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**FEPS YOUNG
ACADEMICS
NETWORK**

**The provision of public
services
between New Public
Management and trade
liberalization**

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A. FEPS YOUNG ACADEMICS NETWORK

The Young Academics Network (YAN) was established in March 2009 by the Foundation of European Progressive Studies (FEPS) with the support of the Renner Institut to gather progressive PhD candidates and young PhD researchers, who are ready to use their academic experience in a debate about the Next Europe. The founding group was composed of awardees of the “Call for Paper” entitled “Next Europe, Next Left” – whose articles also help initiating the FEPS Scientific Magazine “Queries”. Quickly after, with the help of the FEPS member foundations, the group enlarged – presently incorporating around 40 outstanding and promising young academics.

FEPS YAN meets in the Viennese premises of Renner Institut, which offers great facilities for both reflections on the content and also on the process of building the network as such. Both elements constitute mutually enhancing factors, which due to innovative methods applied make this Network also a very unique project. Additionally, the groups work has been supervised by the Chair of the Next Left Research Programme, Dr. Alfred Gusenbauer – who at multiple occasions joined the sessions of the FEPS YAN, offering his feedback and guidance.

This paper is one of the results of the fifth cycle of FEPS YAN. Each of the meetings is an opportunity for the FEPS YAN to discuss the current state of their research, presenting their findings and questions both in the plenary, as also in the respective working groups. The added value of their work is the pan-European, innovative, interdisciplinary character – not to mention, that it is by principle that FEPS wishes to offer a prominent place to this generation of academics, seeing in it a potential to construct alternative that can attract young people to progressivism again. Though the process is very advanced already, the FEPS YAN remains a Network – and hence is ready to welcome new participants.

FEPS YAN plays also an important role within FEPS structure as a whole. The FEPS YAN members are asked to join different events (from large Conferences, such as FEPS “Call to Europe” or “Renaissance for Europe” and PES Convention to smaller High Level Seminars and Focus Group Meetings) and encouraged to provide inputs for publications (i.e. for FEPS Magazine: The Progressive Post). Enhanced participation of the FEPS YAN Members in the overall FEPS life and increase of its visibility remains one of the strategic goals of the network.

B. Authors and Members of the working group



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I. From the Social Democratic State to the Neoliberal State

‘Bureaucracy may take two months to get answer to a letter from a government department, but it takes twenty years for an industry under private enterprise to readjust itself to a fall in demand’¹.

The era of the Neoliberal State is widely understood to have developed during the structural crisis of the Social Democratic State in the 1970s as application of the theories based on the ideas of economists such as Friedrich von Hayek and Milton Friedman. From the outset, neoliberalism was a transnational project in contrast to the nationally-oriented Keynesian projects of the postwar period or Delors’ vision of a social democratic Europe, starting with the United States and the United Kingdom abolishing capital controls in 1974 and 1979. Within the space of a few years during the 1970s, the ideas of these neoliberal economists began to obtain a great support as the answer to the perceived failing of the Social Democratic State².

Although the definition of neoliberalism is therefore debated³, a generally agreed criteria is the preference for market forces over other, particularly state based, forms of economic organization and management. At the macroeconomic level, the neoliberal economic recipe translated into the rejection of countercyclical policies. While the Keynesian model was addressed more often via forms of non-market coordination that entail an invasive presence of the State, in the Neoliberal model capitalists relies more heavily on market relations to resolve their coordination problems.

Neoliberalism became increasingly prominent as a form of governance around the world in the second half of the 20th century (Peters 2001). Neoliberalism feeds from classical political economy theory, by virtue of which markets - and societies, up to a certain extent - should be completely liberated from any type of governmental interference (Smith 2009). The growing hegemonic prominence of neoliberalism has produced vast changes at the individual-level, the national-level and the international-level. Neoliberalism’s focus on the individual means that ideas related to things such as ‘the public good’ and ‘the community’ are now being discarded as unnecessary components of a welfare state (Martinez and García

¹ J. Robinson, "Obstacles to full employment 1", *Nationaløkonomisk Tidsskrift* 84 (1946), p. 28

² C. Crouch, "The strange non-death of neo-liberalism", *Polity*, 2011.

³ R. Venugopal, "Neoliberalism as concept" (2016) *Economy and Society* 165, pp. 172-177.

2000). At the national-level, neoliberal ideas have heavily promoted market-based economies that highly value competition and efficiency, leading to the economic liberalization/rationalization of the state, the restructuring of state sectors, and the dismantling of the welfare state. According to Harvey (2007), the ideas of capitalism have been infused into political, social, and cultural institutions at the state-level.

Economic neoliberalism is an economic theory that supports maximizing the economic freedom for individuals and thus reducing the amount of state intervention to the bare minimum. In this regards, it does advocate the elimination of government-imposed restrictions on transnational movements of goods, capital and people (Harmes 2012). Neoliberal policies aim to increase the overall level of wealth in an economy via market forces. However, they have been ‘explicitly uninterested in the distribution of this wealth’, because in their theories the resulting economic growth will enhance the general level of wellbeing in society as a whole due to trickle-down effects⁴⁵.

Neoliberalism is not only a set of economic ideas but also policy programme and even a cultural trend. This confronts us to the difficulties of defining what exactly neoliberalism is, which makes its all-encompassing nature a prerequisite for its universalization. Another reason for the pervading gallop of neoliberalism in the political, economic and social realms is its success to contrive its own theoretical off-springs that are based on the same simple assumptions that neoliberalism advocates. Neoliberalism either multiplies its ideological principles for the functioning of markets to areas that were previously considered to be non-economic or it rewrites well-known social ideas so that they fit into its framework.

We have to underline that neoliberalism has been highly intolerable to any attempts for alternative thinking. Ideas and proposal that did not accept among others profit maximization, liberalization of economy (inclusive for privatization), deregulation, tax deduction and shrinking of the state are simply claimed to be superficial or esoteric. International financial institutions (IFI) have often promoted neoliberal economic recipes. In their scientific studies IFI relied on the neoclassical economics to back-up neoliberalism. In the early eighties, those researchers and organizations affiliated with the ideological frame of neoliberalism neglected any other variable outside of the market as explanatory for the

⁴ *Ibid.*

⁵ C. Crouch, “*The strange non-death of neo-liberalism*”, Polity, 2011.

economics. Just the contrary, there have been endless theoretical and empirical attempts to subdue the social and political (in other words the non-economic) to the market thinking, virtually reducing all social processes and phenomena to quantifying of invariant supply, demand and utility maximizing.

II. Neoliberalism and globalization

In an era of economic globalization, as national economies became more interdependent, neoliberals also promoted free-trade policies and the free movement of international capital. Although aspects such as the elimination of government-imposed restrictions on transnational movements of goods, capital and people are considered important aspects of globalization, globalization is a multi-dimensional process that extends beyond transnational economic transactions. It was in 2017 and in a deeply symbolic scenario, the Davos World Economic Forum, that Chinese president Xi Jinping, when warning against trade wars, portrayed himself as a 'defender of globalization'. He then made it clear that there are many sides to globalization, and that globalization is not just about capital and commodities. Globalization also means a free flow of ideas, opinions and individuals, something neither Chinese leaders nor other illiberal leaderships seem to realize, something progressive politics should pursue at all times, therefore fighting the empty blanket criticism against 'globalization'. Free trade is not 'evil' in itself, and globalization should be assessed and gauged taking into consideration the specifics of its implementation in the particular scenario that is subject to analysis.

According to Litonjua (2008), "globalization is the global spread of the economic system of capitalism. Promoted by the ideology of neoliberalism, the goal is a wholly deregulated global market society". Neoliberalism being a contentious term, and conceptual rigour often lacking when discussing and utilizing to the concept, there is a risk of assuming and blindly believing that main elements fundamental to the proliferation of economic globalization, such as reductions in trade barriers and capital controls, constitute evidence for the fact that globalization is primarily driven by neoliberal doctrine (Kotz 2000). We might however argue that globalization is not a product of a completely deregulated global economy. Globalization should not be considered a unified political process aimed at achieving a specific goal, nor a single process driven by a hegemonic class committed to an extreme

form of economic liberalism.

Globalization is defined by Held *et al.* (1999) as “a process (or a set of processes) which embodies a transformation in the spatial organization of social relations and transactions”. Therborn (2000) speaks about “tendencies to a world-wide reach, impact, or connectedness of social phenomena”. Globalization therefore brings about “deterritorialization” (Sheuerman 2010), enhanced interconnectedness across territories. Globalization is a phenomenon that has existed throughout history, scholars distinguish several ‘waves’ of globalization, mainly dependent on political and technological factors. We are nowadays experiencing a sixth wave of globalization (Therborn 2000) facilitated specifically by political developments that include a reduction in economic protectionist measures, lower transportation costs, and the rise of Information and Communications Technologies, namely the internet (Naím 2009). From a global perspective, the promotion of “free trade” and unrestricted capital mobility have been codified in a series of international treaties. Combined with dramatically reduced costs for transport and the information revolution, this created a set of specific pressures and constraints for countries and for demand-oriented Keynesian macroeconomic policies. The reduction of trade barriers and enhanced capital mobility together with the application of new information-based technologies facilitated the emergence of free trade agreements that nowadays extend way beyond the mere exchange of goods and put a particular emphasis on the trade of services.

III. Neoliberalism and New Public Management

For 35 years neoliberalism has evolved significantly and has created a vast spectrum of subsidiary theories that fit its logics. Assuredly, after the multifaceted crisis (2007-onwards) neoliberalism has been under severe criticism by many sides. However, it is far too early to accept that neoliberalism has gone. There two assumptions in support here: first, as we explained, neoliberalism is highly fluid and second, it has created off-springs that are currently considered as non-alternative. Ideas and concepts such as public choice theory, capability theory, the concept of good governance and others are still vital and form many of the decision-takers attitudes, both from the left and the right, towards public policy making. New public management is one of these off-springs of the neoliberal mainstream ideological thinking that has shaped public administration for quite a long time. In a simplified manner,

NPM is about integrating market principles in public administration activity. Imputing principles from the business and private sector such as efficiency and cost-benefit into public administration work (that is the functional expression of the public policies implemented by the executive authority) has shaped it for quite long time. Many state officials has been trained, consulted and preached into the NPM idea. (Dreshler 2005) Thus, although the criticism against NPM is strong and solidly argued against both theoretically and empirically, practitioners still tend to imply those practices. That's why NPM impact is still felt across the continent, especially in times when European societies experience severe problems with social cohesion and trust in public institutions vis-à-vis the refugee crisis. Rooting NPM in the countries from Eastern Europe after 1990 seems to be the most problematic. This is due to the fact that prior to 1989 the official regime of state socialism was largely based on a state-party administration that has governed formidable parts of the relations between citizens and between the citizens and the state. As argued here above, introducing NPM with neoliberal reforms resulting in a contraction of the state has led to unprecedentedly low levels of trust especially in those countries where the reforms were stylized under the shock doctrine.

The neoliberal logic has become dominant within economic governance in the UK over recent decades. This process has been actualised in a variety of ways, as the deregulation and the subsequent growth of the financial services industry⁶, the introduction of New Public Management practices to the public sector⁷, and depriving the democratic forums and increasing political power for global economic elites⁸.

In the case of the UK, ideas about New Public Management have been realised in a number of ways, including the increased fragmentation of public service provision through outsourcing, privatisation and other forms of decentralisation, and the institutionalisation of competitive processes both within public bodies and between a variety of providers in the public, private and third sectors.

Meanwhile the New Public Management in the early 1980s underlined the virtues of the market as competition and scaling down, in the 1990s the New Public Management "will to

⁶ A. Major, "Neoliberalism and the new international financial architecture." *Review of International Political Economy* 19.4 (2012): 536-561.

⁷ J. Le Grand, "The politics of choice and competition in public services." *The Political Quarterly* 78.2 (2007): 207-213.

⁸ C. N. Murphy, "Global governance: poorly done and poorly understood." *International Affairs* 76.4 (2000): 789-804.

reinforce the control of managers over professionals by employing instruments for assessing and piloting the latter's activity" ⁹. In this period it was characterized by three features: (1) the necessity to decentralize the administration runs by managers whose responsibility is thereby reinforced; (2) create competition among public service providers, in order to improve the services for citizens; (3) create instruments to assess and measure performance and services.

In this new framework, the public manager's discretion was substituted by a system of bonus and automatic regulation. The production of public goods and services discovered a new era. The introduction of achievements to be assessed, and a huge variety of indicators and targets have transformed the public sector. All the activities have to reach the targets imposed and public indicators will rate the quality of the services. The indicators are public and all the citizens could see and decide what is the best service offered by the public sector. Further, the users of these public services have been increasingly constructed as 'citizen-consumers' requiring a range of information on the quality of services in order to enhance their position in the market, and the driver of quality service provision has shifted away from the notion of professional and public service ethics to targets and financial incentives.

NPM implementation has many problems, but foremost is the deletion of difference between public and private interest. NPM has led to erosion of the welfare state, advocating public administration to treat citizens as costumers. Most importantly, however, it brought to undermining such basic principles of democracy as the subject's definition of the realization of the public interest (common good). *"The use of business techniques within the public sphere thus confuses the most basic requirements of any state, particularly of a democracy, with a liability: regularity, transparency, and due process are simply much more important than low costs and speed."* (Dresher 2005:) NPM served for the depletion of democracy also by the s.c. decentralization paradox (Mongkol 2011) in two ways: first, public managers concentrated more power but removing the democratic accountability process by them through detaching public administration from the specific of the connections between citizens and authorities of the welfare state and second, NPM strives for giving out to private

⁹ P. Bezes et al., "New public management and professionals in the public sector. What new patterns beyond opposition?", *Sociologie du travail* 54 (2012): 1-52. P.14

companies functions that has been previously executed by local or central government like gas or water delivery (Crouch 2011).

IV. The Comprehensive Economic and Trade Agreement between the EU and Canada, the provision of public services and the NPM paradigm

The rise of the neoliberalism and the “new public management” (NPM) paradigm has gone hand in hand with trade liberalization and deeper economic integration.¹⁰ The establishment of the WTO marked a quantitative leap in international trading regime.¹¹ Notably, it enlarged the scope of the old GATT 1947 by introducing, amongst others, rules on trade in services. As the importance of services in global economies grew, the liberalization of cross-border trade in services became a priority in the global trade agenda.¹² In this regard, it has also been showed that services trade is key to fostering economic growth.¹³ However, two main obstacles stand in the way of full services liberalization. For one, owing to their characteristics¹⁴, cross-border liberalization of trade in services is generally more difficult.¹⁵ Secondly, the notion of “service” is rather broad and, crucially, includes public services. Although this notion tends to vary from country to country, it is possible to identify the following distinctive features. Public services are generally (i) provided in the interest of the country, (ii) satisfy social needs and (iii) are universal and accessible.¹⁶ The GATS seems to

¹⁰ J. Johnston, G. Callender, “Multiple Perspectives on Economic Rationalism and the New Managerialism: Power and Public Interest?” (2000) 22 *Administrative Theory & Praxis* 585, 587.

¹¹ See A. Lang, *World trade after neoliberalism* (Oxford University Press, 2013).

¹² B. Hoekman, M. Kostecki, *The Political Economy of the World Trading System: WTO and Beyond* (Oxford University Press, 2001)

¹³ B. Hoekman, A. Matoo, “Services trade and growth”, World Bank, 2007, at <http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth Commission Workshops Global Trends Hoekman Mattoo Paper.pdf> (accessed on 4 April 2017), pp. 2-14.

¹⁴ “The characteristics most frequently noted include: Intangibility—services are difficult to touch. To paraphrase the newspaper *The Economist*, services are products you cannot drop on your foot. Consequently, international transactions in services are often difficult to monitor, measure and tax; Nonstorability—it is often impossible to store services in inventory. This implies that not only is it more difficult to trade services across space, it is also difficult to trade across time. Heterogeneity—services are often nonstandardized and highly tailored to the needs of customers. There is therefore a considerable degree of variation in what is effectively supplied across international borders. The extent of product differentiation is very great. Joint production—services are typically produced and consumed at the same time, with customers participating in the production process (in business school parlance, services are often a high-touch industry)”. *Ibid.*, p. 239

¹⁵ *Ibid.*,

¹⁶ B. Choudhury, *Public Services and International Trade Liberalization: Human Rights and Gender Implications* (Cambridge University Press, 2012) p. 70

solve this issue by introducing an exemption for services provided in the exercise of governmental authority.¹⁷

Due to stalemate of the Doha Round, the international trading regime has increasingly drifted away from multilateralism and embraced bilateral and plurilateral trade liberalization. States have increasingly resorted to bilateral and plurilateral agreements to attain deeper economic integration between their contracting parties. Such treaties contain more pervasive States' commitment on the matters covered by the WTO ("WTO plus" provisions) and regulate matters falling outside the scope of the WTO agreements ("WTO X" provisions).¹⁸ In line with this tendency, the EU has recently concluded several such agreements, namely the Comprehensive Economic and Trade Agreement between Canada and the EU, the EU-Vietnam FTA, and the EU-Singapore FTA, and is negotiating other similar trade agreements with third countries. This section sifts through the provisions set out in the CETA, which may directly or indirectly affect the design of public service policies. In particular, it seeks to assess whether these rules are congenial to the NPM paradigm.

(i) Free provision of services

To start with, all the EU agreements contain rules on cross-border provision of services are characterized by a rather broad scope of application. Article 9.2 of the CETA provides that they apply to:

measures adopted or maintained by a Party affecting cross- border trade in services by a service supplier of the other Party, including a measure affecting:

(a) the production, distribution, marketing, sale, and delivery of a service;

(b) the purchase of, use of, or payment for, a service; and,

(c) the access to and use of, in connection with the supply of a service, services which are required to be offered to the public generally.

The CETA adopts the "negative approach" in liberalising services. That is to say, it liberalises the provision of all services except for those expressly excluded. This choice markedly differ

¹⁷ Art. I (3) (c) of the GATS. As will be shown below, this exception only applies to a limited number of public services.

¹⁸H. Horn H., P. C. Mavroidis, A. Sapir, "Beyond the WTO? An anatomy of EU and US preferential trade agreements" (2010) 33 World Economy 1565.

from that included in previous trade agreements (“positive approach”).¹⁹ For instance, under Article 7.7 of the EU-South Korea FTA, the liberalisation only affects the services included in the Annex 7-A attached to the agreement. What is more, the CETA contains two further provisions, namely the ratchet and standstill clauses²⁰, which amplify the effects of the liberalization provisions. The former locks in the level of services liberalization set out in the agreement. The latter stipulates that if “*a party liberalizes a non-conforming measure...then it cannot subsequently make it more restrictive*”.²¹ However, the CETA excludes the “*services supplied in the exercise of governmental authority*” from their scope of application. The scope of this exception mechanism is still unclear. According to the Commission, this clause excludes all public services from the scope of application of the treaties. However, it is at least questionable whether this exception is capable of shielding all or at least a sufficient number of public services from the liberalisation rules set out in the agreements. As this provision echoes Article I:3 of the GATS, it is likely to be interpreted by taking into consideration the meaning of this rather murky phrase in the WTO context. Under Article I:3 of the GATS, a service is a manifestation of sovereign powers on condition that it is not provided on a commercial basis and is not supplied in competition with one or more service suppliers. In short, these services are not provided with the aim of making profits and have no substitutes in the geographic area in which they are supplied.²² It is well known that nowadays a wide range of public services does not satisfy these two conditions. Therefore, it can be safely argued that EU post-Lisbon trade agreements would apply to the provision of public services, such as water or energy supply. It also bears noting that the same approach is reflected in the Transatlantic Trade and Investment Partnership (TTIP) with the US and in the Trade in Services Agreement, a WTO multilateral agreement currently negotiated by twenty-two States and the European Union. In addition, the CETA provides for a number of reservations to limit the impact of liberalization provisions with respect to certain kinds of services. First, Annex II allows derogation from the market access obligation for “services

¹⁹ W. Shan, S. Zhang, “Market Access Provisions in the Potential eu Model bit: Towards a “Global bit 2.0”?” (2014) 15 *Journal of World Investment and Trade* 422, 437-438.

²⁰ Article 9.7, CETA. For a more detailed analysis of this clause see P. Muchlinski, “Regulating Multinational Enterprises” in M Bungenberg, C. Herrmann, M. Krajewski, J. P. Terhechte (eds), *European Yearbook of International Economic Law* (Springer, 2016), 398.

²¹ M. J. Jovanovic, *International Handbook on the Economics of Integration: Factor Mobility, Agriculture, Environment and Quantitative Studies* (Edward Elgar, 2011) 443.

²² E. H. Leroux, “What is a “Service Supplied in the Exercise of Governmental Authority” Under Article I:3(b) and (c) of the General Agreement on Trade in Services?” (2006) 40 *Journal of World Trade* 345, 354, 384.

considered as public utilities at a national or local level”. This provision goes on to specify that public utilities include a vast array of services, such as environmental services, health services and transport services. Second, Member States and the EU can limit the acquisition of shares of State-owned enterprises providing health, social and education services. A third important reservation permits the adoption of measures with respect to the supply of publicly funded health services and some privately funded health services, with the exception of privately funded hospitals or ambulance services. In this regard, it should be noted that several Member States have appended reservations concerning the latter category of health services. Fourth, the EU made a further reservation to limit market access and national treatment for cross-border trade in human health services. Moreover, the provisions of cross-border provision of services are further qualified by two other reservations, which allow the enactment of measures concerning State-funded education services and social services. Last, but not least, the CETA contains reservations concerning environmental and energy services. In terms of the former, the market access and national treatment obligations are limited with regard to water purification, management and distribution. As for energy services, several Member States have attached reservations to preserve existing national monopolies.

The service liberalization provisions set out in the CETA should be read in light of the Joint interpretative statement issued on 26 October 2016 pursuant to Article 31(3) a) of the Vienna Convention on the Law of Treaties. This statement provides that:

a) The European Union and its Member States and Canada affirm and recognise the right of governments, at all levels, to provide and support the provision of services that they consider public services including in areas such as public health and education, social services and housing and the collection, purification and distribution of water.

b) CETA does not prevent governments from defining and regulating the provision of these services in the public interest. CETA will not require governments to privatise any service nor prevent governments from expanding the range of services they supply to the public.

c) CETA will not prevent governments from providing public services previously supplied by private service suppliers or from bringing back under public control services that

governments had chosen to privatise. CETA does not mean that contracting a public service to private providers makes it irreversibly part of the commercial sector..

Then, it goes on to clarify that:

“Canada and the European Union and its Member States may regulate the provision of public services such as social security and insurance in the public interest. The European Union and its Member States and Canada confirm that compulsory social security and insurance schemes are excluded from the Agreement pursuant to Article 13.2(5) or are exempted from liberalisation obligations of the Agreement on the basis of the reservations the European Union and its Member States and Canada have taken on social and health services”.

(ii) State-owned enterprises

The CETA includes a specific chapter to regulate State-owned enterprises. Under these rules, the Contracting States must run State-owned enterprises in accordance with the tenets of economic rationality. In particular, such enterprises shall base its decisions on economic considerations, such as “price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale²³” unless this would run counter the terms of their public mandate.²⁴ Again, the TTIP embraces a similar approach with respect to services provision. The negotiating documents recently leaked reveal that the agreement between the EU and the US stipulates that the activity of State-owned enterprises shall be governed by economic considerations.

(iii) Investment protection

The CETA rules on investment protection may also affect the provision of public services. The investment chapter contains a vast array of investment protection standards, such as the fair and equitable treatment, the most favoured nation clause, the national treatment clause and the expropriation clause, that can be invoked by private investors to challenge Contracting States measures. As a matter of fact, these rules confer on private investors the

²³ *Ibid.*

²⁴ Article 4, Section III, EU-Vietnam FTA; Article 18.5, CETA.

power to bring the Contracting States before arbitral tribunals or semi-public international adjudication bodies²⁵. In this respect, it should be observed that the investment protection rules set out in the CETA seem to be more balanced than those of EU Member States.²⁶ Notably, it designs (i) the standards of treatment in a more precise manner, (ii) includes exception and carve out mechanisms and (iii) establishes a dispute settlement mechanism that at least in theory seems to be capable of ensuring more transparency and consistency than the traditional investor-State arbitration.²⁷

(iv) Assessment

The rules contained in the CETA seem to be functional to privatization strategies or at least congenial to the preservation of a prominent role of private businesses in the delivery of public services. First, the liberalization rules read in conjunction with the standstill and ratchet clauses prevent the Contracting States from enlarging the range of publicly provided services, even when the “republicization” of certain services would be more efficient.²⁸ Secondly, the exception covering the activities carried out in the exercise of governmental authority is likely to exempt only fundamental sovereign functions.²⁹ Thirdly, the breadth and the impact of the “public utility” clause are still very uncertain, not least because of the murky concept of public utility.³⁰ In this respect, it is worth noting that even the Commission highlighted the obscurity of this notion in the context of the GATS.³¹ Therefore, it is not possible to rule out that this notion would be restrictively interpreted thereby opening the way to the liberalization of services that are generally provided by public entities. Last, the reservations do not apply to the provisions set out in the investment chapter. For all the effort made to design such provisions in a more balanced manner, they could nonetheless discourage the reform of public services provision. Faced with the threat of investment

²⁵ See the Investment Court system set out in the CETA and in the EU-Vietnam FTA.

²⁶ C. Titi, “International Investment Law and the European Union: Towards a New Generation of International Investment Agreements” (2015) 26 *European Journal of International Law* 639, 654-658.

²⁷ *Ibid.*

²⁸ H. Maier-de Kruijff, D. Kainrath, T. Tannheimer, “What is the problem with TTIP? How public services are affected by TTIP and what can be done about it” (2016) FEPS Policy Brief, 6.

²⁹ A. Arena, “Revisiting the Impact of GATS on Public Services”, in M. Krajewski (ed), *Services of General Interest Beyond the Single Market - External and International Law Dimensions* (Springer, 2015) 505.

³⁰ M. Krajewski, “Model clauses for the exclusion of public services from trade and investment agreements” (2016) *European Federation of Public Service Unions* 3-4.

³¹ European Commission, “Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists)”, 28 February 2011, TRADE.B.1/SJ D(2011).

claims, States may be induced to refrain from enacting far-reaching public service reforms.³² For instance, it is likely that the “republicization” of water services or even measures aimed at controlling water tariffs would be challenged on the basis of the fair and equitable treatment standard and the expropriation clause laid out in Chapter VIII of the CETA.³³

V. The way forward: some modest proposals for the negotiation of future EU trade agreements

In the motion for resolution on CETA of 8 February 2017, the S&D group expressed its regret that “*the text of CETA is not clear in that existing public services and any such services that may emerge in the future are not governed by the provisions of CETA*”.³⁴ The EU is currently negotiating a number of trade agreements with third countries, including Japan, India, China and the US. These agreements, and, particularly, the chapters regulating the cross-border provision of services should break away from the NPM paradigm by clearly exempting public services from the application of liberalization commitment. Notably, they should not directly or indirectly lead Contracting States to privatize or keep in private hands services of public interest. In other words, these agreements should leave discretion to the Contracting States over how to provide such services. It is possible to envisage different solutions to achieve this objective.

- **A horizontal blanket exception covering all public services** – Such a provision would exempt all public services from the application of provisions of the agreement.³⁵

Alternatively,

³² This phenomenon is often referred to as “regulatory chill”. See K. Tienhaara, “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in C. Brown, K. Miles (eds), *Evolution in investment treaty law and arbitration* (Cambridge University Press, 2011).

³³ There are several cases in point. See *Compañía de Aguas del Aconquija, SA (AdA) & Compagnie Générale des Eaux v Argentina*, ICSID Case No ARB/97/3, 21 November 2000 (Award); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 14 July 2006 (Award); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, 21 October 2005 (Decision on Respondent’s objections to jurisdiction); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008 (Award). For a detailed analysis of the investment disputes arose out of water concession agreements see P. Thielbörger, “The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?” in P. M. Dupuy, E. U. Petersmann, F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009).

³⁴ *Motion for a resolution to wind up the debate on the statement by the Commission pursuant to Rule 123(2) of the Rules of Procedure on the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, (2017/2525(RSP)), 8 February 2017, para. 2.

³⁵ H. Maier-de Kruijff, D. Kainrath, T. Tannheimer, “What is the problem with TTIP? How public services are affected by TTIP and what can be done about it”, *op.cit.*, 10.

- **Clarifying the existing exceptions and reservations** – Future agreements should define the notion of public service under the agreement.³⁶
- **Dropping the standstill and ratchet clauses** – Future agreements shall allow Contracting States to backtrack on liberalization decisions.
- **Exempting public services from the application of investment protection rules** – Future agreements should bar foreign investors from invoking investment protection rules to challenge public service reforms. Alternatively, the EU should contemplate the possibility to conclude treaties without an investor-State dispute settlement, especially when the counterparty has an advanced legal system that ensures an adequate protection of property and contractual rights.

³⁶ M. Krajewski, “Model clauses for the exclusion of public services from trade and investment agreements”, *op. cit.*, 7.

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