

## Presentation

*Investment, trade in services and the right to water and sanitation: ensuring coherence*

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The debate between the economic dimensions of the costs of water services and the social dimensions of water begins with the issue of the universal right to water access. Market conditions must be clearly established, and the respective roles of the private sector and public authority must be discussed and defined.

Within the international trade paradigm, water is usually considered a tradable good. Also with increasing trade between nations and continents, water is more frequently used to produce exported goods. International trade in commodities implies long-distance transfers of water in virtual form, where virtual water is understood as the volume of water that has been used to produce a commodity and that is thus virtually embedded in it. Trade patterns thus influence patterns of water use and scarcity.

Many of the most contentious policy choices in the water sector involve certain forms of water service, including the provision of drinking water and water for domestic purposes. Providing access to water has become a growing sector of the global service industry. The liberalisation of water and sanitation services market in terms of Foreign Direct Investment (FDI) is between 400 and 700 billion USD. However in terms of financing water and sanitation for poor households, according to the World Bank, the financing gap amounts to hundreds of billions of dollars per year.<sup>2</sup>

Water is considered a tradable service in the current negotiations amongst WTO members in the framework of the General Agreement on Trade in Services (GATS). GATS is the first event multilateral, legally enforceable set of rules to cover a wide array of services, ranging from business related services to water supply and sanitation services. Except for a few narrowly drawn provisions, the Agreement does not differentiate between different types of services in its stated aim of maximising liberalisation. So water services in GATS is no different from telecommunications. Well on second thought, actually telecom is better protected as it falls within the category of universal service obligations (USOs). WTO members have to date not carved out that kind of public policy space for basic services as they have safeguarded for the provision of telecom services. I find this particularly ironic given a 2014 report of the World Bank on tapping the markets for domestic investments in water and sanitation for the poor where surveys were conducted where households were found to pay much more for mobile phones than they pay for a piped water system or for sanitation. They would rather make do with inferior solutions rather than purchase what they can afford.<sup>3</sup>

The term water service is generally categorised under four headings: water collection and purification services, water distribution, sewage treatment and wastewater management; and incidental water services. However, these water services are yet to be classified formally within the WTO framework under the services Sectoral Classification List. Generally all requests for market access for water services have been made under the heading of Environmental Services. This has repercussions as the Doha Ministerial Declaration calls for elimination of tariff and non-tariff barriers to environmental goods and services. So if treated as an environmental service, this means it is essentially no holds barred trade. There is no consistent view on whether supplying water should be classified as environmental activities.

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1 The views expressed are solely of the presenter and are not necessarily the view of OHCHR.

2 Jemima Sy et al, Tapping the Markets : Opportunities for Domestic Investments in Water and Sanitation for the Poor, World Bank, 2014

3 Tapping the Markets, 2014

So what does it mean to be under GATS? Under GATS, the main mode in which Members operate is through mode 3 where services are provided through commercial presence in the territory of any other member, so essentially this is opening up to FDI. Some trade analysts have suggested that GATS is essentially an investment agreement. With respect to water, it can be argued that trade liberalisation has the capacity to improve infrastructure, market access, affordability and service provision.

It means that members seek to facilitate their access to new markets for water utilities and to ensure that the regulatory frameworks for these markets provide a level playing field for their competition with local and other foreign contestants. This is ensured by applying general and specific provisions including most favoured nation, market access and national treatment obligation. Article VI.4 of GATS deals with unnecessary barriers to trade and it is conceivable that domestic regulation and policy tools central to the realisation of the right to water could be threatened under this article.

GATS could also lead to an obligation to dismantle monopolies in the course of granting full market access and natural monopolies are particularly common in the water sector. This is often portrayed as a synonym for a GATS-inherent imperative for the privatization of water services, in the sense of change of control and ownership of water services from the public to the private sector. Also we must note that the general exception clause of the agreement, Art. XIV GATS does not make an unequivocal reference to human rights as one of the legitimate grounds for invoking trade-restricting measures and even if subject to the WTO dispute settlement, the prospect of subjecting broad categories of domestic regulatory tools to necessity oriented scrutiny (as the threshold is higher) by the WTO dispute settlement bodies has attracted considerable critique.

So here the key question is to what extent GATS maintains the legislative or executive manoeuvring room of a state to regulate access to water in accordance with its international obligations to the right to water?

If you look at the GATS provisions as they are, there is no direct violation of the right to water. Add to that the GATS legal framework is still in construction and negotiations are in progress, so its impact is not as large as its potential makes it out to be.

However, the following is the rub. While the WTO insists that nothing in the GATS would allow for its use in deregulating water markets, there is evidence that GATS disciplines on market access contribute to a privatization and deregulation dynamic in the water sector. This is reinforced by water sector strategies of the World Bank where investments in the water sector come with the conditionality of water sector reforms that would pave the way for private sector investments.

Thus critics argue that the proposed GATS rules for trade in environmental services would either remove the right of national governments to regulate or severely restrict the delivery of services in the pursuit of public policy objectives such as universal service obligations, equity, poverty reduction and consumer protection. There is significant doubt about whether the GATS framework is sufficiently malleable to permit the degree of domestic policy flexibility necessary to ensure the protection of the human right to water, particularly in the world's poorest nations.

While the discussion on water within the GATS has so far focused on privatized drinking water supply and opening the market to foreign investors, GATS can impact water resource use and management in other water sectors such as of course sanitation and sewage services, or water related services such as irrigation, environmental management and tourism development.

Indirectly GATS rules can make it easier for transnational service providers to have unlimited access to water to provide service related to energy production, agribusiness and manufacturing. Corporations who establish commercial presence can apply for the right to use the water like any domestic company. This includes the right to use it as a raw material, carrier of effluents and the mining of aquifers. If a corporate service provider is limited in any way, the affected corporation can demand compensation. Here the issues of resource management and environmental protection are crucial to the debate. And here if I may make a

link with the tussle between value and price - While we must advocate for policies to permit the supply of water to poor communities for domestic purposes at a below cost level, it should also be acknowledged that the flip-side of the pricing problem is that heavily subsidized, below-cost pricing for water services may contribute to the over-extraction of water and misuse of this fragile resource. This should also include corporate actors whose licensing fees should reflect the negative externalities arising from the discharge of pollutants into watercourses.

So while the actual legal impact of GATS may be minimal given that it is still a moving target for negotiations- its logics of liberalization, deregulation and privatization hold a powerful appeal and have significant impact including on how states behave and open up markets for investment. So in sum- driving privatization, impairing regulation and constraining flexibility.

But this also provides an opportunity for water management policy makers and environmental and human rights advocates to intervene in the negotiating process with the aim of minimising possible future threats to the adequate provision of water services to poor communities especially in Least Developed Countries (LDCs).

For rights-based water governance we need to clearly define the role of the public authority in public-private partnerships, ensuring that obligations under the GATS do not constrain governments in taking action to promote and protect human rights, allowing tests of the trade-restrictiveness of government domestic regulation under the GATS to take into account a state's obligations under human rights law and expressly permitting members the flexibility to modify and withdraw sector-specific commitments in relation to the liberalisation of trade in water services, taking into account the need for states to meet their human rights obligations. In its present iteration it is difficult to contemplate that GATS will make a positive contribution towards the realisation of the human rights to water and sanitation especially in least developed countries.

But GATs may now be just the tip of the iceberg.

GATS is no longer the big game in town. Enter the plurilateral negotiations that began in January 2012 around the Trade in Services Agreement (TISA) which was initiated by the US and Australia and is currently being negotiated in Geneva with 50 participants that represent 70 percent of the world's trade in services. Connected to this are the negotiations around two mega-regional agreements, the Transatlantic Trade and Investment Partnership between EU and US and the Trans-Pacific Partnership. From what we can glean and especially on TISA the negotiations are mostly secret, there is no general exclusion of public services and waste water services are committed for market opening. Many are calling these three agreements an unholy trinity. In TISA, there are mentions of ratchet and standstill clauses that will lock in reforms and it will be almost impossible for a country to revise any liberalisation once committed to. Subsidised and or public services monopolies such as water, wastewater and waste services could be threatened.

It is clear that TISA wants to set the benchmark for GATS and other trade agreements, so we need to watch this space carefully. Civil society, employers and trade unions have called for exclusion of water services from these negotiations around TISA and the mega-regionals.

I have focused quite a lot on trade in services on the multilateral stage, but clearly these debates also rage on in relation to preferential trade agreements and as I just mentioned some of the plurilateral mega-regionals. That being said, at least in some of the preferential trade agreements, you often have negative lists where exclusions are made and some members have excluded water distribution services and less often sewage services.

These concerns or issues that I have brought up in the area of trade also rear their head in the investment framework. Now as some trade analysts have noted GATS is maybe essentially an investment agreement. And TISA and some of the mega regionals being negotiated also have repercussions for the investment framework around water and sanitation. There are also 300 plus bilateral investment treaties that have

implications for this area. I am not going into the standards for investor protection in these treaties or mega regionals. Instead I thought I might say a few things on investor state disputes that have come up in this area that are highly relevant to concerns around the right to water and sanitation. And these investor state disputes, which are dealt with in arbitration panels that are not open really to third parties outside the dispute have the potential to have a huge monetary impact in terms of damages paid out.

There has not yet been an arbitral decision that fully and squarely adjudicates the issue of a State's fulfilment of human rights obligations alongside investment treaty obligations. In fact amongst arbitrators or the closed legal community that pursue investment arbitration, as one commentator puts it, there is a fundamental predisposition against so-called unscientific normative mergers across treaty regimes. However, human rights have not been completely absent in investment arbitration. In fact the first arbitral pronouncement referring to human rights in more than a cursory manner was that of the ICSID tribunal in the 2010 *Suez and others v. Argentina* award, which declared that Argentina was subject to both international obligations, i.e. human rights and treaty obligations and must respect both of them equally. But the tribunal did not really use this argument any further in the case concerned. The *Suez* case was in the backdrop of a severe economic crisis where the defendant state argued that they renegotiated tariffs for water distribution and wastewater treatment in an Argentinian province to fulfil the government's duty to ensure access to water to the population. The tribunal was critical of this defence relied upon saying that the obligations under the investment treaty and human rights obligations were not incompatible. They could have fulfilled both by enacting social tariffs or subsidies.

Generally in investment arbitration, a host state that seeks foreign investment, and that is aware of the likelihood that investors may challenge its public policy regulations for instance, by alleging an indirect expropriation or breaching the standard of fair and equitable treatment, could be discouraged from adopting regulations or measures that would protect public interest, including public health, the environment or human rights that may conflict with investor's legitimate expectations.

I already mentioned *Suez v. Argentina* and that is one of a few cases where human rights argumentation has made its way into investor state disputes. But whatever argumentation has been brought forward has not often been made by parties to the dispute but by friends of the court through amicus briefs.

It is of note that most of the cases where amicus curiae have been brought forward with human rights arguments, it has been in cases dealing with water and sanitation such as *Suez v. Argentina*. A few other cases I would like to mention. In 2012, in *SAUR v. Argentina*, a French corporation invested in and collaborated with an enterprise that held a concession for a water and sewerage project in Argentina. The defendant state argues that its obligations under the respective agreement should be read in accordance with its obligations regarding human rights to water and sanitation. The tribunal decided that it would be within its discussion whether a substantive standard had been violated but in its subsequent reasoning seems not to have addressed this goal explicitly.

Other cases all related to water and sanitation and human rights - *Vivendi Universal SA v. Argentina* in 2007, *Biwater Gauff v. Tanzania* in 2007, *Aguas del Tunari v. Bolivia* in 2002- Human rights arguments were put forward but played only a minor role if at all within the legal reasoning of the arbitral awards. Some of the problems relate to the stipulation that disputes before the tribunals must arise directly out of an investment so the case has to be made that the human rights concerns relate to the investment itself.

One case where the amicus curiae made some compelling human rights arguments was *Biwater Gauff v. Tanzania* in 2007. In this case it was a situation of a poorly performed lease contract for a water and sewerage system, the amici contended that the investor should be obliged to apply proper business standards including undertaking suitable due diligence procedures and that these responsibilities should be assessed in the context of sustainable development and human rights. The award actually was in favour of the government and did reproduce these arguments in the award and in the merits, mentioned one of the arguments in the context of determining the threshold for a violation of fair and equitable treatment. However, it did not really utilise these arguments as such in the final legal reasoning.

Pac Rim Cayman v. El Salvador, 2011 – CAFTA – arbitration centred on mining activities in El Salvador. NGOs disclosed the human rights implications of the mining activities, namely the critical water supply in the area of the investment and possible negative environmental and health impacts. The amicus curae in this case actually made the argument that this case should not have been before the arbitral tribunal as it dealt with issues far bigger than the investment itself. In this case, it remains to be seen whether the tribunal will take up the human rights related facts or legal arguments in its final award. As the amici's submission related to the jurisdictional phase, they will probably have to apply again for the merits phase and present more substantive human rights arguments.

Overall, in terms of arbitral investment jurisprudence relating to human rights and as you can see, many of them deal with water and sanitation, the decisions are heterogeneous and inconsistent, as is the case with arbitral jurisprudence generally. On the part of arbitral tribunals, no notable efforts have been made to develop a human rights oriented interpretation of investment law standard or a methodology to balance human rights and investment concerns. So far the experience of human rights related amicus curae submissions have not proved to be particularly effective as far as connecting the two legal regimes are concerned.