PUBLIC SERVICES AND THE SCOPE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

A RESEARCH PAPER

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I. INTRODUCTION

The General Agreement on Trade in Services (GATS) contains international rules on the transnational supply of services in the framework of the WTO. While some free trade advocates have hailed the agreement as „the most important single development in the multilateral trading systems since the GATT“[2], many civil society groups and trade unions have been critical about the agreement and its possible future development in ongoing negotiations. They have voiced concerns about the potential impact of the GATS on local, national and regional policies aimed at economic and social development, environmental protection and cultural objectives.

Often these policies involve the provision of certain services through public entities, such as energy, water, health, education, communication and transportation services. The relationship between these „public services“ and the GATS is therefore an area of specific concern, particularly in light of negotiating proposals made by some WTO Members in the „market access“ phase of the GATS 2000 negotiations regarding education, energy, postal, telecommunications and transportation services.[3]

At the center of these concerns are questions about the extent to which GATS rules may affect the supply of „public services“. The answer to these questions depends on the coverage of „public services“ by the GATS (are public services covered, and if so, to what extent?), and on the content of current and possible future GATS disciplines (for those public services that are covered, what does the GATS require?). A clear understanding of the scope if the GATS is therefore important for governments currently negotiating and for civil society groups monitoring these negotiations. This research paper examines the scope of the GATS. It focuses on GATS Article I:3, the provision determining whether „public services“ are covered by the agreement, and adopts primarily a *legal perspective,* only suggesting some policy considerations at the very end.

This paper is divided into seven parts. After this introduction, it commences in Section II by offering some background on public services, and identifying the need to clearly define the scope and coverage of the GATS. Section III contains the provisions determining the substantive scope of the GATS. Based on an examination of WTO documents and discussions, section VI notes that there is currently no agreed understanding of this provision among WTO Members or within the Secretariat. The central part of this note, Section V examines Article I:3 in light of generally accepted principles of interpretation in public international law. It notes that the provision's meaning is not entirely clear, and that an argument in favor of broad coverage can be made. Because many civil society groups are concerned about an expansive reading of GATS, Section VI explores further interpretative principles, and argues that a more narrow interpretation can be reached by using them. However, since these methods do not provide full legal certainty, the final section of this paper is devoted to „legislative“ methods of narrowing the scope of GATS.

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[2] WTO Secretariat, Trade in Services Division, An Introduction to the GATS, October 1999, availabe on-line at: http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (visited 18 May 2001).

[3] See the WTO webpage for these proposals: http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e htm (visited 18 May 2001).

II. BACKGROUND

The following paragraphs will provide those readers not familiar with the implications of the coverage of public services by the GATS with some background comments. These comments will be rather short, since the main focus of this paper is its legal reasoning. Readers familiar with the implications of the relationship between GATS and public services may want to immediately proceed to Section III.

1. What are „public services“?

The concept of what constitutes a „public service“ differs in different contexts, among groups in society, and from country to country. This is partly the case because of certain historic developments, varying social and political values, and differing notions of the appropriate role of the State and the market. In Europe, for example, there is a strong tradition of public health systems (either based on taxes or on mandatory insurances), while health services in the United States are predominantly supplied on private market conditions. The supply of „public services“ also depends on the resources available to governments, which are different in developed and developing countries.

Because of the different concepts of „public services“, and because neither the GATS nor other WTO agreements explicitly use this term, this paper will not refer to the term in general, but use specific examples when illustrating certain arguments. Nevertheless, it is worth making a few general comments about what constitutes a "public service", as context for the following analysis. Apart from obvious differences between countries, the understanding of „public services“ depends on the "lens" through which we view the concept. The following three approaches are not meant to be exhaustive, but simply highlight the conceptual implications of the term.

First, the term „public services“ can be used in a rather general way to refer to services considered as a „public“ or „common good“.[4] Examples would include health, social, and education services, as well as postal, basic telecommunication, or public transportation services. This understanding of „public services“ is thus based on a sectoral approach and focuses on *what is supplied.*

Second, a „public service“ can be understood as a service provided to the general public. In the European context this understanding is often equated with the notion of a „universal service obligation“ (i.e. the obligation to supply the service universally at affordable conditions, often without distinguishing between the costs of supply in different regions). The notion of „universal service“ focuses thus on *to whom and under which conditions the service is supplied.* This approach leads partly to similar results as the first one, because education, postal, basic telecommunication, energy or transportation services are often attributed with a universal service obligation.

A third concept of „public services“ can be based on the understanding that a service is provided by a public entity, either by the government itself (regardless at what level), by a governmental agency or by a public enterprise. This concept focuses therefore on *who is supplying the service.*

All three notions have overlapping areas. Many services supplied on a universal basis are supplied by a governmental agency or a government-owned company. However, if a city government maintains its own road construction unit, the construction services supplied by this unit are not supplied on a universal basis, because they are only supplied for the city itself.

[4] „Public good“ is not used in the economic sense here.

2. Why does the scope of GATS matter?

The question of how GATS influences services such as education, health, water, or energy supply depends on the substantive scope of GATS, because the scope of the agreement determines which services are covered, and which are not. If a service is covered by GATS all horizontal disciplines (such as Article II, Most-Favored-Nation, or Article III, transparency) apply to it. The scope of the Agreement is also relevant if a member has made specific commitments concerning market access (Article XVI) and national treatment (Article XVII). In such a case the scope of GATS also determines the scope of these specific commitments, because a specific commitment only applies to those services sectors or subsectors covered by the GATS in general. If a service sector is covered by GATS disciplines (be they horizontal or specific) any measure affecting trade in that service must be GATS conform. If it is suspected that the measure violates GATS provisions, a WTO Member could bring this case to the WTO dispute settlement mechanism and, ultimately, the Appellate Body could require a GATS-inconsistent supply of a service to be altered (see Box 1).

Box 1 – Examples of Possible Public Services Challenges

The following examples illustrate how certain ways of supplying services in sectors often referred to as „public services" could possibly violate GATS provisions.

Health Services: Country A has a shortage of doctors and nurses and therefore concludes a bilateral agreement with country B granting doctors and nurses from B the right to offer medical services in A. This bilateral agreement may be determined by a WTO panel to violate Article II GATS, because the preferential treatment of service suppliers from B over service suppliers from other countries is not in accordance with the most favored nation principle. However, the bilateral agreement would only be a violation of Article II GATS, if the supply of medical services were covered by GATS.

Postal Service:

Country C makes an unconditioned market access commitment under mode 3 (commercial presence) in postal services. If country C maintains a monopoly for its national postal service concerning letter distribution (but not in other postal services), this monopoly could violate GATS disciplines on monopoly providers (Article VIII) and the market access commitments (Article XVI). Again, this would be only the case if the supply of postal services would be covered by the GATS.

Water Supply Services: Country D - a small developing country - wants to continue its practice of distributing fresh water to its citizens through local authorities. If in market access negotiations, country E - a large industrialized country - would request market access in that sector, it would be more difficult for country D to resist that request, if water supply would fall in the scope of GATS.

While the third example is a situation concerning issues of bargaining and negotiations power and has thus a political impact, the first and second examples constitute classic legal conflicts and could result in a dispute settlement proceeding in the WTO.

III. PROVISIONS DETERMINING THE SUBSTANTIVE SCOPE OF GATS

The scope of the GATS is determined by Article I of the Agreement. Accordingly, the GATS applies to „measures by Members affecting trade in services“ (Article I:1). The term „trade in services“ is defined as supplying services in any of the four modes (Article I:2); and the term „measures of Members“ as measures of governmental and of non-governmental entities (Article I:3(a)). The crucial definition concerning the kind of services covered by the GATS can be found in Article I:3 GATS:

> 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.[5]

The substantive scope of GATS depends on how the notion of a „service supplied in the exercise of governmental authority“ is understood. Such a service must meet two cumulative conditions: It must neither be supplied on a commercial basis nor in competition with one or more service suppliers. If a service is provided on a non-commercial basis but in competition with other suppliers or on a commercial basis but without competition, it is not a service supplied in exercise of governmental authority. The scope of the GATS therefore depends on an understanding of the notions „supplied on a commercial basis“ and „supplied in competition with one or more services suppliers“.

It is important to notice the relationship between the scope of the GATS and the scope of Articles I:3(b) and I:3(c): If a broad definition of “commercial basis” and “in competition” is adopted, the notion of governmental authority is narrow and almost all services would be covered by GATS. If a more narrow interpretation of „commercial basis“ and „in competition“ is adopted, the scope of „governmental authority“ is larger and more services are not covered by GATS.

IV. THE USE OF ARTICLE I:3 (B)(C) GATS IN WTO DOCUMENTS AND DISCUSSIONS

Since this scope is determined by Article I:3(b),(c) GATS, a clear and coherent understanding of this provision is necessary to determine if a service is covered by GATS. A look at recent WTO documents shows that there is a great amount of uncertainty about the exact scope of this provision.[6] Neither the Secretariat nor WTO Members have a clear and coherent understanding of the meaning of Article I:3 (b),(c).

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[5] The French version of Article I:3(b),(c) GATS reads: “Aux fins du présent accord: (...) b) les „services“ comprennent tous les services de tous les secteurs à l'exception des services fournis dans l'exercice du pouvoir gouvernemental; c) un „service fourni dans l'exercice du pouvoir gouvernemental“ s'entend de tout service qui n'est fourni ni sur une base commerciale, ni en concurrence avec un ou plusieurs fournisseurs de services“ and the Spanish version: „A los efectos del presente Acuerdo: (...) b) el término „servicios“ comprende todo servicio de cualquier sector, excepto los servicios suministrados en ejercicio de facultades gubernamentales; c) un „servicio suministrado en ejercicio de facultades gubernamentales“ significa todo servicio que no se suministre en condiciones comerciales ni en competencia con uno o varios proveedores de servicios.“

[6] For an overview of these documents see also Government of British Columbia, Ministry of Employment and Investment, GATS and Public Service Systems, available on-line at http://www.ei.gov.bc.ca./Trade&Export/FAA-WTO/governmentalauth.htm (visited May 5, 2001).

1. Secretariat background notes and papers

In a series of *background notes* on various services sectors, the WTO Secretariat has given some indication about its understanding of Article I:3(b),(c) GATS.

In a background note on *postal and courier services* prepared for the Council for Trade in Services (CTS) the Secretariat stated: „There might also be a relation between postal services provided by wholly government entities and the GATS Article I provision excluding government functions. Postal services of a Member, whatever the status of the postal supplier, would be services covered by the GATS as long as, *and which is usually the case,* they are supplied on a commercial basis.“[7]

Considering *legal services* the Secretariat held that „the administration of justice (judges, court clerks, public prosecutors, state advocates, etc.) (...) is effectively excluded from the scope of the GATS as in most countries it is considered a 'service supplied in the exercise of governmental authority' according to Article I:(3)(c) of the Agreement.“[8] However, the Secretariat also argued that „in some countries, certain notarial activities are regarded as 'services supplied in the exercise of governmental authority', like legal services pertaining to the administration of justice. However, unlike judges, court clerks and public prosecutors, who are civil servants, notaries often supply their services 'on a commercial basis', and therefore are subject to the provisions of the GATS.“[9]

In the background note on *health and social services* the Secretariat observes that „the institutional arrangements governing the provision of health, medical and social services may vary widely, from complete government ownership and control to full market orientation. On the one hand, there is the possibility of services being provided "in the exercise of governmental authority", meaning, according to Article I:3(c) GATS, that they are supplied neither on a commercial basis nor in competition. A case in point of such activities - not covered by the GATS - is the provision of medical and hospital treatment directly through the government, free of charge. In contrast, other systems may allow for full private participation without access controls, apart from quality- and qualification-related regulation, at freely negotiated prices.“ According to the Secretariat the co-existence of government-owned and private hospitals „may raise questions (...) concerning their competitive relationship and the applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article I:3?“ The Secretariat concludes by stating „that the hospital sector in many countries, however, is made up of government- and privately-owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided. Supplementary subsidies may be granted for social, regional and similar policy purposes. It seems unrealistic in such cases to argue for continued application of Article 1:3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services.“[10]

In the background note on *environmental services* the secretariat acknowledges that the scope of Article I:3 (b)(c) GATS is not entirely clear[11]: „(...)[T]he question does arise of when public service functions fall within the scope of GATS disciplines and when they do not. A key issue is whether sales are made on a commercial basis. To begin with, it is not completely clear what the term "commercial basis" means.“ The note continues:

> Nevertheless, if services were deemed to be supplied on a commercial basis, then, regardless of whether ownership was in public or private hands, the sector would be

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[7] Postal and Courier Services, Background Note by the Secretariat, 12 June 1998, S/C/W/39, p. 2 (emphasis added).
[8] Legal Services, Background Note by the Secretariat, 6 July 1998, S/C/W/43, p. 4, No. 15.
[9] Legal Services, supra note , p. 3, Footnote 2.
[10] Health and Social Services, Background Note by the Secretariat, 18 September 1998, S/C/W/50, p. 10-11, No. 37-39.
[11] Environmental Services, Background Note by the Secretariat, 6 July 1998, S/C/W/46, p. 14-15, No. 52-53.

subject to the main GATS disciplines and to the negotiation of commitments under Articles XVI and XVII. A different issue arises in situations in which the government has privatized certain services as local monopolies and the private firms receive payment from the government rather than from individual users. One view could be that these are still services supplied in the exercise of government authority, as defined by GATS Article I:3 – since they are not supplied on a commercial basis to individual users and they continue to be (local) monopolies – and, therefore, do not fall within the scope of GATS disciplines. Another view could be that these services are being procured by the government and, therefore, the manner of purchase *per se* would fall within the scope of GATS Article XIII and any future disciplines on procurement.

The Secretariat suggests that a possible question in this context could be: „Would it be useful to clarify when an environmental service is to be considered as being supplied in the exercise of governmental authority?"

The uncertainty about the exact meaning of Article I:3(b),(c) GATS expressed in the WTO Secretariat's background notes sharply contrasts with its recent publications, written apparently in response to growing civil society concerns, suggesting that the meaning in fact is very clear. In the brochure „*GATS - Fact and Fiction*" the Secretariat claimed that „[b]ecause no question has been raised by any member about services supplied in the exercise of governmental authority there has been no need to for interpretation of this phrase".[12] At the same time the Secretariat acknowledges that „[t]he issue could (...) arise if a specific measure which has been challenged in dispute settlement were to be defended on the ground that it applied only to services in the exercise of governmental authority and was therefore outside the scope of GATS".[13] In the Special Study on *„Unfinished business: Market Access"* the Secretariat goes even further.[14] After stressing the importance of services provided by public authorities for non-commercial reasons, the Secretariat suggests

> It is perfectly possible for governmental services to co-exist in the same jurisdiction with private services. In the health and education sectors this is so common as to be virtually the norm .... It seems clear that the existence or private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as „governmental services"...[15]

This phrase seems to suggest the opposite of the understanding applied in the background note on health and social services.

Notwithstanding whether this most recent approach of the Secretariat to Article I:3(b),(c) GATS is correct or whether the Secretariat will keep this approach in the future, it is safe to say that there is no coherent use of the meaning of this provision throughout the Secretariat publications.

2. Discussions among WTO members

Discussions among *WTO members* also show that there is no agreed definition of services „supplied in the exercise of governmental authority": In an informal discussion in the *Council on Trade in Services (CTS)* about future negotiations in the health and social services sector, Members participating in that discussion felt that basic welfare and equity consideration „had led to a very

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[12] WTO Secretariat, GATS - Fact and Fiction, March 2001, p. 8; available on-line http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (visited 15 May 2001).
[13] GATS - Fact and Fiction, supra note 12.
[14] WTO, Market Access: Unfinished Business, Post-Uruguay Round Inventory and Issues Special Study No. 6, Geneva April 2001, page 123-124, available at: http://www.wto.org/english/res_e/booksp_e/spec_e htm (visited 15 May 2001).
[15] Special Study No. 6, above note 14, page 124.

substantial degree of government involvement, both as a direct provider of such services and as a regulator" in the health and social services sector. Members seemed to agree that „this did not mean that the whole sector was outside the remit of GATS; the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly."[16] It should be noted, however, that this is a phrase used by the Secretariat to summarize the discussions in the meeting in a way the Secretariat understood it. It neither reports a decision of the Members nor does it necessarily represent a consensus of the Members present in the CTS.

In other discussions in the CTS individual members have used different examples, of what they considered „services supplied in the exercise of governmental authority": In a discussion about the review of the Air Transport Services in the Services Council, the representative of the *United States* argued that „services performed in the exercise of governmental authority" could be such services „as air traffic control, slot allocation and, in some cases, airport management."[17] In another discussion in the Services Council about further negotiations in the transport sector, one unidentified delegation expressed the view that freight inspection services were not services supplied in the exercise of governmental authority.[18]

In a discussion concerning negotiations on government procurement under Article XIII GATS in the *Working Party on GATS Rules* the Chairman wondered „whether it was necessary to further specify services not falling under the GATS, i. e. services supplied in the exercise of governmental authority" as stated in Article I:3." However, members did not express any specific views to that question.[19] In a discussion concerning government procurement in the Working Party of GATS Rules, the representative of *Argentina* said that a "concession" of operating a motorway was "a clear case of a service provided in the exercise of governmental authority."[20] In another discussion in the Working Party, the representative of *Thailand* also said that that "concessions were supplied in the exercise of governmental authority".[21] *Switzerland* suggested in the same body that determining the "extent to which some sectors, such as health services, were provided under governmental authority" was important. [22]

In a Joint Communication from the *EC, Hungary, Poland and the Slovak Republic* it was stated that the provisions of EC Treaty Article 55 "are similar to those of Article I:3(b) of GATS".[23] This understanding is of particular concern to some observers, because Article 55 ECT (Article 45 according to the Treaty of Amsterdam) has been interpreted narrowly by the European Court of Justice and there are no examples in the ECJ's jurisprudence where the court found that an activity would fall under the scope of this article.[24]

V. INTERPRETATION ACCORDING TO GENERALLY ACCEPTED METHODS OF PUBLIC INTERNATIONAL LAW

As shown in the previous section, the approaches of the WTO Secretariat and WTO members do not offer a clear understanding of Article I:3(b),(c). This section examines the meaning of this

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[16] Council for Trade in Services, Report of the Meeting Held on 14 October 1998, S/C/M/30, p. 8, No. 22 (b).
[17] Council for Trade in Services, Report of the Meeting Held on 26 May 2000, S/C/M/43, p. 2 and 3, No. 11 and 16.
[18] Council for Trade in Services, Report of the Meeting Held on 23 and 24 November 1998, S/C/M/31, p. 7, No. 9 f).
[19] Working Party on GATS Rules, Report of the Meeting of 19 February 1999, S/WPGR/M/20, p. 13, n. 33.
[20] WPGR, 6 October 1998, S/WPGR/M/18, No. 18.
[21] WPGR, 19 May 1999, S/WPGR/M/22, No.27
[22] WPGR, 7 July 2000, S/WPGR/M/28, No. 27.
[23] Committee on Regional Trade Agreements, WT/REG50/2/Add.3, No. 3 of 19 May 1999. Article 45 (ex 55) ECT reads: „The provisions of this Chapter (=*on the right to establishment*) 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"
[24] See e.g. ECJ, Reyners, ECR 1974, 631.

Article according to generally accepted methods of treaty interpretation used in public international law. It begins by establishing the standards of treaty interpretation. The following subsections will be devoted to the interpretation of the two phrases of Article I:3(c) respectively. While some of the arguments used in that interpretation will be rather straightforward, others are more detailed and rather technical. Readers who are more interested in the general line of arguments may prefer to skip subsections 4 and 5 , which are fairly technical.

1. Standards of treaty interpretation

The rules on interpreting international treaties are laid down in Articles 31 („General rule of interpretation") and 32 („Supplementary Means of interpretation") of the Vienna Convention on the Law of Treaties.[25] It is generally agreed that these rules represent customary international law and can therefore be used for the interpretation of any international treaty. These rules have also been applied by the Appellate Body in interpreting WTO law.[26]

The central norm of treaty interpretation is Article 31:1 of the Vienna Convention stating:

> 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 „context" of the terms includes the text of the entire treaty, its preamble and annexes as well as other agreements made between all parties in connection with the conclusion of the treaty or other documents accepted by all parties as related to the treaty (Article 31:2). Together with the context, any subsequent agreement or practice of the parties regarding the interpretation and any relevant rule of international rule shall be taken into account (Article 31:3). Therefore an interpretation of a GATS provision needs to look at the entire agreement, the annexes and decisions relating to services included in the Final Act of the Uruguay Round[27] and the schedules of specific commitments made under GATS.

Next to the „general principles of interpretation", the Vienna Convention also calls for „Supplementary means of interpretation". They include the preparatory work of the treaty and the circumstances of its conclusion (Article 32). However, these means may only be used in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 let to an ambiguous, obscure, manifestly absurd or unreasonable result.

2. Supply on a „commercial basis"

Services „supplied on a commercial basis" are covered by the GATS according to Article I:3(c). A broad understanding of this term could be that it encompasses any service not supplied free of charge to the consumer. Understood narrowly it could exclude only those services which are not

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[25] See Ian Brownlie, Principles of Public International Law, Fourth Edition, p. 626-632 and Gabrielle Marceau, A Call for Coherence in International Law, JWT 33(5), p. 87, at 115-128.

[26] United States – Standards for reformulated and Conventional Gasoline, 20 May 1996, WT/DS2/AB/R and Japan – Taxes on Alcoholic Beverages, 1 November 1996, WT/DS8-11/AB/R.

[27] This includes seven annexes (Annexes on Article II Exemptions, on Movement of Natural Persons Supplying Services under the Agreement, on Air Transport Services, on Financial Services (2), on Negotiations on Maritime Transport Services, Telecommunications and on Negotiations on Basic Telecommunications) and eight decisions (Decisions on Institutional Arrangements for the GATS, on Certain Dispute Settlement Procedures for the GATS, on Trade in Services and the Environment, on Negotiations on Movement of Natural Persons, on Financial Services, on Negotiations on Maritime Transport Services, on Negotiations on Basic Telecommunications and on Professional Services).

supplied in return for a market price.

For an ordinary textual understanding of „supplied on a commercial basis" the meaning of "commercial" is crucial, because it is the central term of that phrase. The ordinary meaning of „commercial" relates to „commerce" which according to one dictionary means „the buying and selling of goods".[28] Another dictionary states that commercial is a „[g]eneric term for most all aspects of buying and selling."[29] A similar meaning can be attributed to the French and Spanish terms „commercial" and „comercial".[30] Commercial refers thus to the exchange of goods (or services) for money or a monetary equivalent. If „commercial" supply is a supply in return for a *price,* then it could be argued that services provided free of charge should not be considered a service supplied on a commercial basis.[31]

However, it seems that the pure existence of a price is not the only determining factor of the notion of „commercial". It is doubtful, for example, if the act of selling between two friends can be considered „commercial". Also the provision of a product for free could be considered "commercial" in certain circumstances, for example, when selling one good and providing another one for free ("buy one, get one for free"). Therefore, while the price seems to be an important factor in determining if the exchange of a product is called "commercial", it is not the only factor. Other circumstances determined on a case by case basis may play an equally important role.

Apart from taking into account the circumstances of the exchange of goods or services, it is also necessary to distinguish between different prices: A service can be provided in return for a *market price,* i.e. a price determined by supply and demand or a price enabling the supplier to make a *profit* or a price just *covering the costs* of the supplier or even a price *below the actual costs* requiring some additional income for the service supplier (taxes, subsidies or profits from another economic activity). There is a continuum between supplying a service in order to make profit and supplying it for free. Again it would depend on additional circumstances to decide if the supply of a service at a price just covering the costs or even below the costs could be called "commercial". The ordinary meaning of „commercial" can thus not be defined in an abstract way. Consequently it can be applied broadly or narrowly depending on the particular circumstances of the case.

Apart from the meaning of „commercial", the entire phrase „supplied on a commercial basis" needs some clarification. It could either refer only to the question whether the consumer pays a price as elaborated above. It could also refer to the operational basis of the service supplier, i.e. if the service supplier operates on a non-profit or a commercial basis. From a strict textual approach the phrase „supplied on a commercial basis" seems to refer to the modalities of the supply and does not make any specific reference to the service supplier. The immediate meaning of a supply on a certain "basis" seems to be the individual act of supply. This understanding is supported by the second part of Article I:3(c) GATS which makes a direct reference to the service supplier. Also other parts of the GATS (like Article XVI) refer to the service supplier. If the "commercial basis" should have referred to the person supplying the service, it can be argued that the GATS text would have made an explicit reference to the "service supplier".

Since the wording of "commercial basis" allows for a broad understanding of that term, a look the immediate context of these words might provide some clarification: The immediate context of Article I:3(c) GATS is Article I:3(b). Therefore only an understanding of „commercial basis" which reflects the understanding of „governmental authority" should be applied. However, „governmental authority" refers to the service supplier, i.e. the government and not on the modalities of the supply. Consequently, if one argues as suggested above that „supply on a

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[28] Webster's II New College Dictionary, 1995, p. 225.

[29] Black's Law Dictionary, Abridged Fifth Edition, 1983, p. 140. For further definitions see Government of British Columbia, GATS and Public Service System, supra note 6.

[30] See Dictionnaire Universel Francophone En Linge available on-line at http://www francophonie hachette-livre.fr and Diccionario General de la Langua Española Vox, available on-line at http://www.diccionarios.com.

[31] This seems to be the view of the Secretariats in the background note on postal services, see supra note 7.

commercial basis" does not refer to the supplier, but only to the modalities of the supply, the notion of „governmental authority" does not provide further information on „supply on a commercial basis".

Similarly, it is doubtful if the term „commercial presence" used in Article I:2(c) GATS provides further clarity. „Commercial presence" also refers to the person supplying the service: It is defined as „any type of business or professional establishment (...) within the territory of a Member for the purpose of supplying a service" (Art. XXVIII:(d) GATS). „Commercial presence" as one mode of service supply (Mode 3) and „on a commercial basis" seem to be two distinct concepts not suitable for analogies or contextual interpretations.

3. Supply in „competition with one or more service suppliers"

According to the second alternative of Article I:3(c) GATS a service „supplied in competition with one or more other service suppliers" is covered by the Agreement. For an understanding of this phrase the understanding of „competition" seems to be the central term. According to one dictionary „competition" refers to „rivalry between two ore more businesses for the same customers or market"[32] or to „rivalry in the market, striving for customers between those who have the same commodities to dispose off"[33]. Similarly one French dictionary explains the term „concurrence" as „compétition entre personnes, enterprises, etc., qui prétendent à un même avantage".[34] Competition therefore seems to a refer to a situation when one supplier targets the same customers or market segments or tries to realize the same advantage as one or more other service suppliers.

In order to establish when a service is supplied on a competitive basis, a two-step approach seems useful: First it should be asked if there is a situation in which two or more service suppliers supply the same or a comparable service. Secondly it is necessary to find out if the suppliers are able to substitute or only to complement each other. Service suppliers are only "in competition" with each other, if one suppliers can substitute another supplier, i. e. if the losses of one service supplier in terms of customers and market shares can be covered by other suppliers. This depends also on the size of the market in which the suppliers operate: Consider the example of a doctor in a remote town: The number of people needing medical services depends on the size of that town. If the town is very large, one doctor might not be able to treat all sick people. A second doctor could offer her services in that town without competing with the first doctor if the "market" is large enough for both doctors. This shows that two or more suppliers do not always compete with each other even if they provide the same or a comparable service. However, if a patient is dissatisfied with the services of one doctor she could visited another doctor. In such a case, both doctors would be competing. In more general terms, even if a market is large enough for more than one service supplier, service suppliers can compete with each other.

Applying the two-step test to primary education, it could be argued that public schools and private schools provide the same or a comparable service, since they are both providing children of a certain age range with a certain amount of general education. It could also be said that public and private schools are targeting the same market: Since every child can only go to one school, the loss of a service consumer (i. e. a school child) by the public school can be supplemented by the private school. Consequently, it can be argued that public and primary schools are providing a service "in competition" with each other. However, it could also be argued that the services are not comparable, because public schools usually fulfill a universal supply obligation, while private

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[32] Webster's II, supra note 28, p. 329.

[33] See Government of British Columbia, GATS and Public Service Systems, supra note 6.

[34] Dictionnaire Universel Francophone En Ligne, supra note 30. The Spanish on-line dictionary only referred to rivalry (rivalidad) without specifying between whom and for what cause.

schools often don't. Similarly, it could also be argued that public schools with a universal service obligation target the entire market while private schools target only a certain segment of that market, i. e. those who are able and willing to pay school fees.

These considerations show that the exact scope of „competition" according to Article I:3(c) GATS depends on the definition of when two services are the same or comparable and the definition of the targeted market. It remains to be seen, how the Appellate Body will approach these questions, if it ever has to. However, it can be argued that the ordinary meaning of Article I:3(c) GATS does not rule out a broad understanding of these definitions. Therefore an application of Article I:3(c) GATS to primary schools could lead to the result that private and public schools could be regarded as competitors.

If there is only one service supplier covering the entire market, it can be considered a monopoly supplier. Consequently a monopoly service supplier never operates in "competition" with another service supplier. However, it is questionable if all monopoly suppliers are covered by Article I:3(c) GATS. If this would be the case, the supply of a service on a non-commercial basis by any monopoly supplier would be considered a service "supplied in the exercise of governmental authority". A private company holding a monopoly that is neither established or authorized by the government cannot exercise governmental authority.[35] The notion of „governmental authority" requires some public involvement in the service supply. Consequently it can be argued that the monopoly supplier covered by Article I:3(c) GATS cannot be a private company operating without public involvement, but has to be either the government itself, or any public entity or a private entity providing the service according to a statutory mandate.

4. Context of Article I:3(b),(c) GATS

Article 31:1 of the Vienna Convention holds that the "context" of the terms are to be taken into account when interpreting a treaty provisions. As pointed out above, the context of Article I:3(b),(c) GATS includes the Annexes of the Agreement and the schedules of specific commitments.

a) Annexes

In the context of Article I:3(b) GATS reference is sometimes made to the definition of „services supplied under governmental authority" provided in Article 1 b) of the (first) *Annex on Financial Services*, which includes activities of central banks and other monetary authorities, statutory social security and public retirement plans and public entities using governmental financial resources.[36] However, this definition only applies to the supply of financial services and not to the supply of

[35] GATS disciplines on monopoly suppliers (Art. VIII GATS) equally apply to public and private companies, but only if the monopoly „is authorized or established formally on in effect by that Member as the sole supplier of that service" (emphasis added).

[36] (...) b) For the purposes of subparagraph 3 b) of Article I of the Agreement (= the GATS), „services supplied in the exercise of governmental authority" means the following: (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. c) For the purposes of subparagraph 3 b) of Article I of the Agreement, if a Member allows any activities referred to in subparagraphs b) ii) or b) iii) of this paragraph to be conducted by its financial services suppliers in competition with a public entity or a financial service supplier, „services" shall include such activities. d) Subparagraph 3 c) of Article I of the Agreement shall not apply to services covered by this Annex.

other services, since the Annex only covers financial services.[37] Consider the example of a national post service supplying *inter alia* postal (= non-financial) and banking services (= financial services). Only activities relating to financial services are covered by the Annex and are excluded from the scope of GATS if they meet the conditions of Paragraph 1 b) (iii) and c) of the Annex.

Because Article 1 b) directly only applies to financial services, it can at best be used indirectly to determine the scope of Article I:3(b) GATS for other services. Such an indirect use would require that Article 1 b) of the Annex contained any additional implication which can be applied to Article I:3(b),(c) GATS. However, a closer look at the three subparagraphs of Paragraph 1 b) of the Annex shows that this is not the case. Therefore even the indirect application of Article 1 b) of the Annex does not narrow the meaning of this provision derived from the textual interpretation.

The activities described in Paragraph 1 b) (i) of the Annex are activities which by definition cannot be conducted in competition with other service suppliers even in the broadest understanding of this term, since „activities conducted (...) in pursuit of monetary or exchange rate policies" cannot be conducted by more than one entity in every monetary system.

The activities covered by Paragraph 1 b) (ii) and (iii) of the Annex can be conducted by more than one entity in each country, yet both provisions are limited by Paragraph 1 c) of the Annex to the extend that they do not apply to activities conducted by financial services suppliers *in competition* with a public entity or a financial service supplier. This relates back to the question of competition elaborated above. Therefore the scope of Paragraph 1 b) is ultimately determined by the same notion („competition") as Article I:3(c) GATS. However, Paragraph 1 does not clarify how the notion of „competition" should be understood in the present context. Basing a definition of services supplied in the exercise of governmental authorities on the specific provisions of Article 1 b) and c) of the Annex on Financial Services would thus be circular.

The *Annex on Air Transport Services* excludes traffic rights and services directly related to the exercise of traffic rights from the scope of the GATS.[38] This exclusion does not clarify the term „services supplied in the exercise of governmental authority". It can only be argued that traffic rights and services directly related to these services are *not necessarily* services supplied in the exercise of governmental authority according to Article I:3(b),(c) GATS, because otherwise they would not have to be excluded from the scope of the GATS by a separate annex.

The *Annex on Telecommunications* only defines „public telecommunications transport service" as „any telecommunications transport service required (...) by a Member to be offered to the public generally". This relates to only a very narrow aspect of services possibly supplied in the exercise of governmental authority and cannot be generalized in such a way that such a service would have to be offered to the public generally.

b) Schedules of Specific Commitments

The WTO members schedules of specific commitments form an integral part of GATS according to Article XX:3 GATS. Out of the 140 members of the WTO only *Bulgaria* used the term „services supplied under governmental authority" in its schedule. In the section relating to environmental services (Section 6 of the Schedule), Bulgaria stated: „The commitments do not include environmental services supplied in the exercise of governmental authority" and included a footnote explaining that these services are „regulatory, administrative and control services by government and municipal bodies related to environmental issues".[39]

It is not entirely clear why Bulgaria excluded „services supplied in the exercise of governmental

[37] Paragraph 1 a) and d) of the Annex on Financial Services.
[38] See Section 2 a) and b) Annex on Air Transport Services.
[39] The Republic of Bulgaria, Schedule of Specific Commitments, 21 May 1997, GATS/SC/122, p. 21.

authorities“ from its commitments in environmental services. If Bulgaria only wanted to make a declaratory statement one could argue that the definition of services supplied in the exercise of governmental authority is Bulgaria’s understanding of Article I:3(b),(c) GATS at least relating to environmental services. If Bulgaria’s statement was understood to have a separate meaning it would follow that the definition given by Bulgaria is different from the general understanding of Article I:3(b),(c) GATS. This would also explain why Bulgaria included the statement mentioned above. In both cases, however, the statement only indicates the understanding of one WTO-Member about the meaning of the phrase „governmental services“ and can thus not be used as an „agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty“ or as an „instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty“ according to Article 31:2 of the Vienna Convention.

5. Subsequent practice and preparatory work

The following subsection will investigate whether any clarification can be drawn from the methods spelled out in Article 31:3 (subsequent practice, subsequent agreements, other rules of international law) and in Article 32 (preparatory work) of the Vienna Convention.

a) Subsequent practice, agreements, and other rules of international law

According to Article 31 subsection 3 of the Vienna Convention subsequent agreements regarding the interpretation or the application of the treaty as well as subsequent practice in the application of the treaty shall be taken into account when interpreting a treaty.

Subsequent agreements of WTO members include, for example, the protocols and agreements on financial services and basic telecommunications. There is however no reference to the scope of GATS in these agreements. The Decision of the Negotiating Group on Telecommunications of 24 April 1996 on certain definitions contains a paragraph on „Universal service“ stating that „Any Member has the right to define the kind of universal service obligation it wishes to maintain (...)“.[40] While this paragraph could be used as a model for a decision on the definition of „governmental authority“[41], it does not provide clarity on the scope of Article I:3(b),(c) GATS. As pointed out above, there can be a close relationship between a universal service obligation and a „public service“. However, from a legal perspective the terms „services supplied in the exercise of governmental authority“ and services with a „universal service obligation“ do not seem to have any particular link in the framework of GATS.

Subsequent practice of the contracting parties can also include the practice of the organs of an international organization founded under the agreement.[42] However, no interpretative statement or any statement on the issue was issued by the Ministerial Conference, the General Council, the Council for Trade in Service or any subsidiary body. Since the Secretariat is not an organ of the WTO[43], its position on Article I:3(b),(c) GATS could not be viewed as the practice of an international organization.

Adopted panel and Appellate Body decisions are also subsequent practice and might be used for an interpretation. However, so far the dispute settlement institutions have not yet dealt with the

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[40] Available at the WTO-webpage: http://www.wto.org/english/tratop_e/servte_e/tel23_e.htm (visited 9 May 2001).
[41] See infra V. 5 a).
[42] Brownlie, supra note 25, p. 630.
[43] The organs of the WTO are the Ministerial Conference, the General Council (including the Dispute Settlement and the Trade Policy Review Body), the special Councils and the subsidiary bodies such as the various committees and working groups, see Article IV of the Agreement Establishing the WTO.

exact meaning of Art. I:3(c). The only reference was made in the *Bananas*-case by the Appellate Body, when determining the scope of GATS in general terms.[44] In this passage the Appellate Body did not address the question of how Art. I:3 GATS should be understood. However, the sentence „There is nothing in these provisions to suggest a limited scope of application of the scope of GATS“ suggests that the Appellate Body is willing to give the GATS a broad coverage. We will return to this finding in Section VI.1. of this paper.

According to Article 31:3(c) of the Vienna Convention „any relevant rules of international law applicable in the relations between the parties“ shall also be taken into account when interpreting a treaty provision. This additional interpretive tool might be helpful if a treaty provision needs to be interpreted in a specific dispute between two parties, because in that case arguably any rule applicable between those two parties can be used, even if that rule is not applicable in the relations between all WTO members.[45] However, for the purposes of interpreting a provision of WTO law in an abstract manner, only a rule which is applicable in the relations of all members can be used. Since there are hardly any international treaties with exactly the same membership as the WTO agreements, such rules could only be customary international law or general principles of international law. Given the variety of public services and the different methods of supplying them in different countries, such a general rule applicable to all WTO members does not seem to exist. This is mirrored by the different opinions WTO members have about the meaning of Art. I:3(b),(c) GATS and the exact scope of the agreement.

b) Preparatory work

As spelled out by Article 32 of the Vienna Convention the preparatory works (*traveaux préparatoires)* and the circumstances of the treaty's conclusion may be used as further means of interpretation in order to confirm the meaning according to an interpretation based on the principles of Article 31 or if that meaning is ambiguous or obscure or if the result would be absurd or unreasonable. Since the discussions so far have not produced a clear meaning of Article I:3(b),(c) a look at the preparatory work could be useful.

Preparatory work of the GATS treaty include the official documents of the Negotiating Group on Services (GNS) of the Uruguay Round on Multilateral Trade Negotiations and the comprehensive drafts of the GATS, such as the 1991 Final Draft or the Dunkel Draft.

A clause defining services with a reference to governmental functions was first introduced in the December 1990 draft text of the GNS chairman prepared for the Brussels Ministerial meeting.[46] It read:

> „(b) „services“ includes any service in any sector [except services supplied in the exercise of governmental functions]“

At the first meeting of the Negotiating Group on Services on definitions in the draft text in the summer of 1991 some delegations suggested that the term needed an additional definition.[47] In the

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[44] European Communities - Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, No. 220: „ [W]e note that Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". (...) We also note that Article I:3(b) of the GATS provides that "'services' includes any service in any sector except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS. (...) For these reasons, we uphold the Panel's finding that there is no legal basis for an a priori exclusion of measures within the EC banana import licensing regime from the scope of the GATS.“. (Added) emphasis in original, footnotes omitted.

[45] Marceau, supra note 25, p. 123-125.

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

[47] Group of Negotiations on Services, Note on the Meeting of 27 May to 6 June 1991, para. 66, MTN.GNS/42. Note that the minutes record the term „services provided through government functions“, but it seems obvious that they refer

following meeting, delegations discussed the scope of the Agreement, but only Austria addressed the issue of „government functions“ by suggestion that the term „public functions“ should be used instead.[48] 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.“[49]

The December 1991 comprehensive draft of GATT Director General Arthur Dunkel („Dunkel Draft“) did not change the wording of Article I:3(b), but simply eliminated the brackets around the phrase „except services supplied in the exercise of government functions“ 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.“[50]

There are no records about further discussions about Art. I:3(b),(c) GATS in *publicly available* documents of the Uruguay Round negotiations. In the same way, the literature on the negotiating history of GATS does not mention any discussions on this issue.[51]

There was some discussion about the scope of GATS in the GNS in the fall of 1993 *inter alia* concerning measures relating to social security and judicial and administrative assistance.[52] However these discussions did not focus on the scope of „services supplied in the exercise of governmental authority“, but on the scope of a „measure affecting trade in services“.[53] However, in a statement issued in the last week of the Uruguay Round, the chairman of the GNS emphasized that „pending further clarification of this *and other questions relating to the scope of the Agreement,* that it is assumed that participants would refrain from taking issues arising in this area to dispute settlement but would try to settle them through bilateral consultations.“[54] If the definition of „governmental services“ was part of the other questions, it would follow, that negotiators did not agree on the exact scope of the GATS until the end of the Uruguay Round. However, even if this was case, one could not draw any specific conclusion from that fact clarifying the meaning of Article I:3(b),(c) GATS.

Summing up the discussions of this subsection, neither a recourse to subsequent practice nor preparatory work does provide additional information concerning the meaning of Article I:3(b),(c) GATS.

6. Conclusion

The interpretation of Article I:3 (b)(c) GATS based on the interpretative methods of the Vienna Convention on the Law of Treaties does not render a clear result. Besides the wording of the provision there is hardly any additional information which can be used in order to clarify its meaning. The wording, however, can be used to give the Article I:3(b),(c) a narrow or a broad meaning. It can be argued that the main concept of the phrase „on a commercial basis“ is the supply of a service in return for a price paid for the service. However, it might be necessary to take other circumstances or the amount of the price into account. The term „on a commercial basis“ can

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to discussions about Article I:3(b).

[48] Group of Negotiations on Services, Note on the Meeting of 24-28 June 1991, para 8, MTN.GNS/43.

[49] Definitions in the Draft General Agreement on Trade in Services, Note by the Secretariat, 15 October 1991, MTN.GNS/W/139, para. 8.

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

[51] Reyna, supra note 50.

[52] 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.

[53] Issues Relating to the Scope of the General Agreement on Trade in Services, supra note 52, p. 2 and 3.

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

thus be used to give the Agreement a narrow scope, but it is not guaranteed that an interpreter would do so. The meaning of „competition“ depends on the question if the same or a comparable service is provided and on the scope of the targeted market, which has to be decided on a case-to-case basis. Again, adopting broad meanings would be in conformity with the wording of Article I:3(b),(c) GATS.

Since a broad understanding of Article I:3(c) GATS and consequently a narrow range of Article I:3(b) GATS can be reached by generally accepted methods of interpreting international law, the Appellate Body would be in conformity with international law if it adopted a narrow understanding of „services supplied in the exercise of governmental authority.“ The following section will argue that there are further approaches which could be used in order to limit the scope of the GATS.

VI. FURTHER INTERPRETATIVE PRINCIPLES: RESTRICTIVE AND EFFECTIVE INTERPRETATION

While the methods applied so far are generally accepted, some further interpretative principles have also been used in international practice: The principles are the restrictive interpretation (*in dubio mitius*) and the effective interpretation, sometimes referred to as teleological approach.

1. Restrictive Interpretation

The principle of restrictive interpretation or *in dubio mitius* applies in deference to the sovereignty of states. If the meaning of a term is ambiguous, the meaning which involves less general restrictions on the sovereignty of a party shall be used. Although the WTO Appellate Body has not yet decided if that principle applies to all WTO rules, it has indicated that the principle plays some role in interpreting WTO law in the *Hormones* case.[55]

If the principle of restrictive interpretation would be applied in the context of Article I:3 (b)(c) GATS it would mean that a narrower meaning of the phrase „on commercial basis“ and „supplied in competition“ should be used. For example, the term „commercial“ could only be applied to services supplied at a the market price or at a price at least covering the costs of the supply or the notion of „competition“ could only used if the different service suppliers are actually supplying the very same service or/and are targeting absolutely identical market segments. This would rule out a situation of „competition“ between a service supplier with universal service obligation and one without such an obligation. Finally a restrictive interpretation could also come to the conclusion that it is up to the individual governments to decide which services they consider to be supplied „neither on a commercial nor in competition with one or more service suppliers“, since this would be the least restriction on the sovereignty of members.

While the principle of restrictive interpretation could effectively be used to reduce the broad scope of GATS derived from the interpretation of Article I:3(b),(c) GATS, it should be noted that the Appellate Body has applied a broad approach to the scope of GATS in the *Bananas*-Case.[56] Also GATT panels have hold that exceptions need to be interpreted narrowly.[57] Some WTO members have argued along the same lines. However, the Appellate Body did not confirm this approach. In the *Hormones* case, the Appellate Body held: „... merely characterizing a treaty provision as an

[55] EC - Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body (WT/DS26 and 48/AB/R), 16 January 1998, para. 165.
[56] See supra note 44.
[57] See Meinhard Hilf, Power, Rules and Principles - Which Orientation for WTO/GATT Law? Journal of International Economic Law, Vol. 4, No. 1 (March 2001), p. 128.

„exception“ does not by itself justify a „stricter“ or „narrower“ interpretation of that provision that would be warranted (...) by applying the normal rule of treaty interpretation“.[58] Furthermore it should be noted that Art. I:3(b),(c) is not an exception of GATS, but the definition of the coverage of GATS. Consequently, even if the principle that exceptions to WTO agreements have to be interpreted narrowly would be applicable to the GATS, it would not prevent the Appellate Body from interpreting Art. I:3(b) in a broader scope and exclude certain public services from the coverage by GATS.

2. Effective interpretation

A second set of principle evolves around the concept that a treaty should be interpreted in such a way that its goals and objectives can be achieved effectively. These principles are often referred as the principles of effective interpretation (*effet utile)* or the teleological approach.

The Appellate Body referred to a narrow subset of these principles in the *Gasoline* case when it argued that an interpretation should not render a certain clause meaningless.[59] Interpretative approaches relating to the effective implementation of the treaty's objectives go beyond this concept. Their basic rationale is to interpret a treaty provision in such a way that the treaty's general objectives are most effectively implemented. Approaches based on an the principles of effective interpretation require therefore a look at the goals of the treaty, which can generally be derived from the preamble.

In this context the third and fourth preambular paragraphs of GATS are of specific interest.[60] They show that GATS incorporates the goal of liberalization of trade in services as well as the right to regulate the supply of services. The twofold approach of GATS is reiterated in the guidelines for the GATS 2000 market access negotiations.[61] It can therefore be said that the overall objective of the GATS is to liberalize trade in services while securing the sovereign right to regulate services.

While from a political point of view there seems to be greater emphasis on the liberalizing effects of GATS, from a strict legal point it is difficult to argue that there is greater emphasis on either of the two goals of the GATS. It seems rather that both objectives should be treated equally. This could require an interpretation of Article I:3(c) GATS which is somehow narrower than the meaning of the provision obtained from the textual approach. By relying on the objective of the GATS to recognize the right of Members to regulate, it could be argued that an effective interpretation of GATS would come to a similar result as the interpretation guided by the principle *in dubio mitius.*[62]

However, it needs to be stressed that applying the approach of effective treaty interpretation does

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[58] EC - Hormones, supra note 55, para. 104.

[59] US - Gasoline, supra note 26, at Section IV: „An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs to redundancy or inutility.“

[60] Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and securing the overall balance of rights and obligations, while giving due respect to national policy objectives;
Recognizing the right of Members to regulate, and to introduce regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries to exercise this right.

[61] See No. 1. of the Guidelines and Procedures for the Negotiations on Trade in Services, as adopted by the Special Session of the Council for Trade in Services on 28 March 2001, PRESS/217: „Pursuant to the objectives of GATS, as stipulated in the Preamble and Article VI, and as required by Article XIX, the negotiations shall be conducted on the basis of progressive liberalisation as a means of promoting the economic growth of all trading partners and the development of developing countries, and recognizing the right of Members to regulate and to introduce new regulations, on the supply of services (...).“

[62] See Section VI. 1.

not *oblige* the Appellate Body to rely on the GATS objective to recognize the right to regulate. If the Appellate Body would apply an effective approach, it could also rely on the objective of progressive liberalization and therefore uphold a broad interpretation of Article I:3(c) GATS derived from the textual approach. It is worthwhile to remember that the evolution of EC law was based to a great extent on the jurisprudence of the ECJ applying the principle of *effet utile* and *implied powers,* which is a special version of effective interpretation.

VII. „LEGISLATIVE" POSSIBILITIES TO NARROW THE SCOPE OF GATS

So far this paper showed that an interpretation of Article I:3(b),(c) GATS according to generally accepted methods of interpretation reveals no clear meaning of „services supplied in the exercise of governmental authority". Applying a narrow meaning to this phrase and a broad scope of the GATS would be in conformity with the interpretative methods of the Vienna Convention on the Law of Treaties. A broader understanding of the provision could be reached by additional methods of interpretation, such as the restrictive approach or the principle of effective interpretation. However, it is not guaranteed that the Appellate Body would apply these methods.

Many civil society groups are of the opinion that a broad scope of the GATS is detrimental to national economic, social or other policies. While no WTO Member government has yet openly expressed its dissatisfaction with Article I:3(b),(c) GATS it is possible that some governments are also in favor of a narrower scope of the GATS after they realize that the agreement scope of the agreement could be very broad. It is therefore advisable to take some „legislative" steps to narrow the scope.[63] A „legislative" approach would also be preferable to leaving important decisions about the scope of WTO agreements to the dispute settlement processes. Dispute settlement bodies are appropriate to determine whether a particular law is consistent with WTO provisions. They are however not suited to resolve the larger issues, especially about the scope of the WTO agreements. These are policy questions which must be resolved by the governments of the WTO members which are accountable to their constituencies.

"Legislative" possibilities include an amendment to the GATS, an interpretative understanding, an authoritative decision of the Ministerial Conference or the General Council or a non-binding statement.

1. Amendment to GATS or interpretative understanding

The first possibility of narrowing the scope of Article I:3(c) GATS would be an amendment to GATS itself or an interpretative understanding. An interpretative understanding is an international agreement specifying certain provisions of another agreement. Examples in the WTO context include the understandings on the interpretations of various provisions of the GATT. Since the issue in question could probably be clarified with just a few words, an amendment to the GATS either by adding an additional definition to Article I:3 or by changing the wording of Article I:3(b) or (c) would be sufficient. However, a separate understanding would not „re-open" discussions about the language of the GATS itself and it could thus be easier for members to agree on a separate understanding.

There are various possibilities for an amendment to GATS. First, an amendment could eliminate Article I:3(c) GATS and clarify in Article I:3(b) GATS that it is up to the individual members to

[63] These measures are called „legislative", even though they would have to be taken by governments, beause governments are the „law-makers" in the WTO and because the label „legislative" makes it clear, that the issue would not be left to a „judicial" decision of Appellate Body.

decide whether a service is supplied in the exercise of governmental authority. Article I:3(b) GATS could then read:

> „'services' includes any service in any sector except services supplied in the exercise of governmental authority *as determined by the national laws and regulations of each Member"*

It should be noted that a similar self-defining approach is used in Art. XIVbis GATS on security exceptions and in the Decision on definitions by of the Negotiating Group on Basic Telecommunications.[64] However, since this would exclude a large number of service sectors from GATS and would lead to a different scope of the agreement for different members, it is unlikely that members will agree on this definition. A more narrow approach could be based on a specification of „commercial basis" and „in competition". This could be done by amending a further subsection to Article I:3 GATS, which could read:

> *„(d) 'a service supplied on a commercial basis' means any service supplied in exchange for a market price (a price covering the actual costs of supplying the service) and 'a service supplied in competition with one or more service suppliers' a service supplied under the same conditions, especially in fulfillment of a universal supply obligation, as the competitors.*

A separate understanding on the scope of Article I:3 GATS could be worded similarly. Both an amendment and an understanding would require new negotiations among the WTO members and subsequent ratification by the national parliaments (in most cases), because current GATS provisions would be changed. Article X:1 and X:5 WTO-Agreement contain the specific modalities of an amendment to the GATS. Accordingly, any WTO member or the Council for Trade in Services can submit an amendment to the Ministerial Conference. The Ministerial Conference decides by consensus whether to submit the amendment to the members for acceptance. The amendment takes effect for those members that have accepted it, but only after two-thirds of the members accepted it. Thereafter the amendment takes effect for each member upon acceptance by it. Even though it is possible that such a process could be started by a member at the coming Ministerial Conference the entire process bears many obstacles and might take a very long time. It is therefore not very likely that this option could be realized.

2. Authoritative interpretation

According to Article IX:2 WTO-Agreement the Ministerial Conference and the General Council can adopt interpretations of any WTO-Agreement. In the case of GATS this authority shall be exercised on the basis of a recommendation by the Council for Trade in Services. The Ministerial Conference and the General Council would have to decide by a consensus on such an interpretation and if consensus could not be reached by a three-fourths majority. Such an interpretation could have the same or a similar wording as the suggested understanding on Article I:3(b),(c) GATS.

While an authoritative interpretation has not the same legal status as an amendment or an understanding, the Appellate Body would be bound by it when applying Article I:3(b),(c) GATS. Since an authoritative interpretation would be easier to achieve than an amendment or understanding and still have a similar effect, it should be the favored policy option.

3. Non-binding statement

Finally, WTO members could resort to a non-binding statement with similar wording as suggested

[64] Supra note 40.

above. Such a statement could be a decision of the Council on Trade in Services or of the General Council. Since it would not be an authoritative interpretation, it would not be legally binding. Therefore the Appellate Body would not be required to adopt the approach laid down in such a statement. However, such a statement would constitute subsequent practice of the parties according to Article 31:3(b) of the Vienna Convention, since it would establish a common understanding of the parties regarding the interpretation of Article I:3(b),(c) GATS. It is therefore unlikely that the Appellate Body would ignore such a statement. In fact, it is very well possible that the Appellate Body would use such a statement almost as if it was binding, since the Appellate Body has been receptive to the collective will of the WTO members. Nevertheless, a non-binding statement could not render the same legal certainty as the binding methods spelled out above.