

Note: The summary below is about the potential effects of the currently prepared EU trade/investment agreements CETA, TTIP and TiSA in regards to public water supply. The summary shows the results of a survey relating to the provisions on water supply, sanitation and wastewater disposal services in these agreements. The survey is based on papers that have been officially published by the EU Commission as well as a continuous and in-depth investigation beginning in 2013. The survey is being complemented by five sheets relating to technical basics and offering reading aid for the texts and annexes of the agreements. The survey was accompanied by a close and continuous exchange with academical and institutional experts including the BDEW German Association of Energy and Water Industries. The summary below is focussed only on water supply and leaves out sanitation and wastewater disposal services. Explanations on technical terms can be found in the survey. Due to given capacity this survey is only available in German on the [website of Stadtwerke Karlsruhe](#). It is noted that the following summary represents the view of Stadtwerke Karlsruhe and that mistakes cannot be ruled out. It is meant to be a contribution to an objective debate and increased understanding of the agreements regarding water supply. In regards to TiSA no conclusions can be drawn as no current information is available. Non-commercial use of the summary is permitted as long as the source is quoted and a [copy is sent to Stadtwerke Karlsruhe](#).

How water supply in Germany would be affected by the EU free trade and investment agreements CETA, TTIP, TiSA

0. Background

The final text of the free trade and investment agreement [CETA](#) between the EU and Canada has been published on 29 February 2016. It is estimated that in autumn 2016 the European Council and afterwards the EU Parliament will vote on the agreement. The EU free trade and investment agreement with the US, [TTIP, is currently being negotiated](#) as well as the plurilateral agreement on services, [TiSA](#), which is negotiated amongst 23 WTO members, with the EU being one of them.

In these agreements, the negotiations concerning services are based on the [GATS](#) agreement of 1994. Concerning public procurement the agreements are based on the [EU procurement law](#) which has been reformed 2013/2014 and the plurilateral WTO "[Agreement on Government Procurement](#)" (GPA, 2012) respectively. **To fully protect water supply from the currently prepared agreements would mean that no additional commitments are made. It has been declared by the EU Commission that [water supply is not part of TTIP negotiations](#) (link only in German language).**

The EU Parliament has passed a [resolution](#) on 8 September 2015 which also adopts the demands of the successful European Citizen's Initiative [Right2Water](#) (no. 22): "(...) **calls on the Commission to permanently exclude water and sanitation and wastewater disposal from internal market rules and from any trade agreement, (...).**"

In 2013 also the Right2Water initiative had brought about the exclusion of water, sanitation and wastewater disposal from the scope of the [EU directive on concessions](#)¹. As a potentially affected water supplier, Stadtwerke Karlsruhe had strongly [called for this exclusion](#). Nevertheless this exclusion is subject to review and reporting by the EU Commission until 18 April 2019.

¹ EU directive 2014/23/EU on the award of concession contracts, 26 February 2014, below called "EU concessions directive".

1. Investment protection in CETA as a disadvantage for Stadtwerke Karlsruhe

In Germany, water is a public good because the Water Resources Act ([Wasserhaushaltsgesetz](#), WHG) defines a "ban with permit reservation" for the use of water resources. Therefore, any kind of water taking or water use generally requires a water permit ("water right"), which is applied for at the water authorities in a corresponding licensing procedure. In this procedure, water authorities have legal discretion. In regards to a permit they can impose time limits, curtailing, constraints and, under certain circumstances, deny and also subsequently revoke permits. Water supply serving public interests has a privileged status in this context as it forms part of the German "Daseinsvorsorge" (tasks of public interest/services of general (economic) interest, see WHG, chapters 2 and 3).

In CETA, water rights are generally treated as "investments" ([p. 39](#): "concession") and would therefore be **subject to the investment protection** of CETA. Investment protection in **CETA grants extra rights² to foreign investors** (i.e. Canadian investors or international investors with subsidiaries in Canada) **unlike investors that are just operating domestically – like Stadtwerke Karlsruhe**. In comparison to German law this would also lead to an **extension of the property protection for foreign investors** and **allow for the inclusion of future lost profits** which could generally enable higher compensation amounts in cases of "expropriation".

Irrespective of some restrictions³ there is no good reason to assume that these extra rights might *not* have any **effect on** the legal discretion of water authorities and the procedure of **granting water rights**. One **example illustrating that investment disputes can be about the procedure of granting water rights** is the case [Vattenfall against Germany](#) (2009-2011, **amount claimed EUR 1.4 billion**). The investment dispute focussed on constraints associated with the water right and was based on comparable investment protection standards of the [Energy Charter Treaty](#) (pp. 36-39). It resulted in a settlement in favour of Vattenfall (see German TV documentary "[Die Story im Ersten: Konzerne klagen - Wir zahlen](#)", 19 October 2015, 31.00 min, only in German language). The North American free trade and investment treaty NAFTA, too, includes comparable investment protection standards which led to a settlement with the highest compensation payment to date - also for water rights ([AbitibiBowater vs. Canada](#), 2010, **CAN \$130 millions**). **Through this back door CETA could introduce in Germany a new direction towards water resources being de facto in private hands and structures instead of being a public good.**

From the point of view of Stadtwerke Karlsruhe as public water supplier, these **privileges for foreign investors** would not affect own interests from the start. Nevertheless this situation could change **as soon as** an already established commercial **foreign investor** would start **competing for a specific**

² While the CETA investment standard "national treatment" already guarantees foreign investors equivalent rights as domestic investors (art. 8.6, [p. 45](#)) the CETA agreement would distinctly go beyond that standard and grant two extra investment protection standards to foreign investors: the standard of „fair and equitable treatment“ (art. 8.10, [p. 47](#)) and protection from (direct and "indirect") expropriation (art. 8.12, [pp. 48-49](#) with annex 8-A on [p. 331](#)) (see [Krajewski|Hoffmann](#), 2016, p. 5 and pp. 11-12, only in German language). **There is no protection for water supply in CETA in regards to these two extra standards of investment protection.**

³ Art. 1.9, chapter 1, "initial provisions" regarding "Rights and obligations relating to water" ([p. 8](#)); art. 8.9, investment protection ([pp. 46-47](#)); annex 8-A no. 3 regarding expropriation ([p. 331](#)).

ground water source which is already used by Stadtwerke Karlsruhe – a quite realistic scenario. Furthermore, there are a number of additional scenarios with detrimental effects of those privileges for foreign investors in regards to Stadtwerke Karlsruhe. Here, especially the **designation of water protection zones** must be mentioned as the protection procedure already today is a very sensitive issue and more protection zones are abolished than implemented. Stadtwerke Karlsruhe cannot expect that the designation of water protection zones would continue to be equivalently feasible if a foreign investor regarded its own investment inside that zone as shortened and announced an investment dispute.

Moreover, Stadtwerke Karlsruhe have to follow EU procurement law for own procurement activities. Unsuccessful tenderers have access to legal remedies including claiming compensation. Investment protection in CETA would allow them to invoke extra investment protection standards. **Decisions of Stadtwerke Karlsruhe would therefore be subject to a new way of being sued.**

The extension of investment protection only for foreign investors in CETA would therefore lead to a number of potentially grave disadvantages for Stadtwerke Karlsruhe as public water supplier.

Also, there is no necessity for introducing these extra rights (see [statement from the European Association of Judges](#), 9 November 2015, on Investment Court System in TTIP which has also been included in CETA).

Furthermore, investment protection in CETA could have implications on remunicipalisation processes and make them more difficult. For TTIP, the EU has published an [offer for investment protection on 12 November 2015](#) which is comparable to CETA investment provisions in large parts.

2. Insufficient protection of water supply in TTIP and CETA

In its [TTIP services and investment offer](#) of 31 July 2015 the EU has scheduled **water supply under the positive list for market access regarding cross-border services** (annex III/positive list, scheduling in sector energy services, "D. Collection, purification and distribution of water (ISIC rev 3.1: 410)", [p. 126](#)). **Although this does not allow the commercial presence of foreign companies** (i.e. companies of the U.S. or international companies with subsidiaries in the U.S.) within the EU, **this marks additional commitments concerning water supply compared with the GATS agreement of 1994.**

Furthermore, water supply is scheduled twice within annex II both under environmental services ([p. 87](#)) and under energy services ([p. 111](#)) – associated with different commitments: The scheduling under energy services lacks reservations for "most-favoured-nation treatment", "performance requirements" and "senior management and boards of directors". So this is contradictory within annex II. Additionally there is no reservation for the investment protection standards "fair and equitable treatment" and "expropriation" (see above, no. 1).

In CETA, exclusively negative scheduling is used which first of all represents an obligation for general liberalisation. In regards to water supply there is a reservation for market access and national treatment ([p. 1297](#)) but **especially no reservation for "most-favoured-nation treatment" and investment protection.** This is shown in a survey on CETA commissioned by the federal state of Baden-Wuerttemberg on the implications of CETA on the right to regulate of federal states and local authorities ([Prof. Nettesheim, 08 January 2016, p. 27](#), only in German language). Additionally, existing measures protecting public water supply at various levels of government need to be

scheduled within CETA annex I. But there is no scheduling especially of the EU Water Framework Directive, the EU Water Resources Act and the water acts of the German federal states.

3. Uncertainty regarding awards of concessions

In the majority of German big cities as well as in Karlsruhe public water supply is assigned to municipal companies by award of services concessions. In cases where these municipal companies are not completely property of these municipalities but only controlled by municipalities, a considerable legal uncertainty can exist today. The EU concessions directive (2013, see above, no. 0) aimed at substantiating this legal uncertainty to the disadvantage of municipalities but after ongoing protests of municipalities and the population water⁴ was excluded from the scope of the EU concessions directive. However the EU-Commission is called on to consider and report on this exclusion until 18 April 2019. **It needs to be scrutinized if the currently prepared free trade and investment agreements again might substantiate this legal uncertainty to the disadvantage of municipal autonomy, subsidiarity and municipally controlled water suppliers.** Primarily this could happen as a result of regulations in the public procurement⁵ chapters of CETA and TTIP. In her study "The Impact of Free Trade Agreements on Local Self-government - The Provision of Drinking Water by Local Utilities in Germany as a Case Study" (pp. 351-370, in: Krajewski, 2015) Britta Kynast points out to the possibility that detailed **regulations on the award of services concessions in the TTIP public procurement chapter could have to be applied even if there was a corresponding reservation in the TTIP services and investment chapter.**

CETA does not include a distinct exception for EU services concessions in its chapter on "Government Procurement"⁶ while there is one on the Canadian side (note 1.(g), p. 413, see also pdf-page 36 of an Austrian [study on CETA](#), July 2015, only in German language). The EU indicates its readiness to later go beyond that (note 3, p. 506): "*The European Union stands ready, should the ongoing revision of European Union legislation on public procurement result in a widening of the scope of services and services concessions covered by that legislation, to take up negotiations with Canada in view of extending the mutual coverage of services and services concessions of this Chapter.*" However, in the EU market access schedule for services in the government procurement chapter an exhaustive positive listing is used which does not include water supply services. Therefore, services concessions for water supply are unlikely to be covered by CETA government procurement – at least as long as an exclusion for water supply in the EU concessions directive exists.

During the ongoing negotiations on **TTIP**, the fundamental willingness of the EU to include services concessions repeatedly became apparent. In the 6th round there were talks on concessions and PPP (Public Private Partnership)⁷, in the 9th round on services concessions. In the 12th round in February 2016 there was an exchange of market access offers regarding public procurement, since then a consolidated text is being prepared⁸. The EU offer on public procurement has not been published yet. **It is essential especially for municipally controlled water suppliers to follow the TTIP**

⁴ Water supply, sanitation and wastewater disposal.

⁵ In CETA this is called „Government Procurement“.

⁶ [Chapter 19](#), pp. 127-149, and annex 19-1 to annex 19-8 "Market Access Schedule of the European Union", pp. 429-515.

⁷ EU Commission, DG Trade, „[State of Play of TTIP negotiations after the 6th round](#)“, 29 July 2014, no. 1.6.

⁸ EU Commission, DG Trade, „[TTIP – State of Play](#)“, 27 April 2016, p. 5 and p. 9.

negotiations as closely as possible in regards to public procurement. This has also been recommended by Prof. Krajewski in his [study for the German association of municipal companies](#) (VKU, 18 November 2013, last bullet point of summary at the end, only in German language).

Further reason for concern resulted from a speech of the German minister of economic affairs in the German parliament questioning municipal autonomy regarding water supply (27 November 2014, [pp. 6622-6625](#), only in German language).

4. Deficient protection of EU precautionary principle

In March 2015 the German Federal Environmental Agency published the following explanations on the EU precautionary principle in its position paper "[Environmental protection under TTIP](#)" (pp. 4-5):

"There are many areas in the field of environmental protection in which EU and US standards differ. In some areas the US standards are more demanding, for example, energy efficiency requirements for electric motors, some air quality standards and related emission standards. In many other areas, however, EU standards are more demanding, as shown by the following examples:

- ▶ Pesticides and biocides: Unlike in the United States, both persistent, bioaccumulative and toxic substances (PBTs) and carcinogenic, mutagenic and teratogenic substances (CMRs) are no longer qualified for authorisation in the EU;

(...)

Different standards are often due to a fundamental difference in dealing with environmental and health risks: In the EU, risk regulation is based on the precautionary principle, which requires demonstration for each substance that no grave danger will emanate from it before it is approved. In the US, the approach is exactly the opposite: the "risk-based" approach allows the use of a substance as long as no considerable danger has been detected. As a result, a large number of materials and substances are banned in the EU, while they are approved in the US. Not only does this concern the approval of chemicals, pesticides and biocides within the EU chemicals regulation REACH, but also for example establishment of the state of art for emission limits from industrial and waste treatment plants."

Accordingly **the pesticide atrazine is prohibited in the EU but still for sale in the US** (in 2013 use of 33 million kg in US agriculture⁹). In a number of German water works, atrazine is responsible for costly water treatment. **Also in Canada the precautionary principle does not have the same relevance as in the EU or Germany.** Ensuring the precautionary principle in CETA and TTIP therefore is a particular challenge. **From the perspective of a forward-looking protection of water resources, strengthening the precautionary principle as leading principle in the future is of an importance that cannot be overestimated.**

Karlsruhe, 1 June 2016

⁹ See essay in German radio Deutschlandfunk, 2 August 2015 (only in German language): http://www.deutschlandfunk.de/risikobewertung-in-der-forschung-wie-ttip-mit-fakten.740.de.html?dram:article_id=327136.