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

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

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

V. Potential critique of the proposed model clauses and alternatives

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

1. Unilateral determination of the scope of an international agreement

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

³ It should be noted that excluding concessions from the definition of investment in an investment protection chapter of the treaty may not solve this problem. In the case discussed the investment is not the concession itself, but the physical infrastructure or the actual capital invested in the operation of the bus line. Hence an exclusion of concessions although useful in other contexts would not be a sufficient safeguard for public services.
It should, however, be noted that it is not unusual that the scope of application of international agreements partly depends on domestic regulatory frameworks. In fact, even the current model already employs such a possibility, albeit on a smaller scale as the model proposed here. The definition of “services supplied in the exercise of governmental authority” in Article I:3 (c) GATS and similar clauses relies on the non-commercial and non-competitive supply of the service. Both characteristics depend on the respective regulatory framework of the service and are therefore subject to domestic policy choices and decisions. As aptly observed by Zdouc (1999:321) deregulation and liberalization may reduce the number of services that are covered by the GATS exemption clause. In the same way, nationalization policies could increase the number of services that are covered by this clause.

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

2. Potential deviation from existing GATS commitments

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

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

An alternative to the model proposed above which deviates to a lesser degree from the current model could be the limitation of the exclusion of public services to investor-state dispute settlement (ISDS). For example, a potential clause could read: “The provisions of this section (i.e. the section on ISDS) do not apply if the dispute concerns an investment in public services or a measure regulating, providing or financing public services”. The term public services would need to be defined as suggested above. In this case, government measures regulating and financing public services or activities could not be challenged by foreign investors through ISDS. While the measures could still be considered a violation of the disciplines of the agreement, it would not be in the hands of private companies to raise those claims and pursue them through investment tribunals. However, it should be noted that an exemption of public services or measures relating to public services from ISDS would not exempt them from dispute settlement proceedings between the parties of the agreement. This is also the reason why a mere exclusion of public services and respective government measures from ISDS would not provide the same level of protection as the model clause suggested above.

Another alternative could be the inclusion of a reference to public services in a general exception clause of the agreement. For example, such a reference could read as follows: “A Party may adopt or enforce a measure necessary to regulate, provide or finance public services”. Again, the term public services would need to be defined as suggested above. This clause would not exempt public services or respective government measures from the application of certain disciplines, but would justify potential violations of the agreement in the same manner as Article XIV GATS. However, as explained above, such a justification clause would rely on the concept of “necessary” which would require the determination of whether alternative and less-trade restrictive measures would be available to the Member State. For example, it could be argued that subsidizing the provision of services to remote areas of a country is less trade-restrictive than providing the service through a public monopoly. Justification or general exception clauses also tend to be interpreted narrowly by dispute settlement mechanisms. Hence, including a reference to public services in a general exemption clause would also not provide the same level of protection as the model suggested here.

VI. Outlook

The model clause developed in this study is primarily aimed at current of future bilateral free trade and investment agreements of the EU. It is based to a certain extent on the logic of the EU’s own concept of public services which relies on Member State’s discretion regarding the determination of public services. It should be noted, however, that the model proposed here can also be used in other trade and investment contexts. The definitions reliance on specific regulatory regimes can easily be applied in other legal and political systems as well. Unlike other proposals, the model presented here does not rely on language or legal concepts which are restricted to the EU context.

As a consequence, the model proposed here could also be used in other ongoing negotiations on services and investment agreements, most notably the negotiations on a plurilateral Trade

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