



WILL TISA UNDERMINE THE RIGHT TO WATER AND THE RIGHT TO FOOD?

Discussion paper for Panel 33 «Is the Right to Water and Sanitation Supported or Undermined by the New Mega Trade Agreements TTIP, TISA, and CETA?» at the Conference «Commons in a 'Glocal' World: Global Connections and Local Responses», University of Berne, 11 May 2016

1 PRELIMINARY REMARK

It is almost impossible to predict whether and how the Trade in Services Agreement TISA will impact on the human right to water and sanitation, as access to sufficient information is denied by the negotiating States. We do only have very short summaries on the negotiation items and progress and – as best source – the WikiLeaks documents. But these date often back to more than a year ago and are often full of placeholders and bracketed text. So we are forced to rely on suppositions and assumptions and on comparisons with former trade agreements. Another difficulty is to find the delimitation between water as a commodity and hence not affected by TISA, and water-related services and hence affected by TISA. With these reservations, we can try an analysis. It is the States own fault if any analysis is going too far due to the lack of information.

2 CHARACTERISTICS OF TISA

- concerns *international* trade in *services* (not goods)
- currently *under negotiation* with the goal to conclude negotiations by the end of this year
- negotiated by a *limited number of WTO member States* (mainly northern, including Switzerland, some southern – the «Really Good Friends of Services») in almost complete *secrecy, outside WTO* but with the goal of future «*multilateralisation*»
- with the goal to impose a *progressive and irreversible deregulation* of the services sector and to open up public services for *privatisation*
- critical provisions and elements:
 - **Standstill clause:** This *establishes the deregulation level existing* at the time of the conclusion of the agreement. This level *may not be reduced at a later point* in time.
 - **Ratchet clause:** This states that the *deregulation level* after conclusion of the agreement *may only increase*, and that any *deregulation steps* are *not reversible*, unless the respective sector is the subject of a reservation (and if the reservation is not overruled by an annex)
 - **National treatment:** This requires that *foreign and domestic companies are treated on equal terms*.
 - **Negative list:** A service sector that a State wants to exempt from the scope of TISA must be put on a negative list by the time of conclusion of the agreement. Any sector having been «forgotten», and any new sector developing in the future, will never be able to be put on this list.
 - **Restrictions on domestic regulation:** Although a right to domestic regulation is stated, it is still subject to compliance with the TISA rules, and transnational corporations may contest regulations before a dispute panel.
 - **Annexes:** The 17 annexes to the Core Text apply directly to every State party; they will take priority over the offers meaning that a State party has to liberalize even those sectors that it has excluded on the Negative list. There seems to be at least no Annex on water.
- effects of TISA may vary considerably from country to country according to the varying offers, the negative and positive lists, and the reservations and exemptions respectively; however, the annexes may flatten the variations

- standstill and ratchet clauses are by their nature absurd ideas: They allow the development to go *only in one direction* and *prevent the correction* of failed deregulations and privatisations, i.e. they prevent learning processes and are, in this, contrary to human nature.

3 PERTINENT FEATURES OF THE HUMAN RIGHT TO WATER

In order to establish the potential impacts of TISA on the right to water, we need to become aware of its broad scope relating to content and obligations. To this end, I'd like to quote some key provisions of the [General Comment No. 15 \(2002\), The right to water](#) of the UN CESCR (with some comments as footnotes):

I. INTRODUCTION

1. «Water is [...] a **public good** [...]»
6. «Water is required for [...] **personal and domestic uses**, [...] is necessary to **produce food** [...] and ensure **environmental hygiene** [...] is essential for **securing livelihoods** [...] and enjoying certain **cultural practices**.»
7. «ensuring that disadvantaged and marginalized farmers, including women farmers, have **equitable access to water and water management systems** [...] States parties should ensure that there is adequate access to **water for subsistence farming** and for securing the **livelihoods of indigenous peoples**.»

II. NORMATIVE CONTENT OF THE RIGHT TO WATER

10. «The right to water contains [...] the right to **maintain access to existing water supplies** [...], and [...] the right to be **free from arbitrary disconnections or contamination** of water supplies. [...] **equality of opportunity** for people to enjoy the right to water.»
11. «Water should be treated as a **social and cultural good**, and not primarily as an economic good. The manner of the realization of the right to water must also be **sustainable** [...] **for present and future generations**.»
- 12.c.ii «*Economic accessibility*: Water, and water facilities and services, **must be affordable for all**. The direct and indirect costs and charges [...] must not compromise or threaten the realization of other Covenant rights.»
- 12.c.iii «*Non-discrimination*: Water and water facilities and services **must be accessible to all**, including the most vulnerable or marginalized sections of the population, [...] **without discrimination** [...]»
13. «[...] **the vulnerable members of society must be protected** by the adoption of relatively low-cost targeted programmes.»
14. «[...] States parties should ensure that the allocation of water resources, and investments in water, facilitate **access to water for all members of society**. [...] investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.
16. «States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including [...] **refugees, asylum seekers, internally displaced persons, migrant workers**, [...]. In particular, States parties should take steps to ensure that:
 - (a) Women are not excluded from **decision-making processes** concerning water resources and entitlements [...].¹
 - (c) [...] **Access to traditional water sources** in rural areas **should be protected** from unlawful encroachment and pollution. **Deprived urban areas, including informal human settlements**, and **homeless persons**, should have access to properly maintained water facilities. [...]
 - (d) **Indigenous peoples' access** to water resources on their ancestral lands **is protected** from encroachment and unlawful pollution [...];
 - (e) **Nomadic and traveller communities** have **access to adequate water** at traditional and designated halting sites;
 - (h) **Groups facing difficulties with physical access to water**, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands **are provided with safe and sufficient water**.»

¹ This points to the general entitlement to participating in decision-making processes concerning water resources.

III. STATES PARTIES' OBLIGATIONS

General legal obligations

17. «[...] the Covenant [...] **imposes on States parties various obligations** which are of immediate effect [...] such as [...] to take steps [...] **towards the full realization of the right to water.**»²

(a) Obligations to respect

21. «The obligation to respect requires that States parties **refrain from** [...] engaging in **any practice or activity that denies or limits equal access to adequate water**; arbitrarily interfering with customary or traditional arrangements for water allocation [...].»³

(b) Obligations to protect

24. «Where **water services** [...] are **operated or controlled by third parties**, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses **an effective regulatory system must be established**, [...] which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.»⁴

(c) Obligations to fulfil

27. «To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: [...] (b) appropriate pricing policies such as **free or low-cost water**; and (c) **income supplements**. [...]»⁵

International obligations

35. «States parties should **ensure that the right to water is given due attention in international agreements** [...] States parties should take steps to ensure **that these instruments do not adversely impact upon the right to water**. Agreements concerning **trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.**»⁶

IV. VIOLATIONS

44.c «Violations of the obligation to fulfil [...] include, inter alia: [...] **failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements** with other States or with international organizations.»

V. IMPLEMENTATION AT THE NATIONAL LEVEL

48. «[...] The **right** of individuals and groups **to participate in decision-making processes** that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given **full and equal access to information** concerning water, water services and the environment, held by public authorities or third parties.»

56. «Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, [...] and that comprises: (a) opportunity for **genuine consultation with those affected**; (b) **timely and full disclosure of information** on the proposed measures; [...] (d) **legal recourse and remedies** for those affected; [...]»

VI. OBLIGATIONS OF ACTORS OTHER THAN STATES

60. «[...] international **organizations concerned with trade** such as the World Trade Organization (WTO), should cooperate effectively with States parties [...] in relation to the **implementation of the right to water** at the national level. [...]»

² Note that human rights obligations cannot be transferred to private entities in the course of privatisations, they remain by their very nature with the State.

³ This is what just could happen when privatising water services.

⁴ But establishing regulatory systems contradicts the deregulatory approach of TISA.

⁵ Privately run water services will hardly provide free or low-cost water or income supplements → risk of the situation that private services will extract profits and leave the burden to provide income supplements to the State; denying the fact that profits should serve to cover social costs.

⁶ When after conclusion of TISA a new State party wants to join the agreement (multilateralisation), every State party can dictate the conditions under which it will agree. So new States parties may be forced to open up their water management to privatisation if they want to join.

4 POTENTIAL IMPACTS OF TISA ON THE HUMAN RIGHT TO WATER AND SANITATION

The critical questions in this context are:

- Will the human right to water in its breadth, or the various entitlements of the right holders respectively, be full-filled after **deregulation** through TISA?
- Will the human right to water in its breadth, or the various entitlements of the right holders respectively, be full-filled after **privatisation of water supply and water management services**?

Referring to the normative content of the right to water and the related comprehensive human rights obligations regarding water supply, water management, water protection, guaranteeing and fulfilling access to water, these tasks appear, on the one hand, as being too comprehensive as to transferring them to private providers. On the other hand, many of these tasks do not generate returns, so that private providers will not be ready to assume them. This may lead to the situation that only the profitable parts of the whole area of water management will be broken out for privatisation and extracting profits, and States – and hence society – will be left with all tasks that yield costs rather than profits.

As a matter of principle, water supply, water management, and water protection must be seen as a coherent and inseparable task, where the profitable parts must (at least partly) subsidize the costly parts.

TISA may open up public water services to **privatisation and takeover by transnational corporations**, at least in the countries that will not have managed to exempt the services. Experience in the past has shown the following effects⁷:

- **skyrocketing water prices**
- **decline of services**
- **decline in region-wide access to clean water, exclusion of poor areas from access to water**
- **decline in water quality**
- **dismissal of employees (up to 50 %)**
- **insufficient investments**
- **conflicts on operational costs, lack of financial transparency**
- **lack of integrated planning**
- **insufficient ecological sustainability**
- **problems of monitoring private management**
- **(+) partially more funds available for investments**

resulting in 235 cities and villages having cancelled privatisations in order to remunicipalise their water services in the past fifteen years.

Another threat to the right to (clean) water may result from the **privatisation of waste management and sewage disposal services**. When the coverage of the services and their compliance with standards decline, the danger of water pollution in affected areas may increase. A particular danger may result from illegal waste dumps which **poison surface and ground water**, as happened in many places already.

70% of all fresh water consumption, and up to 80% in developing countries, takes place in **agriculture**, namely for **irrigation**. Opening up water resource management to transnational corporations may reduce availability for small-scale producers and for pastoralists by^{8, 9}

- **diverting rivers for industrial agriculture and industry**
- **extracting groundwater for industrial agriculture and industry**

⁷ Transnational Institute: [How TISA strolls off with our services](#), and Krumm, Wolfgang, 2015: GATS und die Wasserversorgung: Die Privatisierung der städtischen Wasserversorgung in Entwicklungsländern. Hamburg, Diploma-tica, and and PSI: 2014: [TISA versus Public Services](#).

⁸ IUF (International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations), 2014: [The Tisa Threat to Food and Agriculture](#).

⁹ FIAN International: [State efforts for the right to water need to scale up](#).

- **raising prices / privileging large-scale agroindustrial producers**

Deregulation may promote water consumption by the most destructive users, the agroindustrial companies producing mainly for export.

Restrictions on domestic regulation may affect water quality standards.

5 POTENTIAL IMPACTS OF TISA ON THE HUMAN RIGHT TO ADEQUATE FOOD AND NUTRITION

Apart of **compromising water supply for agriculture** as discussed above, TISA may impair the right to food in different ways:

- **Privatisation of agricultural support services:** Agriculture depends from a whole range of services as, inter alia, research, extension, credits, storage and marketing. Privatisation may lead to increasing costs, reducing services and orientation towards large-scale clients, heavily impairing small-scale and cooperative agriculture. Official financial support of agricultural support services would constitute «illegal subsidies» and would not be allowed anymore under TISA provisions.
- **Unrestricted land acquisition by foreign investors:** Although land is not a service, it seems that TISA has an impact on land through the national treatment clause. Different States restrict land acquisitions by foreign investors through legal provisions in order to curb land speculation and prevent land price increases. It is said that in the course of the negotiations a list of measures has been compiled which constitute a violation of this clause. Restriction of land acquisition by foreign investors allegedly falls within this category. That means that States which had no restrictions in place at the moment of TISA's conclusion, they never will be able to do so due to the standstill and ratchet clauses, and States with restrictions never will be able to tighten them. Unrestricted access to land – particularly to commons! - for foreign investors means that land grabbing and evictions of local communities will continue in an unrestricted manner. They will lose their livelihoods, the local staple food supply will decrease and food prices will increase. Through this mechanism, TISA might hamper the implementation of the [UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#).
- **Deregulation of financial services: financing land grabbing and food speculation:** Banks and funds provide financial services towards agribusiness corporations by providing funds for the corporations or particular projects. Agricultural large-scale projects often involve land grabbing and eviction of communities. Therefore financial services facilitating these impacts urgently need to be regulated in order to prevent land grabbing and evictions. Also financial speculation on food commodities needs to be curbed down in order to reduce volatility and increases of staple food prices. There is the fear that the regulation of financial services facilitating both land grabbing and food speculation may be inhibited by the standstill and ratchet clauses or by being designated as illegal trade barrier.
- **Prohibition of food subsidies:** Retail sales of food is a service according to the UN Central Product Classification. A deregulation of food retail business under TISA may result in a prohibition of the sale of subsidised food or of the distribution of free food to poor people, as such subsidies could be blamed as trade-distorting or as trade barriers for retailers.
- **Prohibition of import and export restrictions for agricultural commodities and food products:** In order to protect the domestic agricultural development and to secure the livelihoods of peasants, it may be of crucial importance to impose import restrictions on agricultural commodities and foodstuffs. In the case of food crises and famines, States must be able to impose export restrictions on agricultural commodities and foodstuffs. Wholesale trade services of agricultural raw materials, live animals and of food are services according to the UN product classification and would hence be affected by TISA. This means again that restrictions would not be allowed as they would constitute trade barriers.
- **Strangulation of policy spaces for the right to food and human rights in general:** The neoliberal, industrial agriculture and food system did not only fail in alleviating world hunger, but did rather directly contribute to it. A global transformation towards sustainable, democratic, local, family and community based agriculture and food systems is urgently needed in order to realise the rights to food and to water for everyone. Such an immense transformation needs the largest possible political and legal spaces for the States. TISA, however, is designed as to bring about the pure opposite: By banning new regulation and impeding the tightening of existing regulation, it will progressively restrict the leeways for States and enlarge the leeways for the private sector. TISA is a direct and massive attack on the policy and legal spaces of States and will strangle them.

6 HUMAN RIGHTS VIOLATIONS THROUGH THE NEGOTIATION PROCESS

The UN Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, is concerned about the **secrecy surrounding current negotiations** for trade treaties like TTIP, TPP and TISA, which have **excluded key stakeholder groups from the process**, including labour unions, environmental protection groups, food-safety movements and health professionals. The expert maintains that **proactive disclosure by governments, genuine consultation and public participation in decision-making are indispensable to render such agreements democratically legitimate**. «Fast-tracking» adoption of such treaties is tantamount to disenfranchising the public. Therefore, Parliaments should call for a **moratorium on all pending free trade and investment agreements until independent human rights impact assessments are conducted and the public is properly consulted**. Scarce reports indicate that these agreements are not about trade facilitation but essentially about deregulation, which is a «lose-lose» proposition for everybody except transnational corporations. A moratorium on ongoing negotiations is necessary to prevent the establishment of economic and financial structures that foreseeably will lead to gross violations of human rights worldwide and ultimately may lead to situations where international peace and security are threatened.¹⁰

In view of the fact that everyone has the **human right to receive information on and to take part in political processes that affect them**, we consider **the secrecy of the negotiation process and the exclusion of stakeholders as a clear violation of human rights**. All States taking part in the TISA negotiations and not disclosing full information and not involving the public do breach their human rights obligations. We remind States that in the PANTHER human rights principles P means participation and T means transparency. Even when in the end the parliaments will have to ratify the agreement and in some States maybe the people can vote on it, this **final yes or no decision does not replace genuine consultation and public participation** in decision-making, as the UN expert demands.

7 DISMANTLING STATES' POWERS AND FOSTERING CORPORATE CAPTURE

The basic intention of the agreement is the progressive and irreversible deregulation of the services sector and of the economy as a whole, the progressive and irreversible privatisation of public services, and the non-regulation and private nature of all new kinds of services. This is, all the more in combination with the other mega trade agreements, a concerted disempowerment of the State and a concerted takeover by the private sector, the so-called corporate capture.

8 DEMANDS TOWARDS THE STATES

If the negotiating States are to comply with their human rights obligations and are to negotiate in public rather than private interest, they shall fulfill the following demands:

- full and timely **disclosure of all information** on contents, results and progress of negotiations
- **involvement of civil society** in decision-making processes
- comprehensive and independent **human rights impact assessments** of the actual and intended contents of the agreement
- **moratorium** on the negotiations until human rights impact assessments are conducted and the public is properly consulted
- **cancellation of the standstill, ratchet and national treatment clauses** and of the precedence of the **annexes** over national exemptions
- **return** of the negotiation process **into the WTO framework** (and, ultimately, **the incorporation of the WTO into the UN framework**)

¹⁰ OHCHR (Office of the High Commissioner for Human Rights), 2015a: [Independent Expert calls for an end to secret negotiations of free trade and investment agreements until public consultation and participation is ensured and independent human rights impact assessments are conducted.](#)

9 CONCLUSION

The analysis leads to the following summary and conclusion:

- The implementation of TISA is very likely to **undermine the human rights to water, sanitation and food** through various processes.
- **Water supply and water management are not suitable for privatisation** if corresponding human rights are to be upheld.
- **An agreement concluded after a human rights violating negotiation process** is not only undue, it **is void**.
- We, our parliamentarians, and civil society as a whole must **resist TISA in its present form** in order to preserve our commons like water and land and our human rights to water, food, health, information and participation.

Michael Nanz