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Right to Food and Right to Water: Même défi ?[1]

My research at the WTI focuses on trade and investment rules relevant for food security. Together with you I would like to explore the parallels between the regulations applicable to the Right to Food and the Right to Water which both have been enshrined in national and international human rights law.

In a chapter for a book on poverty and trade, entitled "God, the WTO and Hunger" I show the fragmentation existing between human rights and economic treaty law. I start with an analysis of three monotheistic religions, Judaism, the Christian religion, and Islam. All originated between the large river systems of Mesopotamia and Egypt, in a region forever focused on access to water, and where hunger was a well-known phenomenon and cause for migration and exodus.

The common element in all three theologies is the notion of distributive justice. Not in a simple sense of charity but as an inherent obligation for all members of the compact, of the ecclesia, or of the Dar al Islam: almsgiving for Jews and Christians, or *zakat* based on the Islamic law *sharia* is an obligation beyond charity, directly derived from God's love for the people and his commandment to love one's neighbour.

Interestingly, the world's very first constitutions (Ukraine 1710, Preussisches Landrecht 1794) recognise social rights and obligations on precisely the same premises. This then goes on until today, with the new Constitution of Kenya recognising the Right to Food, or the Constitution of Cambodia recognising traditional, communal land rights including access to water.

In the UN system, the respect of poverty and hunger, we now have the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which entered into force in 1976 and which finds its roots in the 1948 Universal Declaration of Human Rights. Article 11/2 reads as follows:

'The States Parties to the present Covenant, recognizing the *fundamental* right of everyone to be free from hunger, *shall take, individually and through international co-operation, the measures*, including specific programmes, which are needed to improve methods of production, conservation and distribution of food [in order] to ensure an equitable distribution of world food supplies in relation to need.[2]

Professor Boisson de Chazourne has just shown us the corresponding UN treaty law for water. Is it the same? At least on the face of it, yes. But let us first look at how these noble goals and words translate into international economic law.

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[1] Speaking Notes Ch. Häberli au 2ème Colloque interdisciplinaire « W4 » du 20 mars 2012
[2] Adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976 (emphasis added).

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I will address, first, the rules for trade and, secondly, for investment applying to hunger and food and then return to water. I think you will easily see how close we are to water, and where the differences lie.

For trade, I will start with the WTO.

The objective of the WTO Agreement on Agriculture (AoA), according to its preamble, is ‘to establish a fair and market-oriented agricultural trading system’, where ‘commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment.’ The Doha Round negotiating mandate has the same objectives (Häberli 2012).

For the first time in history world agricultural trade is now regulated in basically three disciplines (the so-called ‘pillars’ of the AoA): (i) all production support measures with a price support effect are limited, (ii) historic amounts and volumes of export subsidies have been reduced and new ones are prohibited, and (iii) all border protection measures must now consist in tariffs only; these tariffs were somewhat reduced and can no longer be freely increased.

The problem now is, while both export and domestic subsidies were (somewhat) reduced, other competition-distorting instruments remain largely unregulated, in particular international food aid, export credits, state trading in exports and export restrictions. These policy instruments have an obvious bearing on the famous ‘level-playing field’ by which an optimal level of global food security could be achieved. When the food crisis occurred, many commodity markets were shut off without developing countries being able to buy their food import requirements on the world market. Rich countries did not face such problems. By reducing their applied import tariffs they were able to import food and feed at affordable prices and without hurting their own producers.

For investment, the dichotomy between human rights and economic law is even bigger. *Distributive justice* seems to be even more remote here than for trade rules. WTO offers no investment disciplines in a food security context. The relevant, mostly bilateral investment treaties protect even investors who violate human rights and environmental norms and who can benefit from the over-protection and under-regulation provided for in these agreements. This is a shocking case of rules fragmentation, because neither the home nor the host governments can have an interest in so-called ‘land grab’ investment projects. A valid argument could perhaps be made here in favour of ‘public interest’ protection under these treaties.

Overall it appears that present international trade and investment rules are ill-suited to address food trade issues which have a negative impact at the national and household levels. These shortcomings can be said to violate the right to food laid down in human rights treaties. What is clear, however, is that we are in presence of a job half-done – and one, for that matter, which even the results envisaged in the now dead Doha Round negotiations would not really have improved! Actually, some significant loopholes could be getting even bigger, impairing both global and national food security especially in times of high food prices.

A way forward

Possible trade and development-related solutions would ideally be forthcoming in a package of coordinated measures. I see four such measures which together would fulfil the obligation of the international community laid down in the human rights treaties.

1. Poor developing countries must retain policy space for at least temporary protection of fragile agricultural producers. Regional trade agreements may in any case leave them eventually with few options in terms of effective border protection.
2. The absence of new disciplines in export restrictions and export competition, including especially food aid, are the most blatant threats to food security. These problems must be addressed in the WTO. As a minimum, the November 2011 G20 decision to exempt food aid supplies from export restrictions should have been made mandatory without delay.
3. International finance institutions need to review their investment policies and lending priorities, including for their research and development programmes.

4. The same goes for the bilateral investment treaties, at least in respect of agricultural land acquisitions in vulnerable countries.

In conclusion, and to open the discussion, let me ask you what all this means for water?

The main parallel, I believe, is the fragmentation between what I call the over-protection and under-regulation of FDI in food and water. Economic law allows "to do harm", something which human rights provisions explicitly forbid. John Ruggie, the Special Representative of the UN Secretary-General on business and human rights and transnational corporations (TNC) and other business enterprises, developed a tripartite framework on business and human rights including (i) the state's *duty to protect*, (ii) the TNC's *responsibility to respect*, and (iii) *appropriate remedies* for human rights violations.[3] He pointed out that one social norm 'has acquired near-universal recognition by all stakeholders, namely the corporate responsibility to respect human rights, or, put simply, not to infringe on the rights of others'.

The main difference, as I see it, is that an even greater share of responsibility and 'distributive justice' than for food lies at the national level. Food which is traded across borders much more than water – and as you know it even includes impressive amounts of 'virtual water' (e.g. coffee from Ethiopia contains 150 litres for a cup: an issue of access, and allocation). On the other hand the question of water allocation, including for irrigation, is at the national level. This works more or less well everywhere. The teachings of the Old Testament have been mentioned. As the lawyers here know it has also been the object of numerous Roman Law provisions, and of disputes throughout the Middle Age.

Today, it is an especially burning issue in so-called weak states.

Water never flowed freely and it flows even less free in times of globalisation and in situations of extreme poverty where water prices are highest![4]

WTO and other trade agreements have improved the opportunities for efficient agricultural producers. But they have not even addressed the Right to Water. And there are no commitments under the Services part of market access negotiations (GATS).

This is where I think research and policy at the national and international levels is most urgently needed. The international human rights obligations all of our governments have subscribed to in New York must guide this search for solutions. All stakeholders must join this interrogation. We all must contribute here.

[3] See http://www.business-humanrights.org/SpecialRepPortal/Home (accessed 5 January 2012)

[4] A very recent and very shocking report says more Indians have a cell phone than access to a latrine. An even more shocking fact is not that the citizens of Israel use more water than the Swiss, but that they have four times more than the Palestinians in the same area.