

# **Could TTIP Impact Support for Renewable Energy?**

**Municipalisation and community power projects**

Nils Meyer-Ohlendorf

Lena Donat

10 October 2016

## About the Ecologic Institute

The Ecologic Institute is a private not-for-profit think tank for applied environmental research, policy analysis and consultancy with offices in Berlin, Brussels and Washington DC. An independent, non-partisan body, the Ecologic Institute is dedicated to bringing fresh ideas to environmental policies and sustainable development. The Ecologic Institute's work programme focuses on obtaining practical results. It covers the entire spectrum of environmental issues, including the integration of environmental concerns into other policy fields. Founded in 1995, the Ecologic Institute is a partner in the network of Institutes for European Environmental Policy. The Ecologic Institute acts in the public interest; donations are tax-deductible.

## Table of Content

<b>1</b>	<b>Executive Summary</b> .....	<b>1</b>
<b>2</b>	<b>Introduction</b> .....	<b>4</b>
<b>3</b>	<b>Municipalisation of energy services</b> .....	<b>6</b>
3.1	What is (Re-) Municipalisation? .....	6
3.2	Would TTIP allow municipalisation? .....	8
3.2.1	Market access under the services, investment and –e-commerce chapter .....	8
3.2.2	Access to energy transport infrastructure.....	13
3.2.3	Investment protection.....	14
3.2.4	State-owned enterprises (SOE) .....	18
3.2.5	Subsidies .....	20
<b>4</b>	<b>Community power projects</b> .....	<b>21</b>
4.1	What are community power projects? .....	21
4.2	Could TTIP have an impact on community power projects? .....	22
4.2.1	Market access under the investment chapter.....	23
4.2.2	National Treatment.....	24
<b>5</b>	<b>Bibliography</b> .....	<b>25</b>

# 1 Executive Summary

The Transatlantic Trade and Investment Partnership (TTIP) could potentially have significant implications for the re-municipalisation of energy services, and for community energy projects. The extent of the impact depends on the wording of the rules on market access, investment protection, national treatment, state-owned enterprises, and access to energy transport infrastructure. However, these rules – and specifically the applicable reservations – are currently being negotiated, and there is only limited documentation of the state of negotiations.

TTIP's **market access rules** would not affect municipalisation, re-municipalisation of energy services and community power projects – if energy services were exempt from TTIP's rules on market access. The EU and its Member States proposed numerous reservations<sup>1</sup> for public energy services. These reservations would reliably exempt public energy services from TTIP. No respective US proposal is publically available. However, the EU proposal of July 2016 for an energy chapter would grant companies nearly unlimited access to the energy transport infrastructure of the other Party. In addition, CETA – a possible blueprint for TTIP – contains reservations that do not clearly exempt public energy services from market access rules. If public energy services were not exempt from TTIP, municipalisation, re-municipalisation of energy services and community power projects could be negatively affected. It is a matter of negotiations to ensure that public energy services remain exempt.

In contrast to market access rules, there are no exemptions from **investment protection rules**. Investment protection rules apply to a wide range of investments, including investments in the energy sector. The EU proposed an investment protection chapter that is limited in scope and covers only stark violations of investor rights. Although limited in scope, the substantive obligations of the EU proposal remain vague and ambivalent. For this reason, it is difficult to predict the implications of the proposed investment protection rules on the municipalisation or re-municipalisation of energy services and community power projects. For the same reason, the investment protection rules cause uncertainty for the re-municipalisation of energy services, while hardly promoting investment in countries with functioning legal systems – such as the EU or the US.

In broad terms, TTIP could have the following implications for the **municipalisation and re-municipalisation of public energy services**<sup>2</sup>:

- **The EU has proposed reliable reservations for public energy services but not for grid access:** The EU's proposed reservations exempting from market access rules for electricity and gas would allow local governments to establish new public monopolies and would allow governments to reverse future liberalisations in this sector. Existing monopolies in the electricity and gas sector would also not be threatened by TTIP's market access rules – if the EU proposal was accepted by the US and fully respected. In contrast to these reservations, the EU proposal for an energy chapter contains only vague

---

<sup>1</sup> "Reservation" is the term used in the EU proposal for the annex (Schedule) that lists exempt sector and measures. Usually, the term "reservation" is used to define "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (Article 2 (1)(d) of the Vienna Convention on the Law of Treaties); for the purpose of a Schedule the term "exemption" would be more commonly used. We follow the wording used in the TTIP negotiations.

<sup>2</sup> It is important to note that the municipalisation of energy services can take various forms. Each form raises different legal issues.

and potentially weak exemptions for the access to grids. The proposal grants nearly unlimited grid access to companies from the other Party. Such unlimited grid access could have significant implications for the municipalisation and re-municipalisation of public energy services.

- **It would be a problem if TTIP followed CETA's exemption regime:** Although the EU tabled a reservation on public utilities from the market access rules under CETA, it is not clear whether this would cover energy services. Importantly, the EU did not schedule a reservation on electricity production, transmission or distribution of public utilities.
- **Market access rules would be a problem if the energy sector is not exempt:** Market access rules could impact the municipalisation or re-municipalisation of energy services in various ways:
  - Monopolies are – in principle – not compatible with the EU proposal. National laws that allow only specific monopolies to provide energy services, for example, would not be in line with Article 2.2 of the EU proposal.
  - Market access rules prohibit limitations on the participation of foreign capital. Accordingly, it would be illegal to limit foreign shareholding.
  - Market access rules also forbid requiring an investor to perform an economic activity only as a specific type of legal entity. An obligation on energy utilities to conduct their operation only as a specific legal entity, such as a limited liability or public company, could violate TTIP.
- **Chapter on state-owned enterprises (SOEs) would be problematic – if applicable:** The EU and US proposal for an SOE chapter would significantly limit the regulatory leeway of municipal governments and of municipal energy companies. Rules on SOEs would require Parties to ensure that SOEs do not accord less favourable treatment to “like enterprises” and that they act in accordance with commercial considerations in their purchases and sales of goods. However, it is likely that these obligations will not apply to municipal service providers. According to the US proposal, public services providers are exempt if they are only established or maintained for the purpose of providing “essential public services”. This terminology is open to different interpretations but probably includes energy services. The EU proposal contains a placeholder which would limit the scope of application of the SOE rules to those sectors that are covered by the Parties' schedules – from which the EU aims to exempt the electricity and gas sector (see above).

Concerning **community power projects**, TTIP could have the following implications:

- **TTIP would not regulate community power projects but could have an impact on support measures:** TTIP would not regulate community power projects as such but could have implications for policies that typically promote community power projects. Typical support policies include laws that require (partial) community ownership in energy projects or support schemes that privilege community power projects. Ownership rules that require a certain minimum financial participation of local residents could violate TTIP's market access rules.

- **Proposed EU reservations on market access are robust but CETA's approach would be a problem:** The EU and its Member States proposed reservations to market access rules which would exempt energy services, including community power projects, from TTIP. However, if TTIP followed the exemption regime of CETA, these exemptions would not apply.
- **National treatment:** The EU tabled reservations on the application of the National Treatment principle that would exempt energy services. However, the proposal indicates that the EU is willing to give up these reservations if the US accepts mutually acceptable commitments on energy. If the energy sector was not exempt from the national treatment obligations, requirements such as a certain share of local ownership in renewable energy projects, or grid access rules that privilege community power projects could be illegal.

In **conclusion**, it is critical that TTIP exempts public energy services from its market access rules. The EU has proposed reliable exemptions but it is not clear whether the US will accept the EU proposals. The EU proposal to grant companies nearly unlimited access to the energy transport infrastructure of the other Party could negatively impact the re-municipalisation of energy services and community power projects if unlimited grid access allows companies of the other Party to outcompete municipal energy providers and community power projects. This, however, remains an unlikely scenario as long as renewable energy sources installations have privileged grid access. Although investment protection rules will probably be limited in scope investment protection under TTIP is inherently vague and causes unnecessary uncertainties for the re-municipalisation of energy services and community power projects.

## 2 Introduction

Negotiations on the Transatlantic Trade and Investment Partnership (TTIP) started in June 2013. As of April 2016, 13 negotiating rounds have taken place. President Obama and EU leaders have called for the conclusion of the negotiations by the end of 2016. However, due to the Brexit referendum and in light of growing criticism from Member States on the state of the negotiations, it is very unlikely that negotiations will be completed in 2016.

Even if negotiations were to be concluded soon, it could take a long time for TTIP to enter into force - **ratification** of TTIP will probably be burdensome. If TTIP was a mixed agreement, not only the US and the competent EU institutions but also all EU Member States would have to ratify it for it to enter into force. It is possible that some Member States would ratify TTIP only after a positive outcome of a referendum. In Europe's current political context, it is possible that ratification of TTIP would fail. If TTIP was not a mixed agreement, ratification would be simpler – in that case only the Council and the European Parliament would have to ratify it – but this is still not a given. With growing criticism on trade arising during the US presidential election campaign, ratification is also not a matter of course.

**TTIP is heavily contested.** TTIP has become entangled in the broader debate on globalisation, democracy, and the economic and political relations with the US in broad terms. In more concrete terms, TTIP is criticised for its provisions on investment protection, regulatory cooperation, and the lack of transparency in the negotiations. The approach to public services is another contested issue within the TTIP debate. It is clear that TTIP would bind all levels of government, including the municipal level. But could TTIP impede the provision of public services by national or local governments? Or could TTIP require governments to open markets that provide services as essential as health, water and energy?

Concerning **public services**, the US and the EU declared that “no EU or US trade agreement requires governments to privatise any service, or prevents governments from expanding the range of services they supply to the public. Moreover, these agreements do not prevent governments from providing public services previously supplied by private service suppliers.”<sup>3</sup> They also stated that “EU and US trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the high quality of services and to protect important public interest objectives.”<sup>4</sup> A number of civil society organisations have dismissed these statements. They argue that TTIP could require Parties to open public service markets to foreign investors and could negatively affect the provision of public services.<sup>5</sup>

**This paper** discusses potential implications of TTIP on the (re-)municipalisation of energy services and community power projects. Because municipalisation and community power projects can take very different forms, the **paper provides only an overview** of TTIP's potential relevant

---

<sup>3</sup> European Commission (2015). Joint Statement on Public Services, Brussels, 20 March 2015. Online available at: [http://europa.eu/rapid/press-release\\_STATEMENT-15-4646\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm).

<sup>4</sup> Ibid.

<sup>5</sup> See, for instance, UNISON (2015). TTIP, CETA and TISA – what you need to know about EU trade agreements A UNISON briefing March 2015. Online available at: <https://www.unison.org.uk/content/uploads/2015/02/On-line-Catalogue229952.pdf>; Corporate Europe Observatory (2016). Der stille TTIP & CETA Angriff auf öffentliche Dienstleistungen. Online available at: <http://corporateeurope.org/de/international-trade/2016/02/der-stille-ttip-ceta-angriff-auf-ffentliche-dienstleistungen>; Friends of the Earth (2015). Local authorities voice opposition to TTIP. Online available at: <https://www.foeeurope.org/local-authorities-voice-opposition-ttip-010415>.

legal implications. It does not discuss to what extent specific designs of municipalisation and community power would be compatible with TTIP – or not. The analysis is based only on publicly available negotiation documents.<sup>6</sup> It is important to stress that the actual text of the final agreement will be the result of negotiations between the EU and US – the available documents only give an indication of what the EU or the US pursues at a specific point in time. Even these positions can change, regardless of the other Party's preferences.

---

<sup>6</sup> Text proposals from the European Commission are public and are available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>. The US has not published its text proposals. There are also leaked negotiation texts that include the EU position and US position on a number of chapters, including the chapters on cross-border trade in services and state-owned enterprises. These leaked documents are accessible at <https://www.ttip-leaks.org/>.

## 3 Municipalisation of energy services

### 3.1 What is (Re-) Municipalisation?

**Municipalisation** is the transfer of tasks or ownership from a private entity or governmental authorities to the municipal level. Municipal authorities provide services that were previously offered by other entities, either private companies or other state entities.<sup>7</sup> **Re-municipalisation** is – in contrast – the transfer of tasks or ownership that were formerly executed by a municipal authority, from private actors back to municipal authorities.<sup>8</sup>

After a period of privatising energy utilities and grids, the trend has reversed and **an increasing number of energy utilities have been municipalised**.<sup>9</sup> This has been the case in particular in Germany where more than two thirds of all local governments are planning to take over the energy suppliers and distribution networks until the end of 2016.<sup>10</sup> Other European countries have also re-municipalised public services although this more commonly concerns the water and sanitation sector.<sup>11</sup> In many European countries, individual municipalities have re-municipalised public services.<sup>12</sup> It is worth noting that re-municipalisation also takes place in countries in which the central government still supports privatisation.<sup>13</sup>

#### Why do local governments municipalise energy services?

There are manifold reasons why local governments opt to re-municipalise energy services, including

- strengthening the local economy and promoting the creation of local jobs,
- improving the municipal budget,
- aiming for carbon neutrality by shifting to renewable energy and energy efficiency,
- being energy self-sufficient,

---

<sup>7</sup> Susanne Halmer and Barbara Hauenschild (2012). (Re-)Kommunalisierung öffentlicher Dienstleistungen in der EU, Österreichische Gesellschaft für Politikberatung und Politikentwicklung. Online available at: [www.politikberatung.or.at/uploads/media/Rekommunalisierung\\_02.pdf](http://www.politikberatung.or.at/uploads/media/Rekommunalisierung_02.pdf), p. 10-11.

<sup>8</sup> Ibid.

<sup>9</sup> In Germany, for example, 350 new municipal energy service providers were founded between 2002 and 2011. See Klaus-Heiner Rühl (2015). Rekommunalisierung - Gefährden die Privilegien öffentlicher Unternehmen die mittelständische Privatwirtschaft? IW policy paper 34/2015.

<sup>10</sup> David Hall (2012), Re-municipalizing public services in Europe. A report commissioned by the European Federation of Public Service Unions (EPSU), p. 5.

<sup>11</sup> Among 75 re-municipalisation cases of water supply and sanitation services in Europe, in the period of 2000-2014, about 65% occurred in France. See Satoko Kishimoto, Emanuele Lobina and Olivier Petitjean (2014). Our public water future The global experience with remunicipalisation, pp. 19-29.

<sup>12</sup> For example, the municipality Samso in Denmark founded a municipal energy company in 2002 to become the owner of a number of wind turbines. Another example is the Aberdeen Heat & Power Ltd, which was established by the Aberdeen city council in 2001, cf. Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 26.

<sup>13</sup> Joanna Czaplak (2015). Re-municipalisation of services in Europe – Does the new paradigm of municipal services provision appear? Online available at: [econpapers.repec.org/RePEc:tkp:mklp15:1665-1672](http://econpapers.repec.org/RePEc:tkp:mklp15:1665-1672).

- enhancing public participation,
- improving public services.<sup>14</sup>

Municipalisation of energy services<sup>15</sup> **can take various forms:** (1) the municipality establishes a communal energy utility, (2) the municipality purchases and / or leases an energy utility and (3) a law provides that only municipalities are allowed to provide energy services:

- **Establishing a new local energy utility:** A local government may establish a new energy utility, either fully or partly owned by the local government. The new utility could compete with other companies or act as a monopolist. This new utility could take different legal forms. Limited liability, public company or cooperatives are possible legal forms.<sup>16</sup> The new utility could operate with or without grid, service and power generation. It is possible that the utility owns power plants and grids and/or leases them. In Germany, for example, 59% of municipal utilities (*Stadtwerke*) own power plants.<sup>17</sup>
- **Integration of an existing private utility through purchase:** Integrating an existing utility into a company operated or owned by a local government is another form of re-municipalisation. The common way of integration is to purchase shares of an existing company. Purchase can be done through public tendering, which – as a possible design option – could privilege bids from a municipal or another public bidder. Integration can entail changes of the legal form of the former company. It can include the power generation, the grid and/or services.
- **Extending the activities of existing communal enterprises:** Services offered by private companies could be transferred to the municipal government and/or a company fully or partly owned by the municipal government.
- **Leasing of power plants and/or grids:** Rather than establishing and owning a new energy utility, municipalities could also lease power plants and/or grids.
- **Integration of an existing private utility through expropriation:** Direct expropriation is – in principle – another way of municipalising energy services. This option is rarely pursued and often legally problematic. It always requires compensating the previous owner of the utility.
- **Municipalisation through monopolies:** Re-municipalisation can be based on laws requiring that only companies owned by the local government can operate or own power generation systems, grids and/or energy services. Such monopolies could exclude private companies from these business activities, either entirely or partly. In Germany, for

<sup>14</sup> Center für kommunale Energiewirtschaft (2015). Rekommunalisierung von Stadtwerken, Eine empirische Studie in Kooperation mit der Fachhochschule Köln, 2. Auflage. Online available at: [www.ckew.de/images/downloads/rekommunalisierung\\_vs1.pdf](http://www.ckew.de/images/downloads/rekommunalisierung_vs1.pdf).

<sup>15</sup> For simplification reasons, we use the term "municipalisation of energy services" when discussing these different aspects of the municipalisation and re-municipalisation.

<sup>16</sup> Verband kommunaler Unternehmen (2012). Konzessionsverträge- Handlungsoptionen für Kommunen und Stadtwerke. Online available at: <http://www.vku.de/energie/unternehmensstrategien/rekommunalisierung-sdz-iv/konzessionsvertraege00.html>.

<sup>17</sup> Center für kommunale Energiewirtschaft (2015). Rekommunalisierung von Stadtwerken, Eine empirische Studie in Kooperation mit der Fachhochschule Köln, 2. Auflage. Online available at: [www.ckew.de/images/downloads/rekommunalisierung\\_vs1.pdf](http://www.ckew.de/images/downloads/rekommunalisierung_vs1.pdf).

example, operations of municipal utilities are largely based on the Municipal Codes of Federal States (*Gemeindeordnungen*).<sup>18</sup> These laws determine the details of their economic operations.

## 3.2 Would TTIP allow municipalisation?

**Each form of municipalisation raises different legal questions.** These questions arise, in particular, from the following TTIP chapters:

- **Market access rules under the investment chapter:** In principle, market access rules prohibit monopolies, exclusive service providers, or require companies to operate as a specific type of legal entity, such as a limited liability or public company. Importantly, these rules only apply if parties have not exempt a specific sector.
- **Investment protection:** Investment protection rules require governments to treat investors in a fair and equitable manner. These rules also oblige Parties to pay compensation in cases of expropriation.
- **State-owned enterprises:** Rules on state-owned enterprises can considerably limit the leeway of local governments and municipal energy providers in terms of awarding contracts and choosing partners, for example.
- **Rules on subsidies:** Subsidy rules are relevant because municipal energy providers are often subsidised.

### 3.2.1 Market access under the services, investment and –e-commerce chapter

**Investment chapters are usually one of the most significant pillars of trade agreements.** They are common to all bilateral EU free trade agreements.<sup>19</sup> Investment chapters aim to promote access of companies of a Party to the markets of the other Party by liberalising market access. Commitments not to impose certain kinds of “quantitative” barriers or other restrictions on market access are among the core principles of market access. Importantly, market access rules usually do not apply to the entire economy but exempt specific sectors. Investment chapters also include provisions on investment protection, such as obligations not to directly or indirectly expropriate without compensation, or obligations of fair and equitable treatment of investors. The EU has tabled a text proposal for an investment chapter under TTIP in July 2015.<sup>20</sup> There is no publicly available US position on the investment chapter.

---

<sup>18</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). *Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy*. ClientEarth: London, p. 27.

<sup>19</sup> European Commission (2015). TTIP negotiating texts - A reader's guide. Online available at: <http://trade.ec.europa.eu/doclib/html/153034.htm>.

<sup>20</sup> This proposal also includes chapters on services, and e-commerce, available at [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153669.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf): European Union's proposal for services, investment and e-commerce text.

### 3.2.1.1 Market access rules according to the EU proposal (Article 2.2)

The EU proposed market access rules that are common to other EU free trade agreements. CETA contains similar and often even identical language. According to the EU's proposal, neither Party shall adopt or maintain measures that impose:

- “limitations on the number of enterprises whether in the form of numerical quotas, monopolies, exclusive rights or other requirements relating to establishment such as economic needs tests;
- limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment;
- measures which restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity.” (Article 2.2)<sup>21</sup>

These provisions could impact the municipalisation or re-municipalisation of energy services in various ways – unless Parties have exempt sectors:

- **Monopolies:** Monopolies are – in principle – not compatible with the EU proposal. National laws that allow only specific monopolies to provide energy services, for example, would not be in line with Article 2.2 of the EU proposal.
- **Limitations on the participation of foreign capital:** A law that would limit foreign shareholding in an energy utility could violate market access rules, as proposed by the EU.
- **Specific types of legal entity:** An obligation on energy utilities to conduct their operation only as a specific legal entity, such as a limited liability or public company, could violate TTIP.

### 3.2.1.2 Reservations and exceptions

Article 2.7(4) of the EU proposal of July 2015 provides for **various reservations and exemptions** from the rules on market access:

- **Existing measures by local governments:** All existing local governments measures in all sectors are exempt (“grandfather clauses”). The term “measures” include laws, regulations, rules, procedures, decisions, or administrative actions, amongst others. This ex-

---

<sup>21</sup> Article 2.2 EU proposal on trade in services, investment and e-commerce.

emption is broad because negotiators cannot be aware of all measures existing at local level.<sup>22</sup>

- **Continuation, prompt renewals or amendments of existing measures by local governments:** The continuation or prompt renewal of existing local measures in all sectors is also exempt. Amendments can also be exempt but only “to the extent that the amendment does not decrease the conformity of the measure as it existed immediately before the amendment” (Article 2.7 (4), emphasis added). This so-called “ratchet clause” means that once a measure has been liberalised it is not possible to revoke the liberalisation.<sup>23</sup>
- **Measures listed in Annex III:** According to Article 2.7(4), measures are exempt if a Party adopts or maintains them with respect to the sectors and subsectors listed in Annex III. The exemptions cover existing measures and future measures at all government levels if they are part of the exempted sectors. Importantly, governments can decide to unilaterally liberalise measures in the listed sectors, but are free to revoke this liberalisation later.

It is important to note that the **EU has proposed a negative list**. This means that market access rules would always apply unless one of the general exemptions applies or a measure/sector is listed in the Annexes. The negative list approach differs from the positive list approach under which market access rules only apply to sectors that are (positively) listed in annexes or schedules.

**Annex III** contains reservations that have been listed either by the EU or individual Member States. Reservations brought forward by the EU are applicable to all Member States; those listed by individual Member States only apply to these. The reservations always specify to which of the following four “modes” of service supply they apply:

- 1) Cross-border supply
- 2) Consumption abroad
- 3) Commercial presence
- 4) Presence of natural persons

Mode 3, “commercial presence”, is the most relevant mode in view of the issue of municipalising energy services because it defines investment rights. Concerning mode 3, the **EU proposed the following reservations:**

- **EU reservation concerning electricity and gas production, transmission and distribution:** The EU tabled a specific reservation with respect to “Production of electricity, transmission and distribution of electricity on own account” and “Manufacture of gas; distribution of gaseous fuels through means on own account” (Annex III – 5 A and B). The

---

<sup>22</sup> Markus Krajewski and Britta Kynast (2014). Impact of the Transatlantic Trade and investment Partnership (TTIP) on the Legal Framework for Public Services in Europe, Hans Böckler Stiftung. Online available at: [www.boeckler.de/pdf\\_fof/S-2014-720-1-2.pdf](http://www.boeckler.de/pdf_fof/S-2014-720-1-2.pdf), p. 30.

<sup>23</sup> Markus Krajewski and Britta Kynast (2014). Impact of the Transatlantic Trade and investment Partnership (TTIP) on the Legal Framework for Public Services in Europe, Hans Böckler Stiftung. Online available at: [www.boeckler.de/pdf\\_fof/S-2014-720-1-2.pdf](http://www.boeckler.de/pdf_fof/S-2014-720-1-2.pdf), p. 29.

EU declares to be “unbound” by the market access rules in these sectors. These exemptions apply to all levels of government, including municipalities. The EU furthermore declared to be “unbound” with respect to enterprises in the sector “Production of steam and hot water; distribution of steam and hot water on own account” if these enterprises account for more than 5 per cent of the Union’s oil or natural gas imports, or if these enterprises work as direct branches, and for the retailing of motor fuels. **This means that the entire gas and electricity sector is not subject to the market access rules of TTIP.**

- **General reservation concerning public utilities:** The EU has also scheduled a general reservation on public utilities, which may establish public monopolies or grant exclusive rights.<sup>24</sup> The EU also provides a non-exhaustive list of sectors in which such public utilities normally exist, e.g. R&D, environmental services, etc. This list does not include energy services; public energy utilities are thus not automatically exempt. The EU could argue that the list was non-exhaustive and that the exemption covers energy services nonetheless. However, given (1) the rather long list of sectors that are explicitly mentioned and (2) the general purpose of TTIP, this argument is weak.

In addition to these EU reservations, **individual Member States** have scheduled numerous reservations under the “Energy Services” category (Annex III – 18). Many Member States have listed reservations on pipeline transportation of fuels<sup>25</sup> and services incidental to energy distribution<sup>26</sup>, and some on retail sales of fuel oil, bottled gas, coal and wood<sup>27</sup>, services incidental to mining<sup>28</sup>, storage and warehouse services of fuels transported through pipelines.<sup>29</sup> For municipal energy utilities, the most relevant reservation covers “services incidental to energy distribution” (18.G) from which all Member States but Latvia and Croatia have opted out. Services incidental to energy distribution are “transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users”.<sup>30</sup>

**In conclusion**, the EU’s proposed reservation on electricity allows local governments to establish new public monopolies. The EU proposal would also allow governments to reverse future liberalisations in this sector. Existing monopolies of local governments and municipal companies in the electricity and gas sector would not be threatened by the market access rules of TTIP – if the EU proposal becomes part of TTIP. In case Parties do not agree on such a robust reservation for energy services, it is possible that TTIP could impede the re-municipalisation of energy services.

In contrast to the EU, **a US proposal on the investment chapter** is not publicly available.<sup>31</sup> At this point it is not clear whether the US would agree to the general approach proposed by the

---

<sup>24</sup> TTIP Services and Investment Offer of the European Union, p. 119.

<sup>25</sup> Pipeline transportation of fuels (18.B): AT, BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, EL, IE, IT, LV, LU, MT, NL, PL, PT, RO, SK, SI, SE, UK: Unbound.

<sup>26</sup> Services incidental to energy distribution (18.G): In AT, BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, EL, IE, HU, IT, LU, LT, MT, NL, PL, PT, RO, SK, SE, UK: Unbound except for consultancy services, and none for consultancy services. In SI: Unbound except for services incidental to the distribution of gas, and none for the distribution of gas.

<sup>27</sup> Retail sales of fuel oil, bottled gas, coal and wood (18.F): BE, BG, DK, FR, IT, MT, PT reservations.

<sup>28</sup> Services incidental to Mining (18.A): reservation by UK.

<sup>29</sup> Storage and warehouse services of fuels transported through pipelines (18.C): reservation by PL.

<sup>30</sup> United Nations Statistics Division. Classifications Registry. Detailed structure and explanatory notes CPCprov code 88. <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Co=88&Lg=1>.

<sup>31</sup> The leaked TTIP documents did not include the chapter on investments.

EU, and, more specifically, whether they would accept the reservations on energy scheduled by the EU. However, **CETA** – widely perceived as a possible blueprint for TTIP – might give an indication of how TTIP negotiations might evolve. Naturally, this analogy is speculative. The US and EU can agree on a text that deviates from CETA – possibly considerably. With this caveat in mind, it is important to note that the CETA chapter on investments differs considerably from the EU's TTIP proposal on market access to the energy sector:

- **Specific exemptions from the market access rules in Annexes:** According to Article 8.15 CETA, the Parties list specific exemptions from the market access rules in Annexes, similar to the EU proposal for TTIP. Annex I lists existing measures by local authorities or by other government levels that are to be excluded but subject to a ratchet clause. Annex II lists sectors in which also future measures will be exempt. Concerning market access in the energy sector, the EU made no reservation on existing measures in the electricity or energy sector under Annex I. The EU formulated a general reservation on “public utilities” under Annex II, which covers future measures.<sup>32</sup> The wording is almost identical to the EU TTIP proposal and also does not name “energy” as one of the relevant sectors. This reservation is not a clear safeguard for municipal energy providers. There is also an EU reservation under Annex II on foreign ownership of gas/oil/electricity transmission, equivalent to the TTIP proposal (see above). However, in contrast to the TTIP proposal, the **EU did not list a reservation on electricity production, transmission or distribution.**
- **General “governmental authority” exemption:** Under CETA, the market access rules do not apply to “activities carried out in the exercise of governmental authority” (Article 8.2 (2) (b)). This term – also featuring in other trade agreements – is generally considered to be limited to the traditional state functions of the judicial system, administration or police and military, and it is unclear whether it could cover additional tasks like the provision of energy services.<sup>33</sup> However, CETA provides a legal definition of the term, limiting it to those activities that fulfil two conditions: (1) the activities may not be carried out on a commercial basis” and (2) the activities may not be “in competition with one or more economic operators” (Article 8.1 CETA). These specifications leave room for interpretation but it could be argued that whenever a municipal energy service provider generates profits and/or operates in a sector that could theoretically be opened to competition (even when it is in fact monopolised), the governmental authority reservation does not apply.<sup>34</sup>
- **Article XX GATT exemptions:** CETA incorporates the exemptions of Article XX GATT for the market access provisions (Article 28.3). This scope of exemptions covers measures that are “necessary to protect human, animal or plant life or health” and those “imposed for the protection of national treasures of artistic, historic or archaeological value”. The incorporation of Art XX GATT would not provide additional protections because Canada and the EU are already WTO members.

---

<sup>32</sup> CETA, Annex II, Schedule of the European Union, p. 1294.

<sup>33</sup> Markus Krajewski and Britta Kynast (2014). Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe, Hans Böckler Stiftung. Online available at: [www.boeckler.de/pdf/fof/S-2014-720-1-2.pdf](http://www.boeckler.de/pdf/fof/S-2014-720-1-2.pdf), p. 20.

<sup>34</sup> Martin Nettesheim (2016). Die Auswirkungen von CETA auf den politischen Gestaltungsspielraum von Ländern und Gemeinden. Gutachten im Auftrag des Staatsministeriums des Landes Baden-Württemberg, Online available at: [https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524\\_Nettesheim-CETA-Gutachten.pdf](https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524_Nettesheim-CETA-Gutachten.pdf), p. 23.

- **Unbundling measures, planning regulations and, environmental protection:** Article 8.4 exempts certain measures from the market access rules. These exempt measures include unbundling measures, planning regulations and environmental protection measures (Article 8.4 (2)).

Given their vague wording, the exemptions to CETA’s market access rules formulated by the EU do not provide sufficient protection for the municipalisation of energy services.

**In addition to the EU reservations, many Member States have tabled further specific reservations**, some also on the electricity sector. Austria, Lithuania, Malta, the Netherlands and Poland, for example, have formulated reservations under Annex I (existing measures) on the transmission and distribution of electricity. Under Annex II (future measures), Bulgaria, Portugal, Slovakia and Cyprus exempt the entire energy sector. Belgium, France and Hungary have tabled reservations on the production of electricity. Finland and France exempt the transmission of electricity or energy. Wholesaling services of electricity and gas are covered by Finnish and Belgian exemptions, just to name a few examples. However, there are also many Member States that did not table any reservations relevant to the measures of municipal energy service providers. Germany, for instance, declared reservations under Annex II on waste treatment, environmental services, or health services but did not make reservations on energy services (except for nuclear energy).<sup>35</sup> Depending on the scope of the reservations listed by individual Member States, the energy sector might thus be completely exempt from market access rules, partly exempt, or open. If Member States have not formulated additional reservations, only the less specific EU reservations apply.

### 3.2.2 Access to energy transport infrastructure

The EU proposed a chapter on energy and raw materials in July 2016. No US proposal on the subject is publicly available. The EU proposal **would give companies nearly unlimited access to the energy transport infrastructure** of the other Party. The proposal would require a Party to ensure that grid operators “grant access to their systems to entities of the other Party for the transport of gas and electricity” (Article 5.1). Specifying this obligation further, the EU proposes that access is “granted on commercial terms that are reasonable, transparent and non-discriminatory, and at cost-reflective tariffs”. Parties would be required to publish “the terms, conditions and tariffs for the access to and use of energy transport infrastructure” (Article 5.1).

According to the EU proposal, **Parties may derogate** from liberalising access to energy transport infrastructure in a limited number of cases, provided derogations are necessary to fulfil a legitimate policy objective.<sup>36</sup> The EU proposal also permits Parties to adopt temporary measures that are “necessary to protect the safety and to preserve the integrity of energy equipment or

---

<sup>35</sup> Germany has tabled reservations under Annex II on the following sectors: Fishing, Aquaculture, Services incidental to fishing, Waste management: sewage, refuse disposal, and sanitation services, Soil management, Insurance, Placement and supply services, Health and social services, Hospital services, Funeral, cremation and undertaking services, Rental or leasing of vessels, Nuclear-based electricity generation Processing of nuclear material and fuel, Transportation or handling of nuclear material, Entertainment services, including theatre, live bands and circus, services, Libraries, archives and museums and other cultural services.

<sup>36</sup> According to Article 5.2, “a Party may introduce or maintain a limited list of derogations from the right to third party access based on objective criteria set out in legislation provided that they are necessary to fulfil a legitimate policy objective”.

infrastructure” (Article 5.4). These temporary measures may, however, not constitute a disguised restriction on trade or investment. The EU proposal also confirms the right of Parties to pursue legitimate public policy objectives, including the protection of the environment and public health – consistent with the provisions of the energy chapter (Article 2).

In contrast to the exemptions on public energy services, **these exemptions are vague and only limited in scope**: (1) the lists of derogations must be “limited” in number and scope; (2) derogations must be necessary to attain a legitimate policy objective; (3) measures to protect the safety and the integrity of energy equipment or infrastructure are only permissible if they are temporary and they may not constitute a disguised restriction on trade or investment. The public policy clause is equally weak. It stipulates that Parties may adopt public policy measures – but only in consistency with the provisions of energy chapter. The weakness of the exemption and public policy clause reflects the main objectives of the chapter, i.e. to liberalise bilateral trade in goods, services and investment in the areas of energy and raw materials (Article 1). It must be stressed, however, that the chapter also explicitly aims at improving environmental sustainability. But this objective is not underpinned by specific obligations – in contrast to the obligations to grant access to the grid and pipelines.

Nearly unlimited access of companies to energy transport infrastructure of the other Party could have an **impact on the municipalisation of public energy services**. Only in exceptional cases, Parties may deny a company from the other Party access to the electricity grid or pipelines. Municipalisation models that include privileged grid access for municipalised energy services could become illegal – depending on which derogations Parties have and are admissible (according to Article 5.2). It should be noted, however, that access to the energy transport infrastructure does not change the regulatory framework of grid operation. Foreign companies would not be exempt from grid operation rules; they would only have the right to access transport infrastructure and would have to operate in accordance with the existing regulatory framework.

### 3.2.3 Investment protection

The EU published a **proposal for an investment protection** chapter in September 2015. There is no publicly available equivalent proposal from the US. Investment protection has been the most contested part of TTIP, mainly because investment protection rules grant individual investors direct access to arbitration tribunals - the famous and much debated Investor State Dispute Settlement (ISDS). The EU proposal includes two obligations that are particularly relevant for the re-municipalisation of energy services: direct and indirect expropriation, and fair and equitable treatment (FET).

#### 3.2.3.1 Direct and indirect expropriation

Like most other investment treaties, the **EU proposal** contains the obligation not to directly or indirectly expropriate investors without compensation. According to the EU proposal, direct and indirect expropriations are only lawful if they are carried out

- for a public purpose;

- under due process of law;
- in a non-discriminatory manner; and
- against payment of prompt, adequate and effective compensation (Article 5.1, Investment protection chapter).

The EU proposal clarifies that these rules cannot “be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor’s expectations of profits” (Article 2.2).

In practical terms, the prohibition of **indirect expropriation is particularly relevant**.<sup>37</sup> The EU proposal contains an Annex I defining “indirect expropriation”. Accordingly, indirect expropriation covers those measures that do not formally transfer the title of property but result in an effect “equivalent to direct expropriation”. The EU suggests that the economic impact, duration and object and content of the measures should be considered when determining whether an indirect expropriation has occurred. Furthermore, the annex specifies that

“for greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears **manifestly excessive**, non-discriminatory measures of a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations” (Annex I, Article 3, emphasis added).

In short, a government may take public policy measures that qualify as an indirect expropriation unless these measures are “manifestly excessive”. This is, however, not a genuine exemption but an attempt to create a presumption in favour of legitimate regulations.<sup>38</sup>

It depends on the specific **circumstances of each individual case** whether the municipalisation or re-municipalisation of energy services qualifies as an indirect expropriation or not. In many cases, the municipal government buys the investor’s company or shares thereof. This is a common form of re-municipalisation, which is obviously not relevant for investment protection. Investment protection rules are also unlikely to have an impact on the re-municipalisation of energy services after the license expires that permitted operation of the investor’s company. In principle, the investor cannot legitimately expect that a license will be extended. Regardless of these cases, it is possible that indirect expropriation rules have an impact on the following modes of municipalisation or re-municipalisation of energy services:

- **Establishing a monopoly or quasi monopoly:** A municipality could establish a new municipal company as a monopoly or quasi monopoly for the provision of energy services. This new company could *de facto* deprive the investor of its business model or

---

<sup>37</sup> OECD (2005). International Investment Law: A changing landscape. Online available at: <https://www.oecd.org/investment/internationalinvestmentagreements/40077877.pdf>. p. 43 ff.

<sup>38</sup> See Suzy H. Nikiéma (2012). Best Practices - Indirect Expropriation. IISD. Online available at: [http://www.iisd.org/pdf/2012/best\\_practice\\_indirect\\_expropriation.pdf](http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf), p.11.

profits. If the economic effects of this new monopoly were equivalent to direct expropriation, the municipality must prove that the re-municipalisation of energy services is a measure taken in an effort to promote legitimate policy objectives, such as protection of the environment. Because re-municipalisation also often serves the economic interests of the municipality, it could be difficult to prove that re-municipalisation only aims to protect the environment. It should be noted, however, that public policy measures only amount to indirect expropriation in rare circumstance when the impact of the measure is so “severe in light of its purpose that it appears manifestly excessive”.

- **Ownership and legal form requirements:** Newly established ownership requirements or requirements to operate a company in a specific legal form could amount to an indirect expropriation if the economic effects of measures were equivalent to direct expropriation. In these cases, it will be difficult to invoke the public policy clauses to justify ownership or legal form requirements.
- **Grid access:** Prioritised grid access for municipalised energy companies could qualify as an indirect expropriation if this measure substantially impacts the possibility of the investor to operate or sell electricity. It will be difficult to justify these measures with the public policy clause.

### 3.2.3.2 Fair and equitable treatment (FET)

According to the EU proposal on “Investment protection”, Parties would be required to grant **fair and equitable treatment (FET)** to investments on their territory (Article 3.1). This is a standard component of investment treaties and is the principle most commonly invoked in ISDS cases.<sup>39</sup> It aims to establish an international minimum standard.<sup>40</sup> Generally, FET covers consistent behaviour by the host state, good faith, due process, proportionality of measures, and transparency but tribunals have provided differing interpretations of this standard.<sup>41</sup>

In contrast to many existing investment treaties that do not provide a definition of the FET standard, the EU proposal contains an exhaustive list of measures that would constitute a breach of the FET obligation:

- “denial of justice in criminal, civil or administrative proceedings; or
- fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
- manifest arbitrariness; or

---

<sup>39</sup> UNCTAD (2012). Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements II, Online available at: [unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf), p. 10.

<sup>40</sup> See Andreas F. Lowenfeld (2008). International Economic Law, 2nd edition, p. 557; Sornarajah (2006). „A Law for need or a law for greed?: Restoring the lost law in international law of foreign investment“. In: International Environmental Agreements (2006) 6: 329-257 at 345.

<sup>41</sup> Peter Muchlinski (2006). „Caveat Investor? The relevance of the conduct of investor under the fair and equitable treatment standard“. In: International and Comparative Law Quarterly (2006), vol 55, pp 527 – 558, at 530; UNCTAD (2012). Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements II. Online available at: [unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf).

- targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- harassment, coercion, abuse of power or similar bad faith conduct.” (Article 3.2)

The EU proposal provides further that tribunals “may take into account whether a Party made a **specific representation** to an investor to induce a covered investment, that created a **legitimate expectation**, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated” (Article 3.4, emphasis added).<sup>42</sup>

Similar to other investment treaties, the EU proposal contains a so-called **public policy exemption**. Accordingly, the FET shall not affect the right of the Parties to take measures that are “necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity” (Article 2.1).

Against this background, it is clear that the **proposed FET obligation only covers instances of gross violations of good faith and due process**. The restrictive list of FET violations means that tribunals may interpret the FET requirements broadly – as has happened in the past under investment treaties with differing FET obligations.<sup>43</sup> However, the wording remains vague and ambiguous – even in the narrow EU proposal. This leads to uncertainties and it remains very difficult to predict the actual implications of the inherently vague FET concept. Instances where the re-municipalisation of energy services could amount to a violation of the FET obligations include:

- **Manifest arbitrariness and frustration of legitimate expectation:** A municipality’s negotiations with an investor on the prolongation of its license have already advanced far but the municipality then decides to establish new ownership requirements for the energy service provider for the next license phase. The investor could invoke that, considering its legitimate expectations, this decision constitutes a manifest arbitrariness. Tribunals have started to request that investors’ expectations rely upon “specific representations” to avoid an overbroad reading of the FET principle. Such representations can, for instance, include commitments specifically addressed to the investor (e.g. stabilisation clauses in contracts), or guarantees included in domestic legislation.<sup>44</sup> However, given the lack of a clear definition of “specific representations”, the investor might be able to present the negotiation documents to substantiate its legitimate expectations. There is also an increasing number of awards that balance the expectations of the investor against the legitimate interests of the State – but the EU does not make explicit reference to such a balancing of expectations.<sup>45</sup>

---

<sup>42</sup> CETA uses the same wording.

<sup>43</sup> UNCTAD (2012). Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements II, p. 63. Some tribunals have deduced from this concept that states should maintain a completely stable legal and business framework. See *Tecmed vs. Mexico*, 2003; Other tribunals, in contrast, have held that in order to be “legitimate”, investors’ expectations would need to take into account political, socioeconomic, cultural and historical conditions, and the general regulatory environment. ICSID Case No ARB (AF)/00/2.

<sup>44</sup> UNCTAD (2012). Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements II, at 69.

<sup>45</sup> See e.g. *Saluka v. Czech Republic*.

- **Denial of justice:** Investors have access to functioning judicial systems in the US and EU Member States. For this reason, an investor could claim denial of access to courts and administration only in rare cases. Such cases could include overly lengthy court proceedings, high court fees, short time limits for filing a claim, very low compensation rates, or lack of specialised knowledge among the judges.<sup>46</sup>

**Fundamental breach of due process:** FET obligations could be violated if energy services are re-municipalised without consultation of the investors that are directly affected by this decision. Lack of consultation could also constitute a fundamental breach of transparency requirements, another possible violation of FET.

### 3.2.4 State-owned enterprises (SOE)

According to the EU proposal and the leaked negotiation documents, it is likely that TTIP will contain a specific chapter on state-owned enterprises (SOEs). Although state-owned enterprises are common and often exercise governmental functions, they have traditionally not been covered by trade agreements (unless they are considered to be “state organs”). Due to criticism that SOEs distort fair competition, more recent trade agreements include specific SOE rules.<sup>47</sup> The purpose of these rules is to ensure that SOEs and private companies compete on equal terms and prevent SOEs from discriminating against enterprises of other Parties.

The proposals by the EU and US would require Parties to ensure that SOEs do not accord less favourable treatment to like enterprises and that they **act in accordance with commercial considerations** in their purchases and sales of goods. The EU proposal establishes that Parties shall not require or encourage SOEs to act inconsistently with the Party’s obligations under TTIP when exercising governmental authority. The US proposal even requires Parties to “ensure” consistent behaviour (Article 3 “Delegated Authority”). In addition, the US proposed that “no Party shall cause adverse effects to the interests of the other Party through the use of non-commercial assistance that the Party provides, either directly or indirectly to any of its state-owned enterprises” (Article 6.1). The US also proposed that Parties shall ensure that SOEs themselves do not cause adverse effects to the interests of the other Party through the use of non-commercial assistance. **These rules would significantly limit the regulatory leeway of municipal governments and the leeway for municipal energy companies.** SOEs often take decisions that are not entirely based on commercial considerations but also take political considerations into account.<sup>48</sup> Particularly municipal energy utilities have often been established not only for commercial but also for social, democratic and environmental reasons.

However, these **obligations do not necessarily apply to municipal energy service providers:**

---

<sup>46</sup> See, for instance, European Union Agency for Fundamental Rights (2011). Access to Justice in Europe: an overview of challenges and opportunities. Online available at: <http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities>.

<sup>47</sup> Jaemin Lee (2016). Reining in State-Owned Enterprises: A New Scheme of the TPP. Online available at: [http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf).

<sup>48</sup> Jaemin Lee (2016). Reining in State-Owned Enterprises: A New Scheme of the TPP. Online available at: [http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf).

- **Scope of the SOE chapter:** The EU proposal contains a placeholder which would limit the scope of application of the SOE rules to those sectors that are covered by the Parties' schedules (Article 2). Depending on the final wording of this provision, the electricity/gas sector could be exempt from the SOE rules insofar as it is exempt from the application of the general liberalisation rules of TTIP. However, this would need to be worded carefully. It is also worth noting that the US proposal does not provide for such a limitation of the scope.<sup>49</sup> It is also important to note that the US proposed a broad definition of SOE. According to the US proposal an SOE is an "enterprise that is principally engaged in commercial activities" and owned or controlled by central government (Article 1).<sup>50</sup>
- **No obligation to act in accordance with commercial considerations:** According to the EU proposal, SOEs are not obliged to act in accordance with commercial considerations if they "fulfil the purpose for which special or exclusive rights or privileges have been granted". SOEs are also exempt from this obligation if they fulfil their public mandate or if they act "in a generally non-discriminatory manner" (Article 5). Similarly, the US proposal provides that these enterprises are exempt if they "fulfil any terms of its designation", if they do not discriminate or engage in "anticompetitive practices in a non-monopolized market". In these cases, SOEs can take account of public policy or non-commercial considerations, such as public policy considerations.
- **Reservations according to the US proposal:** The US proposal provides a number of exemptions from the non-discriminatory treatment and the obligations to avoid adverse effects and injuries. These obligations do not apply where the SOE is "established or maintained by a Party solely to provide essential services to the general public in its territory". The obligations are also not applicable if the SOE is "subject to government mandates defining its public service function, such as universal service obligations". According to the US proposal, municipal energy services providers would be exempt if they are only established or maintained for the purpose of providing essential public services. The US proposal does not define "essential services to the general public" but, arguably, the provision of energy services, and in particular affordable renewable energy, qualifies as being essential to the general public. Given the vagueness of the term "essential services", other interpretations are possible. The EU proposed no equivalent exemption for "essential public services". It is noteworthy that the US proposal contains one explicit exemption for SOEs that finance housing. The US made no other explicit exemption for other public services, such as energy.
- **No general exemption for monopolies:** The SOE chapter confirms the Parties' right to establish and maintain monopolies and to grant special or exclusive rights or privileges to enterprises. The chapter, however, does not provide for general exemptions for monop-

---

<sup>49</sup> The US proposes to exclude the following from the scope of the SOE chapter: "(a) a central bank or monetary authority of a Party; (b) a financial regulatory body or a resolution authority of a Party; (c) a financial institution or other entity owned or controlled by a Party that is established or operated temporarily solely for resolution purposes; (d) government procurement; or (e) regulatory or supervisory activities of any non-governmental entity."

<sup>50</sup> "State-owned enterprise means an enterprise that is principally engaged in commercial activities; and:

(a) is owned, or controlled through ownership interests, by a Party's central government; or

(b) in which a Party's central government appoints or has the power to appoint the majority of members of the board of directors or any equivalent management

(c) is controlled by a Party's central government through a control person or control persons.", Article 1 US proposal.

lies or public enterprises from the liberalisation obligations of TTIP.<sup>51</sup> Instead, the US and the EU provide examples for such governmental authority, including the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges (Article 3 of the US proposal; EU Chapter on Initial Provisions and Definitions).

**In conclusion**, the SOE chapter would considerably limit the leeway of local governments and municipal energy providers for assigning contracts and choosing partners for their operations – if the chapter fully applies to municipal energy service providers. The EU proposed – as a placeholder – that SOE rules would only apply to sectors that are covered by the Parties' schedules (Article 2). According to the EU proposal, SOEs can act in accordance with public policy considerations if they fulfil the purpose for which special or exclusive rights or privileges have been granted. The US proposal exempts SOEs that solely provide essential services to the general public. These exemptions may not exempt municipal energy service providers from the SOE rules. However, the exact wording of the exemptions will determine whether SOEs are exempt or not.

### 3.2.5 Subsidies

Within the limits of relevant EU law, municipalities cross-subsidise loss-making municipal services with profits gained through other, more profitable municipal service providers. It is mostly municipal energy providers that generate profits that are then used to subsidise e.g. the public transport system or swimming facilities. But there are also cases in which energy providers receive subsidies from other municipal service sectors. For this reason, subsidy rules are relevant for the municipalisation of energy services.

However, proposed subsidies rules are weak and contain no substantive obligations for municipal energy companies. Proposed rules reiterate that WTO law prevails. According to the EU proposal, Parties are obliged to report on subsidies every two years. Parties can request consultations on subsidies. The other Party is not obliged to agree to consultations but only has the duty to provide information. In addition to these procedural obligations, the requested Party “will use its best endeavours to eliminate or minimise the adverse effects on the first Party's trade interests caused by the subsidy in question” (emphasis added). The obligation to endeavour to minimise an adverse effect of subsidies is, however, largely aspirational.

---

<sup>51</sup> See also Martin Nettesheim (2016). Die Auswirkungen von CETA auf den politischen Gestaltungsspielraum von Ländern und Gemeinden. Gutachten im Auftrag des Staatsministeriums des Landes Baden-Württemberg, Online available at: [https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524\\_Nettesheim-CETA-Gutachten.pdf](https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524_Nettesheim-CETA-Gutachten.pdf).

## 4 Community power projects

### 4.1 What are community power projects?

Community power projects take many forms. The general idea is that citizens own or participate in the production and/or use of energy. Projects can include ownership of RES installations or of the (local) grid. Owners or project members may range from individual households to various forms of enterprises, as well as public ownership by municipalities.<sup>52</sup> They can also take different legal forms – ranging from civil partnership, co-operatives, limited liability company, corporations, trusts, to non-profit customer-owned enterprises.

#### Why community power projects?

In general, community power projects are likely to have the following benefits:

- Foster local support for clean energy
- Increased financing for renewable energy and resulting emissions reductions
- Raise awareness about energy sources and energy consumption, and reduce energy demand
- Financial benefits for communities
- Decentralisation
- Stronger communities through a new self-conception as (green) energy producer<sup>53</sup>

With the exception of a few specific programmes,<sup>54</sup> there are no general policies that are explicitly and exclusively designed to support community power projects. However, a number of policies typically promote community power projects and are essential for their success, which include among others:

- **Ownership requirements:** A number of laws and rules in EU Member States require at least partial community ownership of larger wind projects. In Denmark, for instance, developers of wind projects are required to offer ownership shares to individuals living in di-

---

<sup>52</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 17.

<sup>53</sup> Community Power (2013)- The Benefits of an Energy Revolution – Community Power. Online available at: <http://www.foeeurope.org/community-Power-benefits-briefing-011213>, p. 4.

<sup>54</sup> <http://www.localenergyscotland.org/communities>.

rect proximity or in communities nearby.<sup>55</sup> There are also a number of municipal laws that only allow local residents to become partners in community renewable energy projects.<sup>56</sup>

- **Support schemes:** There are a number of support schemes that privilege community power projects:
  - **Different price and/or purchase support schemes for community power:** In Denmark, for example, developers can claim slightly higher feed-in tariff payment in exchange for offering an additional 10% (making a total of 30%) ownership to the local municipality.<sup>57</sup>
  - **Tax relief schemes for investment in community power:** Socially responsible investment and smaller amounts of investments in community power from households could be supported through preferential tax rules, for example through income tax exemptions or reductions.<sup>58</sup>
  - **Financial support:** Grants, loans and other government support can specifically or even exclusively fund community power projects.<sup>59</sup>
  - **Exemption from competitive bidding processes:** Community power projects can be exempt from competitive bidding processes.
- **Grid access/prioritisation:** Grid access rules could specially privilege community power.<sup>60</sup>

## 4.2 Could TTIP have an impact on community power projects?

TTIP provisions will not directly regulate community power projects. There are, however, a number of possible TTIP provisions that could have implications for measures that typically support community power. These include in particular market access rules and national treatment obligations. Subsidies rules could also apply but have only little substantive value (see above). Investment protection rules could also have an impact – within in the limits of the indirect expropriation and FET rules (discussed above).<sup>61</sup>

---

<sup>55</sup> According to the Danish Promotion of Renewable Energy Act, developers have to offer 20% of overall ownership shares of wind projects larger than 25 metres (in height) to eligible persons. The law provides a 'preferential right' to buy the first 50 available shares to eligible persons that live within 4.5 km of the project. Remaining shares must then be offered to eligible individuals that reside in the local municipality. Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 32.

<sup>56</sup> For instance, Dardesheim, Germany and Middelgrundens, Denmark. See Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 17-18.

<sup>57</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London.

<sup>58</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London.

<sup>59</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 43.

<sup>60</sup> Josh Roberts, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London, p. 13.

<sup>61</sup> The aspects of investment protection pertinent to the remunicipalisation of energy services can become relevant for community power projects, see above.

#### 4.2.1 Market access under the investment chapter

The EU tabled reservations from the market access rules for the “production of electricity, transmission and distribution of electricity on own account” and for “manufacture of gas; distribution of gaseous fuels through mains on own account” (Annex III – 5 A and B). The EU has furthermore declared to be “unbound” with respect to the sector “production of steam and hot water; distribution of steam and hot water on own account” if these enterprises account for more than 5 per cent of the Union’s oil or natural gas imports, or if these enterprises work as direct branches”. **This means that the entire gas and electricity sector is effectively not subject to the market access rules of TTIP.** According to the EU proposal, the TTIP market access rules would thus not affect community power projects. This could, however, change if TTIP followed the approach adopted in CETA (see above).

If market access rules applied to energy services and community power projects, the following provisions are potentially problematic:<sup>62</sup>

- **No limitations on the number of enterprises:** According to the EU proposal, neither Party shall adopt or maintain measures that impose “limitations on the number of enterprises whether in the form of numerical quotas, monopolies, exclusive rights or other requirements relating to establishment such as economic needs tests”. Ownership requirements could violate these market access rules if they entailed *de facto* monopolies for community power projects. It should be noted, however, that ownership rules often only require project developers to offer shares to local residents but do not oblige developers to actually have a certain percentage of local ownership. This could be a way to bring community power projects in line with market access rules but would probably also render the support mechanism less effective.
- **No limitation on foreign shareholding:** The EU also proposed – in line with many of its other free trade agreements – that limitations on the participation of foreign capital should be prohibited. No party shall impose limitations “in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment” (Article 2.2 of the EU proposal). Ownership rules that require a certain minimum participation of local residents could violate this provision. Although these ownership rules do not explicitly prohibit foreign participation they could *de facto* violate market access rules. Local residents are, generally, citizens of the host country, and not citizens from the other State Party.
- **No limitation on types of legal entity:** According to the EU proposal, measures that restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity are prohibited (Article 2.2). Laws or other measures that require community power projects to operate as a specific entity could violate Article 2.2.

---

<sup>62</sup> We reiterate that this paper provides an overview on TTIP’s potential legal implications. An in-depth legal assessment depends on the specific designs of a community power project.

## 4.2.2 National Treatment

The EU proposal on investment stipulates the National Treatment principle, a provision common to most, if not all, trade agreements.<sup>63</sup> The principle requires that a Party accords an investor of the other Party treatment “no less favourable than the treatment it accords, in like situations, to its own investors and their investments” (Article 2.3). The EU tabled reservations on the application of the National Treatment principle on the production of electricity, transmission and distribution of electricity, manufacture and distribution of gas for future measures (Annex II). However, the proposal indicates that the EU is willing to give up these reservations if the US accepts mutually acceptable commitments on energy.<sup>64</sup>

If the energy sector was not exempt from the national treatment obligations, Parties would be prohibited to discriminate against investors of other Parties “in like situations” (Article 2.3 of the EU proposal on National Treatment). The national treatment obligations also forbid *de facto* discrimination of nationals of the other TTIP Party.

Some Member States adopted laws that require a certain share of local ownership in renewable energy projects. These rules could constitute a *de facto* discrimination because local residents are usually nationals of the other Party (see above). Grid access rules that privilege community power projects could also result in a *de facto* discrimination against nationals of other TTIP Parties if local groups and nationals would typically benefit from privileged grid access or privileged planning rules for community power projects.

**In conclusion**, the current EU proposal for TTIP would not directly affect community power projects because the electricity and gas sectors are exempt from both the market access and national treatment rules. However, if these exemptions were not to become part of TTIP some measures that currently support community energy projects might become unlawful.

---

<sup>63</sup> The interpretation of the term “like situations” or “like circumstances” is difficult; tribunals have developed ample and sometimes inconsistent case law Rudolf Dolzer (2005). National Treatment: New Developments. 12 December 2005. Symposium co-organised by ICSID, OECD and UNCTAD. Online available at: <https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf>.; Konrad von Moltke (2000). An International Investment Regime? Issues of Sustainability. IISD. Online available at: <https://www.iisd.org/pdf/investment.pdf>.

<sup>64</sup> The proposed annex states for these reservations: “[T]o be deleted if US undertakes mutually acceptable commitments on energy.”

## 5 Bibliography

Center für kommunale Energiewirtschaft (2015). Rekommunalisierung von Stadtwerken, Eine empirische Studie in Kooperation mit der Fachhochschule Köln, 2. Auflage. Online available at: [www.ckew.de/images/downloads/rekommunalisierung\\_vs1.pdf](http://www.ckew.de/images/downloads/rekommunalisierung_vs1.pdf).

Community Power (2013). The Benefits of an Energy Revolution – Community Power. Online available at: <http://www.foeeurope.org/community-Power-benefits-briefing-011213>.

Corporate Europe Observatory (2016). Der stille TTIP & CETA Angriff auf öffentliche Dienstleistungen. Online available at: <http://corporateeurope.org/de/international-trade/2016/02/der-stille-ttip-ceta-angriff-auf-ffentliche-dienstleistungen>.

Czaplak, Joanna (2015). Re-municipalisation of services in Europe – Does the new paradigm of municipal services provision appear? Online available at: [econpapers.repec.org/RePEc:tkp:mklp15:1665-1672](http://econpapers.repec.org/RePEc:tkp:mklp15:1665-1672).

Dolzer, Rudolf (2005). National Treatment: New Developments. 12 December 2005. Symposium co-organised by ICSID, OECD and UNCTAD. Online available at: <http://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf>.

European Commission (2015). Joint Statement on Public Services, Brussels, 20 March 2015. Online available at: [http://europa.eu/rapid/press-release\\_STATEMENT-15-4646\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm)

European Commission (2015). TTIP negotiating texts - A reader's guide. Online available at: <http://trade.ec.europa.eu/doclib/html/153034.htm>.

European Union Agency for Fundamental Rights (2011). Access to Justice in Europe: an overview of challenges and opportunities. Online available at: <http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities>.

Friends of the Earth (2015). Local authorities voice opposition to TTIP. Online available at: <https://www.foeeurope.org/local-authorities-voice-opposition-ttip-010415>.

Hall, David (2012), Re-municipalizing public services in Europe. A report commissioned by the European Federation of Public Service Unions (EPSU).

Halmer, Susanne and Barbara Hauenschild (2012). (Re-)Kommunalisierung öffentlicher Dienstleistungen in der EU, Österreichische Gesellschaft für Politikberatung und Politikentwicklung. Online available at: [www.politikberatung.or.at/uploads/media/Rekommunalisierung\\_02.pdf](http://www.politikberatung.or.at/uploads/media/Rekommunalisierung_02.pdf).

Kishimoto, Satoko, Emanuele Lobina and Olivier Petitjean (2014). Our public water future The global experience with remunicipalisation.

Krajewski, Markus and Britta Kynast (2014). Impact of the Transatlantic Trade and investment Partnership (TTIP) on the Legal Framework for Public Services in Europe, Hans Böckler Stiftung. Online available at: [www.boeckler.de/pdf/fof/S-2014-720-1-2.pdf](http://www.boeckler.de/pdf/fof/S-2014-720-1-2.pdf).

- Lee, Jaemin (2016). Reining in State-Owned Enterprises: A New Scheme of the TPP. Online available at: [http://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf](http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1957270/Lee,-SOE-Chapters-in-TPPPresentation-Paper.pdf).
- Lowenfeld, Andreas F. (2008). International Economic Law, 2nd edition.
- Muchlinski, Peter (2006). „Caveat Investor? The relevance of the conduct of investor under the fair and equitable treatment standard“. In: International and Comparative Law Quarterly (2006), vol 55, pp 527 – 558.
- Nettesheim, Martin (2016). Die Auswirkungen von CETA auf den politischen Gestaltungsspielraum von Ländern und Gemeinden. Gutachten im Auftrag des Staatsministeriums des Landes Baden-Württemberg, Online available at: [https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524\\_Nettesheim-CETA-Gutachten.pdf](https://stm.baden-wuerttemberg.de/fileadmin/redaktion/dateien/PDF/160524_Nettesheim-CETA-Gutachten.pdf).
- Nikièma, Suzy H. (2012). Best Practices - Indirect Expropriation. IISD. Online available at: [http://www.iisd.org/pdf/2012/best\\_practice\\_indirect\\_expropriation.pdf](http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf).
- OECD (2005). International Investment Law: A changing landscape. Online available at: <https://www.oecd.org/investment/internationalinvestmentagreements/40077877.pdf>.
- Roberts, Josh, Frances Bodman and Robert Rybski (2014). Community Power: Model Legal Frameworks for Citizen-owned Renewable Energy. ClientEarth: London.
- Rühl, Klaus-Heiner (2015). Rekommunalisierung - Gefährden die Privilegien öffentlicher Unternehmen die mittelständische Privatwirtschaft? IW policy paper · 34/2015.
- Sornarajah, M. (2006). „A Law for need or a law for greed?: Restoring the lost law in international law of foreign investment“. In: International Environmental Agreements (2006) 6: 329-257.
- UNCTAD (2012). Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements II, Online available at: [unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf).
- UNISON (2015). TTIP, CETA and TISA – what you need to know about EU trade agreements A UNISON briefing March 2015. Online available at: <https://www.unison.org.uk/content/uploads/2015/02/On-line-Catalogue229952.pdf>.
- Verband kommunaler Unternehmen (2012). Konzessionsverträge- Handlungsoptionen für Kommunen und Stadtwerke. Online available at: <http://www.vku.de/energie/unternehmensstrategien/rekommunalisierung-sdz-iv/konzessionsvertraege00.html>.
- von Moltke, Konrad (2000). An International Investment Regime? Issues of Sustainability. IISD. Online available at: <https://www.iisd.org/pdf/investment.pdf>.