS, this definition is not based on the circumstances of the supply of the service. Rather it emphasizes the supplier (central bank, monetary or other public authority) and the nature of the service itself (social security). This limits its applicability to the meaning of the phrase "neither on a commercial basis nor in competition", because some of the activities mentioned in Article 1 b) of the Annex on Financial Services could be supplied in a competitive environment. Furthermore, Article 1 c) of the Annex on Financial Services holds that if a Member allows the activities mentioned in Article 1 b)(ii) and (iii) to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, they are nevertheless understood as services according to GATS. This underlines the importance of competition as a condition for the application of GATS, but does not answer the general question: When are services supplied in competition? Does the exclusion of activities of a central bank or monetary authority from the sectoral scope of GATS shed any light on the meaning of Article I:3(b)(c)? These activities have similar characteristics as core governmental functions, even though they are not part of the legislative, executive and judicative branches of government. Activities of central banks could be described as quasi-regulatory. Unlike commercial banks, the financial services of central banks aim at macro-economic stability. These features distinguish central bank services from most other public services. Also each monetary system has usually only one central bank. Therefore activities carried out by this bank are by definition non-competitive. It is thus submitted that the exclusion of central banks from the scope of GATS, does not further clarify the meaning of Article I:3(b)(c) GATS.

(iii) Annex on Telecommunications and the Telecommunications Reference Paper
Basic telecommunication services are a public service of particular importance. Setting up networks of landline telephone communication is considered a classic example of a natural monopoly.[65] Access to telecommunication is a prerequisite of economic development. Many regulatory regimes of telecommunications incorporate universal service obligations.[66] GATS rules on telecommunication services are mindful of such obligations. Article 5(e)(i) of the Annex on Telecommunications allows Members to impose conditions on access to and use of public telecommunications transport networks, if they are 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

[65] Ogus, above note 11, at 31.
[66] See e. g. Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), O.J. L199/32 (26 July 1997) and Articles 3-6 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service O. J. L15/14 (21 January 1998).

generally".[67] The Reference Paper on Regulatory Principles in the Telecommunications Sector holds that „Any Member has the right to define the kind of universal service obligation it wishes to maintain (...)".[68] The Telecommunication Reference Paper is incorporated in about sixty schedules of specific commitments. It is therefore an integral part of the GATS, but like schedules in general reflects only the opinion of the respective members. Nevertheless, the recognition of the right to impose universal service obligations in telecommunications suggests that many governments place great importance on this regulatory instrument. It can be argued that this reflects the right to regulate and to impose new regulations, which WTO Members wish to recognize.

What are the implications of the permission to impose regulations safeguarding the universal access to basic telecommunications and the specific right to maintain universal service obligations? On the one hand it can be argued that the GATS framework recognizes the specific characteristics of public telecommunications. Members may keep and impose regulations to secure equal access of the public to telecommunications. On the other side, the specific recognitions of these rights are designed as derogations from GATS disciplines. Article 5 (e)(i) of the Annex allows derogations from the general obligation to ensure reasonable and non-discriminatory access to and use of public telecommunications transport networks to foreign service suppliers (Article 5 a) Annex). Similarly the specific recognition of universal service obligations in the Telecommunications Reference Paper and in Member schedules suggests that Members might have feared that such a regulation could be interpreted as a restriction needing scheduling. In any case, these public services derogations are specific to telecommunications and do not limit the general sectoral scope of the agreement.

c) Negotiating history

To finalize the interpretation of Article I:3(b)(c) the preparatory works (*traveaux préparatoires)* and the circumstances of the treaty's conclusion will be considered. Preparatory work of GATS includes the official documents of the Uruguay Round Negotiating Group on Services (GNS) and the comprehensive drafts of the GATS. A clause defining the sectoral scope of the agreement was first introduced in the December 1990 draft text prepared for the Brussels Ministerial meeting.[69] It sounded already very similar to the current provision: „(b) „services" includes any service in any sector [except services supplied in the exercise of governmental functions]". Discussions in the Negotiating Group on Services on definitions in the draft text in the summer of 1991 show that negotiators felt that the term needed an additional definition, but could not agree on a definition.[70]

[67] Article 3(b) defines „public telecommunications transport service" as „any telecommunications transport service required (...) by a Member to be offered to the public generally".

[68] No. 3 of the Reference Paper. The Telecommunications Reference Paper is based on a decision of the Negotiating Group on Telecommunications of 24 April 1996and is available at the WTO-web page: http://www.wto.org/english/tratop_e/servte_e/tel23_e.htm (visited 30 May 2002). On the importance of the reference paper in the context of Article I:3(b) and (c) GATS see also Zdouc, above note 2, at 321, Fn. 85.

[69] MTN.TNC/W/35, 10 December 1990.

[70] Group of Negotiations on Services, Note on the Meeting of 27 May to 6 June 1991, para. 66, MTN.GNS/42 and Note on the Meeting of 24-28 June 1991, para 8, MTN.GNS/43. In a note provided for these discussions issued in October of 1991, the Secretariat states that the GATS covers all sectors „with the possible exclusion, not yet agreed, of government functions." See Definitions in the Draft General Agreement on Trade in Services, Note by the Secretariat, 15 October 1991, MTN.GNS/W/139, para. 8.

The December 1991 comprehensive draft of GATT Director General Arthur Dunkel („Dunkel Draft") simply eliminated the brackets in the 1990 draft provision and noted in an explanatory footnote „The terms of exclusion of services of governmental functions will be reviewed in the context of the work on Article XXXIV."[71] However, there are no public records about such work and the leading commentator on the negotiating history of GATS does not mention any discussions on this issue either.[72] In the fall of 1993 the GNS discussed the scope of GATS *inter alia* concerning measures relating to social security and judicial and administrative assistance.[73] In the last week of the Uruguay Round, the chairman of the GNS pointed to "further clarification of this *and other questions relating to the scope of the Agreement* "[74] If the definition of governmental functions or authority was part of the "other questions", it would seem that negotiators did not agree on the exact scope of the GATS during the Uruguay Round.

d) Conclusion: Most public services are covered by GATS

As shown above the term "services applied in the exercise of governmental authority" is defined with reference to the circumstances and conditions of supply of the services. The nature of the service itself or the characteristics of the service supplier are irrelevant. It is very likely that the conditions of supply required by the agreement to exclude a service from its sectoral coverage will be construed narrowly.[75] Arguably non-profitability and non-competitiveness are characteristics, which the supply of public services often does not meet. It is therefore safe to argue that most services commonly understood as public services are not "supplied in exercise of governmental authority" and are hence not exempt from the sectoral scope of GATS.

It is important to note that the fact that GATS may cover many public services is only partly a result of the narrow definition of services supplied in the exercise of governmental authority. As the agreement bases the definition on the circumstances and conditions of supply, the regulatory regime of a public service can exclude it from the agreement if the service is supplied on a non-commercial and non-competitive basis. Similarly government deregulation can bring public services under the sectoral coverage of GATS. Introducing elements of profitability and competitiveness into sectors previously operated as public non-profit monopolies deprives these services of their status as governmental services according to GATS. As one commentator rightfully observed: "Deregulation and liberalization reduce the coverage of the GATS exemption with respect to governmental services."[76]

This is why the liberalization and privatization of public services mentioned in the previous section have a direct impact on the potential sectoral scope of GATS. Article I:3(c) GATS follows and at the same time reinforces neo-liberal concept of public services. Though this

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[71] Jimmie V. Reyna, 'Services', in: Terence P. Stewart (ed.), *The GATT Uruguay Round - A Negotiating History (1986-1992)*, Volume II: Commentary (Deventer and Boston: Kluwer, 1993) at 2335-2661, Annex I.

[72] Reyna, supra note 71.

[73] Informal GNS Meeting - 29 October 1993, Chairman's Statement, MTN.GNS/48 and Issues Relating to the Scope of the General Agreement on Trade in Services, Note by the Secretariat, 4 November 1993, MTN.GNS/W/177/Rev. 1.

[74] Informal GNS Meeting - 10 December 1993, Chairman's Statement, MTN.GNS/49, para 4, emphasis added.

[75] In a discussion in the Council on Trade in Services, some Members also argued for a narrow interpretation of the exception for governmental services, see Council for Trade in Services, Report of the meeting held on 14 October 1998, Note by the Secretariat', S/C/M/30, p. 5.

[76] Zdouc, above note 2, at 321, note 85.

concept may reflect the consensus of the 1980s and 1990s, it is possible that this consensus will change, because of the dynamic character of public services.[77] However, the definition of services supplied in the excise of governmental authority in Article I:3(c) GATS does not guarantee the necessary flexibility and deference to national laws and regulations.

3. Specific GATS disciplines and public services

If a service falls within the sectoral scope of GATS, the general and specific disciplines of the agreement apply to measures affecting trade in that service. From a policy perspective, the obligations to grant market access (Article XVI) and national treatment (Article XVII) are most important for public services. The obligation to grant Most-Favored-Nation treatment (Article II) is less relevant, because the public service or service supplier will usually be a national service/service supplier and not another foreign service/service supplier. The existing disciplines on domestic regulation (Article VI) do not have a great impact on public services either. Market access and national treatment obligations only apply in sectors, which are specifically committed, and only subject to limitations made in the schedules. Therefore, the impact of GATS on a particular public service sector depends on its entry into the schedule. For example, the EC's commitments in education only apply to "privately funded education services".[78] Publicly financed educational services are not affected by market access and national treatment obligations.

In light of the variety of government measures and the diversity of commitments entered into the schedules, it is impossible to sketch a complete picture of the possible impact of Articles XVI and XVII on public services. Therefore I will only point to some questions to indicate the scope of the impact. Article XVI GATS holds that WTO members may not "maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory" certain quantitative and qualitative restrictions on market access. For example, a member may not limit the number of services suppliers unless specifically stated in its schedule. This can be of importance concerning hospital services, where members may want to limit the number of hospital beds according to a national health plan.[79] Public monopolies are also restrictions of market access requiring scheduling.

The national treatment obligation can be of even greater impact on public services. Article XVII:1 GATS requires that each Member accords "to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers." National treatment can be granted through formally identical and formally different treatment (Article XVII:2). Such treatment is considered less favorable "if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (Article XVII:3). Article XVII GATS therefore prohibits both de jure and de facto discrimination.[80] The decisive issues of national treatment

[77] See above II.1.
[78] EC Schedule, above note 64, p. 55.
[79] See EC Schedule, above note 64, p. 78 (Limitations entered by Belgium, France, Italy, Luxemburg and the Netherlands).
[80] Aaditya Mattoo, 'National Treatment in the GATS, Corner-Stone or Pandora's Box?', 31 (1) JWT (1997) at 110.

are the notion of "likeness" of services and service suppliers[81] and that of "treatment no less favorable".
Concerning likeness it must be noted that national treatment extends to like services *and* like service suppliers. In *EC – Bananas,* the panel held that "to the extent that entities provide like services they are like services suppliers."[82] The possibly far-reaching implications of this brief statement have been rightly pointed out.[83] In the context of public services it is of special importance whether the statement of the panel implies that the characteristics of the services supplier cannot be considered when determining likeness. Compare, for example, a municipal hospital and a private hospital operated by a foreign company.[84] Arguably both hospitals provide the same service. However, can they be considered like service suppliers or should the fact that the municipal hospital is owned and run by a local authority determine a degree of unlikeness in comparison to the foreign private hospital?
If national and foreign services are considered "like", the latter may not be treated less favorably than the former. Concerning public services, this raises the question of subsidies. Since there are currently no specific regulations on subsidies in the agreement, a discriminatory subsidy could violate the national treatment obligation.[85] Can therefore the foreign hospital service provider demand subsidization to the same amount as the municipal hospital?
These considerations illustrate the potential impact of market access and national treatment on public services. This impact underlines the importance of the schedules of specific commitments. As mentioned before, members can exclude or limit the impact of the specific GATS obligations through careful scheduling. For example, members can schedule a horizontal limitation concerning public services or public utilities. 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. 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.[86] These possibilities show that the "bottom-up-approach" of GATS regarding market access and national treatment leaves enough flexibility at least theoretically to ensure regulatory space for public services. However, the utilization of this flexibility requires carefully drafted schedules of specific commitments. Furthermore, any limitations of commitments are subject to demands for liberalization in negotiations and can thus come under pressure.

[81] See Zdouc, above note 2, at 331-334 and Gaëtan Verhoosel, *National Treatment and WTO Dispute Settlement* (Oxford: Hart, 2002) at 33-34.
[82] *EC – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Panel, WT/DS/27/R, para. 7.311
[83] Zdouc, above note 2, at 333.
[84] Hospital services are scheduled under Central Product Classification (CPC) 9311. See Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, p. 39
[85] Scheduling Guidelines, above note 84, p. 6.
[86] 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.

IV. Public services and the freedom to provide services in EC law

Comparisons between EC and WTO law abound.[87] A comparison between the two "constitutional concepts for free trade in services" may enrich the analysis and understanding of WTO law. [88] Articles 49-55 ECT set up the framework for the freedom to provide services.[89] Article 49 prohibiting "restrictions on freedom to provide services within the Community" has direct effect[90] and extends to so-called indistinctly applicable measures.[91] *Eeckhout* already provided a comparison between the prohibition of restriction on freedom to provide services under EC law and non-discrimination and market access under GATS law.[92] Based on and in addition to this framework I explore the sectoral scope of services trade liberalization under EC law. Two aspects are of particular interest: What constitutes a "service" under EC law and how is the provision exempting "activities connected with the exercise of official authority" to be interpreted?

1. The concept of services

Article 50, first sentence ECT holds that services "are normally provided for remuneration". Art. 50, second sentence, states that services shall in particular include activities of an industrial character, of a commercial character, of craftsmen and of the professions. The ECJ decided that the notion of remuneration was central to the concept of services and held that the essential characteristic of remuneration "lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".[93] Remuneration does not require the supply of a service with the intention of making a profit.[94] This distinguishes it from the notion of "on a commercial basis" in Article I:3(c) GATS. The ECJ also held that there was no remuneration in cases where the service was not funded by the consumer, but from the public purse[95]. Even more, a regime not seeking a gainful activity but fulfilling a duty towards the population in social, cultural and educational fields would not be considered a service. In *Humbel* the court therefore decided that courses provided through a national education system would not be considered services according to Article 50 ECT.[96] The court even decided that the payment of enrolment fees would not change the non-economic characteristic of such a system.[97] The jurisprudence concerning the scope of EC competition law follows a similar approach. The ECJ generally held that activities which do not belong to the "economic sphere" or which are "connected with the exercise of the powers of a public authority" are not within the

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[87] See the contributions in Joseph H. H. Weiler (ed.), *The EU, the WTO, and the NAFTA: towards a common law of international trade?* (Oxford : Oxford University Press, 2000) and Graínne de Búrca/Joanne Scott (eds), *The EU and the WTO, legal and constitutional aspects* (Oxford: Hart, 2001).

[88] Piet Eeckhout, Constitutional concepts for free trade in services, in: de Búrca/Scott (eds.), above note 87, at 211.

[89] See generally P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (Third edition, London et. al: Kluwer, 1998), Chapter VII.7.

[90] ECJ, Case 33/74, *Van Binsbergen* ECR 1974, p. 1299, paras. 18-27.

[91] ECJ, Case C-76/90 *Säger* ECR 1991, p. I-4221, paras. 12, 13.

[92] Eeckhout, above note 85, at 223-235.

[93] ECJ, Case 263/86, *Humbel,* ECR 1988, p. 5365, para. 17; Case 157/99 *Geraets-Smits/Peerbooms*, ECR 2001, p. I-5473, para. 58 and Case C-451/99, *Cura Anlagen,* (Judgment of 23 March 2002, nyr) para. 18.

[94] *Geraets-Smits/Peerbooms*, above note 93, para. 50-52.

[95] *Humbel,* above note 93, para. 18.

[96] *Humbel,* above note 93, para. 18. See also case C-109/92, *Wirth,* ECR 1993, p. 6447, para. 15.

[97] *Humbel,* above note 93, para. 19.

scope of competition law.[98] Concerning the economic sphere, the Court ruled for example that the management of the public social security system would not constitute an economic activity.[99] Concerning the activities of a public authority the court held that the control and supervision of air space or the surveillance of anti-pollution in a seaport were by their "nature, aims and rules to which they are subject" typical activities of a public authority.[100] Arguably similar considerations could guide the interpretation of the concept of services under GATS.

2. Services connected with the exercise of official authority

Article 45, first sentence ECT, which applies to the freedom to provide services by reference from Article 55 ECT, reads:

> "The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities, which in that State are connected, even occasionally, with the exercise of official authority."

The similarity between the notion of "exercise of governmental authority" according to Article I:3(b) GATS and the notion of "exercise of official authority" is striking. Indeed representatives from the EC suggested in the WTO that both concepts were similar.[101] This similarity supports the claim that Article I:3(b) GATS was suggested by EC negotiators during the Uruguay Round.[102]

The ECJ generally held that the derogation from the freedom to establishment and to provide services in Article 45 ECT must be interpreted in a manner limiting its scope to what is strictly necessary to protect the interests of the Member states.[103] In *Reyners,* the first case involving Article 45, the court was asked in a preliminary ruling whether certain activities of an "avocat" could be considered official authority. [104] The court did not define official authority in abstract terms, but discussed the relationship between the activities of an avocat and those of courts.[105] Though activities of an "avocat" involve contacts with courts, which may even be compulsory, the ECJ held that the activities of an avocat leave "the discretion of judicial authority and the free exercise of judicial power intact".[106] Hence, the activities of an "avocat" were not seen as connected with official authority. The court based its reasoning on the assumption that judicial authority and the exercise of judicial power constitute "official authority" according to Article 45 ECT. Only an activity closely connected with the exercise of this official authority could be considered part of "official authority". The court used a similar argument in determining whether activities of traffic accident experts form part of the

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[98] See most recently ECJ, Case C-309/99, *Wouters,* ECR 2002, p. para 57. In general Kapteyn/van Themaat, above note 89, at 846-848.

[99] ECJ, Joint Cases C-159/91 and C-160/91, *Poucet and Pistre,* ECR 1993 ECR I-637, paras. 18 and 19

[100] ECJ, Case C-534/92, *SAT/Eurocontrol* ECR 1994. p. I-43, para. 30 and Case C-343/95 *Diego Cali,* ECR 1997, p. I-1547, para 23.

[101] WTO, Committee on Regional Trade Agreements, Joint Communication from the EC, Poland, Hungary and the Slovak Republic, WT/REG50/2/Add.3, para 3, 19 May 1999.

[102] Hartridge, above note 5.

[103] ECJ, Case 147/86, *Commission v. Greece,* ECR 1988, p. 1637, para. 7 and Case C-114/97, *Commission v. Spain,* ECR 1998, I-6717, para. 34.

[104] ECJ, Case 2/74, *Reyners* ECR 1974, p. 631.

[105] *Reyners,* above note 104, paras. 51-54.

[106] *Reyners,* above note 104, para. 53.

exercise of official authority and denied this because their reports are not binding on courts.[107]
Unlike the court Advocate General *Mayras* attempted a definition of "official authority" in *Reyners* and argued that it "is that which arises from the sovereignty and majesty of the State: for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connexion with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration".[108] This definition is similar to the ordinary meaning of "governmental authority" discussed above.
In *Commission v. Greece* the court had to decide whether setting up private schools in Greece was connected with the exercise of official authority.[109] Greece argued that it is for each Member State to define which activities it considers official authority.[110] According to the Greek constitution, provision of instruction is a fundamental duty to the State and remains an activity connected with the exercise of official authority, even if it is carried out by private schools.[111] The court conceded that each Member State can determine the role of official authority with regard to education, but it did not accept that private schools would be connected with the exercise of official authority.[112] The court argued that public supervision of these activities would be sufficient to protect the public interest.[113] Unfortunately neither the court nor the Advocate General discuss these points in detail or relate them to the definition of "governmental authority" suggested by AG *Mayras* in *Reyners.*
Further case law, however, sheds more light on the approach of the ECJ towards Article 45. In a case concerning Italy, the court held that the development of data-processing systems for public authorities was not connected with the exercise of official authority because of the "technical nature" of these activities.[114] In *Thijssen,* the court had to decide whether the office of approved commissioner for regulated insurances in Belgium would fall under Article 45.[115] The court explored the different duties of such commissioners and their relationship to the Insurance Inspectorate, a public authority supervising insurances. Commissioners needed approval by the Inspectorate, but were freely appointed by insurance companies and remunerated by them. The court opined that the Inspectorate itself exercised official authority, but held that the commissioners exercised only auxiliary and preparatory functions vis-à-vis the Inspectorate: Commissioners performed internal auditing functions and could refer certain cases to the Inspectorate, but could not make any final and binding decisions.[116]
In a series of cases the court had to consider whether private security services performed activities connected with the exercise of official authority.[117] The court denied this based on

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[107] ECJ, Case C-306/89, *Commission v. Greece,* ECR 1991, p. I-5863, para. 7
[108] Opinion of Advocate General Mayras in *Reyners,* above note 104 at 664-665.
[109] ECJ, Case 147/86, *Commission v. Greece,* ECR 1988, p. 1637.
[110] *Commission v Greece,* above note 109, para. 6.
[111] See Opinion of Advocate General Sir Gordon Slynn, *Commission v. Greece,* above note 109, at 1649.
[112] *Commission v. Greece,* above note 109, para. 9.
[113] *Commission v. Greece,* above note 109, para. 10.
[114] ECJ, Case C-3/88*, Commission v. Italy,* ECR 1989, p. 4035, para. 13. See also the follow-up case *Commission v. Italy,* Case C-272/91, ECR 1994, p. I-1409.
[115] ECJ, Case C-42/92, *Thijssen,* ECR 1993, p. I-4047.
[116] *Thijssen,* above note 115, paras.19-22.
[117] ECJ, Case C-114/97, *Commission v. Spain,* ECR 1998, I-6717, Case C-355/98 *Commission v Belgium,* ECR 2000, p. I-1221 and Case C-283/99, *Commission v. Italy,* ECR 2001, p. I-4636.

the following considerations: Private security forces are established under private law, they are not vested with powers of restraint and national law distinguishes between public security forces and private security services. Merely contributing to the public security, a task, which "any individual may be called upon", is not sufficient. [118] In *Commission v. Spain,* Advocate General *Alber* especially pointed to the private law relationship between private security services and those who commission them.[119]
This short overview of the case law relating to Article 45 ECT leads to the following conclusion. The court does not define "official authority" in an abstract manner, but decides the question on a case-by-case basis using different lines of argument. One line of argument concerns the closeness of the disputed activities (avocat, insurance commissioner, traffic expert, private security service) to activities indisputably considered "exercise of official authority", such as judicial authority or activities of security forces. The court seemed only willing to assume that the activity in question was connected with exercise of official authority if the latter depended on the former. Another line of argument involves taking a closer look at the circumstances of the activity. The court considered employment and remuneration by private companies as indicator against the assumption of "official authority". However, it should be noted that the ECJ interprets the exemption clause very narrowly. In fact, in all cases the court refused to accept a certain activity as connected with the exercise of official authority. It seems that all activities not considered as connected with the exercise of official authority by the ECJ would equally not be considered services supplied in the exercise of governmental authority according to Article I:3(b)(c) GATS. It is submitted that this supports the expectation that WTO jurisprudence will also interpret the exemption provision narrowly, because of the similar functions of Article 45 ECT and I:3(b)(c) GATS. [120]

3. "Governmental" and "official" authority compared: Less can be more
One can now compare the GATS and EC provisions excluding services exercising "governmental" and "official" authority from the scope of trade liberalization. The textual similarity is reinforced in practice. However, I would like to argue that there is an important textual difference between EC and GATS law, which may become a key to future disputes. Unlike GATS, EC law does not attempt to further define "official authority". The ECJ approaches this term on a case-by-case basis and therefore leaves the door open for future changes and adaptations of its jurisprudence. Unlike WTO dispute settlement bodies the ECJ is not barred from interpreting "official authority" based on broader considerations such as public interests. The ECJ is thus able to interpret Article 45 ECT mindful of the European social consensus and is not forced to define official authority in narrow economic terms. WTO panels and the Appellate Body on the other hand, would enter into extreme intellectual difficulties if they would want to interpret "governmental authority" independently of "commercial basis" or "competition".
The attempt to increase legal certainty by further defining "governmental authority" in GATS law may not have been the wisest decision of GATS negotiators. Article I:3(c) GATS enshrines a particular minimalist understanding of governmental services, which may not be

[118] *Commission v. Spain*, above note 117, para. 36-38.
[119] Opinion of Advocate General Alber, *Commission v. Spain,* above note 117, paras. 23-28.
[120] In fact, some GATS critics point to ECJ jurisprudence as a precedent, Sinclair/Grieshaber-Otto, above note 1, at 20.

the dominant understanding of all times and countries. The provision effectively blocks an interpretation of the agreement mindful of the changing concept of public services. GATS law therefore is at risk of becoming static and unreceptive of the WTO membership at large. This is even more problematic in light of the "judicial bias" of the WTO constitution.[121] The WTO constitution is dominated by an active judicial branch shaping and developing the law, a slow moving legislative (the Members) and a virtually powerless executive (the Secretariat). At the end of the day, the Appellate Body may therefore be faced with the need to interpret the awkward construction of Article I:3(b)(c) GATS.
As pointed out, it would be difficult for the Appellate Body to ignore the definition of governmental authority provided in Article I:3(c) GATS altogether. Even an interpretation utilizing the principle *in dubio mitius* and a case-by-case approach mindful of the regulatory choices of WTO Members would not solve the interpretative problem posed by the construction of Article I:3(b)(c). A possible way out of this problem for the Appellate Body would be to follow the approach taken by the ECJ and define "services" so that certain public services (like public education) are automatically excluded from the scope of the agreement, because they do not constitute an economic activity and therefore should not be considered "services". However, whether or not a service is an economic activity may differ between WTO members making such an approach difficult to sustain within the WTO context.

V. Conclusion

This paper showed that the sectoral scope of GATS is broad and will include most public services. This leaves WTO members wishing to carve out some if not all public services from the application of GATS with three options. First, they can design the regulatory regimes of their public services in such a way that these services are neither supplied on a commercial basis nor in competition with one or more suppliers. This would require a change in current attempts to commercialize and commoditize public services. Secondly, as mentioned previously, WTO Members can schedule limitations to their market access and national treatment commitments or not make any commitments in sectors considered as public services at all. This will however not prevent general GATS disciplines from applying to these services. Furthermore, these limitations or non-commitments may come under pressure in future trade rounds. Thirdly, members may collectively take „legislative" steps to narrow the scope of GATS, such as a change of the agreement or an additional treaty instrument limiting the scope of GATS.[122] However, given the difficulties of renegotiating agreements this seems not a very practical solution. An alternative solution could be an authoritative decision about the interpretation of the scope of GATS according to Article IX:2 of the Marrakesh Agreement Establishing the WTO. These approaches would have the advantage of not leaving important policy decisions like the intended scope of a WTO agreement to the dispute settlement bodies, which are arguably not suited to resolve fundamental issues. Such

[121] See also Frieder Roessler, 'Are the Judicial Organs of the WTO Overburdened?', in: Porter et al. (eds.), above note 3, at 308-328 and Barfield, above note 3, chapter 4.
[122] See Global Unions, European Trade Union Confederation (ETUF) and Word Confederation of Labour (WCL), Statement on the GATS negotiations, 7 June 2002 available at http://www.tuc.org.uk/international/tuc-4946-f0.cfm (visited 10 June 2002).

policy issues must be resolved by the governments of the WTO Members, because they are accountable to their constituencies.[123]

[123] See for a similar argument Jeffrey L. Dunoff, International Dispute Resolution: Can the WTO Learn from MEAs?, in: The Heinrich Böll Foundation (ed): *Trade and Environment, the WTO, and MEAs* (Washington, D.C.: Heinrich Böll Foundation, 2001) at 68.