The right to water and trade in services: Assessing the impact of GATS negotiations on water regulation

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1. Introduction

Water is key to sustainable development. Growing populations, increased water degradation and other environmental problems create enormous difficulties to ensure equal and affordable access to drinkable water and to manage exhaustible water resources in a sustainable manner. In most countries, the supply and management of water has traditionally been a domain of public entities at the national, regional or local level. Yet, countries have employed different regulatory models at different points in history and governments have often played multiple roles in the water sector. These include the roles as natural resource manager, service provider and regulator.

This traditional "public domain" of the water sector has been challenged on the basis of a resurgence of neo-liberal market ideologies. Today many politicians and commentators are convinced that the supply of water through private companies can bring about much needed solutions for the pressing needs in the water sector. During recent years, policies encouraging private (often foreign) investment in water services and privatisation (including outsourcing and public-private partnerships) became the means of choice in many parts of the world. Public or communal schemes of water supply came under pressure in favour of supply schemes requiring competitive water markets. The emergence of multinational companies specialising in water supply and privatisation and commercialisation policies reinforced this development and created a veritable international market for water services.

While many of these policy shifts were based on autonomous national decisions, international economic and financial institutions such as the World Bank also advocated a greater involvement of the private sector. Arguably, the re-definition of the role of public and private entities in the water sector is also reinforced through developments in the World Trade Organization (WTO) and its General Agreement on Trade in Services (GATS). As part of the overall Doha Agenda, WTO members are currently engaged in negotiations to further liberalize trade in services (GATS 2000 negotiations). After the initial request and initial offer phases in June 2002 and March 2003 respectively, the day-to-day negotiations now take place in bilateral settings and the outcome will probably only become public at the end of the Doha Round scheduled for 2005. Based on a general negotiating proposal and country-specific requests by the European Community (EC), these negotiations now also cover water services.

These developments, together with some high-profile examples of failures of private water management and supply, led to concerns about the future of water regulation. Critics point to the impact of GATS and the GATS 2000 negotiations, which are said to have major

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implications on water management and the ability of governments to regulate water services. The critics' voices came together in a statement of civil society groups issued at the WTO's Cancún Ministerial Conference calling upon WTO Members to clearly exclude basic services such as water from the scope of GATS.[2]

In this paper we address some of the questions arising at the interface between services trade liberalization and water regulation. We begin by placing these questions into a human rights context arguing that access to water is a basic human right. The human rights character of access to water leads us to general questions about the relationship between human rights and international trade law. These questions received much academic and political attention in recent years. In this paper we add a further dimension to this relationship. Building upon the perspective of human rights and trade liberalisation as suggested in the 2002 report of the United Nations High Commissioner for Human Rights, we call for an approach to international trade law in deference to national regulatory autonomy. The second part of the paper adopts this approach and applies it to an analysis of key GATS provisions and their impacts on water regulation.

2. Human rights and services liberalisation: A new approach to international trade law?

a) The human right to water

Access to water is a basic human right. Even though the International Bill of Human Rights[3] does not specifically spell out a direct right to water, it can be argued that the right to life (Article 3 of the Universal Declaration of Human Rights) entails access to water and bestows it with a human rights quality: Meeting a standard of living adequate for the health and wellbeing of individuals requires the availability of a minimum amount of clean water. Furthermore, the rights enshrined in Articles 11 and 12 of the 1966 International Covenant of Economic, Social and Cultural Rights (ICESCR)[4] also presuppose access to drinkable water. Article 11 recognises the right of everyone to an adequate standard of living, including sufficient food and shelter. Article 12 contains the right to physical and mental health. Clearly, sufficient food and health require that an individual has affordable access to drinkable water. In a General Comment of November 2002, the UN Committee on Economic, Cultural and Social Rights recognized that Articles 11 and 12 can be seen as a legal basis for the right to water.[5]

More recent international human rights treaties include explicit references to the right to water. For instance, Article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) stipulates that States parties shall ensure women the right to "enjoy adequate living conditions, particularly in relation to … water supply". Similarly, Article 24(2) of the Convention on the Rights of the Child (1989) requires States parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water".

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[2] "Call to Cancún: Halt the GATS negotiations. Take essential services, such as water, out of the WTO" see http://www.weed-online.org/themen/wto/18278.html (19 October 2003).

[3] The International Bill of Rights refers to the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants on Human Rights.

[4] The ICESCR has 147 parties, including 112 members of the WTO.

[5] General Comment No. 15 (2002), E/C.12/2002/11, 26 November 2002, available at http://www.unhchr.ch/html/menu2/6/cescr.htm.

What now is the content of the human right to water? It seems appropriate to define the obligations of states according to the right to water similar to their obligations according to other social and economic rights. The ICESCR calls for a progressive realisation of these rights and acknowledges that - due to limits of available resources – immediate realization of this human right may be constraint.[6] As a social and economic right, the right to water does not encompass a right to access to water, directly enforceable by each person against the state. However, the right to water requires government activities to progressively increase the number of people with safe, affordable and convenient access to drinkable water. This includes government policies and strategies that create economic, social and political conditions for such access. The right to water also includes the obligation to ensure non-discriminatory access to water, especially of the marginalised and vulnerable parts of the society.[7] Depending on the particular circumstances, strategies to ensure non-discriminatory and affordable access to water can employ private companies operating in a liberalised, but regulated market, rely on public provision of water or utilise any other regulatory regime which adequately achieves universal and non-discriminatory access to water.

b) Human rights and trade law: A supportive or conflictive relationship?

In recent years, the relationship between trade law and human rights has become an important subject of academic and political debate.[8] The different contributions to this debate address a whole range of issues. We do not intend to portray them comprehensively or offer any final conclusions. Instead we would like to briefly introduce and critically assess two streams of thoughts which seem particular relevant for our context and then suggest a third approach.

One school of thought relating to trade law and human rights, whose intellectual roots predate the current debate and which has been articulated for some decades now, can be called the liberal-constitutional approach. It is linked with the name of Ernst-Ulrich Petersmann, a long-standing GATT and WTO expert, who has continuously called for a "constitutionalisation" of international (economic) law.[9] According to this approach, international trade law, especially the principle of non-discrimination, is functionally equivalent to constitutional guarantees such as basic rights. Hence, this approach assumes that human rights and the principles of international economic law are mutually reinforcing. As Petersmann (2002) argues: "The globalization of human rights and of economic integration law offers mutually beneficial synergies: protection and enjoyment of human rights depend also on economic resources and on integration law opening markets, reducing discrimination and enabling a welfare-increasing division of labour. As a corollary, economic, legal and political integration are also a function of human rights protecting personal autonomy, legal and social security, peaceful change, individual savings, investments, production and mutually beneficial transactions across frontiers."

We submit that this reading of international trade and human rights law is one-sided, because it does not address potential conflicts between human rights and international trade law. It mainly focuses on traditional market freedoms, such as the right to trade or the right to own

[6] General comment, as note 5, para. 17.
[7] General comment, as note 5, paras. 10-16.
[8] For an overview see Marceau (2002) and the other contributions and debates on the webpage of the European Journal of International Law (EJIL), http://ejil.org/forum_tradehumanrights/
[9] Groundbreaking was Petersmann (1991). A more recent contribution is Petersmann (2002). For a discussion see Howse and Alston at http://ejil.org/forum_tradehumanrights/.

and sell property. It hardly takes political rights such as the right to free speech and free information into account. If it does, it sees these rights also as a function of market processes: Petersmann (2002) claims that "freedom of information and freedom of the press (…) protect spontaneous information mechanisms (such as market prices) which enable individuals to take into account knowledge dispersed among billions of human beings even if individuals remain 'rationally ignorant' of most of this dispersed knowledge." The liberal-constitutional approach seems to assume that the right to health, the right to food and shelter and, indeed, the right to water are best protected and guaranteed through the full adherence to international economic law, because food and shelter, health and water supply are efficiently and effectively provided through market processes in liberalised economies. The perspective of human rights of the liberal-constitutional approach only focuses on the traditional function of human rights as rights against state intervention (*status negativus*, negative concept of human rights). It does not consider human rights which require state activities and are enforced through the state (*status positivus*, positive concept of human rights).

Another body of literature addresses the possibility of conflicts between human rights and international economic law more specifically and proposes solutions to such conflicts. Marceau (2002) for example, analyses the option of integrating human rights law into the dispute settlement practice of the WTO. Much of this literature adopts a narrow legalistic view of possible conflicts between human rights and international trade law. For Marceau (2002) a conflict exists between a WTO provision and a provision of a human rights treaty, if "the WTO mandates or prohibits an action that a human rights treaty conversely prohibits or mandates. Such situations would be rare. In fact, one would have to be able to demonstrate that compliance with the WTO *necessitates* violation of a human rights treaty." While this observation may be correct from a strict legal perspective, it neglects the wider and general relationship between human rights and international trade law.

As mentioned above, human rights are more than just narrow legal obligations of governments to adopt or avoid particular policies. They often require considerable political efforts by governments and often necessitate a great variety of different policy choices. On a more general level, these choices may clash with the approach adopted by international economic law, even if there is no apparent direct conflict in a legal sense. However, the narrow legal perspective focussing on conflicts between obligations is not the only relevant one. Human rights policies and international economic law are sometimes based on different political agenda and rooted in different political contexts. This contextual relationship bears potential for conflict and requires a perspective of human rights and trade law that is neither naively conciliatory nor narrowly legalistic.

c) A progressive approach to trade law and human rights

In this paper, we would like to suggest an alternative approach to the trade and human rights relationship. We find the basis of such an approach in the progressive concept of human rights and international trade law forcefully described and analysed in the recent report of the United Nations High Commissioner for Human Rights on "Liberalization of trade in services and human rights" (UNHCHR 2002). An important corner-stone of this approach is the primary responsibility of the state to protect and realise human rights: "The legal imperative of respecting human rights means that States are accountable for ensuring that these entitlements cannot be reduced to mere privileges or luxuries or left subject to the whim of markets." (UNHCHR 2002: 8). A mere reliance on liberal markets to promote human rights is insufficient from a human rights perspective. The state's obligation under human rights law

includes the obligation to "ensure that private entities or individuals, including transnational corporations (…) do not deprive individuals of their economic, social and cultural rights (…)." The report continues: "The adoption of any deliberately retrogressive measure in the liberalization process that reduces the extent to which any human right is protected constitutes a violation of human rights" (ibid:10). The latter is especially significant if liberalization policies result in a deprivation of the access to basic services for the poorest and most vulnerable parts of the society.

According to the approach suggested by the High Commissioner the promotion and protection of human rights are understood "as objectives of trade liberalization, not as exceptions" (ibid: 8). This approach is not limited to a "negative" conceptualisation of human rights, but embraces a positive concept of human rights as justifications of social and economic regulation (rights enforced through the state). It is based on the understanding that human rights cannot be enjoyed without the state and that national regulation needs to find a balance between different public and private interests.

The report of the High Commissioner highlights an important aspect of the relationship between human rights, trade liberalisation and domestic regulation, which is often overlooked in the debate about trade and human rights. The progressive realisation of certain human rights, especially social and economic rights requires effective national policies. These policies differ from country to country and there are no one-size-fits-all solutions. Consequently, the realisation of human rights requires regulatory space and flexibility to tailor domestic regulatory policies to the needs and particularities of the country, society and human right in question. International trade agreements, however, often aim at curtailing national regulatory freedom and discretion. If international trade agreements, such as GATS, discipline governmental discretion and regulatory flexibility in an area where such discretion and flexibility is needed to realise human rights, these agreements conflict with international human rights obligations.

It should be noted that this conflict does not amount to a specific legal conflict as addressed by the contributions to the trade and human rights debate mentioned above. The human right to water does not legally oblige governments to adopt a particular measure which could violate GATS obligations. It requires governments to adopt policies aiming at and progressively ensuring universal and equal access to drinkable water. The obligation is hence an obligation concerning the aims, but not the means. If governments pursue these aims with means which are in conformity with GATS obligations, the issue of a potential conflict does not arise. This will be particularly the case if governments rely on market forces and private companies in a liberalised environment. If, however, governments decide that they cannot fulfil their human rights obligations through liberalised market but need to rely on a larger public sector, conflicts between GATS obligations and such policies may arise.

d) Conceptualising GATS in deference to national regulatory autonomy to reconcile trade law disciplines and policies pursuing human rights

How can this conflict be solved? We would like to suggest to conceptualise trade law in deference to national regulatory autonomy.[10] This would ensure the political space and the necessary flexibility for states to fulfil their human rights obligations. As pointed out above, the right to water requires government actions aimed at progressively ensuring universal,

[10] For similar approaches see Howse/Nicolaidis, Picciotto and von Bogdandy as cited in Krajewski (2003b).

equal and reliable access to drinkable water. This may entail different regulatory strategies in different countries. Consequently, GATS should not restrict regulatory choices taken in pursuance of human rights obligations. Since economic, financial and social circumstances may change, governments need sufficient flexibility and regulatory space to fulfil their human rights obligations.

In practice, conceptualising GATS in deference to national regulatory autonomy can take at least two different forms.: First, GATS provisions that are ambiguous and open for interpretation should be interpreted narrowly (*in dubio mitius*). It is not clear whether WTO dispute settlement practice would follow such an approach, because the existing case load of GATS is still too limited to actually determine the direction of dispute settlement practice. In any event, it should be kept in mind that such an interpretative approach would not be prohibited by existing dispute settlement practice in other fields of WTO law.[11] Interpreting a treaty clause *in dubio mitius* is also an accepted form of treaty interpretation according to public international law. Second, if provisions are not ambiguous or if a broad scope of a particular discipline cannot be narrowed by interpretative means, governments need to make full use of the flexibility provided by GATS by individually or through collective (legislative) action limiting the impact of GATS on national regulations. This could include cautiousness ness when entering into specific commitments in sensitive sectors such as water services. The latter approach would also be an advisable option if WTO dispute settlement organs do not follow the suggested interpretative approach of *in dubio mitius*. In the following part of this paper we will illustrate the practical consequence of these thoughts with some examples.

3. Water services and the scope of GATS

What are water services? From a trade perspective, water itself is usually considered a good. Hence the export of water would be regarded as trade in goods. However, many of the contentious issues concerning policy choices in the water sector involve certain forms of a "water service", including the provision of water. Water services can be categorised in four broad categories: Water collection and purification services, water distribution, wastewater treatment (sewage) and services incidental to water services (installing and reading meters, building and maintaining distribution networks or management services). In the WTO, these services have not yet been classified under a specific category of the Services Sectoral Classification List. To date, only sewage services have been classified under the general heading of environmental services.

However, the European Community - home to many of the world's largest water companies - recently suggested a (re-)classification of water services in the WTO. It proposed the creation of environmental sub-sectors for different environmental media (e. g. water, air, soil, etc).[12] With respect to "water for human use and wastewater management", the EC proposal contains two sub-sectors: "Water collection, purification and distribution services" and "waste water services". The first sub-sector would include potable water treatment, purification and distribution, including monitoring. The second sub-sector would include removal, treatment and disposal of household, commercial and industrial sewage and other waste waters. The EC's proposal produced mixed reactions among the WTO membership (Cossy 2003). Some countries agreed that a reclassification would be useful, while others oppose such attempts. In

[11] See *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26, Report of the Appellate Body adopted on 13 February 1998, para. 165.
[12] GATS 2000: Environmental Services, Communication from the European Communities and Their Members States, S/CSS/W/38 (22 December 2000).

any event, the EC's proposal is not supported by a large group of WTO members. Nevertheless, the EC is currently targeting a large number of its trading partners with individual, country specific requests to open their water markets based on its proposed reclassification of the sector.

Despite the controversies about the classification of water services, it should be clear that the classification issues do not affect the sectoral scope of GATS. GATS applies to all sectors of the service economy with the exception of air transport rights and services "supplied in the exercise of governmental authority". A service supplied in the exercise of governmental authority is defined in Article I:3(c) GATS as a service which is "neither supplied on a commercial basis nor in competition with one or more service suppliers". Hence, the notions of "commercial" and "in competition" determine the sectoral scope of GATS. The ordinary and contextual meaning of the terms "competition" and "commercial basis" do not seem to leave much room for an interpretation in deference to national autonomy. A service supplied "on a commercial basis" can be defined as a service supplied on a profit-seeking basis. Services are supplied "in competition" if two or more service suppliers target the same market with the same or substitutable services. This is typically the case if they have common end-uses (Krajewski 2003a).

The interpretation of "commercial" and "in competition" shows that the sectoral scope of GATS does not exclude particular service sectors because of their nature or because of a "public interest" in their supply. Rather, non-competitiveness and non-commerciality determine whether a service sector is covered by GATS. These characteristics describe the economic conditions of the supply of a service. To a large extent, they depend on the legal and political framework in which the service is provided. A WTO member wishing to exclude a particular service from the scope of GATS must therefore ensure that this service is supplied on a non-profit and non-competitive basis. For example, if drinking water is distributed by a government department or a state-owned company on a monopoly basis and at a very low subsidized price, which prevents the distributor from making a profit, it can be argued that drinking water distribution is a service which would fall outside of the scope of GATS. If, however, a government chooses to introduce elements of commercialisation and competitiveness into the provision of water through privatisation policies, it may submit this sector to GATS disciplines.

4. GATS disciplines and water services regulation

GATS contains two groups of disciplines and obligations: The first group applies to all measures affecting trade in services ("general obligations"). General obligations include the most-favoured-nation principle, i. e. the obligation to not discriminate between services and service suppliers if they come from different foreign countries. The second group of disciplines applies only if governments specifically committed themselves to these disciplines ("specific commitments") in the course of trade negotiations. Specific commitments include market access and national treatment. WTO members may specify which sectors and sub-sectors they commit to market access and national treatment and which limitations and conditions they apply to these commitments in their schedules of specific commitments. As part of the Doha Agenda, WTO Members are currently negotiating their specific commitments.

For the analysis undertaken in this paper, the specific commitments are of greater importance than the general obligations. In the following, we will look at the impacts these specific

obligations may have on a government's ability to realize the right to water, which in turn will allow us to draw initial policy conclusions from a human rights perspective.

a) Market access

For services sectors or sub-sectors which are fully committed to the GATS market access rule, Article XVI:2 prohibits a number of quantitative and qualitative restrictions to market access. Measures which members may not maintain or introduce include in that case are (private or public) monopolies, exclusive service suppliers, quotas, economic needs tests, restrictions on legal types and joint venture requirements. A full commitment to market access in water services hence prohibits the use of these regulatory instruments.

The reliance on public monopolies plays an especially important role in water management. The supply of water is usually considered a natural monopoly, which is only efficiently provided by a monopoly supplier. This is because water services depend on network infrastructure and building more than one infrastructure is considered economically inefficient. As a consequence regulatory regimes for natural monopolies often use public monopolies or exclusive service suppliers to avoid inefficient competition. Thus, the government's ability to resort to such policies, including monopolies, is fundamental when aiming to ensure the right to water. However, once a services sector – including water services – is fully committed to market access, public or private monopolies, including these originating from natural monopolies need to be abolished. Thus, a human rights approach to trade liberalization suggests that governments should exercise restraint when scheduling their market access commitments. WTO Members may therefore refrain from entering into full market access commitments in the water sector.

Another related, but distinct issue relates to privatisation of water services. From a human rights perspective, the mixed experiences with privatisation and private sector involvement in water services suggest that privatisation should be approached with caution. Given that privatisation apparently does not provide a one-size-fits-all solution to guarantee access to water, privatisation policies should not be made irreversible through international trade rules. Thus, from a human rights perspective the extent to which GATS mandates or locks in privatisation policies is crucial.

From a strictly legal perspective, GATS does not require privatisation of public services (privatisation understood as the change of public to private ownership). There are no GATS provisions explicitly expressing a favour of public or private ownership. GATS does - however - contain a dynamic towards the abolishment of public monopolies. While this does not necessarily require the abolishment of public ownership, abolishing public ownership often goes hand-in-hand with the abolishment of public monopolies. This has been shown by the privatisation of telecommunication, postal and railway services in Europe. Therefore, GATS disciplines on liberalisation cannot be separated from the political agenda which puts public monopolies and publicly owned service suppliers under pressure.

Furthermore, current market access negotiations (GATS 2000) are implicitly also directed towards the elimination of public monopolies, in so far as they aim at progressively higher levels of services trade liberalisation to ensure effective market access. Finally, once a market access commitment has been made, the elimination of the public monopoly becomes a practically irreversible policy choice. Re-establishment of a monopoly for water services – as might be needed in case the introduction competition and private sector engagement in the

water sector has failed – would not only constitute a step backwards from the degree of market openness enshrined in the country's respective GATS commitments but also clearly violate the country's market access commitment.

Thus, when viewed from a human rights perspective, the relationship between the GATS market access provision and the dynamics of trade negotiations on the one side and privatisation policies on the other suggests that governments should exercise caution with respect to entering into specific market access commitments.

b) National treatment

National treatment (Article XVII), the GATS' second main specific obligation, requires governments to ensure equal conditions of competition between foreign and domestic services and service suppliers. The GATS national treatment obligation explicitly requires national policies to be *de jure* and *de facto* non-discriminatory. *De jure* national treatment targets measures that discriminate overtly according to the origin of the service or service supplier. Nationality requirements for service suppliers or measures requiring foreign investors to employ a certain percentage of local staff are typical examples.

Due to limited space, this paper focuses only on problems associated with *de facto* national treatment.[13] *De facto* discrimination usually refers to a measure which affects the "conditions of competition" in favour of the domestic services supplier even though foreign and domestic suppliers are formally treated identically (Article XVII:3). This indicates a potentially far-reaching impact of GATS. If any national regulation making it *de facto* more difficult for a foreign service supplier to compete on a domestic market would be considered a violation of national treatment, many national regulatory measures could be seen as an infringement of GATS. For example, it could be argued that high national quality standards, which are more easily fulfilled by domestic suppliers, affect the conditions of competition in favour of domestic suppliers.

Also, certain universal service obligations (USOs) could violate the GATS *de facto* national treatment obligation. USOs are important elements of regulatory regimes aiming at universal access to water (Türk/Ostrovsky/Speed 2003). They are requirements imposed on the service provider by the state, usually involving an agreement to expand service delivery to certain previously un-served areas, or to provide the service at an affordable price. In very impoverished or marginalized areas, "affordable" can mean that the service provider has to provide the service below its cost. When formulating its water policies, particularly in the context of opening the water services sector to private, foreign companies, a government may decide to apply USOs only to *new* service providers in the relevant sector. As the reason for implementing privatisation and liberalization policy choices is to overcome lack of domestic investment with foreign (direct) investment, the *new* entrants affected by the USO would most likely be foreign private providers, not domestic ones. Consequently, a USO targeting such new entrants could be found to be discriminatory and consequently prohibited under the GATS *de facto* national treatment requirement. This could have far reaching implications for domestic water management policies.

Based on a perspective of interpreting GATS in deference to national regulatory autonomy, several options appear possible to avoid such an outcome. For example, one could suggest

[13] For a discussion of problems of *de jure* national treatment see Türk/Ostrovsky/Speed (2003).

that only if there is a clear difference in treatment, i. e. a distinction operated by the regulatory measure at issue, should the measure be considered as discriminatory (Eeckhout 2001). Another approach would be to call for a renewed consideration of the "aims and affect" test, which determines the discriminatory nature based on the purposes of the measure. However, the Appellate Body to some extent rejected this approach in *EC – Bananas*.[14] We would like to suggest an third approach taking the functions of specific commitments within the over-all GATS architecture and the importance of the schedules for these commitments into account.

According to this third approach, only measures which can theoretically be scheduled as limitations to national treatment should be considered as discriminatory measures within the meaning of Article XVII, both *de jure* and *de facto*. If measures that cannot be scheduled would be considered violations, a WTO Member would be deprived of the right to keep discriminatory measures by scheduling them, which in turn is a fundamental tenant of the GATS bottom up approach. Based on this thought it could be argued that only measures with a *foreseeable* discriminatory effect should be considered *de facto* discriminatory (Krajewski 2003b). Such measures would include requirements for residency or prior practice in the country, or possibly even local content rules. For these types of measures it is foreseeable that they could cause adverse effects on foreign services and service suppliers, because domestic service suppliers typically fulfil these requirements more easily than foreign suppliers. By limiting the coverage of *de facto* discrimination to a prohibition of *foreseeable* discriminatory effects, this approach conceptualises the GATS *de facto* national treatment obligation in deference to national regulatory autonomy. This would ensure the political space and the necessary flexibility for states to fulfil their human rights obligations.

In case such an interpretative approach would not prevail, a human rights approach would suggest to refrain from entering into a national treatment commitment in the first place. If de facto national treatment would be interpreted broadly and would cover also measures with discriminatory effects that are not foreseeable, governments can only ensure sufficient regulatory space by remaining unbound. Scheduling appropriate limitations in such a case seems impossible, because it is not foreseeable which measures need to be scheduled.

c) Disciplines on Domestic Regulation

WTO members are currently negotiating disciplines for domestic regulation (Article VI:4). These new disciplines would require them to eliminate national regulations if they are more trade-restrictive than necessary. Specifically, such disciplines would enable WTO panels or the Appellate Body – in case of a dispute – to decide whether a particular government measure was *necessary* to achieve its objectives or whether other less trade-restrictive means could have been used. This would subject national legislation to the scrutiny of international tribunals comprised of trade law specialists and approaching the relevant issues from a perspective of the trade-restrictiveness of a measure.

This is particularly worrisome as national decisions are often based on carefully struck political and social compromises. If such compromises are then subject to the benchmark decision whether or not the regulatory approach is more trade restrictive than necessary to achieve the relevant policy objective, this may challenge policies aiming to fulfil human rights obligations with means, which are more trade-restrictive than a WTO dispute settlement organ deems necessary. In fact, already the mere possibility that national policies, including

[14] *European Communities – Regime of the Importation, Sale and Distribution of Bananas*, WT/DS27, Report of the Appellate Body adopted on 25 September 1997.

those aiming to realize the human right to water, could be subject in this way to WTO scrutiny in a trade dispute might have a "chilling" effect on the design and implementation of the relevant domestic policies.

While not yet being clearly defined – and even less agreed upon - the type of policies and scope of application of future disciplines on domestic regulation appear to be relatively broad. The policies subject to future disciplines may include a variety of measures, ranging from land use and zoning policies to measures relating to technical standards and qualification requirements. These types of policies include central features of water management policies, which in turn are fundamental for a government's ultimate ability to ensure that safe and clean water is provided to its citizens, including the poor and marginalized.

Zoning regulations, for example, control the distribution of industry which could potentially harm water, and therefore can serve as an important regulatory tool to preserve the quality of ground water. In turn, preservation and responsible management of ground water is crucial for a country's ability to provide safe and clean water to its citizens. As regards technical regulations, they may include setting certain quality standards for water to be provided to human beings. Again they constitute a policy tool central to the realization of the right to water.

Thus, while these policies are crucial for domestic water management, they may – in the future – be covered by trade disciplines on domestic regulation. From a human rights perspective however, water policy makers should be free to pursue water conservation objectives, to ensure water quality standards and to design and implement the relevant policies without pressure to reduce trade or other economic impacts of these policies.

This begs the question of what a human rights approach to trade law and the suggestion to conceptualise trade law in deference to national regulatory autonomy could mean in practice for these examples of domestic water management policies? As mentioned above, a human rights approach to trade law suggests that GATS provisions which are ambiguous and open for interpretation should be interpreted narrowly. In the following we suggest two ways how a human rights approach to trade law can assist in addressing the main concerns raised with respect to future disciplines on domestic regulation.

The first concern relates to possible constraints as regards the choice of policy objectives which may be pursued by domestic regulations. In case future disciplines will (taxatively or exhaustively) list national policy objectives, the pursuit of which shall be allowed as long as the national policy is not more trade restrictive than necessary, a human rights approach to trade liberalization could ensure that the progressive realization of the right to water would be considered as encompassed in one of the explicitly mentioned legitimate national policy objectives. In case future disciplines will contain an open ended list of policy objectives, without explicitly referring to human rights, a human rights approach may still be used to suggest an interpretation that would ensure that the progressive realization of human rights, in our case the objective to provide water to the poor and marginalized, is amongst those policy objectives, that are not explicitly mentioned but still considered legitimate. Finally, in case future disciplines will not contain any list (open or closed) of legitimate national policy objectives, but merely refer to "national policy objectives" per se, a human rights approach would again ensure that progressive realization of the right to water is considered a "national policy objective".[15] Thus, conceptualising trade law in deference to national policy objectives

[15] For a description of the various types of necessity tests see Kenneth/Neumann/Türk (2003) and Neumann/Türk (2003).

suggests to grant WTO Members the maximum leeway in determining their national policy objectives.

Secondly, a human rights approach may be helpful when applying the necessity test as it will most likely be included in future disciplines on domestic regulation. Early WTO jurisprudence has interpreted necessity tests as they are included in various other WTO Agreements. Early interpretations of this test held that it required a showing that there were no alternative measures available which the country "could reasonably be expected to employ" and "which entail[ed] the least degree of inconsistency with other GATT provisions".[16] In recent case law the WTO Appellate Body (AB) has further developed its interpretation of the necessity test, so as to include certain evaluation parameters, that allow for an - albeit limited - weighing and balancing of domestic policy objectives against the measure's trade restrictive impact (Kenneth/Neumann/Türk 2003) Crucial amongst these balancing parameters is the *importance* of the domestic policy goal. Specifically, the AB has stated that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends."[17] Clearly, the reference to the "*importance*" of the value protected allows for subjective choices, which – when being undertaken from a trade liberalization perspective – may endanger the pursuit of policy objectives that may not necessarily aim towards liberalizing trade.

Again, a human rights approach to trade law may provide guidance in this case. Most importantly, when it comes to weighing different factors against each other, a human rights approach to trade law may be used to underline the *importance* of the value pursued. Acknowledgement of a national policy goal's fundamental importance would make it easier for the regulatory measure pursuing it to be considered "necessary".[18] Thus, in case WTO Members decide to adopt far reaching disciplines on domestic regulation that include a necessity test as described above, a human rights approach might assist mitigating possible constraining effects such WTO disciplines could have on domestic regulatory prerogatives. The human rights approach could be used to argue that policies aiming at the progressive realisation of the right to water are "vital" and "important" and that these characteristics should be taken into account when balancing freedoms under trade law and domestic policy choices.

5. Conclusion

While it is not our intention to provide a final answer to the political and legal aspects of the debate about water regulation, human rights and the WTO, this paper offers some suggestions for policy choices and legal interpretations at the interface between services trade liberalization and human rights. These suggestions build upon the approach to conceptualise trade law in deference to national regulatory autonomy, which in turn would ensure the political space and the necessary flexibility for governments to fulfil their human rights obligations.

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[16] *US - Sect. 337 of the Tariff Act of 1930*, para. 5.26, BISD 36S/345, Report of the Panel adopted 7 November 1989. An alternative to the requirement of "least degree of inconsistency" is the requirement to be "not inconsistent with other GATT provisions".

[17] *Korea - Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161, 169/AB/R.

[18] Note that in *EC-Asbestos*, where the protected values were human life and health, the AB has already stated that these were fundamentally important values. *EC – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, para. 172, referring to *Korea – Beef*, WT/DS161, 169/AB/R, paras 162 f., 166.

Along these lines, the potential conflict between trade liberalisation and regulation of services as a means to ensure the progressive realization of the right to water suggests to refrain from expanding the rules of the WTO as a way to avoid creating further tensions. Most obviously, this applies to services negotiations in the area of domestic regulation, but also to other areas, such as subsidies or government procurement. In light of the WTO debate post Cancún, this would imply to downsize the already overloaded Doha agenda, not only for services trade liberalization but also beyond, and refrain from expanding the mandate of the organization.

Furthermore, a human rights approach to trade liberalization requires governments to exercise restraint when designing the level and content of their national treatment and market access commitments. It appears as if up to now, Members have acted with a view to retaining a maximum degree of regulatory flexibility to meet their human rights obligations. Indeed, no WTO Member has so far committed itself in water services, other than sewage services. It is vital, that WTO members continue to proceed with extreme caution concerning water services liberalisation. In this respect, the recent EC's request to a number of countries, including least-developed countries to take full commitments in water services may not have been particularly constructive.[19]

Finally, a human rights approach to trade law aims to conceptualise GATS in deference to national regulatory autonomy by interpreting provisions which are ambiguous and open for interpretation in a narrow way. This essay gave two examples, where such an approach may be warranted.

The progressive realisation of basic human rights, such as the right to water needs effective and prudent regulation. In the absence of one-size-fits-all solutions, it is important that countries retain regulatory flexibility to adopt and – where necessary – withdraw and change regulatory regimes. This is particularly obvious given the examples, where privatisation and liberalisation policies were adopted at the wrong time or in unsuitable circumstances. Allowing private companies to supply water requires effective social and economic regulation and institutions, which must be democratically accountable. Neither GATS nor any other agreements of the WTO or capacity building efforts assist countries with the design of such regulatory regimes, because the objective of the trade regime is liberalisation of trade. Setting standards and targets of welfare enhancing regulation is not part of the GATS agenda. GATS effectively locks-in liberalisation policies and makes it difficult to go back, which is to the detriment of flexible regulation aiming at the progressive realisation of human rights.

[19] For a detailed analysis of the implications of these EC requests see the recent report of the UK based non-governmental organisation World Development Movement, which analysed some of the EC's requests and contrasted them with effective public or communal models of water management and supply in specific countries, such as Brazil, Colombia, Honduras, Tunisia, and Botswana (WDM 2003). While it is not clear whether full market access and national treatment obligations in water services would actually prohibit the legal regimes which are the basis of these models, these modules would come under come under factual pressure.

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