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GATS model has never been tested in any actual legal proceeding, it is generally agreed that the model is based on an outdated understanding of public services.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.