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**LIBERALIZATION OF THE GERMAN WATER  
SERVICE SECTOR**

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*ABSTRACT*

The purpose of this paper is to analyze the question if progressive liberalisation would be compatible with German constitutional law. The specific

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*Word Length*

The content of this paper (including table of content, abstract, footnotes, and bibliography) comprises 18,502 words.



## **ABSTRACT**

The purpose of this paper is to analyse the question is progressive liberalisation would be compatible with German constitutional law. The specific objective is to clarify whether a possible opening up of the German water market for competition, (in order to fulfil possible General Agreement on Trade in Services requirements) would be an infringement to the municipal right to self-government, and whether such an infringement would be justified under constitutional law. Problems were, furthermore, located in the scope of GATS and the inclusion of the water service sector into the agreement.

### **Word Length**

The content of this paper (excluding table of content, abstract, footnotes, and bibliography) comprises 10,802 words.



## I. INTRODUCTION

New voices are beginning to be heard in the debate over water, and new ideas considered. Among the most powerful and controversial of these new ideas is that water should be considered as an “economic good” – subject to the rules and powers of markets, multinational corporations, and international trading regimes. This paper examines the question as to whether progressive liberalisation would be compatible with German constitutional law, especially against the background of the municipal right to self-government and the municipal responsibility to provide basic infrastructure such as schools, libraries, water services etc. (municipal provision for elementary requirements – “Daseinsvorsorge”). First, general background information about liberalisation will be provided. In particular, the advantages, which are linked with the liberalisation of the water service sector, will be described followed by a review of current threats and risks. Secondly, the current organisational structure of the German water market and the respective legal framework will be examined. For this purpose the constitutional protection of the municipal right to self-government in accordance with Article 28 paragraph 2 of the Constitution of the Federal Republic of Germany will be explored; as well as the protection of that right under German competition law. The next section looks at the General Agreement on Trade in Services (GATS)<sup>1</sup> as the overriding legal framework for progressive liberalisation of services and at the question as to whether there is a possibility to exclude the water service sector from that agreement, providing the possibility that internationally claims to liberalise the German water market might not emerge. By concluding that no definite decision about an exclusion of water services from the GATS can be made the paper consequently continues with the examination of the compatibility of a possible liberalisation program under German constitutional law. Thereby the paper will examine what is the necessary action for the German water services sector in order to realize the provisions of the GATS and whether these

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<sup>1</sup> Agreement establishing the World Trade Organisation Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations April 15, 1994 Annex 1B The General Agreement on Trade in Services ( hereinafter GATS) available at <[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#services](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#services)> (last accessed 30 November 2003); GATS contains international rules on the transnational supply of services in the framework of the WTO. The full text of the relevant provisions can be found in appendix number IV.



measures would fulfill the preconditions for a justification under constitutional law. Finally, the paper summarizes the main conclusions and outcomes of the research, particularly that a progressive liberalisation programme would be compatible with German constitutional law.

## II. LIBERALISATION OF THE WATER SERVICE SECTOR - STAGE OF AFFAIRS

With the adoption of the GATS in 1994 service sectors of individual economies, which had previously been untouched by global trade rules, have been opened up to a programme of "progressive liberalisation" under the auspices of the World Trade Organisation (WTO).<sup>2</sup> That liberalisation programme is now beginning to take effect across the wide range of services covered by GATS.

As a result this process of liberalisation has been adopted in Germany over the last few years. After the liberalisation of the electricity and telecommunications sectors a multitude of new providers were set up and have rewarded customers with decreasing prices and additional services. In the light of these liberalisation developments the water service sector lacks behind. This brings the local authority districts into the firing line of GATS and WTO, because this sector has always been a task of municipal provision for elementary requirements. These public services, which are cornerstones of the municipal right of self-government and satisfy fundamental social needs, are now at stake. This becomes especially apparent by considering the facts that the recent negotiations concerning GATS, within the framework of WTO, are held secretly and that once entered agreements are *de facto* difficult to undo.<sup>3</sup>

The conclusion of the GATS negotiations shall coincide with the envisaged end of the new World Trade Round on January 1 2005. Therefore, all WTO members

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<sup>2</sup> Tony Clarke; David A. McDonald *Water Privateers - The Privatisation of Public Water Systems Around The World* Alternatives Journal (2003) v29 i2 p10 (6) page 4

<sup>3</sup> Attac Austria "Geheime Angebotsliste der EU durchgesickert - EU unterminiert eigene Arbeitsmaerkte im Abtausch gegen oeffentliche Dienste der Handelspartner" (20.02.03) available at <<http://www.attac-austria.org/presse/20030220.php>> (last accessed 30 November 2003)



should have submitted their liberalisation “requests” to other member states by the end of June 2002 and they had until the end of March 2003 to submit their “offers” concerning those services which they want to expose to liberalisation in the own country.<sup>4</sup>

The fact that the EU did not submit any offers for liberalisation in the areas of public provision for elementary requirements does not mean that there might not be further problems due to the following circumstances. In the frame of the renegotiations to the GATS, the EU has with the consent of the Federal Government of Germany demanded from 72 WTO-members the opening up of the drinking water market. This is on behalf of the dominating water service exporters Vivendi and Suez.<sup>5</sup>

Such far-reaching requests could quickly boomerang the EU, because it can be assumed that in the course of the following negotiations concessions regarding the offers will have to be made too.<sup>6</sup>

This in turn raises the question, whether the fulfillments of the GATS requirements on the national level would be compatible with the municipal right to self-government under the German constitutional law. The possible opening up of the German water service sectors for competition might be an intrusion upon the municipal's right to self-government by curtailing tasks of municipal provision for elementary requirements. Such an intrusion, however, is only under certain preconditions justified under constitutional law. Section VIII will be, therefore, devoted to the concept of legal protection of municipalities under German constitutional law.

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<sup>4</sup> World Trade Organisation “Doha WTO Ministerial 2001: Ministerial Declaration” WT/MIN(01)/DEC/1 Adopted on 30 November 2001 available at <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#services](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services)> (last accessed 30 November 2003)

<sup>5</sup> Thomas Fritz “Schluss mit der Liberalisierung der Wasserversorgung! Zur Bundestagsdebatte zur WTO-Konferenz in Mexico: Breites Buendnis verlangt Ruecknahme von Marktoeffnungsforderungen an 72 Staaten” (3 July 2003) available at <[http://www.attac.de/presse/presse\\_ausgabe.php?id=214](http://www.attac.de/presse/presse_ausgabe.php?id=214)> (last accessed 30 November 2003); Tony Clarke; David A. McDonald *Water Privateers - The Privatisation of Public Water Systems Around The World* Alternatives Journal (2003) v29 i2 p10 (6) page 4

<sup>6</sup> ngo-online Internetzeitung fuer Deutschland “Liberalisierung – Attac Deutschland verdeutlicht GATS-Risiken im Wirtschaftsausschuss” (09 April 2003) available at <[http://www.ngo-online.de/ganze\\_nachricht.php4?Nr=5941](http://www.ngo-online.de/ganze_nachricht.php4?Nr=5941)> (last accessed 30 November 2003)



### III. DEFINING WATER SERVICES, PRIVATISATION AND LIBERALISATION

In order to get a better understanding for the complex problem situation regarding the liberalisation of the water service sector it is quite useful to have a closer look at the definitions of the different main terms.

The term “*water services*” includes the supply of water to households, industries and agriculture, and the collection and treatment of wastewater from these sectors.<sup>7</sup>

The activity spectrum operators of these services have to cover includes *inter alia* extracting, storing, transporting and treating (chemically or physically) of water. Furthermore, they are responsible for the construction and maintenance of water storage facilities, transport networks and treatment facilities. Monitoring of water quality and quantity is an important part in their scope of duties. Lastly, billing and informing are further crucial tasks at the direct consumer level.<sup>8</sup>

In the discussion concerning the assignment of tasks of water supply and sewage disposal to private enterprises the aspects of “privatisation” and “liberalisation” are often confused. However, each should be treated in a different way.

“*Privatisation*” in the water sector can be understood as the “transferring of some or all assets or operations of public water systems into a private entity”.<sup>9</sup>

Thereby it can be distinguished between “formal” privatisation or corporatisation and “substantive” privatisation. Formal privatisation means that the

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<sup>7</sup> The European Environmental Bureau (EEB) “Environmental Principles for Water Services in the EU: Private Versus Public Water Services” (July 2002), position paper publication number 2002/006, page 5 <available at <http://www.eeb.org/activities/water/Water-Liberalisation-PP-July2002.pdf>> (last accessed 30 November 2003)

<sup>8</sup> The European Environmental Bureau (EEB) “Environmental Principles for Water Services in the EU: Private Versus Public Water Services” (July 2002), position paper publication number 2002/006, page 5 <available at <http://www.eeb.org/activities/water/Water-Liberalisation-PP-July2002.pdf>> (last accessed 30 November 2003)

<sup>9</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes “The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in Development, Environment, and Security February 2002”, page i, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)



enterprise is still the property of the municipalities, but that it has been transformed into a private legal form. At the same time, however, the states' responsibility for task performance continues.<sup>10</sup> "Substantive" privatisation in contrast means that municipality backs out - all or part - of its original duties and assigns them to the third person by the sale of the municipal company (transfer of task performance and responsibility).<sup>11</sup>

"*Liberalisation*" on the other hand "is the process by which governmental control over a certain economic sector is decreased, and market forces are encouraged".<sup>12</sup> Basically in the water sector this can result in the direct competition of water service suppliers for concessions and contracts (competition for the market) and/or in the competition of service suppliers for consumers while they are not confined to a certain region (competition within the market).<sup>13</sup>

#### **IV. ADVANTAGES OF LIBERALISATION**

Various advantages are driving governments to consider and adopt the liberalisation of the water service sector. By looking at these advantages it becomes quick clear why the German government could approve the offering of the German water service sector in the frame of the GATS negotiations and why consequently the question of compatibility of a liberalisation of the German water service sector with the German constitution could become an issue of major concern.

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<sup>10</sup> Berit Sandberg "Privatisierung oeffentlicher Aufgaben" available at <[http://www.user.gwdg.de/~hbrede/pdf-dateien/WS2002\\_2003/PRIVATISIERUNG\\_OEFFENTLICHER\\_AUFGABEN.pdf](http://www.user.gwdg.de/~hbrede/pdf-dateien/WS2002_2003/PRIVATISIERUNG_OEFFENTLICHER_AUFGABEN.pdf)> (last accessed 30 November 2003)

<sup>11</sup> Berit Sandberg "Privatisierung oeffentlicher Aufgaben" available at <[http://www.user.gwdg.de/~hbrede/pdf-dateien/WS2002\\_2003/PRIVATISIERUNG\\_OEFFENTLICHER\\_AUFGABEN.pdf](http://www.user.gwdg.de/~hbrede/pdf-dateien/WS2002_2003/PRIVATISIERUNG_OEFFENTLICHER_AUFGABEN.pdf)> (last accessed 30 November 2003)

<sup>12</sup> European Environmental Bureau (EEB) "A Review of Water Services in the EU under Liberalisation and Privatisation Pressures Special Report" (July 2002) Publication Number: 2002/012, page 10 available at <<http://www.eeb.org/activities/water/special-report-water-services.pdf>> (last accessed 30 November 2003)

<sup>13</sup> European Environmental Bureau (EEB) "A Review of Water Services in the EU under Liberalisation and Privatisation Pressures Special Report" (July 2002) Publication Number: 2002/012, page 10 available at <<http://www.eeb.org/activities/water/special-report-water-services.pdf>> (last accessed 30 November 2003)



By having the highest growth rates the trade in services is regarded as one of the most dynamic and booming sectors in the current world economy. According to the WTO the trade in services reached US \$134 billion in 1999.<sup>14</sup> This, however, counts only for one fifth of the whole world trade and is therefore small compared to the steadily increasing economic importance of the tertiary sector. In the OECD-states, for example the trade in services contributes between 60 and 70 per cent to the gross domestic product (GDP) and employs 64 per cent of employees.<sup>15</sup> The global water market is estimated to be about 800 thousand millions US Dollar per year and the European water market is estimated to be about 80 thousand millions Euro.<sup>16</sup> This in turn means that by opening the markets to liberalisation a great potential might be released and substantial gains can be made.

On the other hand, water services in the EU are still ineffective in terms of sound management, long term planning and safety, and environmental and health protection, which means that adequate water services cannot be provided without enormous increases in investment, improvements in the efficiency of water capture, storage, distribution, and use, and greater wastewater reclamation and reuse.<sup>17</sup>

At the same time, however, the revenues of the municipalities have declined because revenues from taxation in Germany are dropping, which is caused by the reduction of the trade tax, tax relief and tax evasion of big groups. Simultaneously, the expenses of the municipalities have increased, for instance due to long-term unemployment.<sup>18</sup> This financial bleeding of the towns and municipalities causes municipalities to clutch at straws to get a short-term reprieve from the inevitable cost of renewing infrastructure. Due to significant hurdles in finding the capital to expand

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<sup>14</sup> Deutscher Bundestag Schlussbericht der Enquete-Kommission "Globalisierung der Weltwirtschaft – Herausforderungen und Antworten" Drucksache 14/9200 (12.06.2002) chapter 3.3.3.1 "Das GATS-Abkommen", available at <[http://www.bundestag.de/gremien/welt/glob\\_end/index.html](http://www.bundestag.de/gremien/welt/glob_end/index.html)> (last accessed 30 November 2003)

<sup>15</sup> Deutscher Bundestag Schlussbericht der Enquete-Kommission "Globalisierung der Weltwirtschaft – Herausforderungen und Antworten" Drucksache 14/9200 (12.06.2002) chapter 3.3.3.1 "Das GATS-Abkommen", available at <[http://www.bundestag.de/gremien/welt/glob\\_end/index.html](http://www.bundestag.de/gremien/welt/glob_end/index.html)> (last accessed 30 November 2003)

<sup>16</sup> Juergen Crummenerl "Stopt GATS! Gegen die Privatisierung kommunaler Daseinsvorsorge", page 8 available at <<http://www.attac-koeln.de/texte/StopptGats.pdf>> (last accessed 30 November 2003)

<sup>17</sup> The European Environmental Bureau (EEB) "Environmental Principles for Water Services in the EU: Private Versus Public Water Services" (July 2002), position paper publication number 2002/006, page 5, available at <<http://www.eeb.org/activities/water/Water-Liberalisation-PP-July2002.pdf>> (last accessed 30 November 2003)

<sup>18</sup> Juergen Crummenerl "Stopt GATS! Gegen die Privatisierung kommunaler Daseinsvorsorge", page 11 available at <<http://www.attac-koeln.de/texte/StopptGats.pdf>> (last accessed 30 November 2003)



coverage in rapidly growing areas, maintain existing infrastructure, and treat wastewater to the expected quality standards some municipalities might be apt to turn to the private sector, with its greater access to private capital. Private water companies are able to make extensive use of international financial institutions like the World Bank and International Monetary Fund (IMF) and are able to secure loans and grants to finance much of their operations.<sup>19</sup>

And as a matter of fact, the liberalisation of water services could also be accompanied by some other desirable advantages. Probably the most cited argument for a move to the private sector is that most proponents, mainly multi-utility<sup>20</sup> companies and the World Bank, have high hopes in terms of efficiency, because "public institutions do not work as efficiently as private companies".<sup>21</sup> Another result of the liberalisation process might be an increase in competitiveness of European companies internationally, because mergers caused by increased European competition would lead to bigger and more powerful companies with a better international market access. Furthermore, in a liberalised water market the actors would be forced to reveal the minimum costs of providing water. This in turn makes it likely that efficiency gains obtained through careful management and reduction in system inefficiencies could benefit the consumer in the form of lower prices.<sup>22</sup> Additionally, the financial relief of the state and the municipalities could benefit other social services, the overall budget balance, inspection and enforcement institutions, and other environmental projects.<sup>23</sup>

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<sup>19</sup> For instance \$30 million of the one billion dollars required for investment in new infrastructure came from the World Bank, with assistance from the Inter-American Development Bank and local Argentine banks, when Suez obtained a water concession in Buenos Aires. Tony Clarke; David A. McDonald *Water Privateers - The Privatisation of Public Water Systems Around The World* Alternatives Journal (2003) v29 i2 p10 (6) page 3

<sup>20</sup> Multi-utility companies are companies which deliver a number of public services, like water, gas and energy, out of one hand

<sup>21</sup> The European Environmental Bureau (EEB) "Environmental Principles for Water Services in the EU: Private Versus Public Water Services" (July 2002), position paper publication number 2002/006, page 7, available at <<http://www.eeb.org/activities/water/Water-Liberalisation-PP-July2002.pdf>> (last accessed 30 November 2003)

<sup>22</sup> David Ehrhardt, Michael Webb "Improving Water Services through Competition In: Public Policy for the Private Sector" (Published by The World Bank Group), page 7, available at <<http://www.castalia.fr/resources/water04.pdf>> (last accessed 30 November 2003)

<sup>23</sup> World Trade Organisation - Committee on Trade and Environment "Environmental Goods and Services: An Assessment of the Environmental, Economic and Development Benefits of further Global Trade Liberalisation" (WT/CTE/W/172), (20 October 2000), page 3, available at <[http://docsonline.wto.org/gen\\_search.asp?searchmode=simple](http://docsonline.wto.org/gen_search.asp?searchmode=simple)> (last accessed 30 November 2003)



As a result it can be said that the liberalisation of water markets could deliver some considerable benefits. Therefore, one might ask why would it be necessary to examine the question whether a liberalisation of the German water market is justified under constitutional law. Such a question might not occur because due to all these advantages no one might be harmed and no one would have a reason to bring an action at law.

However, why the liberalisation of water markets can become an issue of major concern becomes clear if one considers the inherent risks, which should be carefully reviewed when making any decisions about water as the basis for human existence.

## **V. THE RISKS OF LIBERALISATION**

### **A. Lack of competition**

Liberalisation and privatisation proponents have high expectations in terms of competition. However, so far water supply and sewage services are characterised by low market competition with a high degree of government regulation.<sup>24</sup>

Today just a few companies - mainly the French multinationals - Vivendi and Suez-Lyonnaise, and SAUR, and the UK companies, Thames Water (now owned by the German conglomerate RWE), Anglian Water - dominate in the private sector of the industry. Vivendi and Suez, control 70% of all private water services between them, with over 200 million customers worldwide. Behind them, with 70 million customers, is Thames Water.<sup>25</sup> Attempts by the USA company Azurix - owned by Enron - to break into the market have been a failure (compounded by exposure for corrupt practices in Ghana).<sup>26</sup>

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<sup>24</sup> David Hall "Public partnership and private control - ownership, control and regulation in water concessions in central Europe" PSIRU report (May 1997) available at <[www.psiru.org/reports/9705-W-Eur-JV.doc](http://www.psiru.org/reports/9705-W-Eur-JV.doc)> (last accessed 30 November 2003)

<sup>25</sup> John Hilary "Gats and Water: The Threat of Services Negotiations at the WTO" page 8 available at <[www.savethechildren.org.uk/temp/scuk/cache/cmsattach/21\\_GATS%20and%20water.pdf](http://www.savethechildren.org.uk/temp/scuk/cache/cmsattach/21_GATS%20and%20water.pdf)> (last accessed 30 November 2003)

<sup>26</sup> David Hall "The Public Sector Water Undertaking - a Necessary Option" (February 2001) Public Services International Research Unit (PSIRU) available at <<http://www.psiru.org/reportsindex.htm>> (last accessed 30 November 2003)



Some of the privatisations have happened without any competitive tendering at all, even between the private sector companies. For example, all the private concessions in Czech republic, Hungary and Poland up to 1997 were awarded without any competitive tendering process, as was the SODECI concession in Cote d'Ivoire, yet they are now long-term monopolies.<sup>27</sup>

For physical reasons drinking water cannot be provided by several suppliers. For this reason water systems are natural monopolies by their very nature. Due to some unique characteristics of water services – water is irreplaceable and common carriage is technically very limited – competition within the water market is very difficult to achieve. Therefore, it can be assumed that firstly actual competition will be very rare and that secondly the absence of competitive tendering may accompany a water market with only a few huge global players.

### **B. Higher Prices**

One of the greatest concerns of communities and individuals is that privatisation will lead to increases in the cost of water to consumers.

The universal experience of water privatisation in the United Kingdom (UK) was a sharp increase in the cost of water. On average, prices rose by over 50% in the first 4 years.<sup>28</sup> In France, for instance, where some water is managed by municipalities and some by private companies or public-private joint ventures (PPPs), figures show a consistent picture of the private or PPP concessions charging much higher prices.<sup>29</sup> Such price increases can have various reasons. Acknowledging that fixed costs in the water sector are very high, it is likely that private utilities will among other things acquire related financial means through increased revenues from rates.<sup>30</sup> Private companies are, furthermore, under pressure to make a formerly

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<sup>27</sup> David Hall "Public partnership and private control - ownership, control and regulation in water concessions in central Europe" PSIRU report (May 1997) available at <[www.psir.org/reports/9705-W-Eur-JV.doc](http://www.psir.org/reports/9705-W-Eur-JV.doc)> (last accessed 30 November 2003)

<sup>28</sup> Emanuele Lobina "UK Water Privatisation – a briefing" (February 2001) Public Services International Research Unit (PSIRU) available at <<http://www.psir.org/reports/2001-02-W-UK-over.doc>> (last accessed 30 November 2003)

<sup>29</sup> In 1999 the prices were 13% higher than in 1994 - David Hall "The Public Sector Water Undertaking – a Necessary Option" (February 2001) Public Services International Research Unit (PSIRU) available at <<http://www.psir.org/reportsindex.htm>> (last accessed 30 November 2003)

<sup>30</sup> Nora Schiessler "European Public Services Union Europe's Water Policy on the Road to Implementation & the Opening of Water Markets" EEB Water Seminar (30 November and 1 December 2001) Seminar Report, page 24, available at



unprofitable business profitable. Additionally, private utilities may have a better access to capital than some public systems, but they may also have to pay a higher cost for that capital.<sup>31</sup> Water tariffs might be also driven up in order to meet aggressive investment requirements specified in the concessions. Finally, subsidy removal or reduction has to be compensated in systems where government subsidies were the norm in order to keep water tariffs low and to benefit the public welfare.<sup>32</sup>

Moreover, where cost savings occur it does not mean that these would necessarily result in lower prices. This actually happened in the UK. Forecasts of capital expenditure, which are used by the Office of Water Services (OFWAT)<sup>33</sup> to calculate the allowed prices, have been far higher than the actual expenditure. The companies announced that capital expenditure would rise at the same rate as before the privatisation in 1988. This, however, was not the case and the shortfall was used to boost dividends, but not to cut prices.<sup>34</sup> Similarly, savings in terms of operation cost, which have been actually caused by a more efficiently performance have been used for profit distribution. Thames Water, North West Water, and Yorkshire Water even cut deliberately their investment programme and used the savings to maintain or increase the dividends.<sup>35</sup>

### **C. Water Quality**

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<[http://www.eeb.org/activities/water/EEB\\_Water\\_Seminar\\_11\\_2001\\_Report\\_%20FINAL.pdf](http://www.eeb.org/activities/water/EEB_Water_Seminar_11_2001_Report_%20FINAL.pdf)> (last accessed 30 November 2003)

<sup>31</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes "The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in Development, Environment, and Security February 2002", page 30, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)

<sup>32</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes "The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in Development, Environment, and Security February 2002", page 30, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)

<sup>33</sup> OFWAT is a public regulator, which sets the price regime that companies follow and is statutorily responsible for ensuring that the companies were profitable and for encouraging efficiency. As there is no competition, OFWAT compares the companies performance with each other.

<sup>34</sup> Emanuele Lobina "UK Water Privatisation – a briefing" (February 2001) Public Services International Research Unit (PSIRU) pages 8,10 available at <<http://www.psiru.org/reports/2001-02-W-UK-over.doc>> (last accessed 30 November 2003)

<sup>35</sup> Emanuele Lobina "UK Water Privatisation – a briefing" (February 2001) Public Services International Research Unit (PSIRU) pages 8,10 available at <<http://www.psiru.org/reports/2001-02-W-UK-over.doc>> (last accessed 30 November 2003)



The problem of water quality is another controversial issue around privatisation. As a result of the concentration process caused by increased competition long distance water transportation is very likely. This, however, is due to the specific characteristics of water like large weight and volume very energy intensive and results in hygienic and chemical alteration.<sup>36</sup> Water is not a homogeneous good but is different with regards to physical, chemical and microbiological parameters, such as temperature, pH value, oxygen content, acid capacity or microorganisms. A blending of different drinking waters with different compositions in respect to these parameters is not easy. The mixing of drinking waters without any accompanying measures raises the danger of detrimental changes, which rule out the further use as drinking water. Mainly the detachment of layers and corrosion in the feed lines, germ multiplying and similar undesirable effects have to be mentioned here.<sup>37</sup> As a result more disinfection will be necessary.

The concentration process, accumulated capital, and know how of multi-utilities may trigger in many cases the choice for treatment instead of resource protection. New emerging technologies are promising to treat any polluted water to produce drinking water at decreasing costs. Drinking water quality thus could be based on technical options and not on unpolluted waters.<sup>38</sup> This, however, seems to be quite problematic against the background of the principle of sustainability. The principle of sustainability means "providing an acceptable quality of life for present generations without compromising that of future generations".<sup>39</sup> A preferential chemical treatment of waters, however, cannot be interpreted as future generations friendly.

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<sup>36</sup> European Environmental Bureau (EEB) "A Review of Water Services in the EU under Liberalisation and Privatisation Pressures Special Report" (July 2002) Publication Number: 2002/012, page 19 available at <<http://www.eeb.org/activities/water/special-report-water-services.pdf>> (last accessed 30 November 2003)

<sup>37</sup> Holger Brackemann, Helmut Höring "Liberalisierung der Deutschen Wasserversorgung Auswirkungen auf den Gesundheits- und Umweltschutz, Skizzierung eines Ordnungsrahmens fuer eine Wettbewerbliche Wasserwirtschaft", page 33, available at <<http://www.umweltbundesamt.org/fpdf-1/1888.pdf>> (last accessed 30 November 2003)

<sup>38</sup> Nora Schiessler "European Public Services Union Europe's Water Policy on the Road to Implementation & the Opening of Water Markets" EEB Water Seminar (30 November and 1 December 2001) Seminar Report, page 25, available at <[http://www.eeb.org/activities/water/EEB\\_Water\\_Seminar\\_11\\_2001\\_Report\\_%20FINAL.pdf](http://www.eeb.org/activities/water/EEB_Water_Seminar_11_2001_Report_%20FINAL.pdf)> (last accessed 30 November 2003)

<sup>39</sup> Evangelical Lutheran Church in America "Caring for Creation Now! – Discussion Guide for Congregational Use" available at <[http://www.elca.org/dcs/epr/environment/pdf/cfc\\_discussionGuide.pdf](http://www.elca.org/dcs/epr/environment/pdf/cfc_discussionGuide.pdf)> page 4 ((last accessed 30 November 2003)



Furthermore, cost reduction is mostly achieved at the expense of quality, customer service and resource protection. Against the background of globally distribution and multinational strategy, it seems likely that profits do not return for the improvement of the system.<sup>40</sup>

Due to all these reasons concerns about the ability of private utilities to protect water quality arise.

#### ***D. Accountability, Transparency, and Democracy***

Sometimes the public sectors lack of efficiency is used to demonstrate the advantages of a privatisation approach and also to provide reasons for avoiding public-private partnerships. Consequently, in a privatised market this raises the question of decreasing community powers and democratic accountability.<sup>41</sup> This is supported by the circumstance that private companies have few economic incentives to address monitoring, public participation, transparency and oversight and tend rather to understate or misrepresent to customers the size and potential impacts of water quality problems that do occur.<sup>42</sup> Moreover, regulation in the privatized concessions is difficult anyway.

The possible disregarding of democratic accountability combined with the secrecy of contract and business confidentiality requirements in the private sector can be very difficult to challenge legally. It can further lead to ineffective service provision, discriminatory behavior, or violations of water-quality protections.<sup>43</sup>

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<sup>40</sup> Nora Schiessler "European Public Services Union Europe's Water Policy on the Road to Implementation & the Opening of Water Markets" EEB Water Seminar (30 November and 1 December 2001) Seminar Report, page 24, available at <[http://www.eeb.org/activities/water/EEB\\_Water\\_Seminar\\_11\\_2001\\_Report\\_%20FINAL.pdf](http://www.eeb.org/activities/water/EEB_Water_Seminar_11_2001_Report_%20FINAL.pdf)> (last accessed 30 November 2003)

<sup>41</sup> Globalisation Challenge Initiative / Integrated Social Development Centre "Water Privatisation in Ghana?" An Analysis of Government and World Bank Policies, May 2001, page 7 available at <[http://www.challengeglobalization.org/html/otherpubs/Ghana\\_Water.pdf](http://www.challengeglobalization.org/html/otherpubs/Ghana_Water.pdf)> (last accessed 30 November 2003)

<sup>42</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes "The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in Development, Environment, and Security February 2002", page 39, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)

<sup>43</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes "The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in



### ***E. Concession Duration***

Furthermore, there can arise severe problems with cancellation even if the holder of a license fails to fulfill its contract obligations, because the contract is usually awarded for a period of 20-30 years. Additionally the long-term conclusion of these contracts refuse the municipal partner virtually every influence during this time.<sup>44</sup>

### ***F. Social Exclusion and Health Problems***

Privatisation can also lead to social exclusion. In the UK for instance the number of disconnected households tripled in the first 5 years after the water market was opened for privatisation.<sup>45</sup> As a result the health of the household and the public was endangered. The number of hepatitis doubled and the number of dysentery multiplied by six.<sup>46</sup>

In South Africa people, who could not pay the bill were also disconnected from the water network. As a result many people were forced to use dirty water and therefore cholera broke out. Between 2000 and 2004 140 000 people were affected by that disease alone in South Africa.<sup>47</sup>

### ***G. Neglecting of Water-Use Efficiency and Conservation***

Private suppliers have furthermore little or no financial incentive to encourage water conservation, because improvements in efficiency and conservation reduce

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Development, Environment, and Security February 2002", page 37, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)

<sup>44</sup> Brian Synott "European Public Services Union Europe's Water Policy on the Road to Implementation & the Opening of Water Markets" EEB Water Seminar (30 November and 1 December 2001) Seminar Report, page 22, available at <[http://www.eeb.org/activities/water/EEB\\_Water\\_Seminar\\_11\\_2001\\_Report\\_%20FINAL.pdf](http://www.eeb.org/activities/water/EEB_Water_Seminar_11_2001_Report_%20FINAL.pdf)> (last accessed 30 November 2003)

<sup>45</sup> Emanuele Lobina "UK Water Privatisation – a briefing" (February 2001) Public Services International Research Unit (PSIRU) available at <<http://www.psiru.org/reports/2001-02-W-UK-over.doc>> (last accessed 30 November 2003)

<sup>46</sup> Hiltrud Breyer "Der Kampf ums blaue Gold" Frankfurter Rundschau Online (13 September 2003) available at <[http://www.fr-aktuell.de/ressorts/nachrichten\\_und\\_politik/deutschland/?cnt=302538](http://www.fr-aktuell.de/ressorts/nachrichten_und_politik/deutschland/?cnt=302538)> (last accessed 30 November 2003)

<sup>47</sup> Hiltrud Breyer "Der Kampf ums blaue Gold" Frankfurter Rundschau Online (13 September 2003) available at <[http://www.fr-aktuell.de/ressorts/nachrichten\\_und\\_politik/deutschland/?cnt=302538](http://www.fr-aktuell.de/ressorts/nachrichten_und_politik/deutschland/?cnt=302538)> (last accessed 30 November 2003)



water sales and hence cause lower revenues. Quite the reverse, private companies might attempt to achieve a higher consumption, so that there are also risks in terms of sustainable development.<sup>48</sup>

## **VI. CURRENT ORGANISATION OF THE GERMAN WATER MARKET**

In order to examine the question, which measures have to be taken in fulfilment of the GATS requirements and whether these measures are justified under the German constitutional law, it is necessary to have a closer look to the current organisation of the German water market.

### **A. Municipalities as an Essential Element of Democracy**

The Federal Republic of Germany is a state governed by the rule of law in which the principle of separation of powers applies. For this reason, the distribution of state power is not only horizontal into the legislature, the executive and the judiciary. State power is also divided vertically, i.e. into the organs of the Federation, the 16 *Länder* and the local authorities (municipalities, towns and districts).<sup>49</sup> The underlying idea of this is to unite civil society with the state. With the application of this type of state it is possible to involve individual citizen and activate them for the order of their immediate area of life.<sup>50</sup> Such a decentralisation is therefore necessary to mobilise civil society in order to strengthen political development of an informed opinion and democracy from the bottom to the top, thereby making the municipalities a core of democracy.<sup>51</sup>

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<sup>48</sup> Peter H. Gleick, Gary Wolff, Elizabeth L. Chalecki, Rachel Reyes "The New Economy of Water Risks and Benefits of Globalization and Privatisation of Fresh Water Pacific Institute for Studies in Development, Environment, and Security February 2002", page 37, available at <[http://www.pacinst.org/reports/new\\_economy\\_of\\_water.pdf](http://www.pacinst.org/reports/new_economy_of_water.pdf)> (last accessed 30 November 2003)

<sup>49</sup> Dieter Haschke "Local Government Administration in Germany" German Law Archive – Literature on German Law, <available at <http://www.iuscomp.org/gla/literature/localgov.htm>> (last accessed 30 November 2003)

<sup>50</sup> Walther Fuerst/ Hellmuth Guenther *Grundgesetz - Das Verfassungsrecht der Bundesrepublik Deutschland in den Grundzuegen* (2nd Ed. Berlin, Erich Schmidt Verlag, 1978) page 189

<sup>51</sup> Law Report of the Bundesverfassungsgericht Germany - BVerfGE 79, 127, 149 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003)



***B. Article 28 paragraph 2 of the Constitution of the Federal Republic of Germany  
(Grundgesetz der Bundesrepublik Deutschland)***

According to Article 28 paragraph 2 sentence 1 of the German Federal Constitution, the municipalities have a right of self-government. Corresponding to that, the municipalities are entitled to govern all local affairs of the community in their own responsibility within the limits set by the law.

Out of this constitutional principle arises rights and duties for the municipalities. The term "rights" in this context means that the guarantee of local autonomy prohibits Federal and Länder<sup>52</sup> legislation to remove the rights of local authorities to manage their own affairs or to restrict these rights to such an extent that the substance of the autonomy is taken away from it.<sup>53</sup>

The term "duties" with respect to affairs of the local community means that these affairs have to be looked after by the municipalities. The municipalities cannot question whether they are going to fulfil these tasks. They only have the possibility to determine how the task will be executed.<sup>54</sup>

In other words, the duty to look after the local affairs of the community does not mean per se that the municipalities have to exercise these obligations by themselves. Rather they can decide on the mode of fulfilling these tasks. Therefore, they are able to determine the institutional and organisational arrangements. These arrangements differ in respect to the actors involved and the legal status of the provider. The provider can either come under public law or private law. Subsequently national

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<sup>52</sup> Germany is a federal republic made up of 16 Länder. The Länder have their own state authorities and their own legislation. However, the rule that "Federal law takes precedence over Land law" means that in many cases Land legislation is no longer observed. The Länder are responsible for education and policing. In addition they shoulder the main burden of administrative work, since they are generally in charge of implementing Federal laws.

<sup>53</sup> Dieter Haschke "Local Government Administration in Germany" German Law Archive – Literature on German Law, <available at <http://www.iuscomp.org/gla/literature/localgov.htm>> (last accessed 30 November 2003)

<sup>54</sup> Dieter Haschke "Local Government Administration in Germany" German Law Archive – Literature on German Law, <available at <http://www.iuscomp.org/gla/literature/localgov.htm>> (last accessed 30 November 2003)



authorities can examine merely the legitimacy but not the usefulness of that municipal behaviour.<sup>55</sup>

Furthermore, the term “affairs of the local community” cannot be identified by a legal catalogue, where all the included tasks are listed. Affairs of the local community can be rather identified by their local character and are, therefore, all necessities and interests which are rooted in the local community or bear specific relation to it. In other words, all municipal inhabitants have these affairs in common, because they are specifically concerned the life of the citizens in one community.<sup>56</sup>

If uncertainties regarding a precise classification still remain, then it has to be examined whether first a task is performed due to conventional practice and the legal situation rather by the municipalities or superior state institutions, and second whether the municipal task performance benefits the inhabitants.<sup>57</sup>

Tasks with regard to the public provision for elementary requirements are generally accepted as affairs of the local community. Public provision for elementary requirements in turn is defined as all administrative measures, which provide the general public or a specific public subgroup with useful services, which are likely to promote general welfare.<sup>58</sup>

On the basis of these criteria, the majority sees water services as classical tasks of public provision for elementary requirements.<sup>59</sup> The municipalities are therefore obliged to guarantee water supply and waste water services for the citizens within the scope of local self government.

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<sup>55</sup> Dieter Haschke “Local Government Administration in Germany” German Law Archive – Literature on German Law, <available at <http://www.iuscomp.org/gla/literature/localgov.htm>> (last accessed 30 November 2003)

<sup>56</sup> Law Report of the Bundesverfassungsgericht Germany BVerfGE 79, 127, 151 (2 BvR 1619, 1628/83) ‘Rastede’, Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003); Thomas von Danwitz “The Constitutional Guarantee of Local Self-Government in Germany” page 137 available at <<http://www.kas.org.za/Publications/SeminarReports/Constitution%20and%20Law%20iv/vondanwitz.pdf>> (last accessed 30 November 2003)

<sup>57</sup> Winfried Kluth Vorlesung Kommunalrecht “1. Abschnitt: Die Kommunen im Staats- und Verfassungsgefüge para. 3 Die Verfassungsgarantien der kommunalen Selbstverwaltung in Art. 28 Abs. 2 GG und Art. 87 Verf. LSA” available at <<http://www.jura.uni-halle.de/vwronline/vwronline.htm>> (last accessed 30 November 2003)

<sup>58</sup> Ulrich Cronauge “Kommunale Daseinsvorsorge – Fossil oder Innovation?” (21. September 2001) available at <[http://www.gruene-fraktion.de/rsvgn/rs\\_datei/0,,139,00.pdf](http://www.gruene-fraktion.de/rsvgn/rs_datei/0,,139,00.pdf)> (last accessed 30 November 2003)

<sup>59</sup> Winfried Kluth Vorlesung Kommunalrecht “1. Abschnitt: Die Kommunen im Staats- und Verfassungsgefüge para. 3 Die Verfassungsgarantien der kommunalen Selbstverwaltung in Art. 28 Abs. 2 GG und Art. 87 Verf. LSA” available at <<http://www.jura.uni-halle.de/vwronline/vwronline.htm>> (last accessed 30 November 2003)



Additionally, federal state constitutions<sup>60</sup> as well as water laws<sup>61</sup> have assigned this task to the municipalities within the framework of their own sphere of responsibility.

The municipality can thereby operate its own waterworks, but it can also obtain water from another provider.<sup>62</sup> While doing so it only has to pay attention to the condition that it has to guarantee the performance of the assigned tasks. In every organisational form sufficient control and intervention rights have to be reserved for the municipality, so that any deficiencies can be avoided. Mostly this happens in the form of contractual agreements or a majority share of the municipality in new founded companies.<sup>63</sup> Beside this state authorities have to examine, whether the legal regulatory standards (e.g. quality of the delivered drinking water) are carried out.<sup>64</sup>

The spectrum of organisational arrangements without the participation of private entrepreneurs ranges from government operated systems (Regiebetrieb) and Semi-autonomous agencies (Eigenbetrieb) over municipal enterprises (kommunale privatrechtliche Eigengesellschaft) to public or inter – municipalities co-operation (Zweckverband or Wasser- und Bodenverband).<sup>65</sup> These forms of organisational agreements, however, are only of secondary significance of opening up the German

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<sup>60</sup> e.g. Article 83 paragraph 1 Bavarian Constitution: *The municipalities' own sphere of responsibility covers particularly...the supply of the citizens with water, light, gas and electricity.*

<sup>61</sup> e.g. Paragraph 37 a subsection 1 sentence 1 Water Law of Berlin: In its territory the Land Berlin has to guarantee a well-ordered water supply...”, similar Paragraph 57 subsection 1 sentence 1 of the Saxon Water Law

<sup>62</sup> Hans-Jürgen Ewers “Optionen, Chancen und Rahmenbedingungen einer Marktöffnung für eine nachhaltige Wasserversorgung” (July 2001) available at <[http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage\\_2Fdownload\\_2FWirtschaftspolitik\\_2FWasserversorgung1.pdf,templateId=download.pdf](http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage_2Fdownload_2FWirtschaftspolitik_2FWasserversorgung1.pdf,templateId=download.pdf)> (last accessed 30 November 2003)

<sup>63</sup> Frank Hoerter CDU Arbeitskreis Umwelt Technik und Verkehr “Liberalisierung und Privatisierung der kommunalen Wasserversorgung” page 2 available at <<http://www.stutensee.net/cdu.karlsruhe-land/aks/wasserprivatisierung-2003-02.doc>> (last accessed 30 November 2003)

<sup>64</sup> Bund-Laender- Arbeitsgruppe “Kleinanlagen”/ Umweltbundesamt “Empfehlungen zur Ueberwachung von Kleinanlagen der Trinkwasserversorgung - Leitfaden fuer Gesundheitsaemter”, page 8, available at <<http://www.hygieneinspektoren-nrw.de/leitfaden-ueberwachung-kleinanlagen.pdf>> (last accessed 30 November 2003)

<sup>65</sup> Hartmut Clausen, Michael Rothgang “Innovations and Sustainability in the Water Services Sectors – Institutional Framework, Actors, and Policy Instruments” Paper prepared for the Workshop “Recent Advances in Applied Infrastructure Research” (12 October 2002), page 12, available at <[http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin\\_wip\\_workshop\\_2002-paper\\_clausen\\_rothgang-water\\_innovations.pdf](http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin_wip_workshop_2002-paper_clausen_rothgang-water_innovations.pdf)> (last accessed 30 November 2003)



water market to private entrepreneurs. Organisational arrangements with participation of private entrepreneurs will be more important. Therefore, a short description of these organisational arrangements will be provided subsequently, because they provide for possibilities on how to implement liberalisation in the water sector.

In terms of the assignment of water service rights and duties to a private enterprise, organisational arrangements cover mixed enterprises (Gemischtwirtschaftliche Gesellschaft) and private firms (by delegation, concession agreement).

### **1. Business model**

The Business model is characterized by the circumstance that a private enterprise provides the water services and that the municipality has to pay remuneration for that. The consumer/ user in turn pays a fee to the municipality for the service. Regardless of this circumstance the municipality is, however, still responsible for providing the service.<sup>66</sup>

### **2. Cooperation model**

This model includes two different forms of co-operation between the municipality and a private enterprise. The starting point, each time, is the founding of a company. In one variant the municipality has direct influence over the service provision by its share of the business. In the other variant the municipality is merely aco-partner of a company, which leases the network facilities from a private enterprise.<sup>67</sup>

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<sup>66</sup> Frank Hoerter CDU Working Group Environment Technology and Transport Liberalisation and Privatisation of the Municipal Water Supply page 1 available at Frank Hoerter CDU Arbeitskreis Umwelt Technik und Verkehr "Liberalisierung und Privatisierung der kommunalen Wasserversorgung" page 2 available at <<http://www.stutensee.net/cdu.karlsruhe-land/aks/wasserprivatisierung-2003-02.doc>> (last accessed 30 November 2003)

<sup>67</sup> Frank Hoerter CDU Working Group Environment Technology and Transport Liberalisation and Privatisation of the Municipal Water Supply page 1 available at Frank Hoerter CDU Arbeitskreis Umwelt Technik und Verkehr "Liberalisierung und Privatisierung der kommunalen Wasserversorgung" page 2 available at <<http://www.stutensee.net/cdu.karlsruhe-land/aks/wasserprivatisierung-2003-02.doc>> (last accessed 30 November 2003)



### **3. Management model**

If the form of a management model has been chosen, then the ownership of the facilities remain fully with the municipalities. The operation responsibilities, however, are assigned to a private partner, so that its expertise and market knowledge can be used.<sup>68</sup>

### **4. Concession model**

In the framework of a management model, the municipality permits a private enterprise to perform the water service and to collect the respective remuneration for this service from the customers. The municipality grants thus a territorial monopoly for a certain length of time.<sup>69</sup>

## **C. Current Market Structures**

At the present, the German water supply market is characterised by the existence of a few big and a multitude of very small enterprises, which are operated in different legal forms. The average number of customers of most of the utilities is less than 3000 and large public co-operations covering vast areas like the Ruhrverband that supplies the urban zones along the river Ruhr are the exception.<sup>70</sup> Within the water management sector, the water supply and the waste water treatment are physically and administratively separated in most cases. In the specialist literature it is referred to 6000 to 7000 water supply enterprises and about 8000 sewage disposal enterprises.<sup>71</sup>

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<sup>68</sup> Frank Hoerter, above page 2

<sup>69</sup> Frank Hoerter, above page 2

<sup>70</sup> Hartmut Clausen, Michael Rothgang "Innovations and Sustainability in the Water Services Sectors – Institutional Framework, Actors, and Policy Instruments Paper prepared for the Workshop "Recent Advances in Applied Infrastructure Research" (12 October 2002), page 13, available at <[http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin\\_wip\\_workshop\\_2002-paper\\_clausen\\_rothgang-water\\_innovations.pdf](http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin_wip_workshop_2002-paper_clausen_rothgang-water_innovations.pdf)> (last accessed 30 November 2003)

<sup>71</sup> Hans-Jürgen Ewers (project leading) "Optionen, Chancen und Rahmenbedingungen einer Marktöffnung für eine nachhaltige Wasserversorgung" (July 2001), page 11, available at <[http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage\\_2Fdownload\\_2Fwirtschaftspolitik\\_2FWasserversorgung1.pdf;templateId=download.pdf](http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage_2Fdownload_2Fwirtschaftspolitik_2FWasserversorgung1.pdf;templateId=download.pdf)> (last accessed 30 November 2003)



The municipalities own the enterprises predominantly. About 85 % of the water supply enterprises are operated under a public legal form, which cover 52 % of the water delivery amount. 15 % of all water supply enterprises, which deliver 48 % of the water amount used in Germany, show a private legal form. Just 1.6 % of the enterprises are completely private property.<sup>72</sup>

Considering these figures, it can be stated that the reform of the public water service sector is going to have significant consequences. Therefore, it is important to assure that all questions with respect to constitutional law are clarified before making any far-reaching decisions.

#### ***D. Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen)***

In Germany, the Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen)<sup>73</sup> takes territorial monopolies for water services out of the general provisions of the competition law with regard to monopolies, thereby allowing, that in a specific region just one single water supply provider namely the municipality appears and is alone responsible for providing population and industry with drinking water.<sup>74</sup> This is contrary to the energy and gas market, where competition to these markets was introduced with the repeal of Article 103 of the Act against Restraints on Competition in its version from 20 February 1990.<sup>75</sup> This Article, however, is still valid for the water service sector due to transitional

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<sup>72</sup> Hans-Jürgen Ewers (project leading) "Optionen, Chancen und Rahmenbedingungen einer Marktöffnung für eine nachhaltige Wasserversorgung" (July 2001), page 11, available at <[http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage\\_2Fdownload\\_2Fwirtschaftspolitik\\_2FWasserversorgung1.pdf,templateId=download.pdf](http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage_2Fdownload_2Fwirtschaftspolitik_2FWasserversorgung1.pdf,templateId=download.pdf)> (last accessed 30 November 2003)

<sup>73</sup> The full text of the relevant provisions can be found in appendix number II. The whole text of the Act is available at <<http://www.bundeskartellamt.de/GWB01-2002.pdf>> (last accessed 30 November 2003)

<sup>74</sup> Article 131 (8) of the Act against Restraints of Competition, see appendix number II; Hans Rudolf Ebel *Kartellrecht GWB und EWG-Vertrag* (inclusive 25<sup>th</sup> completion, Luchterhand, Koeln, 1993) section 103 GWB paragraph 1

<sup>75</sup> The Act Against Restraints of Competition as published on 20 February 1990 (Federal Law Gazette I) Bundesgesetzblatt, p. 235, The full text of the relevant provisions can be found in appendix number III.



provisions in Article 131 (8) of the Act against Restraints on Competition, so that monopolies in that sector are still legally possible.<sup>76</sup>

Article 103 of the Act against Restraints on Competition in its version from 20 February 1990 states that the municipalities have the possibility to conclude demarcation contracts in accordance with section 103 (1) number 1 and concession contracts in accordance with section 103 (1) number 2.

Demarcation contracts are contracts for undertakings with other utilities or regional authorities, in which one party is obligated to refrain from the public supply of electricity, gas or water in a certain area via conducting.<sup>77</sup>

Concession contracts are contracts between utilities and local authorities in which the local authority is obligated to allow one utility, the right to exclusively lay and operate the pipe system on or beneath public paths for existing or intended public electricity, gas or water supply for the end-consumer in the local authority area.<sup>78</sup>

As a consequence of the possibility to conclude these two kinds of contracts the municipalities are able to establish area monopolies. Independent producers and providers have therefore no possibility to enter the service areas through their own pipe systems or via the pipe systems of the municipalities.<sup>79</sup> In order to liberalise the German water market it is therefore necessary to repeal section 103 of the Act against Restraints on Competition old version, so that the possibility of concluding demarcation and concession contracts and the setting up of area monopolies would be impossible.

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<sup>76</sup> Article 131 (8) of the Act against Restraints of Competition Article

<sup>77</sup> see also Siegfried Klaue *Gesetz gegen Wettbewerbsbeschränkungen: GWB Kommentar/ Immenga/ Mestmaecker* (2<sup>nd</sup> Ed, Muenchen, Beck, 1992) page 2411 paragraph 12

<sup>78</sup> Siegfried Klaue *Gesetz gegen Wettbewerbsbeschränkungen: GWB Kommentar/ Immenga/ Mestmaecker* (2<sup>nd</sup> Ed, Muenchen, Beck, 1992) page 2415 paragraph 23

<sup>79</sup> Hans Rudolf Ebel *Kartellrecht GWB und EWG-Vertrag* (inclusive 25<sup>th</sup> completion, Luchterhand, Koeln, 1993) section 103 GWB paragraph 24



### *E. Anschluss- and Benutzungszwang*

In addition to the choice of the organisational form, the municipalities can require the residents to be connected to the public water supply and sewage disposal network of the municipality or the respective public co-operation (Zweckverband) and to enter into contract with the public supplier (Anschlusszwang and Benutzungszwang).<sup>80</sup>

The "Benutzungszwang" obligates the citizen to use the public network and prohibits them from using other facilities. Concerning the "Anschlusszwang" the resident has an obligation to take all measures, which are necessary in order to use the public facilities.<sup>81</sup>

These obligations, which are laid down in the statutes of the municipalities<sup>82</sup> and which also constitute entry barriers for potential competitors, are necessary instruments to ensure adequate or high drinking water quality and comprehensive, low-cost water supply which in turn ensure inevitably the common wealth.<sup>83</sup> Simultaneously, however, there also exists the legal right to use the network.<sup>84</sup>

Regulations regarding the obligation to have a connection to the public network are mostly connected with an intrusion on the fundamental rights of the citizens, especially these of Article 14 [Property], Article 12 [Occupational freedom] and Article 2 paragraph 1 [Personal freedoms] of the Constitution of the Federal Republic of Germany.<sup>85</sup> For reasons of proportionality the respective regulations have, therefore to contain clauses, which regulate cases of hardship and facilitate exceptions

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<sup>80</sup> Hans-Jürgen Ewers "Optionen, Chancen und Rahmenbedingungen einer Marktöffnung für eine nachhaltige Wasserversorgung" (July 2001), page 17, available at <[http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage\\_2Fdownload\\_2Fwirtschaftspolitik\\_2FWasserversorgung1.pdf,templateId=download.pdf](http://www.bmwi.bund.de/Redaktion/Inhalte/Import/Pdf/Homepage_2Fdownload_2Fwirtschaftspolitik_2FWasserversorgung1.pdf,templateId=download.pdf)> (last accessed 30 November 2003)

<sup>81</sup> Marco Wicklein "Verwaltungsrecht BT Kommunalrecht Sachsen" (January 2001), page 55, available at <<http://www.marco-wicklein.de/studium.htm>> (last accessed 30 November 2003)

<sup>82</sup> compare paragraph 14 Saxon Local Government Code (Saechsische Gemeindeordnung – SächsGemO) available at <<http://www.rodau.de/sgo0.htm>> (last accessed 30 November 2003)

<sup>83</sup> Hartmut Clausen, Michael Rothgang "Innovations and Sustainability in the Water Services Sectors – Institutional Framework, Actors, and Policy Instruments Paper prepared for the Workshop "Recent Advances in Applied Infrastructure Research" (12 October 2002), page 11, available at <[http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin\\_wip\\_workshop\\_2002-paper\\_clausen\\_rothgang-water\\_innovations.pdf](http://wip.tu-berlin.de/workshop/2002/papers/tu-berlin_wip_workshop_2002-paper_clausen_rothgang-water_innovations.pdf)> (last accessed 30 November 2003)

<sup>84</sup> Bund-Laender- Arbeitsgruppe "Kleinanlagen"/ Umweltbundesamt "Empfehlungen zur Ueberwachung von Kleinanlagen der Trinkwasserversorgung - Leitfaden fuer Gesundheitsaemter", page 8, available at <<http://www.hygieneinspektoren-nrw.de/leitfaden-ueberwachung-kleinanlagen.pdf>> (last accessed 30 November 2003)

<sup>85</sup> The full texts of the relevant regulations are in the appendix number. I



when the Anschluss- and Benutzungszwang would appear as unreasonable hardness. These clauses contain mostly a weighing up between self-interests regarding the property and the commitment to the public welfare.<sup>86</sup>

Considering the demonstrated legal framework it is clear, that the multitude of the present laws and conditions facilitate not only the protection of the drinking water quality, but also function as market access barriers for potential competitors. The German drinking water market can be characterized as a heavily regulated and monopolised supply sector.

## **VII. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)**

The GATS consists of the main Articles, the Annexes, the schedules of specific commitments and the lists of exemptions from most-favoured-nation (MFN) treatment, which have to be submitted by member governments. It is compulsory for all WTO Members that they have a schedule of services commitments. Only the content of the schedules of specific commitments and the lists of exemptions from MFN can decide to what extent the basic principles of the GATS – market access (GATS Article XVI), national treatment (GATS Article XVII) and MFN treatment (GATS Article II) – can be applied in the different countries jurisdictions.<sup>87</sup>

The Most-Favoured-Nation principle means that each WTO Member has to give any other Member with respect to its services and service suppliers the same best treatment like it gives to services and service suppliers of any other country. Any disadvantaging is prohibited. It also does, thereby, not play a role, whether the comparison country is a Member of the WTO or not. Similar is the national treatment obligation under Article XVI of the GATS, which requires the WTO Members to treat other WTO Member services and service suppliers equal in comparison to

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<sup>86</sup> Bund-Laender- Arbeitsgruppe "Kleinanlagen"/ Umweltbundesamt "Empfehlungen zur Ueberwachung von Kleinanlagen der Trinkwasserversorgung - Leitfaden fuer Gesundheitsaemter", page 8, available at <<http://www.hygieneinspektoren-nrw.de/leitfaden-ueberwachung-kleinanlagen.pdf>> (last accessed 30 November 2003)

<sup>87</sup> World Trade Organisation, Secretariat *Guide to the GATS – An Overview of Issues for Further Liberalisation of Trade in Services* ( MA : Kluwer Law International, Boston, 2000), page 651



domestic services and services suppliers.<sup>88</sup> Finally, the market access provisions of GATS cover six types of restrictions, which are prohibited by the agreement unless there are any limitations agreed.<sup>89</sup>

These provisions are fundamental to the liberalisation of service markets. They provide foreign companies with access to market of the respective services sector.

The schedules list the service sectors to which each country wants to apply the market access and national treatment obligations of the GATS and any exceptions from those obligations. If making a commitment a government agrees a specified level of market access and national treatment and not to introduce any new measures that may restrict market entry or service operation. Commitments can only be withdrawn or modified after the agreement of compensatory adjustments with affected countries, and no withdrawals or modifications may be made until three years after the entry into force of the commitment (GATS Article XXI (1) and (2)).<sup>90</sup>

That means that the withdrawal of commitments is a stringent and difficult procedure. Every member which wants to modify or backtrack its commitments (i.e. make its services regulatory regime more strict) can do this only after three years from entry into force of those commitments; and has to negotiate and to provide an acceptable compensation to its trading partners in the WTO. It seems therefore that it is practically impossible to demand public basis services back after they have been liberalised once.<sup>91</sup>

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<sup>88</sup> World Trade Organisation, Secretariat *Guide to the GATS – An Overview of Issues for Further Liberalisation of Trade in Services* ( MA : Kluwer Law International, Boston, 2000), page 653

<sup>89</sup> GATS Article XVI; World Trade Organisation “GATS Training Module – 1.7. Conditional Granting of Market Access and National Treatment” available at

<[http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s7p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s7p1_e.htm)> World Trade Organisation “GATS General Obligations (1)” available at <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto06/wto6\\_14.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_14.htm)> (last accessed 30 November 2003)

<sup>90</sup> World Trade Organisation, Secretariat *Guide to the GATS – An Overview of Issues for Further Liberalisation of Trade in Services* ( MA : Kluwer Law International, Boston, 2000), page 652

<sup>91</sup> Stephan Best “EU-Konvent und GATS” available at

<<http://www.attac.de/gats/hintergrund/eukonventgats>> World Trade Organisation “GATS General Obligations (1)” available at <[http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto06/wto6\\_14.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_14.htm)> (last accessed 30 November 2003)



Acknowledging this circumstance it is important to clarify the relationship between GATS regulations and the provision of services through public entities. If any member state makes any specific commitments regarding the above-depicted provisions the GATS could be applied, unless the service sector is explicitly excluded from the GATS in general.<sup>92</sup>

Therefore it is important to define the scope of the GATS and to examine whether water services fall under the scope of GATS and if so to what extend.

#### ***A. Scope of the GATS – Are Water Services Included?***

According to Article I (1) of the GATS the agreement applies to “measures by Members affecting trade in services”. It does not matter in this context whether a measure is taken at central, regional or local government level, or by non-governmental bodies exercising delegated powers. GATS potentially covers everything that governments do which affect trade in services and, it potentially covers all levels of governments. Government measures include legislation and regulation as well as requirements, procedures, practices or other actions.<sup>93</sup>

The term “trade in services” is defined as supplying services in any of the four modes listed in Article I (2). They can be divided into twelve sectors.<sup>94</sup> In principle, that means that all internationally traded services are included and no service sector is excluded from the GATS.<sup>95</sup> The water sector is therefore basically covered by the GATS.

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<sup>92</sup> International Branch, Ministry of Employment and Investment Government of British Columbia “GATS and Public Service Systems: the GATS ‘governmental authority’ exclusion” (02 April 2001) available at <<http://members.dodo.net.au/rlsanders/issues/economy/gats/kit/bcgats.htm>> (last accessed 30 November 2003)

<sup>93</sup> World Trade Organisation “GATS Training Module – 1.4. Scope and Application” available at <[http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s4p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s4p1_e.htm)> (last accessed 30 November 2003)

<sup>94</sup> which are entrepreneurial and occupational services, post and telecommunications services, energy and water supply, bank and insurance services, medical and social services, tourism and transport services, sales services, building and construction industry, education, culture and sport, environment services, financial services and other unlisted services.

<sup>95</sup> World Trade Organisation “GATS Training Module – 1.4. Scope and Application” available at <[http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s4p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s4p1_e.htm)> (last accessed 30 November 2003)



There are only a few exceptions. Two of them are, for instance: services provided to the public in the exercise of governmental authority<sup>96</sup>, and services in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights are not covered by the GATS.<sup>97</sup>

It is, therefore relevant to clarify, whether water services can be subsumed under one of these two exceptions of the GATS. If one could answer this question in the positive all further fears with regards to a progressive liberalisation of water services and the compatibility with the German constitution would be unnecessary, because the public services would not be subject to the progressive liberalisation rules of the GATS.

Exclusion by the second alternative (traffic) does obviously not come into consideration. However, it remains important to examine the first alternative in Article I paragraph 3 (b) - "Services supplied in the exercise of governmental authority" - more completely. This becomes obvious with a view, for instance, to the organisation of the German Water Market. There the municipalities are within the scope of local self government and public provision for elementary requirements obliged to guarantee water supply and waste water services for the citizens.<sup>98</sup> It seems due to these circumstances reasonable to assume that public water services are supplied within in the exercise of governmental authority.

Therefore, the central question is, whether public water services are "Services supplied within the exercise of governmental authority"

"Services supplied in the exercise of governmental authority" are according to Article I (3) (c) of the GATS defined as services "supplied neither on a commercial basis, nor in competition with one or more service suppliers". If one of these preconditions is not given, the service has to be GATS concurring. It is therefore necessary to examine the exact meaning of these two preconditions in detail in order

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<sup>96</sup> GATS Article I (3) (b), see appendix number IV

<sup>97</sup> ANNEX ON AIR TRANSPORT SERVICES of the GATS, see appendix number IV

<sup>98</sup> compare remarks under paragraph VI. B.



to answer the question whether water services fall within the scope of the exclusion of Article I (3) (b) and consequently not in the scope of GATS.

### *1. Interpretation according to WTO Secretariat and WTO Members*

There is a great uncertainty and a big controversy about the exact meaning of the two preconditions under the Secretariat and the WTO members, because the agreement does not define the phrases explicitly.<sup>99</sup>

Basically, the WTO Secretariat refuses, for instance, to take postal and courier services as well as the provision of medical and hospital treatment into the scope of the exclusion of Article I (3) (b) of the GATS, because they are usually supplied on a commercial basis or in a competitive relationship.<sup>100</sup> However, in another document the Secretariat seems to suggest the opposite by stating that “the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as governmental services”.<sup>101</sup> That would mean that the existence of a complex mixture of public and private water suppliers like it exists in Germany (e.g. concession model, management model, government operated systems) would be an indication for excluding water services from the area services supplied in the exercise of governmental authority. It could rather be a favourable sign that the public role in the service sector as a whole shall be the overriding factor, despite the commercial or competitive nature of any of its parts.

Also, the WTO members do not use standardised criteria in order to answer the question whether a service can be subsumed under exception of Article I (3) (b) and

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<sup>99</sup> International Branch, Ministry of Employment and Investment Government of British Columbia “GATS and Public Service Systems: the GATS ‘governmental authority’ exclusion” (02 April 2001) available at <<http://members.dodo.net.au/rlsanders/issues/economy/gats/kit/bcgats.htm>> (last accessed 30 November 2003)

<sup>100</sup> World Trade Organisation Secretariat “Postal and Courier Services – Background Note by the Secretariat”, 12 June 1998, S/C/W/39, page 2, available at <[http://www.wto.org/english/tratop\\_e/serv\\_e/w39.doc](http://www.wto.org/english/tratop_e/serv_e/w39.doc)> (last accessed 30 November 2003); World Trade Organisation Secretariat “Health and Social Services – Background Note by the Secretariat”, 18 September 1998, S/C/W/50, page 10-11 paragraph 37-39 available at <[http://www.wto.org/english/tratop\\_e/serv\\_e/w50.doc](http://www.wto.org/english/tratop_e/serv_e/w50.doc)> (last accessed 30 November 2003)

<sup>101</sup> World Trade Organisation “Market Access: Unfinished Business, Post Uruguay Round Inventory and Issues Special Study No 6”, April 2001, page 124 available at <[http://www.wto.org/english/res\\_e/booksp\\_e/maccess\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/maccess_e.pdf)> (last accessed 30 November 2003)



(c) of the GATS and therefore do not come to a unified result. They rather decide each case separately and independently from each other.<sup>102</sup>

## 2. Interpretation according to International Standards

In order to define the exact meaning of Article I (3) (c) of the GATS Markus Krajewski examined the phrases "supplied neither on a commercial basis, nor in competition with one or more service suppliers" along internationally accepted rules on interpreting international treaties, which are laid down in the Vienna Convention on the Law of Treaties.<sup>103</sup>

According to Article 31 (1) of the Vienna Convention a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose. Context of the terms includes the text of the entire treaty, its preamble and annexes as well as other agreements made between the parties in connection with the conclusion of the treaty or other documents accepted by all parties related to the treaty.<sup>104</sup>

Furthermore, supplementary means of interpretation like the preparatory work of the treaty and the circumstances of its conclusion can be used to confirm the result from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leads to an ambiguous, obscure, manifestly absurd or unreasonable result.<sup>105</sup>

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<sup>102</sup> see for a summarise of the different WTO member views e.g.: International Branch, Ministry of Employment and Investment Government of British Columbia "GATS and Public Service Systems: the GATS 'governmental authority' exclusion" (02 April 2001) available at <<http://members.dodo.net.au/rlsanders/issues/economy/gats/kit/bcgats.htm>> (last accessed 30 November 2003)

<sup>103</sup> Vienna Convention on the Law of Treaties (27 January 1980) United Nations, *Treaty Series*, vol. 1155, p.331.or available under <<http://www.un.org/law/ilc/texts/treatfra.htm>> (last accessed 30 November 2003) or see for the relevant provisions appendix number V (hereinafter Vienna Convention).

<sup>104</sup> Article 31 (2) of the Vienna Convention, see appendix number V

<sup>105</sup> Article 32 of the Vienna Convention, appendix number 5



These rules can be used for the interpretation of any international treaty since they stand for customary international law.<sup>106</sup>

Krajewski's analysis, however, revealed that neither the ordinary meaning nor the context of the agreement nor the preparatory work of the agreement could provide for clear interpretation results and that a narrow interpretation of the exclusion provision in Article I:3(b) of the GATS is more likely. The main outcomes of his analysis shall be depicted here briefly.<sup>107</sup>

#### **a. Ordinary Meaning**

Regarding the ordinary meaning of the two phrases, Krajewski examined the main terms commercial, commerce, and competition and concluded that these terms are too ambiguous as that they could deliver all-embracing rules on how to classify services as supplied in the exercise of governmental authority.

However, since "commercial presence" is defined in Article XXVIII:(d) of the GATS as "any type of business or professional establishment ..." Krajewski concluded that the ordinary meaning of "commercial" in the context of GATS refers to profit-seeking activities, because businesses or professional establishments are typically set up to make gains.<sup>108</sup> Furthermore, he argued that the supply modalities are also very important. This is because institutions sometimes provide a service on a non-commercial and a commercial basis.<sup>109</sup> In application of these results it seems therefore a bit doubtful whether German public water supply enterprises deliver their

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<sup>106</sup> Ian Sinclair *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> Ed, Manchester University Press, Manchester, 1984), 5

<sup>107</sup> Markus Krajewski "Public Services and Trade Liberalisation: Mapping the Legal Framework" *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 15 (last accessed 30 November 2003)

<sup>108</sup> Markus Krajewski "Public Services and Trade Liberalisation: Mapping the Legal Framework" *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 9 (last accessed 30 November 2003)

<sup>109</sup> Markus Krajewski "Public Services and Trade Liberalisation: Mapping the Legal Framework" *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 9 (last accessed 30 November 2003)



services on a commercial basis, since their ability to make profits seem to be limited and in certain cases the income may not cover the expenditures.<sup>110</sup>

Regarding the question whether a service is supplied "in competition" Krajewski concluded that due to the broad ordinary meaning of that term it can only be answered for each individual case separately and "may vary from country to country".<sup>111</sup>

In Germany, it is today generally accepted that the implementation of public services does not exclude the existence of competition. It is decisive that the entities stand vis-à-vis at the same level in business life, that they offer services in return for payment and that the same service is or could be offered by private providers.<sup>112</sup>

However, the German public water service sector could fall out of the scope of "competition", because one could say that in Germany there exists the possibility of concluding demarcation and concession contracts, which means that the respective service suppliers operate as monopolies and do not face competition. However, section 131 of the Act against Restraints on Competition is a special regulation from the remaining provisions of the Act. In order to apply this Act, however, it is necessary that there is actually competition.<sup>113</sup> Therefore, it has a lot to commend it that municipal water services seem to participate in competition, because they offer services in return for payment and private providers need to maintain their hold on the market beside the public providers. If, however, this condition is answered in the affirmative the exclusion provision of Article

#### **b. Context of Article I (3) (b) and (c) of the GATS**

Regarding the context, Krajewski examined *inter alia* Section 1 (b) of the Annex on Financial Services to the GATS. There a definition of "services supplied

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<sup>110</sup> Compare remarks under paragraph III.

<sup>111</sup> Markus Krajewski "Public Services and Trade Liberalisation: Mapping the Legal Framework" *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 10 (last accessed 30 November 2003)

<sup>112</sup> Gabriele Berger "Nehmen Bibliotheken an der Marktwirtschaft teil? Bibliotheksleistungen und Wettbewerbsrecht", published in *Bibliotheksdienst* 30. (1996), S. 1753 available at <[http://deposit.ddb.de/ep/netpub/89/96/96/967969689/\\_data\\_stat/www.dbi-berlin.de/dbi\\_pub/einzelth/rechtpub/bd96\\_h10.htm](http://deposit.ddb.de/ep/netpub/89/96/96/967969689/_data_stat/www.dbi-berlin.de/dbi_pub/einzelth/rechtpub/bd96_h10.htm)> (last accessed 30 November 2003)

<sup>113</sup> Article 130 (2) of the Act against Restraints of Competition, see appendix number III



under governmental authority” can be found. It includes activities of central banks and other monetary authorities, statutory social security and public retirement plans and public entities using governmental financial resources.<sup>114</sup>

Krajewski concluded, however, that this definition only applies to the supply of financial services, since the Annex only covers financial services.<sup>115</sup> Therefore, it could not provide any answers related to the scope of GATS with respect to other services.<sup>116</sup>

Furthermore, he could not find any instructive indications in any subsequent agreements or in any schedule of specific commitments, which could have led to a unified clarification of the meaning of the terms in Article 3 (b) and (c) of the GATS.<sup>117</sup>

### **c. Preparatory Work**

In order to complete the interpretation of Article I:3(b)(c) Krajewski took the preparatory works - the circumstances of the treaty's conclusion - into consideration in accordance with Article 32 of the Vienna Convention, since the interpretation along Article 31 of the Vienna Convention did not bring any clear results.

He emphasised a clause from the December 1990 draft text of the GATS prepared for the Brussels Ministerial meeting, which was supposed to define the sectoral scope of the agreement and which stated the following:

„... (b) „services“ includes any service in any sector [except services supplied in the exercise of governmental functions]“.<sup>118</sup>

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<sup>114</sup> see appendix number IV

<sup>115</sup> Section 1 (a) and (d) of the Annex on Financial Services, see appendix number IV

<sup>116</sup> Markus Krajewski “*Public Services and Trade Liberalisation: Mapping the Legal Framework*” *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 13 (last accessed 30 November 2003)

<sup>117</sup> Markus Krajewski “*Public Services and Trade Liberalisation: Mapping the Legal Framework*” *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 12 (last accessed 30 November 2003)

<sup>118</sup> Markus Krajewski “*Public Services and Trade Liberalisation: Mapping the Legal Framework*” *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 14 (last accessed 30 November 2003)



He demonstrated further that in the subsequent meetings of the Negotiating Group on Services no discussion regarding the clause could lead to an unambiguous result even though there was an awareness that the phrase still needed a lot of clarification. He rather showed that during the Uruguay Round there was no agreement on the scope of the GATS.<sup>119</sup>

#### **d. Interim Result**

As an interim result it can be said that the set of services which fall under the scope of Article I (3) (b) of the GATS seems to be very large even though so far no clear classification rules have been provided. Due to the difficulty to exclude any service sectors per se and due to the above shown view that public protagonists in the German water service sector participate in competition it seems to be very probable that the German water service sector falls outside of the scope of Article I (3) (b) of the GATS and consequently inside the scope of the GATS.

### **3. General Exemptions according to Article XIV of the GATS**

Furthermore, Article XIV of the GATS provides for some general exemptions from the implementation of GATS provisions. One appears to be relevant to the question of whether the opening up of water markets may be limited or constrained by national laws.

Article XIV (b) states that:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

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<sup>119</sup> Markus Krajewski “Public Services and Trade Liberalisation: Mapping the Legal Framework” *Journal of International Economic Law* (2003) v6 i2 page 341 3-367 available at <<http://www.attac.de/gats/krajewski-gats-publicservices.pdf>> page 15 (last accessed 30 November 2003)



... necessary to protect human, animal or plant life or health..."

Water services supplied by private national and or international service providers could be subject to an Article XIV (b) exemption if these services threaten human or ecosystem health. As mentioned before, serious health problems have emerged as a consequence of the privatisation of water markets.

On the one hand one might take the view that measures which prevent the liberalisation of water markets in general (in the German water market example the maintaining of section 103 of the Act against Restraints on Competition old version) in order to prevent such health threats are covered by Article XIV (b) of the GATS.

On the other hand, however, it can be said that the outbreaks of the diseases in the mentioned cases were the result of the disconnection of households and therefore an indirect consequence of liberalisation. The qualitative sufficient delivery of water services for itself, however, has no inherent threat to public health. Therefore, one might argue that it would only be possible to establish legal measures with respect to Article XIV (b) of the GATS, which accompany and elaborate measures for the liberalisation of water markets (like the establishing of quality standards), but do not prevent liberalisation in general.

The exemption provision of Article XIV (b) of the GATS, however, might become relevant in terms of ecosystem health. It is generally accepted that certain amounts of water are needed to maintain the diversity and productivity of ecologically characteristic fish and wildlife and the living resources on which they depend.<sup>120</sup> Therefore, specific instream flow requirements have been set for particular watersheds to maintain ecosystem health.<sup>121</sup> Damage might for instance occur due to water mismanagement, overexploitation, and aquifer contamination by private water suppliers.

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<sup>120</sup> Texas Parks and Wildlife Department, Texas Commission on Environmental Quality, Texas Water Development Board "Texas Instream Flow Studies: Programmatic Work Plan" (19 December 2002), page 1, available at <http://www.twdb.state.tx.us/data/instreamflows/pdfs/Programmatic%20Work%20Plan.pdf> > (last accessed 30 November 2003)

<sup>121</sup> Texas Parks and Wildlife Department, Texas Commission on Environmental Quality, Texas Water Development Board "Texas Instream Flow Studies: Programmatic Work Plan" (19 December 2002), page 2, available at <http://www.twdb.state.tx.us/data/instreamflows/pdfs/Programmatic%20Work%20Plan.pdf> > (last accessed 30 November 2003)



However, it remains doubtful, if a relationship of such environmental threats with the liberalisation of water markets can be proved, so that it would be justified by Article XIV (b) of the GATS to establish legal measures, which prevent the liberalisation of water markets in general or if only accompanying measures can be justified by that article.

#### **4. Interim Result**

Since there is no definite possibility to exclude the water service sector from the scope of the GATS, it remains important to answer the question whether the opening up of the German water market for private entrepreneurs is compatible under constitutional law.

### **VIII. COMPATIBILITY OF PROGRESSIVE LIBERALISATION WITH THE GERMAN CONSTITUTIONAL LAW**

In view of the described advantages there is a lot to be said for an opening up of the German water service sector for competition. However, it seems doubtful whether this is possible from a constitutional perspective.

In the event of offering the German water sector for progressive liberalisation in one of the schedules of the GATS; section 103 of the Act against Restraints on Competition old version would have to be repealed, because it prevents competition and therefore affects trade in services and it is a measure of a governmental entity.<sup>122</sup>

Like in many other European states, local self-government in Germany is considered as a principal foundation and a legal requirement to safeguard local and regional diversity, political autonomy and the democratic identity of the population.

Therefore, it is doubtful whether an alteration of the Act against Restraints on Competition in fulfilment of the GATS requirements would be compatible with the municipal right to self-government under German constitutional law.

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<sup>122</sup> GATS Article I (3) (a), see appendix number IV



### *A. Constitutionally Justification of Limitation of the Constitutionally Guaranteed Right of Self-Government*

As established earlier, water services in Germany are considered as affairs of the local community. This municipal task would be restricted by an alteration of the Act against Restraints on Competition in so far as this sovereign measure would take away the right of municipalities to make exclusively decisions about service delivery. As a result, conclusions of demarcation contracts would be prohibited for the municipals.

Such an intrusion in the right to self-government, however, has to be constitutionally justified. According to Article 28 II of the German constitution ("limits set by the law") it is possible to enact laws in order to limit the municipal right of self-government. This means, the legislator has basically the possibility either to take away the tasks from the municipalities or to dictate to the municipalities how they have to fulfil their self-government tasks.<sup>123</sup>

This option for legislative limitations of local self-government, however, does not imply all kinds of restrictions, because otherwise it would undermine and endanger the constitutionally guaranteed right of self-government. While there is general agreement that the core of local self-government has to be strictly protected against legislative limitations, those elements of local self-government located on the fringe of that guarantee may generally be subject to legislative regulations.<sup>124</sup>

According to Article 28 paragraph 2 of the constitution it is the states' duty to guarantee local self-government interests. This means that the state is obliged under institutional law to maintain a functional catalogue of municipal tasks and the sphere of municipal self-government affairs.<sup>125</sup> As a consequence, the state is bound to act against complete substantive privatisation of tasks located in the core of local self-

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<sup>123</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 143 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003)

<sup>124</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 127 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003);

<sup>125</sup> Bernhard Kempen "Schranken der Privatisierung" (June 2002) page 67 available at [http://www.uni-koeln.de/jur-fak/instvolk/html/pdf1\\_Kempen/Privatisierung.pdf](http://www.uni-koeln.de/jur-fak/instvolk/html/pdf1_Kempen/Privatisierung.pdf)



government. Direct orders which aim in another direction are consequently inadmissible.<sup>126</sup>

Therefore, first of all, it has to be clarified whether the alteration of the GWB affects the core or the fringe of local self-government in order to answer secondly the question, whether this measure is a justified limit to local self-government.

### ***B. Core of the constitutionally protected sphere of local self-government***

In the opinion of the Federal Constitution Court there is no specific or determinable task catalogue of what could describe the core of local self-government. The core of local self-government is rather defined as the essential, which cannot be removed from the institution without changing the structure and the type of the institution at the same time.<sup>127</sup>

An intrusion of the core of local self-government can be assumed in any case, if the restriction by law leads to a hollowing out of the right of self-government, so that the municipality loses the opportunity for powerful operation and only a phantom existence of the municipality would remain.<sup>128</sup> There is a general agreement that this would be the case if fundamental contents of local self-government like power of legislation, personnel autonomy, or financial autonomy would be partly or completely taken away. The tasks of municipal provision for elementary requirements are also to be considered here. However, an exact and differentiated reflection of the single tasks is thereby imperative.<sup>129</sup>

To approach the question of whether water supply can be attributed to the centre or to the fringe of the constitutionally protected sphere of local self-government, it is necessary to consider the basic idea of local self-government as decentralized form of administration with an active participation of the citizen in government.

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<sup>126</sup> Bernhard Kempen "Schranken der Privatisierung" (June 2002) page 68 available at [http://www.uni-koeln.de/jur-fak/instvolk/html/pdf1\\_Kempen/Privatisierung.pdf](http://www.uni-koeln.de/jur-fak/instvolk/html/pdf1_Kempen/Privatisierung.pdf)

<sup>127</sup> Winfried Kluth Vorlesung Kommunalrecht "1. Abschnitt: Die Kommunen im Staats- und Verfassungsgefüge para. 3 Die Verfassungsgarantien der kommunalen Selbstverwaltung in Art. 28 Abs. 2 GG und Art. 87 Verf. LSA", page 10, available at <http://www.jura.uni-halle.de/vwronline/vwronline.htm> (last accessed 30 November 2003)

<sup>128</sup> Marco Wicklein "Verwaltungsrecht BT Kommunalrecht Sachsen" (January 2001), page 11, available at <http://www.marco-wicklein.de/studium.htm> (last accessed 30 November 2003)

<sup>129</sup> Winfried Kluth Vorlesung Kommunalrecht "1. Abschnitt: Die Kommunen im Staats- und Verfassungsgefüge para. 3 Die Verfassungsgarantien der kommunalen Selbstverwaltung in Art. 28 Abs. 2 GG und Art. 87 Verf. LSA", page 10, available at <http://www.jura.uni-halle.de/vwronline/vwronline.htm> (last accessed 30 November 2003)



Taking the above-described initial constitutional position and the actual historical development as a basis, the municipalities are today seen as public service centers. Moreover, public provisions for elementary requirements have in this connection always been characterized as the essence of the local self-government. Water supply as a whole can be thus relatively indisputably classified as an element of the core of local self-government. However, it is important to distinguish this from the question, whether specific sorts of actions and/or their specific kind of performance are also considered as the core of local self-government.<sup>130</sup>

After the liberalisation the municipalities would be hindered from the conclusion of concession and demarcation contracts and would no longer be in the position to decide exclusively who performs the water supply in their respective municipal territory and how. It is therefore questionable, whether the authorization to conclude these competition excluding contracts is a core element of local self-government. An answer to this question can be found by contemplating the specific technical and physical aspects linked to drinking water.

Water is not in every case a homogeneous and uniform good, but is different in terms of physical, chemical and microbiological parameters, such as temperature, pH value, oxygen content, acid capacity or micro organisms. A blending of drinking waters with different compositions in respect to these parameters is not easily possible. The mixing of drinking waters without any accompanying measures raises the danger of detrimental changes, which rule out a further use (of the water) as drinking water. Mainly, the detachment of layers and corrosion in the feed lines, germ multiplying and similar undesirable effects have to be mentioned here. Furthermore, the water transport is energy intensive and can lead to changes of the chemical and hygienic composition. The networks of pipes in allocation/distribution direction are

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<sup>130</sup> Winfried Kluth Vorlesung Kommunalrecht "1. Abschnitt: Die Kommunen im Staats- und Verfassungsgefüge para. 3 Die Verfassungsgarantien der kommunalen Selbstverwaltung in Art. 28 Abs. 2 GG und Art. 87 Verf. LSA", page 10, available at <<http://www.jura.uni-halle.de/vwronline/vwronline.htm>> (last accessed 30 November 2003)



normally equipped with decreasing diameters, so that not arbitrarily water amounts can be feed in the network.<sup>131</sup>

Today, the state of the scientific and technical knowledge provides the technical methods to produce water of even composition. However, the construction and the extension of comprehensive infrastructures, as well as the blending and purification of waters with different qualities are very capital-intensive or necessitate additional investment and running costs.<sup>132</sup> Therefore, with respect to the blending of waters there are also economical limits.

In summary, in order to provide the water sector with the possibility to enter into contracts which are an exception to some of the provisions of the Act against Restraints on Competition has its practical reasons in the circumstance that it requires a huge effort and that therefore it is economically more reasonable if there is just one provider.<sup>133</sup>

Considering all these facts it becomes quite clear that the drinking water sector is a natural monopoly.<sup>134</sup> This however is not an aspect, which is rooted in the municipality as an institution or in its structure.

The vesting of municipalities with the possibility of demarcation and concession contracts has been introduced to avoid conflicts with the existing competition law.<sup>135</sup> However, this has its roots in technical aspects and not in specific factors concerning the municipal institution itself. However, questions, which are uncoupled from status, structure or type of the municipality and merely are conditional on the state of the scientific and technical knowledge and on economical limits can not be located in the

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<sup>131</sup> Holger Brackemann, Helmut Höring "Liberalisierung der Deutschen Wasserversorgung Auswirkungen auf den Gesundheits- und Umweltschutz, Skizzierung eines Ordnungsrahmens fuer eine Wettbewerbliche Wasserwirtschaft", page 33, available at <<http://www.umweltbundesamt.org/fpdf-1/1888.pdf>> (last accessed 30 November 2003)

<sup>132</sup> Holger Brackemann, Helmut Höring "Liberalisierung der Deutschen Wasserversorgung Auswirkungen auf den Gesundheits- und Umweltschutz, Skizzierung eines Ordnungsrahmens fuer eine Wettbewerbliche Wasserwirtschaft", page 33, available at <<http://www.umweltbundesamt.org/fpdf-1/1888.pdf>> (last accessed 30 November 2003)

<sup>133</sup> Siegfried Klaue *Gesetz gegen Wettbewerbsbeschaenkungen: GWB Kommentar/ Immenga/ Mestmaecker* (2<sup>nd</sup> Ed, Muenchen, Beck, 1992) page 2398 paragraph 1

<sup>134</sup> Hans Rudolf Ebel *Kartellrecht GWB und EWG-Vertrag* (inclusive 25<sup>th</sup> completion, Luchterhand, Koeln, 1993) section 103 GWB paragraph 1

<sup>135</sup> compare sections 1,15, and 18, see appendix number II, Eugen Langen *Kommentar zum deutschen und europaischen Kartellrecht* (7<sup>th</sup> Ed, Luchterhand, Berlin, 1994), page 1373 paragraph 1



core of the local self-government. An exclusion of the possibility for municipalities to enter into concession or demarcation contracts does not affect the core of local self-government.

As a result, although water supply is traditionally one of the most elementary tasks of municipal provision for elementary requirements, a greater transfer of the authority for water supply to private hands in the way of progressive liberalisation would neither endanger the institution of the municipality nor would it change its structure or type. The core of the local self-government would not be touched.

### *C. Fringe of the constitutionally protected sphere of local self-government*

Consequently, the possibility to enter into concession or demarcation contracts and the resulting exclusive right to provide the population with drinking water is in any case located in the fringe of the municipal right of self-government.

The Federal Constitutional Court of Germany ruled in the Rastede-decision that a transfer of tasks might in principle be legitimately instructed. But the protection of local affairs under Article 28 paragraph 2 GG requires that the priority of administration at local level has to be respected.<sup>136</sup> In the fringe of the scope of the municipal right to self-government a revocation of a self-government task can therefore only be justified by public policy objectives of greater importance, namely reasons of common welfare.<sup>137</sup> This is particularly the case if a proper performance of tasks would otherwise not be guaranteed. The Court has explicitly stated that aspects regarding the simplification of the administration or reasons of cost effectiveness would not satisfy the constitutional requirements, which favour the political and democratic aspect of the participation of the citizens in the performance of public tasks. Reasons of profitability and thrift can only be justified by an

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<sup>136</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 150 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003)  
Thomas von Danwitz "The Constitutional Guarantee of Local Self-Government in Germany" page 137 available at <<http://www.kas.org.za/Publications/SeminarReports/Constitution%20and%20Law%20iv/vondanwitz.pdf>> (last accessed 14 November 2003)

<sup>137</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 153 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003)



excessively increase of costs, if the task performance remains in the hands of the municipality.<sup>138</sup>

At the first glance, an opening up of the German water market according to these standards is very questionable in terms of German constitutional law. Acknowledging the above-mentioned risks of privatisation – losses of water quality, higher prices, loss of transparency and democracy, and social exclusion - it is hard to bring reasons of common welfare to bear.

On the other hand, environmental effects could justify the revocation of a self-governmental task, because they would be public policy objectives of greater importance.<sup>139</sup> However, such worthwhile effects are difficult to find. Without any other accompanying regulatory measures it seems, due to the above-mentioned risks of privatisation, likely that there will be a deterioration in terms of sustainable development (water treatment instead of using unpolluted water).

It seems due to these circumstances that the revocation of section 103 of the Act against Restraints on Competition old version would not be compatible with the German Constitution. This result, however, does not take into account the following circumstances.

The alteration of the Act against Restraints on Competition in fulfilment of the GATS requirements would not revoke the municipalities rights to the provision for elementary requirements. This municipal task would be restricted only in so far as this sovereign measure would take away the right of municipalities to make exclusively decisions about service delivery. Only the entrance into a demarcation contract would be prohibited for the municipals. However, they still would have the right to provide water services in the future. The creation of competition will force the municipalities to work more efficiently, because they will face competitors and cannot fall back upon area monopolies for water services. With the revocation of

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<sup>138</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 153 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 14 November 2003)

<sup>139</sup> Law Report Bundesverfassungsgericht Germany - BVerfGE 79, 127, 153 (2 BvR 1619, 1628/83) 'Rastede', Karlsruhe, 23 November 1988, available at <<http://www.oefre.unibe.ch/law/dfr/bv079127.html>> (last accessed 30 November 2003)



section 103 of the old version of the Act against Restraints on Competition there will not be a revocation of a whole task, but a revocation of a right, which is related to a certain self-government task and which is above that not even rooted in the municipality institution. Therefore, there is really no interest of the institution municipality at the stake.

Moreover, the statutory feature of section 103 of the old version of the Act against Restraints on Competition has to be taken into account. The spirit and purpose of that Article is to cope with the special physical nature of water and the resulting necessity of area monopolies. These circumstances were supposed to be safeguarded with regard to competition law.<sup>140</sup> Provided that private entrepreneurs can assure certain water quality standards and prices as well as social standards it seems therefore possible to represent the opinion that the right to conclude demarcation and concession contracts, which is separated from the general possibility of the performance of self-government tasks, can due to the listed facts not outweigh the interest of other potential market participants to deliver water services as long as they are basically from a technical perspective in a position to do so. It is hard to see, why a regulation which is based on technical and financial reasons, but which seems to be already out-dated in the meantime due to technical and economic developments, should outweigh the interest on a free practice of occupation.

The protection of the present quality, environment, and social standards can be kept by statutory means like the establishment of a licence system, so that concerns in this respect, which could lead to a contrary opinion can be dispelled. The establishment of such statutory standard conditions for each market participant would also protect the competitiveness of the municipalities, which are already from a constitutional perspective responsible for the well-being of their citizens.

As long as private suppliers can provide water services with appropriate quality standards in Germany, there is no reason to consider the revocation of section 103 of the old version of the Act against Restraints on Competition as alarmingly under constitutional law.

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<sup>140</sup> see explanations above



## IX CONCLUSION

On the other hand, it is also possible to take the view that due to the basically poor financial situation in the municipal cashboxes the municipalities could be actually prevented from a successful participation in the market development in a liberalised water market. Consequently, the performance of water supply in the frame of the provision for elementary requirements actually could be impossible. Therefore, the municipal right to self-government might be actually annulled. However, there are no clues for such a weak budgetary position of the municipalities.

It is, however, important to consider the circumstance that the municipalities face due to their responsibility in the frame of the provision for elementary requirements a special situation, e.g. the commitment to the public purpose when founding enterprises or the validity of the basic rights for municipal enterprises in private organisational form.<sup>141</sup> On top of that it has to be considered that water is not any economic good, but rather a fundamental element to life and therefore a social responsibility for municipal governments. These circumstances prevent an unlimited liberalisation and privatisation of the German water supply economy.

Public interests and objectives of conservation, health provision, and consumer needs are likely to justify that private enterprises have to accept certain disadvantages in contrast to municipal competitors.<sup>142</sup> A system of laws in favour of a liberalisation may therefore not misjudge the particular responsibility of the municipalities and their enterprises. If a legislator wants to put the municipalities into a competitive situation with private enterprises, it has to guarantee equal competitive participation.

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<sup>141</sup> Bernhard Stuer "Daseinsvorsorge durch Privatisierung – Wettbewerb oder Staatliche Gewährleistung" available at <<http://www.stueer.via.t-online.de/berichte/leipzig1.pdf>> (last accessed 30 November 2003)

<sup>142</sup> Bernhard Stuer "Daseinsvorsorge durch Privatisierung – Wettbewerb oder Staatliche Gewährleistung" available at <<http://www.stueer.via.t-online.de/berichte/leipzig1.pdf>> (last accessed 30 November 2003)



## IX. CONCLUSION

Considering the possible advantages of liberalisation with regards to the German water market, it seems likely that the EU with the consent of the Federal Government of Germany might open up the German water service sector for other WTO member states and their private entrepreneurs. Basically, the water sector cannot be excluded *per se* from the scope of GATS, since the interpretation of Article I (3) (b) GATS does not lead to unambiguous results and since it is not sure whether the liberalisation of the water market would fulfil the preconditions of Article XIV (b) of the GATS. In general, the liberalisation of the water markets does not seem to be very desirable because of the considerable threat to the provision of water services to domestic users, notably with respect to prices and water quality. This, however, cannot eliminate the fact that the opening up of the German water market for private entrepreneurs by a repeal of section 103 of the old version of the Act against Restraints on Competition is compatible with German constitutional law, since the municipal right of self-government is not violated.

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**XI. APPENDIX**

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Article 12 [Occupational freedom; prohibition of forced labour]

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*I. Constitution of the Federal Republic of Germany – Excerpts*

Amended by Unification Treaty, 31 August 1990 and federal statute of 23 September 1990

Article 2 [Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

...

Article 12 [Occupational freedom; prohibition of forced labour]

(1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

(2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

(3) Forced labor may be imposed only on persons deprived of their liberty by the judgment of a court.

Article 14 [Property, inheritance, expropriation]

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

Article 28 [Federal guarantee of Land constitutions and of local self-government]

(1) The constitutional order in the Länder must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.



(2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

(3) The Federation shall guarantee that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

## **II. Act against Restraints of Competition – Excerpts**

Revised version from 26 August 1998

### **PART I**

#### **Restraints of Competition**

##### **CHAPTER I**

Cartel Agreements Cartel Decisions and

Concerted Practices

##### **Section 1**

Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

### **PART II**

#### **Other Contracts**

##### **Section 15**

##### **Resale Price Maintenance for Published Products**

(1) Section 14 shall not apply insofar as an undertaking binds the purchasers of its published products by legal or economic means to stipulate certain resale prices or to impose the same commitment upon their own customers, down to the resale to the ultimate consumer. The commitment can be applied in cross-border trade. However, as concerns agreements with tangible effects on cross-border trade within the European Community, Sentence 2 shall only apply, in relation to purchasers in Member States of the European Community, insofar as it [the commitment] is intended to protect a domestically-



admissible resale price maintenance from being circumvented. Moreover, the fulfilment of obligations arising from the regulations in the Treaty Establishing the European Community shall not preclude the legal force and enforceability of the resale price maintenance.

(2) Agreements of the kind described in subsection (1) shall be made in writing insofar as they concern prices and price elements. It shall suffice for the parties to sign documents referring to a price list or price notification. Section 126 (2) of the Civil Code [*Bürgerliches Gesetzbuch*] shall be inapplicable.

(3) The Federal Cartel Office may, either *ex officio* or upon application by a purchaser so bound, declare the resale price maintenance to be of no effect and prohibit the implementation of a new and similar price maintenance scheme if

1. the resale price maintenance scheme is operated in an abusive manner,

or

2. the resale price maintenance scheme or its combination with other restraints of competition is likely to increase the price of the bound goods, or to prevent their prices from decreasing, or to restrict their production or sale.

#### **Section 18**

##### ***Agreements on Other Protected and Unprotected Achievements and on Seeds***

Section 17 shall be applied *mutatis mutandis*

1. to agreements on the sale or licensing of legally unprotected inventions, manufacturing methods, designs, other achievements furthering technology, achievements furthering plant cultivation in the field of plant breeding, insofar as they represent essential business secrets and are identified,

2. to mixed agreements on protected achievements within the meaning of Section 17 and unprotected achievements within the meaning of no. 1,

3. to agreements on the sale or licensing of other property rights such as trademarks, registered designs, copyrights (e.g. to software), insofar as these agreements relate to agreements on protected achievements within the meaning of Section 17, on unprotected achievements within the meaning of no. 1 or to mixed agreements within the meaning of no. 2, and contribute to the achievement of the primary purpose of the sale or licensing of industrial property rights or unprotected achievements, and to

4. agreements regarding seeds of a variety approved under the Seed Trade Act between a plant breeder and a seed multiplier or an undertaking at the seed multiplication level.

#### **Part V**

##### ***Area of Application of the Act***

Section 130 [Public Undertakings; Area of Application]



(1) This Act shall apply also to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities. The provisions of the Parts I to III of this Act shall not be applicable to the German Federal Bank and to the Reconstruction Loan Corporation.

(2) This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.

(3) The provisions of the Energy Industry Act shall not preclude the application of Sections 19 and 20.

## **PART VI**

### **Transitional and Final Provisions**

#### **Section 131 [Repeal, Transitional Provisions]**

(1) The Act Against Restraints of Competition as published on 20 February 1990 (Federal Law Gazette I, p. 235), last amended by Articles 1,2 (3) of the Act of 26 August 1998 (Federal Law Gazette I, p. 2512), is repealed.

(2) Agreements and decisions within the meaning of Section 5c of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of two years after the entry into force of this Act.

(3) Agreements and decisions for which an authorisation was granted pursuant to Section 5 (2) or (3), Section 6 (2) or Section 7 of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of one year after the entry into force of this Act. If the authorisation was granted for a shorter time period, the exemption shall expire on the expiry of that shorter time period.

(4) Agreements within the meaning of Sections 20 and 21 of the Act Against Restraints of Competition in the version referred to in subsection (1) which impose obligations upon the acquirer or licensee as regards the determination of prices for the protected object shall be exempt from the prohibition under Section 17 (1) until the expiry of one year after the entry into force of this Act.

(5) Competition rules recognised by the cartel authority pursuant to Sections 28 to 31 of the Act Against Restraints of Competition in the version referred to in subsection (1) shall be exempt from the prohibition under Section 1 until the expiry of one year after the entry into force of this Act.

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(6) Section 1 shall not be applicable to agreements between airlines which took effect before the entry into force of this Act, until the expiry of two years after the entry into force of this Act, if and insofar as they deal with transportation services beyond the borders of the territory in which the Treaty Establishing the European Community is applicable.



(7) Agreements, decisions and recommendations of the kind described in Section 29 which took effect before the entry into force of this Act shall also remain effective thereafter. The cartel authority shall declare them to be of no effect within a period of two years after the entry into force of this Act if they no longer satisfy the conditions of this Act. Section 29 (5) sentence 4 shall be applicable.

(8) Sections 103, 103a and 105 of the Act Against Restraints of Competition in the version referred to in subsection (1), as well as those other provisions which refer to them, shall continue to apply insofar as they concern the public supply of water. The same shall apply in this respect to provisions to which the above provisions refer.

(9) Sections 23 to 24a of the Act Against Restraints of Competition in the version referred to in subsection (1), as well as those other provisions which refer to them, shall continue to apply to concentrations reaching the thresholds of Section 35 (1) which were put into effect and not notified or not finally reviewed by the Federal Cartel Office before the entry into force of this Act. The same shall apply in this respect to provisions to which the above provisions refer.

### **III. Act against Restraints of Competition – Excerpts**

#### ***In the version from 20 February 1990***

#### **PART V**

#### **Area of Application**

#### **Section 103**

(1) Sections 1, 15 and 18 do not apply for

1. contracts of undertakings for the supply of electricity/gas/water with other utilities or regional authorities, in so far as one party is obligated by the contract to refrain from the public supply of electricity, gas or water in a certain area via conducting;
2. contracts of utilities with local authorities, in so far as the local authority is obligated by the contract to allow one utility exclusively the laying and the operation of conducting on or beneath public paths for existing or intended public electricity, gas or water supply for the end-consumer in the local authority area;
3. contracts of utilities with utilities of the allocation level, in so far as one utility of the allocation level is obligated by the contract to refrain from supplying its purchasers with



electricity, gas or water via conducting to more unfavourable prices or conditions as the utility does with its comparable purchasers

4. contract of utilities with other utilities, in so far as these contracts are concluded for the common purpose that certain services will be provided exclusively to one or more utilities for the performance of public supply of electricity, gas or water via conducting.

...

PART II

GENERAL OBLIGATIONS AND PRINCIPLES

*IV. Agreement establishing the World Trade Organisation Final Act  
Embodying the Results of the Uruguay Round of Multilateral Trade  
Negotiations (signed in Marrakesh in 1994) Annex 1B The General  
Agreement on Trade in Services*

*PART I*

*SCOPE AND DEFINITION*

*Article I*

*Scope and Definition*

1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
  - (a) from the territory of one Member into the territory of any other Member;
  - (b) in the territory of one Member to the service consumer of any other Member;
  - (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
  - (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
3. For the purposes of this Agreement:
  - (a) "measures by Members" means measures taken by:
    - (i) central, regional or local governments and authorities; and
    - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

- (b) "services" includes any service in any sector except services supplied in the exercise of



governmental authority;

- (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

## **PART II**

### **GENERAL OBLIGATIONS AND DISCIPLINES**

#### **Article II**

##### **Most-Favoured-Nation Treatment**

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

## **PART III**

### **SPECIFIC COMMITMENTS**

#### **Article XVI**

##### **Market Access**

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
  - (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
  - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
  - (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
  - (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and



directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) 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.

#### *Article XVII*

##### *National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

#### *Part IV*

##### *PROGRESSIVE LIBERALIZATION*

#### *Article XXI*

##### *Modification of Schedules*

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.  
(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.
2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous



commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings.

Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

### ***ANNEX ON AIR TRANSPORT SERVICES***

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

(a) traffic rights, however granted; or

(b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:

(a) aircraft repair and maintenance services;

(b) the selling and marketing of air transport services;

(c) computer reservation system (CRS) services.

4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.



6. Definitions:

- (a) "Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.
- (b) "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
- (c) "Computer reservation system (CRS) services" mean services provided by computerized systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.
- (d) "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

**ANNEX ON FINANCIAL SERVICES**

**1. Scope and Definition**

- (a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.
- (b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:
  - (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
  - (ii) activities forming part of a statutory system of social security or public retirement plans;  
and
  - (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.
- (c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.
- (d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.



## V. *Vienna Convention on the Law of Treaties*

Signed at Vienna 23 May 1969, entry into force: 27 January 1980

### **SECTION 3. INTERPRETATION OF TREATIES**

#### *Article 31*

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.  
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### *Article 32*

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or



(b) leads to a result which is manifestly absurd or unreasonable.



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