Regulation of environmental services and the GATS

Conflict or mutual support?

Die Marktentwicklung von Umwelt-Dienstleistungen ist in hohem Maße politikabhängig. Dabei spielen neben internationalen Abkommen wie GATS auch vielfältige nationale Regelungen ein Rolle. Doch wie können verschiedene Instrumente aufeinander ausgerichtet werden, um positive Entwicklungen zu unterstützen?
Von Markus Krajewski

The General Agreement on Trade in Services (GATS), which entered into force as one of the agreements administered by the World Trade Organization (WTO) in 1995, is a key element of the international framework on trade in services. It has a profound impact on trade in environmental services and on the regulation of such services aimed to ensure high-quality, efficient and accessible environmental services. This contribution addresses the scope of potential conflict between WTO rules and regulation of environmental services, but it will also highlight the flexibility of GATS and how GATS can be used to reinfore regulatory policies (1).

Domestic regulation of environmental services

The provision of environmental services often constitutes a natural monopoly, in particular if large infrastructure networks are required. Typically, the supply of water or the collection of sewage are considered natural monopolies. Without government interference, the provision of such a service through an unregulated market would either result in inefficient duplication of networks or exploitation of consumers.

Furthermore, many environmental services have characteristics of a public good. A public good is not usually provided by private economic agents without governmental assistance, because the non-exclusive and non-rival character of a public good does not promise adequate returns. The general health and safety benefits of refuse collection in public places are a typical example for such positive external effects. Hence, refuse collection in public places is considered a public function. For these reasons, strict regulatory control through exclusive contracts, economic needs tests, technical standards and licensing requirements is still a key feature in many environmental services regimes.

Public services and GATS

GATS does not apply to services supplied under governmental authority. The term governmental authority is further defined in Article I:3 (c) GATS as services which are supplied "neither on a commercial basis nor in competition with one or more service suppliers". The meaning of this definition is open to further interpretation and has been the cause of some irritation both inside and outside the WTO. This stems from the potentially wide scope of the notions "commercial basis" and "in competition". It is generally agreed that a service supplied "on a commercial basis" can be defined as a service supplied on a profit-seeking basis. Services are supplied "in competition" if two or more service suppliers target the same market with the same or substitutable services. As a consequence, only services which are supplied on a non-profit basis by a public monopoly supplier are excluded from the scope of GATS.

This shows that the scope of GATS does not exclude particular services because of their nature as a service of general interest, or because of their characteristics as a governmental service under national law, or because they are supplied by a public authority. Rather, non-competitiveness and non-commerciality determine whether a service sector is covered by GATS. In other words, a WTO member wishing to exclude a particular service from the scope of GATS must ensure that this service is supplied on a non-profit and non-competitive basis. For example, if drinking water is distributed by a government department or a state-owned company on a monopoly basis and at a very low subsidised price, which prevents the distributor from making a profit, it can be argued that drinking water distribution is a service which would fall outside of the scope of GATS.

Many environmental services today are not supplied exclusively by a government or a public entity. Many are supplied on a profit-seeking basis, especially when they are provided through hybrid financing forms such as public-private partnerships or private financial initiatives, as these forms of financing public services involve profit seeking on the part of the private partner. It is therefore safe to assume that most environmental services are covered by GATS.

Areas of potential conflict

The GATS does not prevent WTO Members from establishing and maintaining special regimes for the provision of environmental services. It neither requires nor precludes a particular regulatory framework. However, GATS disciplines influence

the adoption and implementation of specific regulatory instruments. Furthermore, current GATS disciplines as well as future liberalisation commitments create a political momentum towards liberalisation.

Therefore, a regulatory regime which relies on government intervention in the market and restrictions on economic activities may be subject to greater constraints under GATS than a system relying on competition and market forces. In this respect, the traditional provision of environmental infrastructure services such as the supply of drinking water to households, the collection of waste water or the collection and disposal of refuse seems to emerge from a different culture to that of GATS, with its emphasis on liberalisation and market-based instruments.

The relative tension between environmental services and GATS provisions can be shown for example by reference to the GATS market access obligation (Article XVI). This obligation requires the abolition and precludes the establishment of public monopolies or exclusive service suppliers unless a WTO member has scheduled a specific limitation to its commitment (Article XVI:2 (a) GATS). Monopolies and exclusive service suppliers are, however, regulatory instruments which are typically used in the context of environmental services. Article XVI of GATS only applies if a WTO Member has made a commitment in the respective sector. However, given the impact of further negotiations, it is clear that the ultimate goal of the GATS regime is full commitment in all sectors.

Furthermore, the national treatment obligation (Art. XVII GATS), which requires that a WTO Member treats foreign services and service suppliers no less favourably than like domestic services and service suppliers, has impacts on the regulation of environmental services. This is because it prohibits the modification of the conditions of competition in favour of domestic services either formally or on a de facto basis.

Lastly the outcome of ongoing negotiations on disciplines for domestic regulation according to Article VI:4 GATS are relevant. These negotiations take place in the Working Party on Domestic Regulation, a subsidiary body of the Council for Trade in Services. Such disciplines should ensure that domestic regulations including licensing rules, technical standards, and planning restrictions are no more burdensome, that is no more trade restrictive, than necessary. Depending on the scope of future disciplines and the specific design of a necessity test in such disciplines, certain domestic regulations such as quality standards or universal service obligations could be seen as more burdensome than necessary. This may put them under pressure from the multilateral trading system.

Areas of mutual support

The preceding discussion on the impact of the GATS on environmental services has revealed that the liberalisation of trade in services on the one hand and public provision or strict regulation on the other hand do not lead in the same directions and are not necessarily mutually supportive. However, there can also be areas of mutual support.

First, the GATS could enhance the effectiveness and efficiency of provision of environmental services in relation to former public monopolies, which have been recently transformed and privatised. It is generally accepted that if a public monopoly is privatised regulation needs to be in place to ensure competitiveness and an open market, because otherwise a private monopoly supplier will dominate the market and try to gain monopoly rents. Pro-competitive regulation is therefore necessary. GATS commitments and GATS obligations could support such regulation. However, it should also be kept in mind, that GATS obligations are not a substitute for such regulation.

Another area of mutual supportiveness concerns private investment. If governments consider direct foreign investment in environmental services as beneficial because they expect capital inflow or technology transfer, then GATS commitments could support a stable investment climate. Even though GATS commitments do not automatically attract investors and even though a lack of GATS commitments does not always deter investors, there seems to be a general understanding that GATS commitments can contribute positively to a decision to invest in a foreign country.

In the end, the impact and effects of GATS on environmental services will depend on two factors: First, the regulatory framework and specific instruments employed by a country for the provision of these services. Second, the scope and content of the specific GATS commitments are made by a country. To ensure that GATS does not put too much pressure on a particular regime and that the flexibility of GATS can be used effectively to harness the potential benefits of liberalisation, environmental planners and regulators, administrators and legislators need to realise the impact of GATS on national regulation and need to follow the ongoing GATS negotiations closely to prevent unnecessary or unwanted commitments in environmental services.

Annotations

(1) This contribution is based on earlier work, in particular: Krajewski, M.: Environmental Services of General Interest in the WTO: No love at first sight In: Journal of European Environmental and Planning Law 2004. S. 103-115.

AUTOR + KONTAKT

Dr. Markus Krajewski ist Juniorprofessor für Öffentliches und Europäisches Wirtschaftsrecht und Wirtschaftsvölkerrecht an der Juristischen Fakultät der Universität Potsdam.

Juristische Fakultät, Universität Potsdam,
August-Bebel-Straße 89, 14482 Potsdam,
E-Mail: mkrajews@uni-potsdam.de