Model clauses for the exclusion of public services from trade and investment agreements

Markus Krajewski*

February 2016

I. Introduction and aim of the study

The impact of international trade agreements on public services has been a controversial subject for a number of years. Generally, the obligations of trade agreements have the potential to limit the ability of governments to choose freely between different regulatory instruments and techniques for the organisation and provision of services considered to be essential for the general public such as network communications, energy and water distribution, education, health and social services. While this impact has been discussed with regards to the GATS quite extensively (Krajewski 2003; Adlung 2006, Arena 2011 and Arena 2015), the analysis of other trade agreements in this context has been limited.

However, the current negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US and the negotiations of twenty-three WTO Members of a plurilateral Agreement on Trade in Services (TiSA) as well as the recent conclusion of the trade agreement between the EU and Canada (CETA) led to a renewed debate about public services and trade agreements (European Commission 2015; Grudzielsky 2015; Social Platform 2015). In addition, since CETA and TTIP also contain chapters on investment protection, the impact of investment agreements on public services also became an issue of concern. While the mechanisms of investment protection agreements differ from those of trade agreements, they may nevertheless also have limiting effects on governments’ abilities to organize, provide and finance public services (Krajewski 2015a).

In light of the recent controversy and considering that one of the European Commission’s negotiating goals in the TTIP and other negotiations is to develop “golden standards” in these agreements, it might be worth to develop new instruments to prevent negative impacts of trade and investment agreements on public services. The potential conflicts between trade and investment agreements and public services have long been recognized and various instruments to mitigate this conflict have been discussed (Krajewski 2011). One such instrument could be the complete exclusion of these services from the scope of trade and investment agreements or from the most contentious parts and provisions of these agreements. This study therefore develops and explains model clauses which could be used in international trade and investment agreements to exclude public services from the scope of these agreements in their entirety in a legally reliable manner. The study is based on the assumption that it would be best for the protection of public services if trade and investment agreements – or the most contentious parts of these agreements – would not apply to public services. The

* University of Erlangen-Nürnberg. E-Mail: Markus.Krajewski@fau.de. A study commissioned by the Chamber of Labour Vienna (AK Wien) and the European Federation of Public Service Unions (EPSU). The views presented in this study do not necessarily represent official positions of the funding institutions. This study builds on previous work of the author referenced throughout the text.
study will therefore not discuss model clauses or other options which could be used to limit the impact of trade and investment agreements or certain provisions of these agreements to public services. Comprehensive analyses of all legal instruments protecting public services in trade agreements can be found in previous studies (Krajewski 2015b and Krajewski 2011).

The study is organized in three main parts: Section II will provide a short overview of the current model of the European Union towards public services in trade and investment agreements and will explain its legal consequences. Subsequently, section III will analyse the main flaws of this approach and will develop arguments why the complete exclusion of public services from trade and investment agreements could be seen as a “golden standard” for safeguarding the provision and organization of public services in the EU. The main part of this study, section IV will then develop a model clause for the exclusion of public services. It will be shown that the major challenge is the definition of the notion of public services in a manner that does not preclude the future development of new public services and new models of providing or organizing them. The last section, section V, will address potential challenges and criticism of the proposed model clauses and will briefly assess alternatives to the proposed model clauses.

II. The current EU model of protecting public services in trade agreements

Since the conclusion of the GATS in 1994 and in all subsequent trade agreements the EU has followed a specific model of protecting public services. The model combines a general exemption of services supplied in the exercise of governmental or official authority with various instruments which limit the impact of specific commitments. The latter include the so-called “public utilities”-clause.

1. Exclusion of services supplied and activities carried out in the exercise of governmental authority

GATS and many free trade agreements signed by the EU contain a clause which excludes services supplied in the exercise of governmental authority from the scope of the chapter on trade in services. Similarly, activities carried out in the exercise of governmental authority are excluded from the chapters on investment liberalisation. These activities are therefore neither subject to specific commitments nor to general obligations of the respective chapters. All public services which are not covered by this exemption clause are subject to all obligations of the respective agreement or chapter.

The most prominent example is Art. I:3 (b) GATS which excludes services supplied in the exercise of governmental authority from the notion of “services” in the meaning of the agreement and therefore from the application of GATS. The term service “supplied in the exercise of governmental authority” is defined as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers” (see e. g. Art. I:3 (c) GATS). CETA, the EU-Singapore Free Trade Agreement and a draft of the EU proposal for the TiSA core text also contain these exception clauses.

The term services supplied in the exercise of governmental authority is usually understood in a narrow sense (Leroux 2006: 352). WTO Members agreed in a 1998 meeting of the Council