Neither the CETA chapter on investment protection nor the EU’s proposal for an investment protection chapter in TTIP contain any special references to public services, services supplied in the exercise of governmental authority, public utilities or publicly financed services. For example, the exclusion of “activities carried out in the exercise of governmental authority” in the CETA chapter on investment is limited to the sections on establishment of investments and non-discriminatory treatment, but does not extend to the section on investment protection. It is hence safe to conclude that the current EU model offers no protection for public services with regards to investment protection.

This can be explained with the limited experience of the EU regarding investment protection agreements. The EU’s competence in this field was only established by the Treaty of Lisbon in 2009. CETA, the EU-Singapore FTA and TTIP are hence the first trade agreements which contain an investment protection chapter. In addition, the potential negative impact of investment protection agreements has not yet been discussed and analysed extensively. However, there have already been some investor-state dispute settlement cases which related to investments in the field of public services (Krajewski 2015a).

2. Ambiguous terminology

The current EU model relies on various terms whose meaning is either unclear or too narrow to effectively protect public services. It combines functional, sectoral and hybrid definitions and uses terms which are not necessarily linked with each other. This leads to uncertainties when determining the exact scope of the different provisions. While the term “services supplied in the exercise of public authority” is comparatively easy to interpret and understand, the notion of “public utilities” and the concept of “publicly financed” are less clear as explained above. They have no specific meaning in international law and no equivalent term in EU law. Even though there seems to be a relatively large overlap between public utilities and services of general economic interest (SGEI) in the meaning of Article 106 para 2 TFEU the exact relationship remains unclear. It should also be noted that the term SGEI is itself not entirely clear in EU law. This ambiguity has been partly solved in EU law though, because it is generally accepted that the Member States determine if a service is considered a service of general economic interest (see below IV.2.).

In addition to the unclear meanings of key terms used by the EU in its model for the protection of public services, the relationship of the different terms is unclear. In particular, it is unclear if the term “public utilities” and “publicly financed services” may overlap as suggested by the EU schedule of the EU-Singapore free trade agreement.

3. Different levels of protection of public services

The EU’s current approach towards public services in trade agreements is not based on a coherent functional model. While the underlying concept of the different layers of protection allows the EU and its Member States to distinguish between different activities and rationales for protecting them from parts or the whole of a trade agreement, the concrete application of the model is problematic. For example, it exempts certain services which are publicly financed from market access and national treatment obligation, but excludes public utilities only from the application of the prohibition of monopolies and exclusive service suppliers.