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.