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.
in Services Agreement (TiSA). As mentioned above, the current proposals for that agreement rely on the old models of trade agreements addressing public services which have rightly been criticized.

The model clause proposed here could also be used as an element of a reform agenda for the multilateral GATS and could serve as an alternative or amendment to GATS Article I:3 (c). Even though the old GATS model has never been tested in any actual legal proceeding, it is generally agreed that the model is based on an outdated understanding of public services. A model based on the proposal developed in this study would be more attuned to modern concepts of public services which are based on the necessity of regulatory space for democratically legitimized decisions of competent national, regional or local authorities.

VII. Summary

1. The current model of the EU aimed at the protection of public services in free trade agreements does not provide for a full protection of all public services. It does not apply to investment protection, relies on ambiguous terminology and is incoherent. While the model has never been formally tested, it is questionable if it effectively protected public services and even more so if it will do so in the context of TTIP, TiSA or future services and investment agreements.

2. Inserting a clause which would generally exclude public services and government measures aimed at regulating, providing and financing public services from the scope of a trade and investment agreement or a chapter on investment and services would lead to a greater level of protection and could be seen as a “golden standard” in the context of current negotiations and agreements.

3. A clause excluding public services and government measures aimed at regulating, providing and financing public services from the scope of an agreement or a relevant chapter would need to be based on a definition of public services which is sufficiently clear but also flexible enough to address the dynamic and changing nature of public services in various contexts. It is hence suggested to define the term public services with reference to the respective regulatory framework and therefore with deference to Member States’ regulatory autonomy and discretion.

4. A model clause as the one proposed here would not allow Member States to easily determine the scope of the disciplines of a trade and investment agreement unilaterally because it would rely on actual regulations imposed by the competent authorities or on special regulatory arrangements which could include the provision of the services by the authorities themselves hence preventing any misuse. Furthermore, potential deviations from GATS commitments through a clause excluding public services from the scope of an agreement or chapter could be justified if the requirements of Article V GATS are met.

5. The model clause developed in this study could not only be used in the context of current negotiations on free trade agreements of the EU, but could also be applied in plurilateral and multilateral contexts. It is firmly rooted in the conviction that future trade agreements need to preserve more policy space for governmental regulations and activities in the public interest.