Human Rights Compatibility of Trade in WASH Services in the African Continental Free Trade Area

By:

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Setting the tone

The COVID-19 pandemic has among other impacts exposed the precarious health and socio-economic risks faced by the billions of people living without adequate water, sanitation and hygiene (WASH) services in their homes and even those without housing that guarantees them a standard of living adequate for the health and well-being. In many countries, it is often the poor, marginalized and vulnerable populations that are often left without access to basic WASH services. In developing countries, owing to the ailing state of public infrastructure for WASH services and the poor financing from a combination of taxes, tariffs and transfers, the private sector plays a vital role in the extension of services. Similar trends can be identified among marginalized groups in

industrialised countries as well, as seen among indigenous communities in Australia and Canada, and racial minorities in the United States of America. Consequently various ongoing reforms are aimed at the commercialisation of the WASH sector and creating an enabling environment for greater participation of the private sector through liberalization (allowing an open market system for services that were previously provided through a monopoly, usually a public utility company), privatisation (recognition of private property rights of water resources), deregulation (elimination of regulatory barriers to competition) and other forms of neo-liberalization.

In the context of international trade, liberalization of a sector creates an avenue for the participation of foreign suppliers or the provision of foreign services to meet local demand. In addition to the existing World Trade Organization (WTO) treaties, such as the General Agreement on Trade in Services, bilateral and (sub)regional treaties, and contracts with international financial organisations such as the World Bank, create the legal framework for liberalisation of services for State Parties, the entry into force of the African Continental Free Trade Area (AfCFTA) Agreement since May 2019, creates an additional layer of obligations that are relevant for trade in WASH services, in the event of liberalization of the WASH sector under the AfCFTA Agreement framework. This post analyses the implications of the AfCFTA for the progressive realisation of the Human Rights to Water and Sanitation (HRWS) within the jurisdictions of participating Member States. So far, 29 countries have complied with their domestic requirements for ratification of the AfCFTA Agreement. Based on the provisions of the AfCFTA Protocol on Trade in Services, this post specifically addresses the question: *what are the prospects for the use of regional trade as a mechanism for advancing the HRWS in the AfCFTA*?

Requirements for Trade in Services under the Protocol

The Protocol defines trade services and trade in services similar to the GATS, by including any service in any sector that is not supplied in the exercise of government authority and recognizing any of the four modes of supply of services outlined in the GATS – supply from the territory of one member to another member, supply in the territory of a member to service consumers within the territory of any other member state, supply through commercial

presence in the territory of any member state, and supply through the presence of natural persons of a member state in the territory of any other member state. The progressive liberalization of the WASH sector, under the Protocol, would essentially facilitate the participation of foreign entities either through direct provision of services or foreign direct investment through any of the four modes. It should also promote human rights, wellbeing and economic justice. These outcomes are in line with the principles and objectives of the Treaty Establishing the African Economic Community 1991, and are reflected in the integration of both liberalization and human rights protection in the mandates of regional economic communities' courts such as the Economic Community of West African States (ECOWAS) Court of Justice. The AfCFTA Protocol on Trade in Services contains both negative integration elements including the most favoured nation treatment (article 4), rules on market access (article 19) and national treatment (article 25), and positive integration elements such as mutual recognition and harmonization (article 10). These are relevant for any service measures taken by the government of a member state and administrative bodies exercising delegated powers within the member state, at all levels, from the national to the local.

Human Rights Concerns

The main goal of the international HRWS is to prioritise universal access to safe, affordable, accessible, adequate water and sanitation, including hygiene services. The human rights framework also has procedural requirements to ensure non-discrimination, public participation, transparency and accountability and the extraterritorial obligation to do no harm in the governance of WASH services. Water is understood as having diverse characteristics being simultaneously an economic, social, cultural, political and ecological good. This multiplicity of framings complicates the localization and mainstreaming of the HRWS in relevant institutions at various levels of governance, from the international to the local. Within the broader context of international law, there are tensions and synergies between the HRWS and the regulation of transboundary water resources for navigational and non-navigational uses, regulation of foreign trade and investment in WASH services, prevention of the use of water as a weapon in international warfare, and the protection of international water courses from transboundary harm. That said, the HRWS

does not prescribe any economic model for the realization of the rights. Nonetheless, State Parties and any non-state actors, involved in the delivery of WASH are required to comply with human rights standards of respect, protection, fulfilment, and promotion of universal access in their operations.

Under the AfCFTA Protocol on Trade in Services (the Protocol), it is open to member states to indicate in their list of commitments the sectors that are to be liberalized and this applies to all excluding services that are supplied in the exercise of government authority (article 2(3)(b)). Hence, the Protocol is limited to services that are supplied on a commercial or competitive basis (article 2(3)(c)). Furthermore, member states are at liberty to alter and withdraw from the commitments, in adherence with the stated procedures (article 23). The Protocol provisions are in this way is similar to the GATS scheduling. While the first phase of liberalizations has prioritised five services sectors – business, communication, finance, tourism, and transport services - subsequent negotiations are expected to cover all other services sectors. It can therefore be safely assumed that there will be a natural progression to open all services sectors, including WASH services, to the possibility of negotiation between Members States, for instance as occurred with the Doha Round of the WTO negotiations. While in principle, the liberalization of the WASH sector is not incompatible with the HRWS, past experiences with the privatization of public WASH utilities and the outcomes of international investment agreements in the WASH sector across developing countries raise practical concerns for at least three principles of the HRWS advocates: accessibility (physical and economic), local control of water resources, and the protection of water quality.

First, given that the domestic WASH sector is mostly poorly funded and lacking in technological capacity, liberalization could create stiff competition and unjust socio-economic outcomes for small and medium scale domestic suppliers and services, especially the informal sector, which has grown bridge the gap in WASH services in most urban centers across Africa. Admittedly, there are significant human rights concerns over the quality, affordability and equity of informal WASH services, and poor performance on tax, labour and other government policies and regulations associated with informality. Nonetheless, the informal sector has been a key player in the delivery of basic WASH services in many urban settings, particularly for the urban poor and many other

left behind groups. Expectedly, the narrative is now changing to whether and how the informal water markets can be engaged, as part of 'off-grid' mechanisms for achieving global commitments for universal access to WASH. This could however be derailed by the liberalisation of the WASH sector and entry of better resourced foreign suppliers.

Second, the rules on market access, national treatment and other negative integration elements imply that domestic consumption and other uses cannot be prioritized over foreign demands once water resources and other WASH services are commercialized within the Protocol framework. This would further expose poor, vulnerable and marginalized groups without adequate WASH services to additional competition from foreign demand for high end uses or even higher willingness and ability to pay for WASH services by potential consumers located in other member states. Remarkably, trade in water services can occur in different forms including through virtual water, i.e. water utilised for the production of goods or services. In this sense, even an increase in virtual water weakens local control over water resources.

Third, in disputes arising between State's HRWS obligations and the contractual rights of foreign investors, the experiences of (developing) countries with international tribunals such as the International Centre for Settlement of Investment Disputes (ICSID) are alleged to be marred by a foreign investors' bias on the part of arbitrators. This can constrain the ability of affected State Parties to international economic treaties to exercise sovereign rights over their water resources and alter regulations in the interest of the wellbeing of their citizens and national development priorities. The concept of legitimate expectations has been suggested for enabling States comply with both human rights and contractual obligations. With this, it is expected that legislative reviews aimed at preventing water pollution for instance will not be considered as violating international investment standards, unlike arbitrary administrative procedures by the State for instance. However, this is not a given and in practice, the ability of States to achieve a balance in favour of their human rights obligation is highly dependent on their administrative capacity and resources among other factors.

Policy recommendations

In the wake of the COVID-19 pandemic, and the need to ensure access to WASH services as part of public health measures, African countries such as Togo, Burkina Faso and Ghana adopted fiscal policies for improved access to WASH services for citizens. These mostly include free or subsidised water services for a specified duration. Perhaps, this would not have been possible if their water sectors were fully liberalized within the framework of international trade treaties such as the Protocol. This reiterates the need for the highest level of protection of the HRWS both as a public good to protect wellbeing and as a means of sustaining economic activities which require WASH services in domestic settings. To this end, the following three policy recommendations are offered as prior conditions to be met before the liberalisation of WASH services in order to protect the HRWS from violation.

(a) A strong domestic policy and legal framework for WASH services should be developed, informed by a proper valuation of ecosystem services which diverse segments of the population, including left behind groups, derive from water resource. This would require successive consultations with different interest groups and strategies to resolve power differentials that could sway the outcome of the consultations in favour of the more powerful domestic or foreign (commercial) interests rather than local poor, vulnerable and marginalised groups.

(b) Capacity building for key WASH-sector actors and the representatives of left behind groupsto ensure that they can effectively participate in the policy formulation and negotiation process and convey their WASH needs to be captured in the planning process.

(c) Mainstreaming of State's HRWS obligations as part of the legitimate exercise of police powers and the prioritisation of the protection of common resources needed to meet domestic WASH services needs as a public good, over the commercialisation of WASH services and compliance with contractual obligations for pecuniary benefits.

Additionally, basic services which sustain human wellbeing and advance related rights, such as WASH, healthcare, and food and nutrition, should be specially addressed in future AfCFTA Agreement negotiations, to ensure the prioritisation of human rights, human wellbeing and economic and environmental justice during the implementation phase.

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