Environmental Services of General Interest in the WTO: no love at first sight

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I. Introduction

The last couple of years have seen lively political debates about the impact of the law of the World Trade Organization (WTO) on national environmental regulation. Most of these debates have focused on the regulation of the production, processing and consumption of goods. Services and the impact of WTO law on services regulation only recently entered the picture, the regulation and provision of public services or services of general interest being of particular concern. Many of these services have a direct environmental connotation, especially environmental infrastructure services such as wastewater treatment or refuse collection. It is therefore of interest how WTO law, especially the provisions of the General Agreement on Trade in Services (GATS), influence the rules adopted at the national level to ensure high-quality, efficient and accessible environmental services of general interest.

The aim of this article is to sketch out the scope of potential conflict between WTO rules and regulation of environmental services of general interest. It will be argued that the regulation and provision of environmental services of general interest often and traditionally involves legal regimes and policy instruments which are at odds with WTO rules on trade liberalisation and their underlying philosophy. This concerns public monopolies, exclusive service contracts, economic needs tests and other forms of regulatory control. This article will show that it is fair to say that there is no love at first sight between WTO rules and environmental services of general interest. However, it will also highlight the flexibility of GATS and how this flexibility can be used effectively. In its concluding section the article will raise the question as to whether there is the potential for love at second sight.

To present the arguments for this article, two existing strands of debate need to be considered and combined: First, the discussions and controversy about GATS and public services and second, the impact of GATS and current GATS negotiations on environmental services. After a short review of the WTO and GATS in particular (Part 2.), the article will address each debate in turn. Part 3 explores the relationship between public services or services of general interest and GATS by analysing the exception for governmental services under GATS and the core obligations of the agreement, while Part 4 examines environmental services in the context of GATS, in particular the current GATS negotiations on further liberalisation of trade in services. The recurrence of certain arguments and themes throughout this article demonstrates the linkages between both debates and reveals the main aspects of the impact of GATS on environmental services of general interest.

II. A primer on the WTO and GATS law

The principles and rules of the WTO affecting and relating to environmental services of general interest can be found mainly in the General Agreement on Trade in Services (GATS). This section gives readers not familiar with this agreement a short introduction into its main characteristics and legal structure. Since GATS is part of the WTO, a very short overview of the WTO may also be useful for "trade law novices". For more comprehensive coverage, readers are referred to the ever growing body of literature on this subject1.

1. Overview of the WTO

The Marrakesh Agreement Establishing the World Trade Organization was concluded in 1994 and
entered into force on 1 January 1995. The agreement contains the results of the Uruguay Round on multilateral trade negotiations, which lasted from 1986 to 1993. The WTO is the legal successor to the General Agreement on Tariffs and Trade 1947, which served as the negotiating forum and dispute settlement institution for the international trade regime since the late 1940s. The WTO has currently 147 Members. Over 20 countries, including Russia, are negotiating their accession to the WTO.

According to its founding agreement, the WTO is to provide the common institutional framework for the conduct of trade relations among its Members. Like its predecessor, the WTO’s main functions are to facilitate trade negotiations and to settle trade disputes. Unlike the World Bank, the IMF or other international organisations, the WTO as an institution has only very few operative capacities. The WTO’s decision-making process (agenda-setting, development and implementation of WTO law) relies almost exclusively on the WTO membership. In line with this, the WTO Secretariat has no right of initiative but fulfills supportive and administrative functions mandated by the WTO membership. The WTO can therefore aptly be described as a “member-driven” organisation.

Decisions in the WTO are mainly taken by consensus, which gives every member a formal right of veto. However, in practice the WTO’s decision-making process is dominated by the major trading powers, notably the EC and the US. All WTO organs except the dispute settlement panels and the Appellate Body are plenary organs, i.e. all WTO Members are members of each organ. However, due to limited personnel and financial resources, many delegations do not attend all of the meetings.

Unlike GATT 1947, the WTO has an obligatory dispute resolution procedure with a standing Appellate Body to hear appeals against decisions of the dispute settlement panels. The decisions of the Appellate Body, which become binding almost automatically and which can be enforced through trade sanctions, are in many ways the most visible part of the WTO. The impressive body of case law, decided in the first ten years of the WTO’s existence, reveals a more or less consistent jurisprudence clearly rooted in the interpretative principles and rules of general public international law. Many of the decisions of the WTO’s dispute settlement mechanism concern highly controversial subjects, including a number of important aspects of the relationship between trade and the environment such as the Shrimp/Turtle case or the Asbestos case.

The substantive rules and obligations of the WTO agreement are contained in a number of multilateral and plurilateral trade agreements annexed to the WTO agreement. These can be distinguished according to their subject matter: The first “pillar” of WTO law concerns trade in goods and contains GATT 1994 as the core agreement and twelve additional agreements addressing special aspects such as technical barriers to trade, sanitary and phytosanitary measures, agriculture, textiles, antidumping and subsidies. The second “pillar” relates to services and contains the General Agreement on Trade in Services (GATS), which is the focus of the present article. The third pillar contains the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

2. Scope of GATS

As mentioned above, GATS is one of the core agreements of the WTO. The WTO’s decision-making and dispute settlement rules therefore also apply in the context of GATS. GATS applies to “measures of Members affecting trade in services” (Article I:1 GATS). “Measures of Members” include governmental measures at all governmental levels (central, regional and local) and measures of non-governmental bodies vested with regulatory powers delegated to them by a government agency. While GATS does not define the term “services” as such, it excludes from its scope services supplied under “governmental authority”. This exclusion is of particular importance in the context of services of general interest and will be analysed in greater detail below. GATS defines “trade in services”, and thus