

Trade in Services: A Holistic Solution to New-Found Issues in Trade Law?

FOREWORD

Trade, Law & Development: A Year in Review

EDITORIAL

Ipsiata Gupta & Radhika Parthasarathy, *Trade in Services: A Tool to Redress Unemployment?*

ARTICLES

Rudolf Adlung, *The GATS: A Sleeping Beauty?*

Petros C. Mavroidis, *And You Put the Load Right on Me: Digital Taxes, Tax Discrimination and Trade in Services*

Andreas Maurer, *Overview on Available Trade Statistics and Tools to Assess Trade in Services*

Markus Krajewski, *The Impact of Services Trade Liberalisation on Human Rights Revisiting Old Questions in New Contexts*

Hildegunn Kyvik Nordås, *Telecommunications: The Underlying Transport Means for Services Exports*

Weiwei Zhang, *Blockchain: Replacing, Eliminating and Creating Trade in Services*

Mira Burri, *Trade in Services Regulation in the Data-Driven Economy*

Pralok Gupta & Sunayana Sasmal, *The Curious Case of Trade Facilitation in Services: Rejected Multilaterally but Adopted Bilaterally and Plurilaterally*

Ben Shepherd, *Quantifying Trade Law: New Perspectives on the Services Trade Restrictiveness Index*

Sunanda Tewari & Prakhar Bhardwaj, *Situating India's Mode 4 Commitments in Geopolitics and Political Economy: The Case of GATS 2000 Proposal, India-Singapore CECA and India-ASEAN TiS*

NOTES

Anirudh Shingal, *Aid for Trade in Services: Definition, Magnitude and Effects*

Trade, Law *and* Development

Vol. 12, No. 1

2020

PATRON

Hon'ble Prof. Poonam Saxena

FACULTY-IN-CHARGE

Dr. Rosmy Joan

EDITORS-IN-CHIEF

Ipsiata Gupta

Radhika Parthasarathy

EDITORS

Ayushi Singh
(SENIOR EDITOR)

Gautami Govindarajan
(MANAGING)

Apoorva Singh

ASSOCIATE EDITORS

Abilash Viswanathan
Anjali Sasikumar

Abhinav Srivastav
Sabil Verma
Tania Gupta

Amogh Pareek
Sukanya Viswanathan

COPY EDITORS

Aastha Asthana
Rashmi John

Aniketa Jain
Shlok Patwa
Swikruti Nayak

Neerali Nanda
Suvam Kumar

CONSULTING EDITORS

Ali Amerjee
Dishi Bhomawat

Manu Sanan
Prateek Bhattacharya

Meghana Sharafudeen
Shashank P. Kumar

BOARD OF ADVISORS

Raj Bhala
Daniel Magraw
Ricardo Ramírez Hernández

Glenn Wiser
B. S. Chimni
Vaughan Lowe

Jagdish Bhagwati
M. Sornarajah
W. Michael Reisman

Published by:

The Registrar, National Law University, Jodhpur
ISSN : 0976-2329 | eISSN : 0975-3346

THE IMPACT OF SERVICES TRADE LIBERALISATION ON HUMAN RIGHTS— REVISITING OLD QUESTIONS IN NEW CONTEXTS

MARKUS KRAJEWSKI*

International trade agreements may limit the policy options available to States when respecting, protecting and fulfilling human rights. The present paper addresses this relationship from the perspective of rules concerning the liberalisation of trade in services such as the General Agreement on Trade in Services (GATS) and chapters on services trade in free trade agreements (FTAs) as well as new plurilateral and multilateral initiatives in the field of trade in services including the negotiations of a Trade in Services Agreement (TiSA). After a brief overview of the history of the discourse on services trade liberalisation and human rights, the paper recalls the main obligations of States under human rights law on the one side and their obligations under trade law on the other side. Based on this, the paper assesses if the concerns and fears about the impact of the GATS on human rights articulated twenty-five years ago are still valid. Subsequently, the paper discusses if the findings concerning the GATS and human rights need to be revisited in light of new bilateral, regional and plurilateral developments. Finally, the paper proposes and analyses options for future agreements on trade in services which could mitigate the negative effects of trade agreements on human rights.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. A DISCURSIVE HISTORY OF SERVICES TRADE LIBERALISATION AND HUMAN RIGHTS
 - 1. ORIGINS AND BACKGROUND
 - 2. THE HUMAN RIGHTS TURN OF THE DEBATE
 - 3. CLAIMS AND COUNTERCLAIMS
- III. SUBSTANTIVE LEGAL BACKGROUND
 - 1. HUMAN RIGHTS OBLIGATIONS
 - 2. KEY ELEMENTS OF THE GATS AND THEIR IMPACT ON HUMAN RIGHTS

* Professor of Public and International Law, University of Erlangen-Nürnberg, Germany.
Contact: markus.krajewski[at]fau.de.

IV. REVISITING THE IMPACT OF GATS ON HUMAN RIGHTS AFTER TWO DECADES

V. NEW CONTEXTS

1. PLURILATERAL AND REGIONAL APPROACHES TOWARDS TRADE IN SERVICES LIBERALISATION
2. HUMAN RIGHTS IMPACT OF FTAs

VI. FURTHER REMEDIES AND REFORM OPTIONS

1. GENERAL PROPOSALS TO MAINTAIN POLICY SPACE AND TO LIMIT THE SCOPE OF SERVICES TRADE DISCIPLINES
2. ENHANCED EXCEPTION CLAUSES
3. HUMAN RIGHTS IMPACT ASSESSMENTS

VII. CONCLUSION

I. INTRODUCTION

The relationship between trade agreements and human rights has been a subject of academic and political interest for several years.¹ It is generally agreed that the picture is complex and mixed: international trade may lead to greater choices and economic opportunities, and therefore has a positive impact on human rights.² However, international trade agreements may also limit the policy options available to States, when respecting, protecting and fulfilling human rights. While this has been discussed substantially and frequently with regard to the impact of trade rules on intellectual property rights on the right to health³, the impact of rules concerning the liberalisation of trade in services such as the GATS and chapters on services trade in FTAs, is often less analysed.

In light of the looming trade wars between the major trading powers, the severe crisis of the World Trade Organization's (WTO) dispute settlement system and the hitherto unforeseeable effects of the COVID-19 pandemic on the global economy and trade relations, analysing the impact of services liberalisation on human rights may no longer seem pressing and urgent. Yet, recent developments in the field of

¹See, HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005); JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANIZATION (2007); THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS (Sarah Joseph et al. eds., 2009); SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE (2011) [hereinafter Joseph]; LINKING GLOBAL TRADE AND HUMAN RIGHTS (Daniel Drache & Lesley A. Jacobs eds., 2014).

² Lorand Bartels, *Trade and Human Rights*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 571, 573-574 (Daniel Bethlehem et al. eds., 2009).

³ Fredrick Abbott, *TRIPS and Human Rights: Preliminary Reflections*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 145-170 (Frederick Abbott et al. eds., 2006); HOLGER HESTERMAYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2008); *TRIPS and the Right to Health*, in Joseph, *supra* note 1.

trade in services invite us to revisit this question. In particular, the proliferation of bilateral and regional FTAs with a services chapter or plurilateral and multilateral initiatives in the field of trade in services such as the negotiations of the TiSA, or a new initiative to develop disciplines on domestic regulation suggests that a fresh look at the issue may be necessary and could yield new results.

The article proceeds as follows: Part II offers a brief overview of the history of the discourse on services trade liberalisation, with particular reference to the GATS and human rights. It recalls the origins and background of the debate and its specific shift to focus on human rights, while sketching the main claims of the debate. In order to assess these claims from a legal perspective, Part III recalls the main obligations of States under human rights law on the one hand, and their obligations under international trade law on the other. Based on this, Part IV elaborates on the extent to which the concerns and fears articulated in the debate on services trade and human rights have materialised, twenty-five years after the entry into force of the GATS. Subsequently, Part V turns to current developments at the multilateral, regional and bilateral level, and discusses the need, if any, to revisit the findings concerning the GATS and human rights in light of these new developments. Further, Part VI proposes and analyses options for future trade agreements to co-exist with human rights obligations, and finally, Part VII concludes with the main findings and arguments of this article.

II. A DISCURSIVE HISTORY OF SERVICES TRADE LIBERALISATION AND HUMAN RIGHTS

For the most part, the debate about the impact of services trade liberalisation on human rights has been a debate about the impact of the GATS on human rights. Chapters on trade in services in other trade agreements, such as regional and bilateral FTAs, only became a matter of the debate later. This is noteworthy, because the first major regional FTA, the North American Free Trade Agreement (NAFTA) of 1993, contained a chapter on services as well. The rules on trade in services at the regional level are hence, older than such rules in the global trading regime.⁴ However, these rules were not at the centre of the debates about the relationship between NAFTA (and regional trade agreements) and human rights in the 1990s and early 2000s.⁵

⁴ Markus Krajewski, *Services Trade Liberalisation and Regulation: New Developments and Old Problems*, 1 EUR. Y.B. OF INT'L ECON. L.153, 155-56 (2010).

⁵See, James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27(4) U.C. DAVIS L. REV. 793-842 (1994); Julien Cantegreil, *Implementing Human Rights in the NAFTA Regime – The Potential of a Pending Case: GlamisCorp v USA*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009).

1. *Origins and Background*

The GATS is the first and – so far the only – multilateral agreement addressing trade in services aimed at the liberalisation of such trade. As one of the agreements annexed to the Marrakesh Agreement Establishing the WTO, the GATS came into force in 1995. During the Uruguay Round negotiations leading to the GATS and in the first years after its entry into force, the agreement was largely absent from the major controversies surrounding the new trade regime. This changed five years after the establishment of the WTO, when WTO Members launched new negotiations on services liberalisation in 2000, as stipulated in Article XIX:1 of the GATS.⁶ These negotiations were then integrated into the overall framework of the Doha Development Agenda (DDA), launched at the WTO Ministerial Conference in Doha in 2001. In the same year, WTO Members agreed on negotiating guidelines for trade in services and started exchanging initial requests and offers in 2002 and 2003.

While negotiations on further services liberalisation in the WTO were effectively stalled for more than ten years, the GATS negotiations in 2000 marked the beginning of the debate on the impact of the GATS on human rights and related issues. In order to fully appreciate the origin of this debate, the wider historical context needs to be noted. The 1999 WTO Ministerial Conference in Seattle witnessed, for the first time, the emerging crisis concerning the legitimacy of the WTO.⁷ This alerted many observers, activists, politicians and the media to the prospect of further liberalisation of services trade and sparked a controversy about the impact of the GATS on public interests associated with competing claims about facts and fiction.⁸ Civil society organisations with a focus on development, environmental issues and public services began raising concerns about the impact of the GATS on these issues.⁹

⁶ Rafael Leal-Arcas, *Services as Key for the Conclusion of the Doha Round*, 35(4) LEGAL ISSUES OF ECON. INTEGRATION 305, 301-21 (2008).

⁷ For an immediate reaction, see, Gary Horlick, *The Speedbump at Seattle*, 3 J. INT'L ECON. L. 167–172 (2000); See generally, Manfred Elsig, *The World Trade Organization's Legitimacy Crisis*, 41 J. WORLD TRADE 75-98 (2007); See also Tomer Broude, *From Seattle to Occupy: The Shifting Focus of Social Protest*, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 91 (Daniel Drache & Lesley A. Jacobs eds., 2014).

⁸ WTO Secretariat, *GATS – Fact and Fiction*, WORLD TRADE ORGANIZATION (2001), https://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf (last visited, Apr. 6, 2020) [hereinafter GATS – Facts]; Chakravarthi Raghavan, *GATS - Fact and Fiction, At Best A Partial Truth*, THIRD WORLD NETWORK (Mar. 20, 2001), <https://www.twn.my/title/fiction.htm>.

⁹ JESSICA WOODROFFE, WORLD DEVELOPMENT MOVEMENT, GATS: A DISSERVICE TO THE POOR - THE HIGH COSTS AND LIMITED BENEFITS OF THE GENERAL AGREEMENT IN TRADE IN SERVICES FOR DEVELOPING COUNTRIES (2002),

2. *The Human Rights Turn of the Debate*

The general debate about the impact of GATS on development, environment and public services which started in 2001 soon shifted its focus to human rights. In 2002, the United Nations High Commissioner for Human Rights published a report on the liberalisation of trade in services and human rights as part of a series of reports on human rights and globalisation, trade and investment.¹⁰ According to the report, liberalisation of trade in services must not deprive individuals from enjoying basic human rights, such as the right to education, health and development. Consequently, the GATS should not reduce the ability of governments to ensure equal and affordable access to essential services. Furthermore, the High Commissioner pointed out, that “the adoption of any deliberately retrogressive measure in the liberalisation process that reduces the extent to which any human right is protected constitutes a violation of human rights”.¹¹ This would especially be the case if liberalisation policies result in a deprivation of the access to basic services for the poorest and most vulnerable parts of the society. The High Commissioner identified a number of issues arising from the GATS from a human rights perspective¹² — first, the broad scope of GATS and the risk of constraining governments from taking actions to promote or protect human rights, second, the right to regulate services which are essential to promote and protect human rights, which may be a “duty to regulate under human rights law”, and third, concerns that a stringent ‘necessity test’ will make service regulations ensuring human rights protection difficult.

Other actors of the United Nations (UN) human rights system followed the approach of the High Commissioner’s Report: The Special Rapporteur on the

https://www.iatp.org/sites/default/files/GATS_A_Disservice_to_the_Poor.pdf;
ELISABETH TUERK ET AL., CENTRE FOR INTERNATIONAL ENVIRONMENT LAW, GATS AND WATER: RETAINING POLICY SPACE TO SERVE THE POOR (2003); PUBLIC SERVICES INTERNATIONAL, THE WTO AND THE GENERAL AGREEMENT ON TRADE IN SERVICES: WHAT IS AT STAKE FOR PUBLIC HEALTH? (1999); Sarah Sexton, *Trading Health Care Away? GATS, Public Services and Privatisation* (The Corner House, Briefing Paper No. 23, 2001), <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/23gats.pdf> [hereinafter Sexton].

¹⁰High Commissioner (Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights), *Liberalisation of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9 (June 25, 2002), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/141/14/PDF/G0214114.pdf?OpenElement> [hereinafter Report]; See also, *Reports of the High Commissioner for Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Globalization/Pages/ReportsHC.aspx> (last visited, Mar. 30, 2020).

¹¹Report, *supra* note 10, at 10-11.

¹²*Id.*, at 24-26.

Right to Health, Paul Hunt, conducted a mission to the WTO in 2004 and reiterated some of the human rights concerns of the GATS.¹³ He stated that while “increased trade in services might lead to an improvement in health services for some, it could also generate increased discrimination in the provision of health services – particularly discrimination on the basis of social status – and a withdrawal of resources from the poor towards the wealth.”¹⁴ The Special Rapporteur was also concerned about the limited flexibility to change existing commitments and emphasised “[t]he importance of a WTO member undertaking a right to health impact assessment before making a commitment to open up the health service sector to international competition. In this way, the WTO member can decide on the correct form, pace and sequence of trade liberalisation according to national needs and consistent with the right to health.”¹⁵

The report of the High Commissioner and related publications and statements by civil society organisations, initiated a broader scholarly debate on the impact of trade in services liberalisation on human rights in particular, and domestic regulatory space more broadly.¹⁶ However, most participants of the debate were specialists of international trade law or of special services or policy fields. Despite the input from the UN Human Rights institutions, human rights scholars and genuine human rights organisations have been largely absent from the debate on GATS and human rights. Until today, the impact of GATS – or trade agreements addressing services liberalisation more generally – on human rights has failed to be an issue of an article in some of the leading human rights journals, such as the *Human Rights Quarterly* (John Hopkins University Press), the *International Journal of Human Rights* (Routledge), *Human Rights Law Review* (OUP), *Human Rights Review* (Springer) or the *Journal of Human Rights Practice* (OUP).

3. *Claims and Counterclaims*

The debate about the impact of the liberalisation of trade in services through GATS on human rights is shaped by various claims and counterclaims related to the fear of negative effects and the hope for positive effects. Some authors point out that the GATS may have a positive effect on human rights if it would lead to

¹³Paul Hunt (Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health), *The Right of Everyone to the Enjoyment of the highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004)[hereinafter Report of the Special Rapporteur].

¹⁴*Id.*, ¶ 48.

¹⁵*Id.*, ¶ 52.

¹⁶Panagiotis Delimatisis, *Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique*, 7 EUR. Y.B. OF INT'L ECON. L. 154-172 (2016).

freedom of press,¹⁷ or if violations of core labour standards are recognised as an impediment to free trade.¹⁸ However, in most cases it has been argued that the GATS and trade agreements limit the potential of States to protect and promote human rights.¹⁹

a) Overstated Concerns? Privatisation, Commercialisation and Loss of Regulatory Autonomy

Even though numerous questions have been addressed through several analyses of the impact of the GATS on human rights, three main concerns can be identified as the key aspects of the critique of the GATS.

The first concerns a pressure towards privatisation of hitherto public services and the inability to revert any previous privatisations. A 2001 study on GATS and health services claimed that “GATS could facilitate further privatisation and competition in health care services if more countries are pressured during GATS 2000 negotiations to list health care services on their schedules of commitments in all ways of supplying the service.”²⁰ Unlike this clear statement, most commentators take a more cautious approach by pointing to the fact that the GATS does not demand privatisation, but argue that the provisions and structure of the GATS remain ambiguous and therefore create legal uncertainty about the precise scope and reach of the GATS.²¹

The second concern revolves around the claim that the GATS leads to the commercialisation or marketisation of public goods. This has been argued particularly in light of the impact of the GATS on education. As one commentator put it, “[t]he use of business vocabulary, development strategies and management techniques reveal the commercial strategy that is leading the GATS negotiations.” This strategy can conflict with the concept of education as a public good. Indeed, under the GATS, the risk of transforming human rights into services exists

¹⁷ Henry Gao, *Google’s China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS*, 6 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 347-385 (2011).

¹⁸ Marion Panizzon, *How Close Will GATS Get to Human Rights?*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 534-60 (Marion Panizzon et al. eds., 2008).

¹⁹ Jane Kelsey, *Trade in Services Agreements, the Financial Crisis, and Human Rights Implications*, 104 AM. SOC’Y OF INT’L L. PROC. 128-31 (2010).

²⁰ Sexton, *supra* note 9, at 19.

²¹ Shawkat Alam et al., *The General Agreement on Trade in Services (GATS), Water, and Human Rights from the Perspective of Developing Countries*, 58 NETHERLANDS INT’L L. REV. 43, 74 (2011)[hereinafter Alam et al.]; Rebecca Bates, *The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?*, 31(1) SYDNEY L. REV. 121, 142 (2009)[hereinafter Bates].

because “the market is the dominant force in policy.”²² Anthony VanDuzer summarises these views correctly by pointing out that “[m]any GATS critics start from a philosophical objection to a trade regime in which health and education services are treated like commodities.”²³ He proceeds to state that “[t]rade liberalization commitments are viewed as serious constraints on the ability of developing country governments to achieve equitable access to basic health and education services and other objectives sought to be fulfilled by government schemes governing the regulation and delivery of these services.”²⁴

The third issue of concern is the impact of the GATS on regulatory autonomy and policy space of States. Many commentators and political observers agree that trade agreements may lead to policies and governmental measures that result in a negative impact on the full enjoyment of human rights and the State’s ability to respect, protect and fulfil them. This general observation applies to all areas of international trade law, and hence also to rules regulating the liberalisation of trade in services. The key question in this context concerns the possible limitations imposed by the GATS on regulatory autonomy and policy space for countries to adopt measures which aim at the fulfilment of their human rights obligations.²⁵ The impact of the GATS on regulatory power has also been recognised by the WTO dispute settlement panel in the first case concerning the GATS where it was stated that, “International commitments made under the GATS ... are ... designed to limit the regulatory powers of WTO Members”.²⁶ This relationship is also recognised in the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs). Principle 9 states that “[S]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States (...).”²⁷ The commentary

²² Pierrick Devidal, *Trading Away Human Rights? The GATS and the Right to Education: A Legal Perspective*, 2 J. CRITICAL EDUC. POL’Y STUD. 29, 43 (2004).

²³ J. Anthony VanDuzer, *Navigating between the Poles: Unpacking the Debate on the Implications for Development of GATS Obligations Relating to Health and Education Services*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 167, 168, (E-U Petersmann ed., 2005)[hereinafter VanDuzer].

²⁴ *Id.*

²⁵ Mina Mashayekhi et al., *Strategic Considerations for Developing Countries: The Case of GATS and Health Services*, in INTERNATIONAL TRADE IN HEALTH SERVICES AND THE GATS: CURRENT ISSUES AND DEBATES 44 (Chantal Blouin et al. eds., 2006)[hereinafter Mashayekhi].

²⁶ Panel Report, *Mexico — Measures Affecting Telecommunications Services*, ¶ 7.244, W.T.O. Doc. WT/DS204/R (adopted June 1, 2004).

²⁷ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, GUIDING PRINCIPLES OF BUSINESS AND HUMAN RIGHTS, IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK 11 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

specifies that FTAs can create economic opportunities for States, but also negatively affect the domestic policy space of governments.²⁸

The fear of privatisation and commercialisation dominated the debate on GATS and human rights in the early years, and has been rejected by proponents of trade liberalisation. In a much noted contribution on services trade and education, Pierre Sauvé claimed that governments maintain the ability to “regulate their service sectors in accordance with national policy objectives (...); refrain from taking liberalisation commitments in any particular sector, sub-sector or mode of supply; maintain or designate monopolies; and retain the ability to subsidise service activities in their territories.”²⁹ Many observers agree that countries can mitigate pressures of privatisation and commercialisation through careful and cautious commitments under the GATS. However, they would maintain that the GATS aims at limiting regulatory autonomy and policy space.³⁰

b) Disappointed Hopes? Increased Investment and Development Opportunities

It should be noted that proponents of trade liberalisation not only rejected the claims by GATS critics, but also maintained that the GATS and services trade liberalisation may have a positive impact on the delivery of basic services such as health, education or water. In essence, it has been argued that market opening facilitated through the GATS could attract much needed foreign direct investment in these sectors³¹ and create opportunities and access to services through modes of cross-border supply such as online education and electronic health services or consumption of these services abroad.³² While the underlying rationale of the GATS and trade liberalisation seems to rely on these assumptions, there is hardly any empirical evidence showing a causal relationship between liberalisation commitments and increased foreign investment in areas with such commitments.³³

²⁸ *Id.*

²⁹ Pierre Sauvé, *Trade, Education and the GATS: What's in, What's out, What's All the Fuss about?*, 14 HIGHER EDUC. MGMT & POL'Y 47, 61 (2002)[hereinafter Sauvé].

³⁰ BARNALI CHOUDHURY, PUBLIC SERVICES AND INTERNATIONAL TRADE LIBERALIZATION - HUMAN RIGHTS AND GENDER IMPLICATIONS 4,5 (2012).

³¹ GATS – Facts, *supra* note 8; Sauvé, *supra* note 29, at 64.

³² Chantal Blouin, *Economic Dimensions and Impact Assessment of GATS to Promote and Protect Health*, in INTERNATIONAL TRADE IN HEALTH SERVICES AND THE GATS: CURRENT ISSUES AND DEBATES 169, 178,179(Chantal Blouin et al. eds., 2006).

³³ U.N. Conference on Trade and Development, *Assessment of Trade in Services of Developing Countries: Summary of Findings*, U.N. Doc. UNCTAD/ITCD/TSB/7 (Aug. 26, 1999), [https:// www.unctad.org/en/docs/poitcdtsbd7.pdf](https://www.unctad.org/en/docs/poitcdtsbd7.pdf).

It is also unclear if GATS obligations had any impact on the cross-border supply of services which seems to mostly depend on technological capacities.

III. SUBSTANTIVE LEGAL BACKGROUND

How much of the discourse on the impact of the GATS on human rights is based on substantive legal obligations of the State parties to the respective agreements? In order to answer this question, the following Part will analyse the content and State obligations of the human right to water, health and education and derive specific regulatory duties from them. These will then be assessed in light of the scope and the main obligations under the GATS.

1. Human Rights Obligations

As pointed out in the previous Part, the debate about the impact of the GATS on human rights revolves mostly around the human rights to water, health and education. The human rights to water, health and education have their legal basis in global and regional human rights treaties, in particular in the International Covenant Economic, Social and Cultural Rights (ICESCR). The normative content and the State obligations flowing from these rights have been spelled out in General Comments of the Committee on Economic Social and Cultural Rights (CESCR)³⁴, which is entrusted with the implementation of the ICESCR.

a) Legal Basis and Normative Content of the Human Rights to Water, Health and Education

The human rights to health and education are enshrined in Articles 25 and 26 of the Universal Declaration on Human Rights (UDHR) and Articles 12 and 13 of the ICESCR respectively. Even though the ‘human right to water’ is not explicitly recognised in these or other major international human rights sources, it is clearly rooted in the contemporary human rights framework.³⁵ In its General Comment

³⁴ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999)[hereinafter General Comment No. 13]; CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14]; CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003)[hereinafter General Comment No. 15].

³⁵ See, JIMENA MURILLO CHÁVARRO, THE HUMAN RIGHT TO WATER - A LEGAL COMPARATIVE PERSPECTIVE AT THE INTERNATIONAL, REGIONAL AND DOMESTIC LEVEL

No. 15 of 2002 concerning the right to water, the CESCR referred to Articles 11 and 12 of the ICESCR as the basis of this right.³⁶ In 2010, the United Nations General Assembly adopted Resolution 64/292 recognising “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”³⁷ This statement is evidence of an international consensus which regards the right to water and sanitation as a fundamental human right.³⁸

The normative contents of the three human rights, as further explained in the three respective General Comments of the CESCR, are similar and contain comparable core elements.³⁹ According to General Comment No. 14 on the right to health, the right contains four interrelated and essential elements: first, functioning public health and health-care facilities, goods and services have to be available in sufficient quantity (Availability). Second, these facilities, goods and services have to be physically and economically accessible to everyone without discrimination (Accessibility). Third, health facilities, goods and services must be respectful of medical ethics and culturally appropriate (Acceptability). Fourth, facilities, goods and services must also be scientifically and medically appropriate and of good quality (Quality).⁴⁰

Similar to the right to health, the CESCR defined the contents of the right to education in General Comment No. 13 through four elements: (1) Availability, i.e. functioning educational institutions and programmes have to be available in sufficient quantity; (2) Non-discriminatory, economic and physical accessibility; (3) Acceptability, meaning that the form and substance of education, including curricula and teaching methods, have to be acceptable to students and, in appropriate cases, parents; and (4) Adaptability, i.e., education needs to be able to adapt to the needs of changing societies and communities.⁴¹

43-125 (2015); PIERRE THIELBÖRGER, *THE RIGHT(S) TO WATER: THE MULTI-LEVEL GOVERNANCE OF A UNIQUE HUMAN RIGHT* 56-88 (2014); INGA T. WINKLER, *THE HUMAN RIGHT TO WATER - SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 37-59 (2012).

³⁶ General Comment No. 15, *supra* note 34, ¶ 3.

³⁷ G.A.Res. 64/292 (Aug. 3, 2010).

³⁸ Benjamin Mason Meier & Yuna Kim, *Human Rights Accountability Through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation*, 26 *DUKE J. OF COMP. & INT'L L.* 139-228 (2016).

³⁹ *See also*, OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 303(3rd ed., 2019)[hereinafter Olivier de Schutter].

⁴⁰ General Comment No. 14, *supra* note 34, ¶ 12.

⁴¹ General Comment No. 13, *supra* note 34, ¶ 6.

The normative content of the right to water deviates from the '4 A-approach' of the right to health and education only slightly, and includes availability, physical, economic and non-discriminatory accessibility and quality; the water required for personal or domestic use must be safe, i.e. free from any threat to a person's health.⁴² Despite this minor deviation, it can be concluded, that the normative content of the human rights relevant in the present context requires States to ensure that health, education and water services are provided, that their supply is available to all and that the services meet certain quality standards, in the case of health and education reflecting the preferences and cultural contexts of the users of these services.

b) The Triad of State Obligations: Respect, Protect, Remedy

While the elements recalled above describe the contents of the respective human rights, the CESCR used the triad of the obligation to respect, protect and fulfil to clarify the specific State obligations flowing from these human rights.⁴³ The obligation to respect requires that States abstain from interfering directly or indirectly with the enjoyment of human rights. This includes refraining from policies which would directly or indirectly deny individuals access to water, health or education.⁴⁴ States are also prohibited from discriminating between different groups with respect to these services.

The obligation to protect requires States to prevent third parties, including private corporations, from interfering with the enjoyment of human rights.⁴⁵ For example, States may be required to adopt and effectively implement measures which restrain third parties from denying individuals access to adequate water, health or education facilities. This obligation is relevant in the context of regulating privatisation and privatised essential services, as the State is required to adopt and implement appropriate legislation and administrative measures. With regard to the right to water, the CESCR explicitly stated:

“Where water services (...) are operated or controlled by third parties, State parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses, an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes

⁴² General Comment No. 15, *supra* note 34, ¶ 12.

⁴³ General Comment No. 13, *supra* note 34, ¶ 46; General Comment No. 14, *supra* note 34, ¶ 33; General Comment No. 15, *supra* note 34, ¶ 20. *See also*, MANUSULI SSENIONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 23 (2009); Olivier de Schutter, *supra* note 39, at 292.

⁴⁴ General Comment No. 15, *supra* note 34, ¶ 21.

⁴⁵ OLIVIER DE SCHUTTER, *supra* note 39, at 436.

*independent monitoring, genuine public participation and imposition of penalties for non-compliance.*⁴⁶

Lastly, the obligation to fulfil requires States to take positive measures to assist individuals and communities to enjoy the relevant human right. Depending on the circumstances, States may also be obliged to provide services directly if individuals or a group are unable, for reasons beyond their control, to gain access to such services by the means at their disposal.⁴⁷ This may involve significant State activities, including the establishment of institutions and the supply of services. With regards to the right to health, the CESCR stated: “The obligation to fulfil requires States parties (...) to adopt a national health policy with a detailed plan for realising the right to health. States have to ensure (...) the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all (...).”⁴⁸

Based on the above, it can be concluded that the obligations to protect and to fulfil are more relevant with regards to the impact of the GATS on human rights as these obligations require specific activities of the State, including regulating the private supply of services and intervening if private services operators contribute to human rights violations as well as direct supply of services in specific circumstances. As these obligations require positive State measures, they may conflict with GATS obligations which largely aim at prohibiting specific measures.

2. Key Elements of the GATS and Their Impact on Human Rights

The impact of the GATS on policies to promote and to protect human rights is shaped by the key elements of the agreement: its broad scope of application, the nature and contents of its core obligations and the potential of the general exception clause.

a) Broad Scope

According to Article I:1 of the GATS, the agreement applies to measures of WTO Members “affecting trade in services”. The GATS does not define the term services, but indicates a broad sectoral scope of application by including “any

⁴⁶ General Comment No. 15, *supra* note 34, ¶ 24.

⁴⁷ General Comment No. 15, *supra* note 34, ¶ 25.

⁴⁸ General Comment No. 14, *supra* note 34, ¶ 36.

service in any sector except services supplied in the exercise of governmental authority” (Article I: 3 (b) of the GATS). Hence, all services except those supplied in the exercise of governmental authority and certain air traffic rights are covered by the GATS. Services supplied in the exercise of governmental authority are defined as services provided neither on a commercial basis nor in competition with other service suppliers. This definition is usually understood narrowly.⁴⁹

This raises the question of whether the GATS also applies to services which are closely connected to the fulfilment of human rights. If water, health and education services are supplied by private commercial suppliers, there is no doubt that these services would fall within the scope of the GATS. If they are provided by public monopolies and not in competition with other service suppliers, it needs to be determined if they are provided on a commercial basis, i.e., against remuneration.⁵⁰ Most commentators agree that water and sanitation services are usually not provided in the exercise of governmental authority in the narrow sense and therefore covered by the GATS.⁵¹ Health services whether provided in individual practices by doctors or in clinics and hospitals are also covered by the GATS and other agreements covering trade in services.⁵² While it might be possible for States to organise their health systems in such a way that they would fall within the exemption of services supplied in the exercise of governmental authority,⁵³ in most cases doctors and hospitals receive some form of remuneration for their services and may even be in competition with each other. Similar to water and health services, education services are covered by the GATS unless they are provided purely in exercise of governmental authority, which is, despite some political claims to the contrary,⁵⁴ usually not the case.⁵⁵

Furthermore, it should be noted that the GATS only applies to services to the extent they are traded. Trade in services is defined through four modes of supply: cross-border supply (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3) which amounts to any form of foreign direct investment, and

⁴⁹ Markus Krajewski, *Public Services and Trade Liberalization: Mapping the Legal Framework*, 6(2) J. INT'L ECON. L. 341-367 (2003); Amedeo Arena, *Revisiting the Impact of GATS on Public Services*, in SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET 15-48 (Markus Krajewski ed., 2015).

⁵⁰ Rudolf Adlung, *Public Services and the GATS*, 9 J. INT'L ECON. L. 455, 462-463 (2006).

⁵¹ Alam et al., *supra* note 21, at 60; Bates, *supra* note 21, at 139.

⁵² VanDuzer, *supra* note 23, at 171.

⁵³ Panagiotis Delimatsis, *GATS and Public Health Care: An Uneasy Relationship*, in RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO (2013)[hereinafter Delimatsis].

⁵⁴ Kurt Larsen & Stéphane Vincent-Lancrin, *International Trade in Education Services: Good or Bad?*, 14(3) HIGHER EDUC.& MGMT. POL'Y 27 (2002).

⁵⁵ Devidal, *supra* note 22, at 42.

the movement of natural persons (Mode 4).⁵⁶ Yet, national measures regulating the provision of services usually do not distinguish between foreign and domestic investment. Hence, any regulation concerning the establishment of a service provider could fall within the ambit of the GATS. Furthermore, the GATS applies to measures of central, regional, and local governments as well as non-governmental bodies exercising delegated powers, such as self-regulating bodies of professional service suppliers which can issue binding regulations. In many countries, services regulations addressing human rights concerns exist at the regional or even local level such as zoning regulations or local public monopolies.⁵⁷

As a consequence of the broad scope of the GATS and because there are no sectoral or regulatory carve-outs, the GATS can apply to a large range of measures even if they are not predominantly aimed at regulating trade or foreign investment. This may not be a problem yet from a human rights perspective, but could lead to conflicts if certain domestic regulations violate the core obligations of the GATS and cannot be justified on the basis of the exception clauses.

b) Core Obligations

As mentioned above, the debate about the GATS and human rights focuses on issues of privatisation and regulatory space. In this context, the National Treatment (Article XVII of the GATS) and Market Access (Article XVI of the GATS) obligations are the most important core obligations. Potentially, disciplines on domestic regulation (Article VI of the GATS) might also have a significant impact.⁵⁸

The National Treatment obligation requires a WTO Member to treat services and service suppliers of another Member no less favourably than its own like services and service suppliers. Article XVII: 2 of the GATS specifies that National Treatment under GATS includes *de jure* and *de facto* non-discrimination. Therefore, Article of the XVII GATS aims at the protection of a level playing field between domestic and foreign services and service suppliers.⁵⁹ The Market Access obligation (Article XVI) specifies that a Member may not maintain or adopt a number of specific measures including limitations on the number of service

⁵⁶ Andrew Lang, *GATS*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 157–185 (Bethlehem et al. eds., 2009).

⁵⁷ Johanna Jacobsson, *Services Liberalization by Sub-Central Entities – Towards Deeper Commitments?*, in COHERENCE AND DIVERGENCE IN SERVICES TRADE LAW (Rhea Hoffmann & Markus Krajewski eds., 2020)(forthcoming).

⁵⁸ For a analysis of domestic regulation see below III. 2. c)-

⁵⁹ Panel Report, *China — Certain Measures Affecting Electronic Payment Services*, ¶ 7.700, W.T.O. Doc. WT/DS413/R (adopted Aug. 31, 2012).

suppliers, service transactions or total number of service operations expressed in the form of numerical quotas, monopolies, exclusive service suppliers, and the requirements of an economic needs test. These are typical instruments aimed at the regulation of essential services such as education, health or water distribution.⁶⁰

It should be noted that National Treatment and Market Access obligations only apply if and to the extent a WTO Member made specific commitments listed in its Schedules of Commitments. The contents of these Schedules are therefore crucial concerning the impact of the GATS on regulatory autonomy. However, while the GATS follows this 'positive list'-approach, a number of services chapters in regional or bilateral FTAs follow a 'negative list'-approach which requires them to list any existing or future measures which would not comply with the obligations of Market Access or National Treatment.⁶¹ While in theory both approaches allow for the same amount of flexibility, the positive list-approach is usually considered more appropriate to maintain policy space and regulatory autonomy. States need to positively commit towards the liberalisation of a particular sector, whereas a negative list-approach requires States to explicitly exclude certain sectors or measures from their commitments if they want to maintain regulatory space.

In light of the market power of large multinational companies engaged in the supply of water services, concerns exist that States may come under the pressure to open their markets and effectively privatise water services, because a full Market Access obligation would prohibit the maintenance of public monopolies. If States opened their markets to private water suppliers, the potential of States to regulate privatised water markets may be effectively limited by the GATS.⁶² Furthermore, a full National Treatment obligation would prohibit governments from subsidising domestic service suppliers even if they serve different parts of the country than their foreign competitors.⁶³ Similarly, price regulations which favour poorer regions or poorer households could be seen as discriminatory if they favour domestic suppliers over foreign suppliers.⁶⁴ The potential for such conflicts in the GATS context would only arise if a country engages in specific commitments in

⁶⁰ Markus Krajewski, *Market Access and Non-Discrimination*, in NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY (2003).

⁶¹ Sherry Stephenson, *Regional versus Multilateral Liberalization of Services*, 1WORLD TRADE REV.187, 193-194 (2002).

⁶² ChienHuei Wu & Helen HaiNing Huang, *Right to Water in the Shadow of Trade Liberalization*, in THE REGULATION OF THE GLOBAL WATER SERVICES MARKET 139-147 (Julien Chaisse ed., 2017).

⁶³ Andrew Lang, *The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry*, 7 J. INT'L ECON. L.801, 810-812 (2004).

⁶⁴ Alam et al., *supra* note 21, at 72-73.

the respective service sector. Regarding water supply, no country has done so. However, many countries, including many developing countries, have undertaken specific commitments in sanitation services. In particular, acceding Member States such as Afghanistan, Ecuador, Cambodia, Laos and Liberia; but also founding Member States such as South Africa did not make any limitations concerning these services in commercial presence. Hence, their markets are fully open in this regard.

Similar to the impact of the GATS on the right to water, the impact of the GATS on the right to health may also evolve around issues of privatisation and regulation of private healthcare providers. In particular, countries which committed themselves to Market Access in health and hospital services may not introduce public monopolies. Furthermore, the Market Access obligation also prohibits quantitative restrictions such as quotas or economic needs tests. These instruments are however often used in the context of national and/or regional health plans. The potential for this conflict is illustrated by limitations of specific commitments with regard to the number of beds, heavy equipment or doctors per hospital. In the GATS context, Members can choose not to make commitments in health and hospital services due to the positive list-approach. In trade agreements following a negative list-approach policy space can only be maintained if countries carve out the health and hospital sectors in the Annexes provided for future measures.

In addition to issues concerning the regulation of private health and hospital services, GATS obligations can also have implications on the regulation of telemedicine and patients' mobility which may in turn negatively affect the right to health. While access to telemedicine may support the full enjoyment of the right to health, it can also have dangerous consequences if not regulated properly.⁶⁵ Governments may therefore restrict certain forms of telemedicine if they cannot guarantee the safety and quality of the service. However, any quantitative restriction in this regard could violate a Market Access commitment in Mode 1. Global patient mobility can be beneficial for individuals if they receive medical treatment not available in their home countries, but it could also have a negative effect on the health systems in the countries of treatment, because limited resources could be allocated to treat patients from abroad instead of domestic patients.⁶⁶ The GATS could facilitate patient mobility, because limitations of patient mobility could amount to violations of specific commitments in Mode 2.⁶⁷

⁶⁵ Chantal Blouin et al., *Trade in Health Services Under the Four Modes of Supply: Review of Current Trends and Policy Issues*, in Mashayekhi, *supra* note 25, at 205; VanDuzer, *supra* note 23, at 177.

⁶⁶ Rupert Chanda, *Trade in Health Services*, 80(2) BULL. OF THE WORLD HEALTH ORG. 160 (2002); VanDuzer, *supra* note 23, at 179.

⁶⁷ Markus Krajewski, *Patient Mobility Beyond Calais: Health Services Under WTO Law*, in HEALTH CARE AND EU LAW 455 (Johan Willem van de Gronden et al eds., 2011).

With regards to the impact of the substantial GATS obligations on education, most literature and civil society organisations voice concerns pertaining to the commercial forms of education. It is argued that the GATS may lead to dual market structures through educational services supplied through Mode 2 or a privatisation of the education system through Mode 3.⁶⁸

c) Domestic Regulation

Apart from opening markets and prohibiting discrimination, the GATS also aims at disciplining non-discriminatory measures impeding trade in services through Article VI. According to Article VI: 4 of the GATS, the WTO shall develop disciplines to ensure that measures of domestic regulation “do not constitute unnecessary barriers to trade in services”. These disciplines shall ensure that domestic regulations are, *inter alia*, “based on objective and transparent criteria, such as competence and the ability to supply the service” and “not more burdensome than necessary to ensure the quality of the service”. A key element of concern in this context is whether, and to what extent, the disciplines should contain a so-called necessity test determining whether a measure was more burdensome than necessary to achieve its regulatory objective.⁶⁹ If adopted, such a test could significantly limit regulatory autonomy and policy space, because it would require States to prove that the measures they adopted were the least trade restrictive.⁷⁰ So far, WTO jurisprudence considering the “necessity” of measures has not shown particular deference to regulatory autonomy and policy space.⁷¹

WTO Members have been engaged in negotiations on domestic regulation disciplines since 1999. The negotiations slowed down between 2012 and 2015, but gained new momentum in 2016 and 2017. However, WTO Members have still not reached consensus and the negotiations seem to have lost speed again in recent years.⁷²

⁶⁸ Devidal, *supra* note 22, at 41.

⁶⁹ PANAGIOTIS DELIMATIS, INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS. NECESSITY, TRANSPARENCY AND REGULATORY DIVERSITY (2007); Gabriel Gari, *Recent Developments on Disciplines on Domestic Regulations Affecting Trade in Services: Convergence or Divergence?*, in COHERENCE AND DIVERGENCE IN SERVICES TRADE LAW (Rhea Hoffmann & Markus Krajewski eds., 2020) (forthcoming) [hereinafter Gari].

⁷⁰ Markus Krajewski, *Domestic Regulation and Services Trade: Lessons from Regional and Bilateral Free Trade Agreements*, in RESEARCH HANDBOOK ON TRADE IN SERVICES 216 (Pierre Sauvé & Martin Roy eds. 2016)..

⁷¹ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ¶ 164, W.T.O. Doc. WT/DS161/AB/R and WT/DS169/AB/R, (adopted Jan. 10, 2001).

⁷² See Gari, *supra* note 69.

Yet, a group of fifty-nine WTO members decided to advance discussions on domestic regulation in parallel to the work of the Working Party on Domestic Regulation at the 11th Ministerial Conference of the WTO in Buenos Aires in 2017.⁷³ Since then, members of this Joint Initiative on Services Domestic Regulation met regularly at the WTO, and committed themselves in 2019 to continue work on outstanding issues, with a view to incorporating the outcome in their respective schedules of commitments at the 12th Ministerial Conference originally planned to be held in Nur-Sultan (Kazakhstan) in June 2020. These plurilateral negotiations have been met with strong opposition by a number of developing countries including India and the African group.⁷⁴ Nevertheless, the WTO Members engaged in the plurilateral Joint Initiative seem to be willing to submit draft schedules including a reference paper on domestic regulation based on the outcome of these negotiations. However, it remains unclear how these disciplines could be integrated into the schedules without the final conclusion of the general services negotiations.

IV. REVISITING THE IMPACT OF GATS ON HUMAN RIGHTS AFTER TWO DECADES

Twenty years after the initiation of the GATS negotiations, it might be worth reflecting on the original claims about the GATS and human rights and to draw an intermediate conclusion. Unregulated liberalisation and market opening for essential services of public interest can limit the ability of States to fulfil their human rights obligations, in particular the obligations to protect and to fulfil. Hence, the unlimited application of all GATS obligations on these services sectors can be detrimental for the human rights to water, health and education. However, WTO Members can limit the application of the main GATS obligations through careful scheduling, in particular, by excluding publicly financed services from the scope of their commitments or by listing specific regulatory instruments such as public monopolies as limitations of these commitments.

In light of the overall state of the negotiations on further services liberalisation, the pressure on withdrawing existing limitation or increasing the scope of commitments also seems minimal. After their start in 2000, the services negotiations in the WTO came to a first halt after the failure of the Cancún Ministerial Conference in 2003. Members undertook a fresh approach in July 2004

⁷³ World Trade Organization, Joint Ministerial Statement on Services Domestic Regulation, W.T.O. Doc.WT/MIN(17)/61 (Dec. 13, 2017).

⁷⁴ Gari, *supra* note 69.

and engaged in another round of exchanging offers and requests. By December 2005, the total number of initial offers had reached sixty-nine complemented by thirty revised offers. As shown by a WTO Staff Working Paper, the overall level of offers at the time remained small.⁷⁵ Matters did not progress further. In fact, the Doha Round negotiations have come effectively to an end at the WTO Ministerial Conference in Nairobi in 2005 and there are currently no effective multilateral negotiations.

It should also be noted that health and water services have attracted very limited attention in the services negotiations. According to the WTO, health is the only major sector where no negotiating proposal and no collective request has been tabled.⁷⁶ Apart from some initial attempts by the EU, water services have also not been subject of any formal requests or offers. In education services, matters were slightly different: The United States, Japan, New Zealand and Australia tabled negotiating proposals between 2000 and 2002 and Switzerland contributed a paper on its experience in 2005.⁷⁷ However, these proposals seem no longer relevant in light of the general state of the negotiations.

It should also be noted that no WTO dispute addressed education, health or water services. It can therefore be concluded that the impact of the GATS on these services has been minimal. The reasons for this seem manifold.⁷⁸ However, the better understanding of the potential impact of GATS on regulatory space in these areas and the impact of GATS on human rights may have contributed to the overall cautious approach of the WTO Membership towards the liberalisation of education, health or water services.

V. NEW CONTEXTS

A quarter of a century after the conclusion of the GATS, the international law on trade in services is characterised by two trends: On the one side, countries increasingly conclude regional trade agreements with chapters on trade in services

⁷⁵ Rudolf Adlung, *Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers* (WTO Staff Working Paper No. ERSD-2009-05, 2009), <https://ssrn.com/abstract=1345018> (last visited, Apr. 13, 2020).

⁷⁶ *Health and Social Services*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/serv_e/health_social_e/health_social_e.htm (last visited, Apr. 13, 2020).

⁷⁷ Council for Trade in Services-, Special Session, *Communication from Switzerland - Education Services and the GATS: The Experience of Switzerland*, W.T.O. Doc. TN/S/W/39 (Apr. 4, 2005).

⁷⁸ Delimatsis, *supra* note 53, at 5.

which aim at a further liberalisation of services trade. On the other side, the GATS structure still remains the dominant model serving as a basis of many preferential trade agreements.

1. Plurilateral and Regional Approaches Towards Trade in Services Liberalisation

Since March 2013, twenty-three WTO Members, including the EU, US, Canada, Japan and others are engaged in plurilateral negotiations for a new international agreement on trade in services (TiSA).⁷⁹ The aim of these negotiations is to further deepen liberalisation commitments among countries with a strong interest in liberalising trade in services and to adopt an agreement which could potentially be integrated into the WTO framework even though it remains unclear how this could be done with commitments negotiated only among few WTO Members. While the TiSA negotiations seemed to gain significant momentum in 2015 and 2016, they have been stalled since December 2016 in light of the new US trade policy focussing less on multilateral and plurilateral initiatives and more on unilateral approaches. Hence the TiSA negotiations have not yielded any results. However, it is possible that they might be taken up again if the US trade policy approach changes. In any event, health, education and water services do not seem to be at the core of the TiSA negotiations.

The contemporary legal regime of trade in services is not only shaped by the GATS, but also by an ever-growing number of bilateral and regional trade agreements.⁸⁰ While many of these agreements follow the GATS-approach, some of them also deviate from the GATS leading to a regime which is shaped both by coherence and divergence.⁸¹ As of April 2020 the WTO database for regional trade agreements contained 161 agreements which also cover trade in services.⁸²

Most of these agreements are bilateral, for example the EU-Vietnam Trade Agreement or the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) but there are also some noteworthy regional and even mega regional arrangements such as the new United States-Mexico-Canada

⁷⁹ Juan A. Marchetti & Martin Roy, *The TiSA Initiative: An Overview of Market Access Issues*, 48 J. WORLD TRADE 683-728 (2014); Jane Kelsey, *From GATS to TiSA: Pushing the Trade in Services Regime Beyond the Limits*, 7 EUR. Y.B. OF INT'L ECON. L.119-151 (2016).

⁸⁰ Martin Roy et al., *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?* 6 WORLD TRADE REV. 155-192 (2007).

⁸¹ Panagiotis Delimatsis, *Coherence and Divergence in Agreements on Trade in Services: A Drama in Three Acts*, in COHERENCE AND DIVERGENCE IN SERVICES TRADE LAW (Rhea Hoffmann & Markus Krajewski eds., Heidelberg, 2020) (forthcoming).

⁸² *Regional Trade Agreements Database*, WTO OMC, <http://rtais.wto.org/UI/PublicSearchByCrResult.aspx>. (last visited, Apr. 7, 2020).

Agreement (USMCA) or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Services chapters will also be included in the EU-Mercosur Free Trade Agreement, the Regional Comprehensive Economic Partnership (RCEP) and in the African Continental Free Trade Area (AfCFTA). The main principles and obligations as well as the structure of these chapters are sometimes comparable to the GATS, but there are also some deviations. This raises the question if these regional agreements display the same challenges to policies and regulations aimed to protect human rights than the GATS.

2. *Human Rights Impact of FTAs*

Most regional and bilateral trade agreements follow a definition of services which is similar to Article I of the GATS and contain a similar exception for services supplied in the exercise of governmental authority.⁸³ Hence these agreements would usually also cover education, health and water services. There have been some attempts to exclude water distribution from the scope of FTAs. However, a full exclusion has never been realised. One prominent example is Article 1.9(1) of the CETA, recognising “that water in its natural state, including water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product.” Yet, Article 1.9(3) clarifies, “if a Party permits the commercial use of a specific water source, it shall do so in a manner consistent with this Agreement.”⁸⁴ It is therefore clear that there is no general exclusion clause for water and in particular water distribution in CETA.

Another aspect to be considered is the approach towards listing commitments. If regional trade agreements do not follow the positive list approach of the GATS, but a negative list approach, States would have to list measures concerning water services in order to exclude them from the scope of these obligations. For example, the EU made the following reservation in the CETA with regards to water distribution: “The EU reserves the right to adopt or maintain any measure with respect to activities, including services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the supply of drinking water, and water management.”⁸⁵ Similarly, Canada made this reservation: “Canada reserves the right to adopt or maintain a

⁸³ Markus Krajewski, *Public Services Exemptions in EU Free Trade and Investment Agreements*, in *SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET: EXTERNAL AND INTERNATIONAL LAW DIMENSIONS* 243 (Markus Krajewski ed., 2015).

⁸⁴ See also, Alejandro Gonzalez Arreaza, *Water Resources and CETA: A Blueprint for Developing a Discipline for International Trade in Natural Resources*, SSRN (Mar.14, 2017), <https://ssrn.com/abstract=2938957>.

⁸⁵ Comprehensive Economic and Trade Agreement, EU-Can., Annex II – Reservations Applicable in the European Union, Oct. 30, 2016, O.J. (L 11) 23[hereinafter CETA].

measure with respect to the collection, purification and distribution of water”.⁸⁶ As a consequence, the National Treatment and Market Access obligations in CETA do not apply to water services.

Another example concerns health services in the context of the USCMA: Mexico made a reservation indicating that it maintains the right to adopt or maintain any measure related to market access in health services with the exception of private hospital services, private services of clinical laboratories and other private services auxiliary to medical treatment in Modes 2 and 3.⁸⁷ This means that Mexico can regulate public hospital services, but may not impose any market access restrictions on private hospitals in terms of consumption abroad and commercial presence. However, Mexico can limit telemedicine services, as Mexico maintained its regulatory space concerning Mode 1.

Malaysia scheduled a limitation under the CPTPP concerning the adoption or maintenance of any measure with respect to National Treatment concerning public education and public health.⁸⁸ However, unlike Mexico’s limitation under the USCMA Malaysia’s limitation under the CPTPP does not cover the Market Access obligation. Hence, Malaysia would not be allowed to maintain public monopolies or other quantitative restrictions in this regard. Malaysia, can however, exclude foreign service suppliers from these sectors due to the fact that it limited the application of the National Treatment obligation.

VI. FURTHER REMEDIES AND REFORM OPTIONS

Even though a full and comprehensive empirical study into all commitments and limitations concerning water, health and education services in regional trade agreements is beyond the scope of this article, it seems safe to conclude that many countries are sensitive towards these services and the need to maintain regulatory space in this context. In addition to careful scheduling, there are further proposals to mitigate negative effects of trade agreements on human rights.

⁸⁶ CETA, Annex II - Schedule of Canada - Reservations applicable in Canada.

⁸⁷ North American Free Trade Agreement, Can.-Mex.-U.S., Annex II - Investment and Services Non-Conforming Measures – Mexico, Dec. 12, 2019, 32 I.L.M. 289 (1993).

⁸⁸ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Autl.-Bru.-Can.-Chi.-Jap.-Mal.-Mex.-N.Z.-Peru-Sing.-Viet., Annex II Malaysia, Dec. 30, 2018, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/>.

1. General Proposals to Maintain Policy Space and to Limit the Scope of Services Trade Disciplines

Some trade agreements contain a reference to human rights in their preamble. For example, the parties to CETA reaffirm “their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights.” References to human rights in preambles of trade agreements have also been discussed in literature.⁸⁹ However, these references do not change anything substantially. They only recognise the relevance of human rights in the context of the trade agreement. Nevertheless, a reference to human rights in the preamble can at least be used as a tool to interpret provisions of the trade agreement in light of human rights.

Another option which is aimed at strengthening the State’s right to regulate vis-à-vis the obligations of the trade agreement is a provision in the agreement explicitly recognising that right. Such a ‘right to regulate’ clause generally also serves only as interpretive guidance and does not possess any normative force on its own, because the right to regulate is enshrined in the regulatory sovereignty of each state and does not need a specific recognition. Furthermore, the obligations of trade agreements do not limit the right to regulate, but rather how this right is exercised. However, a clause which remains non-operative will not limit the obligations of a trade agreement when they conflict with regulatory approaches aimed at protecting and fulfilling human rights.

2. Enhanced Exception Clauses

Unlike preambular references or ‘right to regulate’ clauses with hortatory language, general exception clauses can mitigate the effect of the substantive obligations of trade agreements on national regulations. The general exceptions clause of Article XIV of the GATS and similar clauses in FTAs allow parties to these agreements to deviate from the obligations under certain circumstances. However, in order to rely on an exception clause, a State must first demonstrate that it pursues a genuinely legitimate policy objective such as the protection of public morals or human life or health. It should be noted that exception clauses are based on closed lists of acceptable public policies. Human rights are usually not among them. In practice, a State can therefore justify the deviation from an obligation in a trade agreement if the measure is necessary to protect human, animal or plant life or health (e. g. Article XIV(b) of the GATS). However, a State could not justify such a deviation

⁸⁹ Susan Ariel Aaronson, *Human Rights, in* PREFERENTIAL TRADE AGREEMENTS POLICIES FOR DEVELOPMENT: A HANDBOOK 443, 450 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).

arguing that it is necessary to protect human rights per se.⁹⁰ Furthermore, the measure in question must be necessary to pursue this objective and must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

In light of the limited list of policy objectives it has been suggested to incorporate a clause which allows States to deviate from the obligations of the trade agreement if they adopt measures which are necessary to fulfil human rights obligations.⁹¹ This would give States the possibility to rely on human rights while defending policy measures. However, the State relying on this clause would still need to prove that measure is necessary, and it would only come into operation as an exception with a limited scope of application.

3. *Human Rights Impact Assessments*

While human rights exception clauses may mitigate potential conflicts between obligations arising out of trade agreements and human rights, they do not address the more general questions concerning whether a trade agreement should be concluded at all or which aspects should be part of the agreement. These questions are at the centre of impact assessments of trade agreements with a specific focus on human rights. Human rights impact assessments analyse the potential impact of an agreement on the human rights situation in the contracting parties. In fact, human rights treaty bodies and special procedures of the Human Rights Council have consistently called upon States to conduct human rights impact assessments of trade and investment agreements.⁹²

⁹⁰ Rachel Harris & Gillian Moon, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years?*, 16 MELB. J. INT'L L. 1-52 (2015); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction - The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353-403(2002).

⁹¹ LORAND BARTELS, GERMAN INSTITUTE FOR HUMAN RIGHTS, A MODEL HUMAN RIGHTS CLAUSE FOR THE EU'S INTERNATIONAL TRADE AGREEMENTS, 37 (2014), http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf.

⁹² James Harrison & Alessa Goller, *Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?*, 8 HUM. RTS. L. REV. 587-89 (2008)[hereinafter Harrison & Goller]; See, Comm. on Economic, Social and Cultural Rights, Rep. on Concluding Observations on the Sixth Periodic Report of Canada, 15 ¶, U.N. Doc. E/C.12/CAN/CO/6(Mar. 6, 2016); General Assembly, Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 77, U.N. Doc. A/72/162 (July 18, 2017).

Human rights impact assessments can be conducted at different moments in time. First, the impact of a trade agreement on human rights can be assessed before the negotiations start. A human rights impact assessment at such an early stage would address general questions and could assess whether negotiations about a trade agreement with the partner country in question should be pursued at all or whether certain elements of trade agreements, such as certain services sectors, should be kept out of the negotiations from the very beginning. Second, the impact of the trade agreement on human rights could also be assessed during the negotiations once certain elements and aspects of the agreement have already been agreed upon, but a final outcome has not yet been reached. In this case, the outcome of the human rights impact assessment could therefore still influence the negotiations. Third, a human rights impact assessment could also be conducted after the end of the negotiations and before the agreement is signed and ratified. This would allow a much more comprehensive analysis. However, it might be difficult for the human rights impact assessment to have a real impact on the actual contents of the agreement. Lastly, it is important to conduct regular human rights impact assessments also after the conclusion of the agreement and during its operation (ex post human rights impact assessment).⁹³ In this context, trade agreements need elements and clauses which would allow a revision or termination of the agreement, should it have negative effects on human rights.

While there is no single method for human rights impact assessment,⁹⁴ the procedure should be guided by a human rights-based approach.⁹⁵ A simple quantitative approach is not sufficient, instead a whole range of factors and potential developments need to be taken into account, some of which could be quantified through the use of numerical benchmarks. However, other effects of a trade agreement on human rights could only be described and analysed in a qualitative way. In any case, oversimplification should be avoided. For example, the graphical description of the impact of the TiSA negotiations on human rights used in the Sustainability Impact Assessment commissioned by the European Union is not convincing as it is only based on the perception of NGOs and stakeholders and does not include any independent assessment of the issues.⁹⁶ In the end, a human rights impact assessment might not yield in a clear

⁹³ Olivier De Schutter (Special Rapporteur on the Right to Food), *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, ¶ 3.3, U.N. DOC. A/HRC/19/59/Add.5 (Dec. 19, 2011) [hereinafter Schutter]; *See also*, Jadranka Petrovic, *Intersecting Trade, Politics and Human Rights: The Negotiation Phase of the Australia-China Free Trade Agreement*, 51 J. WORLD TRADE 67-104(2017).

⁹⁴ Harrison & Goller, *supra* note 92, at 593.

⁹⁵ Schutter, *supra* note 93, ¶ 4.

⁹⁶ *See*, ECORYS, TRADE SIA IN SUPPORT OF NEGOTIATIONS ON A PLURILATERAL TRADE IN SERVICES AGREEMENT 108 (2017), www.trade-sia.com/tisa/wp-content/uploads/sites/7/2014/02/TiSA-Final-Report.pdf (last visited, May 9, 2020).

recommendation whether to conclude or not to conclude an agreement, but could suggest areas of conflict between the agreement and the protection of human rights which might be mitigated through careful drafting of the agreement.

VII. CONCLUSION

The analysis in this article showed that the after an intense beginning to the debate on the impact of GATS on human rights, matters have become subtler. While claims that the GATS forces countries to privatise or commercialise essential services have been exaggerated, it is clear that GATS has the potential to reduce regulatory flexibility and policy space. This potential can largely be mitigated through careful scheduling of commitments and exceptions. From a human rights perspective, States may be obliged to do so in order to maintain sufficient autonomy to meet their obligations to protect and to fulfil. As GATS negotiations have effectively come to a halt, the attention has shifted to plurilateral, regional and bilateral trade agreements with services chapters. Their impact on the human right to water, health and education is similar to the potential impact of GATS on these rights. Again, prudent drafting with the need for regulatory flexibility in mind is called for. Anecdotal evidence suggests that most States are aware of these challenges and try to live up to them.

To assist States in managing any remaining risks of services trade agreements on human rights, two reform options have been suggested: States can include a specific reference to the protection of human rights in the general exception clauses of the agreements, or States should assess the human rights impact on the future and existing trade agreements on human rights to get a clearer picture of how to negotiate and conclude trade agreements as well as to review their operation from a human rights perspective.