



# Murky waters

**GATS and the provision of water in developing countries**

**LENI WILD and DAVID MEPHAM**

A REPORT FROM A HIGH-LEVEL SEMINAR IN BRUSSELS IN MARCH 2005

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## Summary

The debate over the General Agreement on Trade in Services (GATS) and its impact on the provision of water is highly controversial. It is also mired by misperception, mistrust and exaggeration. Both sides (those strongly supportive and strongly critical of GATS) have overstated its impact on the provision of water services in the developing world. GATS will not transform the prospects of those who currently lack access to safe drinking water by facilitating a huge growth in international private sector investment in the water sector. But nor will the withdrawal of water services from GATS negotiations do much by itself to address poor people's lack of access to safe drinking water, particularly in the poorest rural and urban areas.

However, there are legitimate concerns about the relationship of GATS to the water sector which need to be addressed and are not being properly dealt with at present. These concerns are being voiced by non-governmental organisations (NGOs), civil society groups, developing country governments, parliamentarians and even by some major multinational water companies. These concerns fall into four broad categories. Different critics of GATS highlight some or all of these concerns.

Firstly, there is a concern that the policy of extending GATS commitments to water provision is being driven by ideology and vested interests and not by a proper and independent assessment of its potential impacts on poor countries and people. The European Commission and the WTO Secretariat assert that this process will be beneficial for the poor but they provide little evidence to substantiate this assertion. These organisations have also failed to persuade those poor country governments and people who they claim will benefit from the process.

Secondly, there are concerns about the conduct of the GATS negotiations and about the process for reaching decisions through GATS, which apply particularly to the water sector. The disparities in power between wealthy and poorer country negotiators mean that the latter are generally disadvantaged in protecting or promoting their trading or wider economic interests. The bilateral format of these negotiations and the lack of transparency surrounding them – with countries often making secret offers and requests – can also work against the weaker party in the negotiations.

Thirdly, various concerns have been raised about the substance of the GATS 2000 agenda. There is an issue over whether water should be listed under 'environmental services' or if it should be kept out of these negotiation rounds altogether and an issue over the impact of GATS on poorer countries' capacity to regulate. Effective regulation is critical to protect the interests and needs of the poor, including their access to water services. It is also necessary to protect the legitimate interests of private investors. But the existing ambiguity of the GATS Agreement in respect of regulation could hinder the capacity of governments to regulate the private sector in the public interest. Questions have also been raised about the effective irreversibility of commitments made under GATS, and whether this denies poorer countries the necessary flexibility to meet the development needs of their people.

Fourthly, there is a concern that the attempt by the European Union to extend GATS commitments to water services diverts attention and energy from more urgent efforts, on the part of governments, development agencies and the private sector, to meet the water and sanitation needs of the world's poor.

Making greater progress in meeting these needs will require increased investment from a variety of sources – including public, private and community resources – better governance and management of the water sector, and greater involvement by the users of water services. This should be the major focus of national and international efforts.

## Policy recommendations

ippr recommends that the European Commission should:

- withdraw any requests to Least Developed Countries that include water services in GATS negotiations (the European Commission has already excluded health and audio-visual services from these negotiations).

ippr recommends that the European Commission, the WTO and development donors should:

- support independent assessments of the potential impact of GATS on poor countries and people;
- provide significantly increased capacity building support for poorer countries, so that they are better able to negotiate their trading interests in bilateral and international negotiations;
- discuss with developing country governments changing the GATS negotiation process to allow multilateral rather than bilateral negotiations and greater openness and transparency;
- be open to further modification of the GATS Agreement, to allow poorer countries the flexibility to amend their commitments in light of changing economic, environmental and social circumstances;
- ensure much greater community involvement and ownership of water and sanitation policies, combined with increased investment from a variety of sources, including public, private and community resources.

## Introduction

1.1 billion people – one person in six – have no access to clean drinking water and over 2.6 billion people – two fifths of the world's population – have no access to safe sanitation (WaterAid 2005). One child dies every fifteen seconds from diarrhoea, caused largely by poor sanitation and contaminated water. That is 2 million preventable child deaths each year, mostly in Asia, sub-Saharan Africa and Latin America. Dirty water and unsafe sanitation also damage poor people's livelihoods and are a major barrier to progress in development.

Solving this crisis presents a major global challenge, but it is one that the world's governments have pledged to meet. In September 2000, world leaders agreed to the 'Millennium Development Goals', a set of targets for poverty reduction and development. These included the goal to reduce by half the proportion of people without sustainable access to safe drinking water. At the 2002 World Summit for Sustainable Development (WSSD) in Johannesburg a further target was set for safe sanitation. Governments and international institutions are now signed up to a target of reducing by half the proportion of the world's population who are unable to 'reach or afford safe drinking water' and 'the proportion of people without access to basic sanitation'. Both targets are supposed to be achieved by 2015 (WSSD 2002). 22 March 2005, World Water Day, also marked the start of a United Nations international decade of action, Water for Life, aimed at achieving the Millennium Development Goal for water.

Present trends indicate the scale of the task ahead. "To achieve the targets, 175,000 people need to gain access to safe water and 350,000 people to basic sanitation every day between now and 2015" (Benn 2005). But while the size of the unmet need for clean water and safe sanitation remains huge, considerable progress has been made over recent years. The efforts of local communities, governments, international development agencies and the private sector have demonstrated that substantial increases in water and sanitation provision are achievable.

The challenge for governments now is to build on these efforts and to translate their declarations into real improvements in the water and sanitation conditions of poor people. That means greater political commitment. It means a strengthened development partnership between governments, international institutions, the private sector and civil society. It also means ensuring that international rules and agreements – for example on trade and investment – help rather than hinder the achievement of sustainable development goals.

This is where the General Agreement on Trade in Services (GATS) comes in. While some of the criticisms of GATS are overstated, there are legitimate concerns about its potential impacts, including its impact on the provision of water. These concerns are being voiced by non-governmental organisations, civil society groups, developing country governments, parliamentarians and even by some major multinational companies operating in the sector.

Four criticisms have been made of GATS. Critics highlight some or all of these concerns. Firstly, there is a concern that the policy of extending GATS commitments to water provision is being driven by ideology and vested interests and not by a proper and independent assessment of its potential impacts on the poor. Secondly, there are concerns about the conduct of the GATS negotiations and about the process for reaching decisions through GATS. Many developing countries have been at a serious negotiating disadvantage in the GATS 2000 round, as they often lack the necessary capacity and/or technical expertise for these negotiations. Thirdly, questions remain regarding the impact of GATS on poorer countries' capacity to regulate. There are fears that GATS could hinder the capacity of governments to regulate the private sector in the public interest. Fourthly, and perhaps most importantly, there is a concern that the attempt to extend GATS commitments to water services diverts attention and energy from more urgent efforts, on the part of governments, development agencies and the private sector, to meet the water and sanitation needs of the world's poor.

With the aim of discussing these concerns, countering the excessively polarised debate about GATS and water, and helping to build a greater policy consensus on the issues, the ippr held a high-level symposium in Brussels on 15 March 2005. This event brought together key stakeholders from the World Trade Organisation, the European Union, the private sector, non-governmental organisations, academia and representatives from developing countries. While many of the comments discussed at this symposium influenced this paper's recommendations, final and exclusive responsibility rests with the authors.



# 1. What is the GATS Agreement?

The trade in services now accounts for around twenty per cent of global trade, and this figure is set to rise significantly in the decades to come (IATP 2003). Recognition of the growing importance of services, highlighted in the Uruguay Round of trade talks, led to the establishment of the General Agreement on Trade in Services (GATS) in 1995. It is the first and only set of multilateral rules covering international trade in services. The framework covers all services, except those provided in the exercise of governmental authority and those related to air traffic rights. More specifically, it covers four different 'modes of supply', which define trade in services under GATS as cross-border supply, consumption abroad, commercial presence and the presence or movement of natural persons (for example individuals travelling to another country to provide a service). GATS is seen as a cornerstone of the World Trade Organisation (WTO) and builds on the General Agreement on Tariffs and Trade (GATT), which had previously brought trade in goods into the multilateral system.

The GATS framework aims to increase trade in services by providing transparency in, and the progressive liberalisation of, services markets. It establishes a framework for WTO members to access the services markets of other WTO members, by setting limits on how the provision of services can be regulated. In brief, the framework consists of two major elements. First, it is an agreement which lays out the general obligations for all services trade. This includes the principles of non-discrimination and extending 'most-favoured' nation treatment to all other members – in essence an agreement to treat all trading partners equally, in all trade in services. Secondly it sets out individual countries' specific commitments. Each WTO Member has a Schedule of Specific Commitments that identifies the services for which that Member guarantees market access and national treatment, as well as any limitations that may be attached. The principle of national treatment used here means that a country must provide the same treatment to others as it does to its own nationals. The commitments included within a schedule are decided by a 'request/offers' process, in which countries make requests to other countries for market access in certain sectors. Members then respond with offers.

## **GATS 2000 Negotiations**

GATS contain a commitment to 'progressive liberalisation'. This means that governments have agreed to engage in negotiations every few years in order to expand the agreement into new areas, gradually remove all exemptions, and move further towards a free market in the international trade in services. Under GATS, Members are committed to launching successive rounds of services negotiations with a view to achieving progressively higher levels of liberalisation. The first such round was to begin no later than five years from the date of entry into force of the Agreement and, accordingly, started in January 2000. These have become known as the GATS 2000 negotiations and were merged into the Doha Round of international trade talks after 2001 – the first round of talks that explicitly put some of the broader social and political goals (of economic growth, poverty reduction and sustainable development) to the forefront. This merging was in part an attempt to boost the development focus of the GATS negotiations. These negotiations were due to conclude in May 2005. Yet, for a number of reasons, this deadline was not met. The Hong Kong Ministerial meeting in December 2005 might provide another opportunity to move forward in this process.

## 2. How does the GATS process work in practice?

The GATS Agreement contains many references to the needs of developing countries and explicitly recognises 'the right to regulate'. However, ambiguities remain which suggest that, *de facto*, GATS might limit the ability of countries to regulate their key services and to respond to changes in their economic, social and environmental circumstances (see also Mehta and la Cour Madsen 2003). This presents a particular worry for developing countries, which often already have weak systems of regulation, poor provision of key services and are highly vulnerable to economic shocks.

### The "politics of process"<sup>1</sup>

Following the failure to launch a comprehensive Trade Round in Seattle at the end of 1999, progress in the GATS 2000 negotiations has been slow. Throughout 2000, much time was spent completing preparatory steps ahead of beginning any substantive negotiations. In light of this slow start, and a lack of sufficient offers in response to requests, the deadline for these negotiations was extended from January 2005 to May 2005. Following the failure of the Cancun Ministerial meeting in June 2004, and a lack of agreement throughout the negotiations, this revised deadline was also not met. Even senior officials within the WTO acknowledged that there were difficulties. In December 2004, a senior WTO official said that a "huge number" of offers were still missing from the negotiations (BRIDGES Weekly 2004). And the Chair of the Services Negotiating Committee, Chilean Ambassador Jara, acknowledged that meeting the May 2005 deadline would be difficult, due to the challenges of reaching agreement on this framework (Strickner and Smaller 2004; Strickner 2005). The European Union Trade Commissioner Peter Mandelson has indicated that the wide differences between requests for market access and actual offers are unsustainable if GATS is to move forward (BRIDGES Weekly 2005).

Critics argue that this lack of agreement reflects the fact that many developing countries have been at a serious negotiating disadvantage in the GATS 2000 round. The ability to regulate effectively, through setting precise conditions for service sector access, depends on a negotiator's ability to specify all forms of limitation (and regulation) required. A massive amount of administrative capacity and foresight is required for this to be effective, as negotiators need to be aware of national laws, rules and regulations in every country involved – something which is often beyond the capacity or resources of negotiators from poorer countries (Mehta and la Cour Madsen 2003). Accusations of undue pressure during negotiations also abound, according to critics, including that members of the WTO (including the European Union) booked rooms for corporate groups to lobby other WTO members. For Least Developed Countries this could mean one delegate meeting large numbers of professional lobbyists (Strickner 2005).

This contradicts much of what GATS, in theory, purports to stand for. Article XIX of the GATS Agreement provides that progressive liberalisation should take place with due respect for national policy objectives and Members' development levels, both overall and in individual sectors. In theory developing countries have the flexibility to open fewer sectors, liberalise fewer types of transactions, and progressively extend market access in line with their development situation. Yet without proper capacity building and resources for developing country negotiators, this nominal freedom can be severely curtailed (Mehta and la Cour Madsen 2003;98-99). Furthermore, the bilateral format of these negotiations, combined with the lack of transparency surrounding them (with countries often making secret offers and requests), can work against the weaker party in the negotiations. The requests/offer process, it seems, invariably ends up as a bilateral negotiation between two countries, despite the multilateral setting of the WTO (*ibid*; 99). To date the principles outlined in GATS have not been effectively implemented in the GATS 2000 negotiations or taken into account in the market access commitments requested by developed countries and there remains a real need

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<sup>1</sup> (Mehta and la Cour Madsen 2003)

to substantially increase the negotiating capacity of these countries. The Hong Kong Ministerial in December 2005 provides an opportunity to move forward in these negotiations, but real commitments must also be made to address these concerns.

### **Potential impacts upon regulation and the irreversibility of commitments**

The GATS Agreement specifically recognises the right of Members to regulate, and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives. Yet questions remain regarding the extent to which GATS might affect governments' capacity to regulate. The framework advocates 'regulation not more burdensome than necessary', but it is unclear how 'necessity' will actually be defined. These are fears that this could hinder the capacity of governments to regulate the private sector in the public interest.

The commitments made by WTO members under GATS may also become 'locked in', with very limited options to withdraw or modify them. Article XXI of the GATS Agreement sets out the procedure a country must follow if it wants to alter its GATS commitments. This procedure includes: 1) changes cannot be initiated until three years after the initial commitment entered into force; 2) other members must be given three months notice of any changes; and 3) the modifying country must come up with compensating commitments, which are satisfactory to all members. While the WTO Secretariat argues that these mechanisms offer flexibility, civil society organisations point to the practical limitations of this system, with developing countries unlikely to be able to afford to compensate their richer WTO partners (Woodroffe and Joy 2002).

### 3. How are water services treated under GATS?

#### Definitions of water services

GATS exclude “services supplied in the exercise of governmental authority”. These are services that are supplied neither on a commercial basis nor in competition with other suppliers. In many countries water supply and sanitation services have traditionally been provided through national, regional or local systems that are in the exercise of governmental authority. Yet since GATS 1994 (the original negotiations on the GATS framework itself) some developing countries, either through their own choice or as a result of conditionalities imposed by the International Financial Institutions, have introduced private water services in the formal sector. In such countries, water services can no longer be seen as a service ‘supplied in the exercise of governmental authority’ and hence are now subject to the purview of GATS.

Debate still exists, however, as to whether water services should be categorised in this manner. These water services, which combine some commercial operations, are listed under ‘environmental services’. However critics argue that water is a social and human rights issue as much as an environmental one – water, after all, is essential for life. This does not mean that it is necessarily inappropriate to charge for water in all circumstances, but it does mean ensuring that cost is not an impediment for poor people gaining access to water services. In light of these sensitivities there is a real need to ensure that international rules and agreements do not hinder poor peoples’ access to water. Indeed it may not be appropriate to subject water services in these countries to a binding international trade regime at all. Given this, there would appear to be a strong argument for exempting water services from GATS commitments in these negotiation rounds.

#### Regulation of water services

Concerns have been raised about the impact of GATS on the capacity of governments to regulate the private sector in the public interest. In theory, the GATS Agreement recognises the right to regulate. But the existing wording of the agreement, which talks about ‘regulation not more burdensome than necessary’, is ambiguous and open to considerable interpretation (Mehta and la Cour Madsen 2003; 97). Arguably, it confuses more than it clarifies.

This raises particular issues in respect of the water sector. In many poor countries, the water sector is characterised by weak governance and weak systems of regulation. In relation to large-scale infrastructure projects there have also been problems of corruption, from which poor people are generally the biggest losers. Better governance and regulation, and support for institutional capacity, are therefore essential for the achievement of better water and wastewater services in the public sector, and for the more effective regulation of local private sector providers. But it is vital too if developing countries choose to involve the international private sector through a public/private partnerships or some other arrangement. In these circumstances, governments need the capacity to consult effectively, formulate contractual agreements with private water companies and to properly enforce them.

There is a concern over how ‘necessity’ will be defined and what this will mean for water. There is a possibility, for example, that some forms of useful regulation in the water sector will be viewed as discriminatory, or as unduly burdensome, or as effective barriers to market access for foreign service providers (Lang 2003).

Another concern is that poorer countries may be locked into commitments they make regarding the water sector. The GATS framework seeks legal security and predictability (to ensure a stable investment climate). Yet water regulators will require a high degree of flexibility to respond to any changes in the environment or patterns of domestic use – and the current context of water scarcity and climate change makes it imperative that this flexibility is

maintained (CIEL and WWF 2003). Despite repeated calls there has still not been a comprehensive impact assessment of how progressive liberalisation under GATS will affect poorer countries or any analysis of the extent to which governments will be restricted from regulating key services to mitigate for economic, social or environmental changes.

#### 4. What is the position of the European Commission on GATS and water services?

In an effort to give impetus to the ongoing but stalled WTO services negotiations, the European Commission moved forward in the GATS request/offer process by presenting a revised compilation of requests for market-opening bilaterally to 103 WTO Members on 25 January 2005. Environmental services (which in this definition include water services and waste management) are one of a number of service sectors the European Commission is requesting access to. Least Developed Countries are being asked to make commitments in at least two of five named service sectors, including environmental services but excluding health and audio-visual services.

According to the European Union, where requests are being made on environmental services the aim is to capitalise on the experience and skills of European environmental services companies in tackling environmental problems. One of the EU's motives, as throughout the GATS negotiations, is to provide new commercial opportunities for European companies. But it also contends that GATS liberalisation will assist development, providing an opportunity for poorer countries to attract stable long-term investment. Yet little assessment has been done to analyse the potential impacts of GATS on developmental and social objectives.

Most of the private water companies which are active internationally are European. The fact that the European Commission consulted with them, as it did with NGOs and civil society groups, before submitting their GATS request on water services has led to allegations that these companies have exercised undue influence on the Commission's policy (IATP 2003). The companies themselves deny having offered any advice to the Commission on whether water services should be included in GATS and there are varying views among them on the utility of this as far as poor countries are concerned. Some think that where the governments of poorer countries choose to involve the private sector in the provision of water they should be encouraged to look to international as well as to local service providers. Others think that while international companies may have expertise to offer, the local nature and political sensitivities of the water sector are such that it does not make sense to subject it to a binding international trade regime.

## 5. Can we build better partnerships for water?

In principle, allowing requests for water services under GATS should not undermine the ability of developing countries to implement measures safeguarding the interests of the poor. However, in practice, it seems that the “politics of process”, or rather asymmetries of power between negotiators, alongside ambiguities surrounding its impact on water regulation and possible limits to policy flexibility, could work to curtail domestic policy autonomy in this vital sector (Mehta and la Cour Madsen 2003).

The European Commission should, in the first instance, withdraw its requests to Least Developed Countries to include water services in GATS negotiations (the European Commission has already excluded health and audio-visual services from these negotiations). This would prevent any commitments being agreed to before their implications were properly understood – and before a full assessment could be made of the impact of GATS on poor countries and people.

This would allow the Commission and others to focus their attention on how to better meet the water and sanitation needs of the world's poor. It would also reinforce some of the more positive steps the EU is taking to meet these needs, such as the EU's Water Initiative, which initially focuses on Africa and the newly independent states of the former Soviet Union (see [www.euwi.net](http://www.euwi.net)). Through a ‘multi-stakeholder process’, this Initiative seeks to bring together governments, civil society groups and the private sector, as well as other key stakeholders where appropriate. Yet to be a success, it will also require much greater political commitment and support, as well as greater financial resources.

Providing clean water and safe sanitation to those who currently lack it will require much greater political commitment from all involved actors. International donors, developing country governments and even the international private sector need to demonstrate this commitment in the overall resources they allocate to water and sanitation. They also need to radically refocus these resources to meet the needs of the poor. At present development donors tend to allocate their aid resources to better-off parts of urban areas at the expense of rural areas.

There also needs to be much greater community involvement and ownership of water and sanitation policies. Poor people are often best placed to identify their water and sanitation needs and to suggest policy responses to them – and experience shows that involving local communities and devising sustainable local solutions reduces the costs of meeting water, sanitation and hygiene targets (Jolly 2003). National, municipal and local governments, international donor countries and the international private sector need to listen and consult widely with local communities. This will require the extensive involvement of local communities, particularly women, in discussions around water provision. It should also involve open discussion of options in relation to existing or new sources of water supply and sanitation provision.

Building new partnerships and exploring new ways of working between community groups, national and international actors, and the private sector, will be vital if faster progress is to be made in improving access to clean water and safe sanitation by 2015.

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## Annex: List of participants at ippr symposium on ‘GATS and the provision of water in developing countries’

15 March 2005

Crown Plaza Europa, Brussels

Richard	Aylard	RWE Thames Water
Maude	Barlow	The Council of Canadians
Dick	Barry	Unison
James	Baxter	Australian Mission to the EU
Georgina	Bernard	Embassy of Jamaica
Aurélie	Bretonneau	Cabinet to Mr. Mandelson
Stefan	Brost	Federation of the German Waste Management Industry
Ed	Brown	Loughborough University
George	Bullen	Embassy of Eastern Caribbean States
Elena	Chiarella	Africa-Europe Faith and Justice network (AEFJN)
C.T	Chinenere	Embassy of Zimbabwe
Luc	Coppejeans	Africa-Europe Faith and Justice network (AEFJN)
Paolo	Curradi	EuropeAid Cooperation Office - European Commission
Andrea	Danowski	Bundesverband der Gas-und Wasserwirtschaft BGW
Marilena	Di Stasi	Cabinet of the Belgian Foreign Affairs Minister
David	Earnshaw	Burson Marsteller/BKSH
Ulrike	Ebert	RWE Thames Water
Mohamed	El Dahshan	DG Trade
Rudolf	Gridl	Trade attaché (Denmark)
Sutiawan	Gunesse	Embassy of Mauritius
Danielle	Hirsch	Both ENDS
Ziaul	Hoque Mukta	ActionAid Bangladesh
Anders	Jessen	DG Trade
Max Gad Njuguna	Kahende	Embassy of Kenya
Sajjad	Karim MEP	EP Committee for Trade
Kati	Kaskeala	Burson Marsteller/BKSH
Walter	Kennes	DG Development
Pascal	Kerneis	European Services Forum
François-Charles	La Prevote	European Commission - DG Trade
Jacques	Labre	Suez Environment
Thomas	Lambert	Trade attaché (Belgium)
Pierre	Latrille	World Trade Organisation
Jean Beniot	Leblanc	Mission of Canada to the European Union
François	Letocart	Entraide et Fraternité
Paul	Lever	RWE Thames Water
Anja	Lörcher	Foreign Trade Association

H.E.Mme Maria Manuela dos Santos	Lucas	Embassy of Mozambique
Caroline Fode	Lucas MEP	EP Committee for Trade
Marc	M.Dabor	Embassy of Sierra Leone
Linda Sergio	Maes	Coalition of the Flemish North South Movement 11.11.11
Lubomir	Makris	Mission of Honduras to the EU
David Roshni	Mate	Embassy of Mozambique
Tau'ili'ili Uili	Mazouch	Permanent Representation of the Czech Republic to the EU
Alither	Mepham	Institute of Public Policy Research
Anil	Menon	Institute of Development Studies
Anna	Meredith	Embassy of Western Samoa
Riccardo	Mutsago	UK Department for International Development
Valerie Gift	Naidoo	The Blue Planet Project
Valerie	Paradowski	Assistant to Prof. Zaleski
Thomas	Petrella	UCL (Belgium)
Marie	Plainemaison	Veolia Environnement
Gunther	Punungwe	Embassy of Zimbabwe
Monika	Renet	WWF France
Mohamed	Ritter	Trade attaché
Mr	Romani	WWF France
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Thomas	Siddharth	Embassy of India
Ingmar	Sturdy MEP	EP Committee for Trade
Beatrix	Thomas	Embassies of the Eastern Caribbean States
Leni	Ulmer	Aprodev
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	von Homeyer	Ecologic
	Widmer	German association of local utilities
	Wild	Institute for Public Policy Research