How close will GATS get to Human Rights?

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Human Rights, Labour Mobility, GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, International Convention on the Rights of All Migrant Workers and Members of their Families, Schedule of specific commitments, non-violation nullification and impairment, domestic regulation, migrant workers, wage and labour conditions parity, jus cogens, customary law,

Similarly to the UN considering gross human rights violations a threat to peace, the WTO should consider certain human rights violations an impediment to free trade. Mutually agreed benefits of trade liberalization may be offset when a human rights infringement nullifies and impairs the multilaterally agreed level of tariff concessions or the negotiated volume of market access commitments in services. The liberalization of services trade through mode 4, whereby the service supplier moves abroad to deliver a service, relies on the free movement of natural persons. This mode of service delivery renders the GATS the WTO covered agreement with the closest affinity to the individual as a subject of international law and therefore, to human rights. Restricting the human rights of foreign service suppliers therefore could have the effect of nullifying and impairing the economic value and legal predictability of the GATS commitments. The WTO Agreements lack the legal basis for prosecuting human rights violations. While WTO Members are bound to respect jus cogens human rights, the non-jus cogens human rights originating in customary international law usually do not raise trade issues relevant enough to question the consistency with a provision of the WTO Agreements. It is suggested that the non-violation nullification and impairment complaints may be used to consider the economic damage which occurs when human rights infringements impair upon GATS commitments, specifically in those cases where the WTO Members receiving services condition their mode 4 commitments to the respect for core labour standards. If the human right amounts to jus cogens or emanates from a human rights treaty to which both parties to a WTO dispute are Members, the human right itself forms the ground of a WTO violation complaint. In all other cases, it is not the human rights violation itself, but its effect that is the economic damage on the sending country’s economy, which nullifies and impairs a trade benefit.

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Introduction

Similarly to the UN considering gross human rights violations a threat to peace, the WTO should consider certain human rights violations a threat to multilateral trade. Economic damage done to multilateral services trade by
human rights restrictions results in the sending WTO Member State no longer benefitting from the negotiated levels of the GATS modal and sectoral commitments. This constellation can give rise to a claim of non-violation nullification and impairment filed by the WTO Member sending the foreign service supplier against the WTO Member receiving the natural person.

The GATS calls upon the WTO Member States to commit to opening their labour markets to access for foreign labour. The GATS Annex on the Movement of Natural Persons describes how far the WTO Members have liberalized the free movement of persons.

Human rights violations have a trade-restrictive effect when service suppliers, including investors, lose trading opportunities abroad. Some WTO Member States may justify restricting the human rights of foreign service providers as legitimate with the security, public order and exceptions to services liberalization provided for in Article XIV GATS. However, jurisprudence should imply a human rights-consistent interpretation of Article XIV and not accommodate Art. XIV GATS exemptions that violate human rights.

In a twist from traditional human rights and trade doctrine, this article argues that human rights protection is favourable to trade as opposed to the more classic conundrum denouncing trade’s disrespect for human rights, by finding that restrictions on human rights may fall into the group of measures that may impede achieving progressively higher levels of liberalization of trade in services.¹

To suggest a new perspective is to look at the trade-effects human rights violations may have on the GATS commitments. When a WTO Member receiving services violates the human rights of the foreign service supplier, such a violation may have the effect of nullifying or impairing existing trading opportunities because it offsets the value of the GATS commitment the sending country had relied upon when sending the service supplier abroad. For example, a governmental measure restricting human rights may have the effect of creating a business-unfriendly climate of repression, terror and instability preventing exporters and service suppliers from trading abroad and to reap the benefits of multilaterally negotiated trade. When a WTO Member State has relied on such benefits in good faith to the point that this Member’s legitimate expectation has been frustrated, the human rights violation may provide the grounds for a WTO non-violation nullification and impairment complaint. With the exception of jus cogens, which binds countries irrespective of their WTO membership, other human rights violations with trade-preventive effects will be relevant for WTO law once a WTO Panel examines them as questions of fact in a non-violation nullification and impairment complaint.

¹ GATS Preamble, para. 3.
By addressing the “boundaries of the WTO” with relation to human rights from an economic point of view, the paper may be a contribution to the debate on whether to establish the WTO as a constitutional order or not. The paper investigates the relevancy of human rights as “facilitator[s] of noncoercive trade as a mutually beneficial phenomenon”, in GATS as far as the movement of natural persons as service suppliers is concerned. As such, the paper will contribute to link labour mobility with human rights in general, and investigate whether there is an affinity in GATS to protecting worker migrants’ human rights, more specifically.

2. Factual Affinity of Human Rights for Trade in Services

Trade in services relies more closely on human rights than does trade in goods. Mode 4 of services supply requires a natural person to move abroad. Thus, the liberalization of migrant work renders the GATS the only WTO covered agreement to involve the individual as a subject of international law. Specifically, GATS mode 4 and its Annex on the Movement of Natural Persons has implications on two strands of worker migration-related human rights issues. Firstly, the regulation by the GATS of a temporary entry and

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4 See Bhagwati, Jagdish, Afterword: The Questions of Linkage, in 96 ASIL, 126, 127 (2002).
stay of a natural person to deliver a services abroad lays the foundation for an evolving right to migrate. By liberalizing the temporary movement of natural persons supplying services abroad, the GATS targets certain aspects of labour migration. A potential research question would be to ask if and how the GATS provides the foundation for prosecuting WTO Members violating a right to entry and stay of foreign workers and why the GATS cannot establish a human right to migrate. Secondly, the temporary movement of natural persons to the territory of another WTO Member State relies more closely on the protection of migrant workers’ than it does link up with other human rights.

1. GATS Annex on the Movement of Natural Persons and the Right to Migrate

The GATS in Article 1, paragraph 2 (d) targets one aspect of labour mobility, namely the movement of persons abroad that is required for supplying services. The degree to which WTO Member States open their labour markets to foreign service suppliers depends upon the level of “specific market access commitments they promise to undertake in accordance with Part III of the GATS.

Thus, since the “volume and extent of the specific commitments on market access (Article XVI) and national treatment (Article XVII) undertaken by that WTO Member in an individual sector,” determine the degree of openness for liberalizing labour mobility, the GATS does not realize the free movement of natural persons to the extent that the EU’s single market does. 6

With the exception of labour markets integration agreements in Article Vbis GATS, the GATS is not an agreement regulating the flows of international labour migration.7 Moreover, the GATS expressly refrains from interfering with immigration laws of its Member States, unless such measures are applied in such a manner so as to nullify or impair the benefits accruing to any member under the terms of a specific commitment (paragraph 4 of the GATS Annex on Natural Persons). While the GATS in principle expressly leaves regulation of entry and stay in the sovereignty of the WTO Member States and creates a carve out for immigration law, some scholars find that since the GATS limits the movement of natural persons abroad to a certain duration of time, the GATS “creates temporary immigration disciplines”.8

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8 See Grynberg and Qalo, 2006, p. 620.
Nevertheless, human rights are more closely related to services trade than to trade in goods because in services, particularly, in mode 4, the human being is the the object physically moving over the border. Given that, the WTO is a government-to-government organization, its rules reprimand States for violating the obligations of other States and it is not concerned with protecting the rights of individuals against another WTO Member States restricting such individuals’ rights. There are few exceptions to this rule in the Agreement on Agriculture (right to food), the SPS/TBT and the TRIPS (right to health) and, even more limitedly, the right to prompt judicial, arbitral or impartial and objective administrative review under Article VI of GATS. However, under GATS mode 4 the individual is treated as a subject of international (GATS) law, even though none of the GATS provisions have direct effect on the individual.

GATS liberalizes labour migration in an accessory manner only, because the Annex on Natural Persons of GATS frames the movement of natural persons as a precondition for mode 4 of services supply and not as an end in itself. Furthermore, the GATS only selectively liberalizes the movement of natural persons, since the free movement of persons targeted by GATS relates to migrants with a guaranteed workplace abroad. Moreover, the GATS liberalizes the movement of persons, who will be “non-permanent” residents abroad, i.e. temporary migrant workers, who will return to their sending country at the end of the contractual term, usually, once they have provided the service or, if the worker is self-employed, who will return at the end of his/her economic activity. In practice, the WTO Member States have liber-

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10 See Marceau, 2004, pp. 51-53, with references to Caroline Dommen and Simon Walker, who were among the first to advocate a right to health in the WTO (TRIPS).

11 See GATS Article 1, paragraph 2 (d).

12 See Paragraph 2 of the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement: “The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.”

13 See id.

14 See Krikorian, Mark, Flawed Assumptions Underlying Guestworker Programmes,” in: Backgrounder February 2004, Center for Immigration Studies, Washington DC, who says: “Guestworkers” is termed used to underline that migrant workers “are expected to return home rather than settle permanently”; however, as Mark Krikorian continues, the term stands for a unrealistic “attempt to make the importa-
alized mode 4 only for highly skilled professionals, whether these be self-employed or employed by a multinational company sending professionals abroad. Thus, GATS practice is selective as to the segment of migrant workers that profit from WTO trade liberalization and GATS mandate is not to breakdown on national borders to migrant labor.

2. GATS Legal Affinity to Migrant Workers’ Human Rights

Even if its regulatory goal is to liberalize the movement of labour and not to protect the rights of migrant workers, the GATS may still have areas of inter-linkage with the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families adopted by many developing countries in 1990. Based upon this factual close affinity of liberalized temporary labour to migrant workers human rights, the question whether legally too, such movement-related human rights enjoy a more pertinent status than other, non-migrant labour related human rights and are thus to be given heightened protection under GATS. If such a legal linkage between the UN Convention and the GATS can be approved, as a result, violations of such migrant workers human rights would be prosecuted under the violation-type complaint of the WTO, even if these rights do not have jus cogens status. With more certainty one can affirm that if WTO Members in a dispute over GATS mode 4 commitments are both parties to a human rights treaty with a worker migration focus, such as the UN Convention on Migrant Workers’ Human Rights, such migrant workers’ human rights will form the grounds of a GATS violation type complaint, if the sending WTO Member had been unable to send service providers because of a bad human rights situation in the receiving WTO Member State. However, also this question of relatedness or remotedness of GATS to migrant workers’ human rights, will not be addressed in this paper.

This paper will discuss from the perspective of the GATS those human rights violations unrelated to the status of a natural person as a service supplier. A successive paper will then focus on the human rights violations relating to mode 4 of the GATS and thus target only those human rights which pertain to the status of a natural person as a service supplier. In this context, the article will examine whether human rights violations concerning migrant workers have a heightened relevancy for the temporary movement of natur-

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15 See Paragraph 1 of the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement.

16 GATS practice does not address the quantitatively more important sector of lower-skilled service suppliers (janitors, nannies) workers, and the text of Art. 1 para. 2(d) GATS does not allow the temporary stay of natural persons producing abroad, such as certain categories of construction workers, farm labourers and workers in industrial production (textile, steel manufacturing) etc, since that segment falls outside the scope of services trade.
rals persons as regulated by the GATS Annex and whether the GATS could establish the foundation of a prospective human right to migrate.

3. Sources and Current Status of Human Rights Law in WTO Norms

The legal authority of a particular human right depends on its source quality. Human rights vested with the authority of jus cogens take prime those emerging from custom and these latter take precedence over treaty-based human right protection. These “relationships of inferiority and superiority” not only apply among human rights, but also define the relationship between human rights and other norms of international law, including WTO trade obligations. The question is which human rights have the hierarchial power to precede trade liberalization obligations of the WTO Members and what are the effects of human rights’ normative hierarchy over WTO rules?

1.1. Jus Cogens Norms

Jus cogens as defined by Article 53 of the Vienna Convention on the Law of Treaties (VCLT) stands for a category of international legal norms that prevail in all circumstances over all other norms of international law. A norm of jus cogens is binding on all States, irrespective of whether a State has directly consented to be bound by it or not. Jus cogens can only be violated as a matter of state policy. The content and the limits of jus cogens fluctuate and are subject to debate. A more recent decision stated that the measuring slate for jus cogens validity of a norm is the “rigorous standard of requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.”

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19 See Meron, Theodore, On a Hierarchy of International Human Rights, in: 80(1) AJIL, 1986, pp. 11, 15; see also Allain, Jean, The jus cogens Nature of non-refoulement, in: 23 (4) International Journal of Refugee Law, 2001, pp. 533-558, for example, Theodore Meron proposes to count due process as jus cogens, while others declare the right to food fundamental enough to qualify for jus cogens. Some, such as Jean Allain also count certain international humanitarian norms to the body of jus cogens, while others find non-refoulement (prohibition to return refugees to places where there lives and freedoms are endangered) primordial enough to fall under these norms.

Section 702 of the revised (third) Restatement and the American Law Institute lists the following prohibitory norms of international customary law as forming the body of jus cogens: the right to life and the prohibition of genocide; the prohibition of slavery or slave trade, murder and causing disappearance of individuals; the prohibition of torture and other inhuman or degrading treatment or punishment; the prohibition of prolonged arbitrary detention; the prohibition of systematic racial discrimination (e.g. apartheid); and the prohibition of consistent patterns of gross violations of internationally recognized human rights; and the prohibition of retroactive penal measures.

In the Michael Domingues v. United States October 22, 2002 the Inter-American Commission on Human Rights defines jus cogens as those norms of international law, which “derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.” Among the sources of law vested with the authority of jus cogens, certain sets of human rights play a central role. The revised (third) Restatement and the American Law Institute takes a broad view by arguing that all customary human rights are jus cogens and that an international agreement violating these would be void. Under the narrower view one would distinguish jus cogens human rights from other, non-ius cogens human rights. A jus cogens human right is a particularly important human right, because it is binding on all States irrespective of whether or not a State has signed a human rights convention or not.


The ICJ in the Barcelona Traction Second Phase judgment defines fundamental human rights as those rights which are firstly inextricably linked to the human person (subjective factor), and secondly generally accepted (objective factor) as forming inherently part of the body of international law (whether or not they are incorporated into codifications, such as universal declarations or treaties). Jus cogens human rights are always obligations erga omnes to the effect that any State can bring a claim based on disrespect of such rights by another State, irrespective of whether or not a State has institutionalized the protection of those human rights in a treaty.

While jus cogens sets limits treaty law it remains nevertheless disputed how far the concept extends, and the question remains for WTO treaty law to what content and limit of jus cogens it should subscribe to. The answer to this question will influence the scope of violation and non-violation-type complaints perhaps available in WTO law for responding to human rights violations.

Violations of such jus cogens human rights pre-empt violations of other, non-jus cogens international obligations, because of jus cogens stands hierarchically superior to international treaty law (e.g., WTO treaty obligations). The peremptory status of jus cogens calls upon GATS treaty law to respect customary human rights and to consider such rights as priming the GATS obligations in a case of conflict. WTO Members’ obligations to comply not only consists of respect for the law of the WTO Agreements but includes the peremptory norms of jus cogens. Thus, disrespect for jus cogens can be equally brought before the WTO DSU similar to a claim of non-compliance with GATS obligations, as both would form the ground of a violation complaint.

24 Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belgium v. Spain), 1970 ICJ Rep. 4 (Second Phase Judgment of February 5), para. 33: “When a State admist into its territory foreign investments or foreign nationals, whether natural or juristic persons it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.”


27 The function of erga omnes is immanent in jus cogens, but is a broader than the concept of jus cogens, since also non-jus cogens obligations may be erga omnes, such as the customary principle of pacta sunt servanda.

Those human rights vested with the identity of jus cogens will, as non-derogable take precedence over all derogable (treaty-based) international norms, whether these be other human rights or trade liberalization obligations or yet another set of norms. Therefore, a jus cogens human right, will rank hierarchically higher than the law of the WTO Agreements, and thus be binding on all WTO Member States. For the WTO covered agreements, it means that WTO Member States are responsible for any violations of ius cogens, and, depending on the definition of ius cogens, for any human rights violations they commit in order to fulfil the obligations of the GATS, including their scheduled obligations in the commitments.

A first area of potential conflict between jus cogens and GATS could arise because of the only temporary nature of the right of natural persons providing services abroad to stay in the territory of another WTO Member State.  

A second conflict potential exists between jus cogens (human rights) and the law of the WTO covered agreements may specifically arise where WTO Member States pledge to undertake additional GATS commitments pursuant to call for progressive liberalization under Article XIX GATS. Any WTO Member State is precluded from referring to its obligations under GATS (treaty) law for justifying a restriction on the exercise of ius cogens human rights conflicting with GATS obligations (including GATS commitments) by its nationals or by foreign service providers. Thus, a WTO Member State violating ius cogens human rights in order to fulfill its GATS treaty obligations could be prosecuted before the WTO DSU.

1.2. Customary International Law

The scope of WTO jurisdiction extends to sources of international other than the law of the WTO Agreements. According to the statement of the Panel in Korea—Government Procurement, non-WTO law, specifically, jus cogens and other, non-peremptory custom apply to “WTO treaties” as well as to the “process of treaty formation”. While the Korea—Government Procurement Panel failed to explain whether or not other, non-WTO treaty law would apply to the interpretation of the WTO Agreements, the Appellate Body in US—Shrimp confirmed that international treaties other than the WTO Agreements could inform WTO treaty interpretation. This principle principle of effectiveness in treaty interpretation applies most obviously if such treaty law represents evolving international custom. While WTO jurisprudence on conflicts of customary law with the WTO treaties in the case of EC-Hormones, Appellate Body Report, paras. 123-124, where the precautionary principle was found to conflict (but not to pre-empt) the SPS Agreement; see also Francionio, Francesco, above, p. 149.


This is so even where not all the parties to the dispute are members of such a non-WTO international agreement. In the case of the Convention on Biological Diversity (CBD) called upon by the Appellate Body in US—Shrimp to interpret the meaning of
dence establishes that custom may have a hierarchically higher stand than WTO law, it implies in US—Shrimp that WTO treaty law takes precedence over non-WTO agreements failing to express a measure of customary law (“recent acknowledgment by the international community”).

For the GATS this would mean that non-WTO law, such as human rights, apply to GATS commitments, as well as to the process of progressive liberalization under GATS. To others Article 3.2 DSU clearly is opposed to applying non-WTO rules to situations falling under the scope of WTO law, unless there is an express clause of renvoi in a WTO covered agreement. This article views the WTO as a regime open to applying other sources of law and thus agrees with the standpoint put forth by Garcia-Rubio and many others that among the sources of non-WTO law, specifically customary international law applies to the analysis of the WTO treaties, unless the terms of reference of a Panel exempt their use. In consequence, customary international human rights may be applied by the WTO judiciary in a case before the WTO dispute settlement body.

1.3. Defensive Human Rights Protection in WTO Law

Under the traditional defensive view of trade and human rights, scholars, and to a limited degree, Panel and Appellate Body jurisprudence have found that governments protect human rights by imposing restrictions on businesses that run against the WTO free trade rules, but which may be justified under the general exceptions (from trade liberalization rules) in GATT Art. XX and GATS Art. XIV. The traditional approach is that imposing of trade barriers against those WTO Members, which violate human rights is, under limited exceptions, WTO-consistent. Human rights, even if not explicitly protected in WTO rules are thus implied in the substantive law of GATT Art. XX and GATS Art. XIV. They form part of the WTO applicable law, which the judiciary must take into account when interpreting.

Article XX(g) GATT, the US was not member of the CBD, but the CBD was recognized as expressing a measure of customary international law; see US—Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report of 12 October 1998, WT/DS58/AB/R, paras. 168 and fn. 174 to para. 171.


Human rights lawyers argue that free trade discourages protection of human rights, since the principle of comparative advantage would not oppose trading in goods and services produced at the expense of human rights and perhaps encourage market access for goods that were more cheaply produced because human rights have been violated in their production, such as that workers have not been able to organize themselves and bargain for more pay or better working conditions. Inversely, the neoliberal view finds that international standards of human rights protection may act as a non-trade barrier to trade liberalization obligations. The obligation to afford equal conditions of competition decreases the incentive to comply with core labour rights, for instance. This is so because protecting human rights comes at the cost of losing a comparative advantage, which some countries may have over others when employing children, allowing forced labour, restricting the freedom of association of workers. Thus, many WTO States have argued against human rights protection in the WTO, which they see as a trade-off instead of as a gain for free trade and its foundational function for growth through multilateral, liberal trade.

WTO jurisprudence has addressed so-called “non-trade” values, including, the environment, culture, labour standards and human rights, as exceptions to the principles of free trade. Governments may protect human rights at the expense of free trade, as long as the restriction is justified under the general exceptions of GATT (Article XX) or GATS (Article XIV). Thus, import restrictions on products manufactured or services delivered in violation of human rights may be valid even if they disrespect the GATT obligations to eliminate of tariffs, to refrain from imposing non-tariff barriers and import quotas and the GATS market access commitments.

There is more to WTO-human rights linkages than a defensive attitude. While human rights have often been perceived as antagonists to free trade, a novel view would suggest to link human rights violations to an impairment of the trade volume between WTO Member countries. Under the antagonistic view, human rights will not easily be reconciled with WTO law, as long as the regulation of trade liberalization subscribes to the principle of comparative advantage, which so far has tolerated goods and services supplied in violation of human rights. However, from the antagonistic perspective, human rights are protagonists of free trade, because only human rights-compliant trade induces growth that harbors welfare to all.

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of the use of Article XX GATT exception as “import restrictions imposed for human rights considerations.”

36 The term „non-trade“ values is based in scholarship, possibly, Joel Trachtman first used it in his article on “Trade and … Problems, Cost-Benefit Analysis and Subsidiarity” in 9(1) European Journal of International Law, 1998, pp. 32-85; non-trade values are the general term WTO scholarship uses to address health, human rights, environment, culture, labour and other subjects of linkage with trade. The term is probably borrowed from “non-trade” concerns which paragraph 5 of the Preamble to the WTO Agreement on Agriculture uses to list, non-exclusively, which concerns other than trade liberalization the AoA should take into account, they include food security, environmental protection and special and differential treatment.
Human rights violations may occur for instance, when a global news agency like CNN or BBC of a WTO Member State is entitled under the GATS commitments of a receiving WTO Member to broadcast in the territory of another WTO Member State, and the employer (BBC, CNN) realizes that it is too dangerous and costly to send journalists abroad to research and report on that other WTO Member State and for it. This may be the case, when foreign journalists are being harassed and intimidated in their rights to report professionally, to access information, to have their sources protected, to their right to physical safety and journalists will refuse to or are inhibited from providing news services.\textsuperscript{37} Faced with human rights violations in a receiving WTO Member State, the sending WTO Member States may completely suspend delivering services by moving natural persons to the receiving state. In the worst case, the receiving WTO Member State will no longer receive any migrant worker from any sending WTO Member State and its mode 4 commitments in a specific sector or in all committed sectors would become void. Due to human rights violations in the receiving State, the sending States would shift from delivering services through mode 4 to mode 1 as in electronic banking, tele-education (e-learning), tele-medicine, without the need for experts to move abroad and risk their life or health or face serious impediments to the exercise of their profession. However, most of the time human rights violations are not GATS relevant. For instance, a government’s restricted practice for the registration of NGOs falls outside the scope of GATS law, since it may be difficult to qualify NGO activity as a service. Also, when only nationals are the targets of human rights violations, the cross-border element, necessary for establishing a WTO and human rights case, is missing.\textsuperscript{38}

Human rights share a factually greater proximity to trade in services than to trade in goods. Therefore, the defensive approach of justifying trade restrictions imposed for human rights protection through the exception clauses in the various WTO Agreements is insufficient for trade in services when the supply involves the movement of natural persons abroad.

Human rights could be relevant to all modes of services supply. An example in mode 2, may be when a health tourist moving to another WTO Member State is getting treated and during his stay, his organs/tissue are being used for medical experiments and his personal data is disseminated for non-health treatment related reasons, his human right to personal integrity may be violated by the service supplying country. The question is whether his country of origin or residency may bring a claim against the service supply-


ing country for violation of human rights linked to the supply of services under the WTO/GATS dispute settlement system. In mode 4, it is the service supplier moving, and there the question is whether the human rights situation in the country receiving the service and hosting the foreign service provider may become an important consideration for deciding whether to go abroad. Human rights violations should be prosecuted with the multilateral rules for trade in services when they jeopardize the foreign service supplier abroad and put at risk the fulfillment of a mode 4 commitment. According to the GATS Preamble, services are being liberalized to achieve the goal of “expansion of trade under conditions of transparency and progressive liberalization”. However, restrictions on human rights impair such percepts of transparency and impede the progressive elimination of cross-border barriers to services trade. When the country, which receives foreign service suppliers pursuant to mode 3 or 4 of GATS engages in restricting their human rights such violations may lead to a loss of trust on the side of the sending country. As a result, the human rights violations diminish the basis for good faith negotiations to progressively submit more service sectors to the multilateral disciplines and to liberalize other sectors more in depth. Thus, human rights violations impact negatively on the goals of the GATS as put down in the GATS Preamble.

4. Offensive Human Rights Protection through International Trade Law of GATS

1. Violation-Type Complaints

Some human rights violations are only so remotely connected to trade that they will have no impact on the economic relations between two WTO Member States. However, there may be instances where the human rights violation goes hand in hand with economic damage. The human rights violations may directly lead to a decrease of export volumes of services or may render commitments in a whole mode of services supply mute. An economic operator faced with human rights violations in the receiving country will shift, for example, from supplying services through temporary movement of natural persons abroad (mode 4) to cross-border supply (mode 1). Aided by technological innovation the service will be transported abroad electronically, thus substituting for the natural person moving physically into the territory of the receiving WTO Member State. The consequence of shifting the mode of service supply is that the horizontal commitment to mode 4 of services supply is voided (since the service—due to human rights violations—is being supplied through mode 1 instead). This example thus demonstrates how human rights violations may fall into the scope of GATS jurisdiction.

39 GATS Preamble, para. 2.
By a violation complaint, the complainant claims that the respondent has violated a norm of the WTO covered agreement, which in the terms of Article XXIII:1(a) GATT 1994 translates into the respondent having “failed to carry out its obligations” under any of the WTO covered agreements. To facilitate the use of redress for violations of the WTO covered agreements, Art. 3.8 DSU establishes a legal presumption of nullification and impairment (only for violation-type complaints), if the complainant can show the respondent has violated a norm of WTO law (prima facie). Pursuant to the reversal of burden of proof attached to this legal presumption, the presumption that there has been an impact on trade can be rebutted, however no case is recorded, where the respondent was successful to date. What the respondent party will do instead, is to show that its alleged non-compliance of the measure in question is justified under the general or other exception of the GATT or GATS. Thus, according to Panel practice the demonstration of an inconsistency with any of the WTO covered agreements quasi-automatically establishes the quasi-irrefutable presumption that the violation has had a negative impact on trade.

Unless the respondent can claim no nullification or impairment of a benefit, a legal inconsistency with a WTO covered agreement results in a nullification or impairment of a benefit accruing to the complainant under these agreements and the complainant’s claim will be successful.

This chapter firstly, explains why violations of human rights with jus cogens status form the basis of a violation-type complaint under GATS Article XXIII paragraph 1 in combination with the DSU, and thus fall into the jurisdiction of the GATS even though the GATS does not explicitly require the WTO Member States to recognize human rights.

Secondly, the chapter will show that there are certain selective human-rights-like obligations in the GATS treaty text (Articles III and VI), which also may provide the grounds of a violation-type complaint. Such individual-rights-like norms guaranteeing due process rights of natural persons are the only human rights-related norms that are expressed in the GATS text.

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1.1. Human Rights with Jus Cogens Status

Even if the text of the WTO covered agreements does not require respect for human rights, WTO Member States, are required to respect those human rights which jus cogens declares universally binding on all States.\(^43\)

Fundamental, jus cogens human rights are binding on all WTO Member States, independently of whether the WTO Agreements contain the obligation to protect human rights or not. Because jus cogens applies erga omnes, those human rights forming part of jus cogens bind the WTO Member States irrespectively of the nationality of the victim of the violation. Thus, violations of jus cogens norms, whether these are human rights or other obligations, count as violations of WTO treaty law.

1.1.1. Receiving Country’s Violations of Jus Cogens and Impact on Mode 4

Violations of (jus cogens) human rights vis-à-vis journalists, for example, may impair upon the provision of services through mode 4. Since 23 April 2004 Nepal is a WTO Member,\(^44\) but since February 2006, a civil war-like situation has become responsible for many human rights abuses, involving death and security threats vis-à-vis foreign journalists.\(^45\)

Both, Nepal’s official government and the Maoist groupings are responsible for committing jus cogens violations\(^46\) mostly against Nepalese journalists, namely engaging in disappearances, illegal detention, torture and summary killings.\(^47\) Journalism is a services sector operating through mode 4 and thus relies on the movement of natural persons. Suppliers of the print media services may be deterred from exercising their profession from abroad if there are too many human rights violations, especially if these restrictions reach the degree of jus cogens violations, such as death or health threats.\(^48\) Unless the service supplied by the natural or juridical person has a cross-border component to it, the human rights violation attributed to a foreigner will not be GATS-relevant. For a jus cogens violation to be prosecuted by a WTO violation complaint, the violating country will have to have made a specific

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\(^{43}\) See Howse, Robert and Mutua, Makau, Protecting Human Rights in a Global Economy, [complete reference]


\(^{48}\)
or horizontal commitment on the services which it is impeding by restricting the human rights of the service supplier. If no commitment is made and a country violates the jus cogens human rights of a foreigner supplying a service, the link to the WTO and particularly to the GATS may be too weak to render the WTO responsible.

But even if Nepal had made commitments on foreign news media, GATS would target only those foreign journalists in Nepal, offering their news services to Nepalese people. Foreign journalists operating abroad in civil war zones, but providing news services to their audiences at home only, would not fall under GATS mode 4 because they are not engaged in cross-border news services supply.

However, if the foreign journalists operates for a global news agency that has a licence to broadcast to the population of that foreign country also, the reporting activity of the foreign journalist will fall under GATS mode 4, and news reporting can be an example for a profession exposed to human rights violations when supplying services in a foreign country.

While journalists abroad rely on, and are often faced with, restrictions on their freedom of movement or freedom of expression, violations of those freedoms do not qualify as jus cogens, even they are incisive to the point of preventing the reasonable exercise of the journalism. Such restrictions would not be prosecuted under GATS/WTO violation-type complaints, but rather will, as discussed in another chapter, form the basis of a WTO non-violation type complaint, if all other conditions (such as the existence of a mode 4 commitment for news services, etc.) are fulfilled. 49

1.1.2. Violations of Jus Cogens and Impact on Mode 3

Pursuant to a Presidential Decree on Land Acquisition (36/2005 amended in 2006) the Indonesian government violated the human right against threats to health by evicting under the use of force Indonesian citizens from their land, in order to offer prime investment locations to foreign investors. 50 Indonesia has commitments in GATS mode 3 for tourism and opens its market to “3, 4

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50 Cabrera, Fernando, Human Rights Watch warns Indonesia and foreign investors on forced evictions, Human Rights Watch’s report “Condemned Evictions in Jakarta”, available at: http://hrw.org/reports/2006/indonesia0906/, claims that Indonesia was expropriating and seizing land under “excessive use of force— including beatings and destruction of homes and possessions” to prepare the land for “major infrastructure projects” for attracting more foreign investment to the country. The Decree was issued after Indonesia had held an Infrastructure Summit with foreign investors in 2005 where it had pledged to to sort out unresolved land disputes in order to renew its effort to attract foreign investment which had often been stalled by such land disputes.
or 5 starred hotels” in the “eastern part of Indonesia, Kalimantan, Bengkulu, Jambi and Sulawesi with capital share owned by 100% foreign investor”.51

The commercial presence in Indonesia by foreign hotel chains will rely on land conflicts being resolved and a certain infrastructure being available to the foreign investor. Foreign investors will only build hotels when there is no risk that indigenous people bring territorial claims on the land where they are building hotels. Moreover, the foreign investor will want the land to be free of settlers, fishermen and other trade that would interfere with touristic activities or diminish the attractiveness of the site to tourism.

Thus, to fulfil its commitments Indonesia may have committed human rights violations by evicting indigenous people. If those human right violations amount to ius corgens violations, Indonesia could be held accountable for them before the WTO DS, as long as it can be shown that the restriction of human rights (prohibition against physical threat, prohibition of killings, etc.) has a causal link to the fulfilment of Indonesia’s GATS commitment with respect to opening certain provinces to commercial presence in the tourism sector.

If shown that Indonesia’s conduct disrespected ius corgens human rights, its GATS commitments would be rendered void to both Indonesia and all WTO Members. A new question for the WTO would be whether in such a situation the international community could bring a claim of responsibility vis-à-vis the WTO asking the WTO to declare invalid Indonesia’s GATS commitments or a fortiori, deny Indonesia WTO Membership.

Another question would be whether, in such a case, any WTO Member State could have a legal standing to bring a case against Indonesia before the WTO DSU. Such a case would be based on the fact that even if Indonesia did not infringe any express provision of WTO law, its conduct nevertheless amounts to a cross-border trade issue, firstly, because the violations having the degree of ius corgens, are equivalent to violations of WTO law for the WTO DSU. Secondly, the WTO DSU must be the tribunal empowered to prosecute Indonesia’s conduct, because the ius corgens violations would have a link to trade insofar as it could be shown that Indonesia had restricted human rights—even of its own nationals (as opposed to foreign service providers), to avoid a conflict with its specific commitments under GATS.

Ius corgens human rights are listed as the prohibition of torture and slavery, the prohibition of genocide and mass killings. The question of knowing which human rights are ius corgens and which human rights are bereft of peremptory force is a difficult one. Nevertheless, a few human rights fall with more certainty into the category of ius corgens than others. However, one must say that the list of peremptory norms is not exhaustive and evolution of international practice may find certain human rights to have acquired a ius corgens status, which they did not have previously.

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51 See GATS, Indonesia Schedule of Specific Commitments, WTO Document GATS/SC/43 of 15 April 1994, p. 27.
Thus, a GATS Member State receiving service suppliers and keeping them under conditions of slave labour, or tolerating that the employer of the home state is keeping them under conditions of slave labour, is violating the jus cogens right against slavery and the sending WTO Member State could bring a violation type complaint against that receiving Member State under the GATS /WTO dispute settlement procedure. Even if, with narrow exceptions, the natural person fails to qualify as a subject of international treaty law under the WTO/GATS, all human beings are subjects to those fundamental international human rights that bind all States under jus cogens.

1.2. Due Process “Rights” of GATS Domestic Regulation

International human rights protection typically admonish States for violating rights of individuals, including for instance, restrictions on freedom of commerce. However, there are exceptions in WTO law, where certain covered agreements set up obligations, which directly affect the individual. Because these obligations do not go so far as to protect the individual against the State, this paper terms them “individual rights-like” norms. Examples in place are the protection of intellectual property rights as private rights in Part II of the TRIPS and the obligations on WTO Member States to install “reasonable procedures for the acquisition of intellectual property rights” in Article 62 TRIPS. In GATS, there is the obligation for WTO Member States to install, vis-à-vis the natural or juridical person moving abroad to deliver services, judicial protection in matters relating to the domestic regulation of services pursuant in Article VI GATS.\(^52\)

In summary, the consequence of the WTO covered agreements being a non-human rights treaty is that the natural and juridical person, even as services providers, are with a few exceptions, including the right to judicial review of work authorization, excluded from the scope of WTO and GATS jurisdiction.

Where the GATS imposes limitations on government conduct, such as the transparency and domestic regulation requirements under Articles III and VI, in view of improving the situation of the individual citizens vis-à-vis their government, the GATS has intervened in the relationship of the State vis-à-vis the nationals of that State. The rule is that WTO/GATS obligations bind governments vis-à-vis other governments and not vis-à-vis individual right holders.\(^53\) In Articles III and VI, the GATS limit the government’s exercise of power vis-à-vis individuals, however, the individual will not have the

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53 See Article I para. 1 GATS: “This Agreements applies to measures by Members affecting trade in services”; and Article I para. 2 (a-d) defines trade in services as being the cross-border supply of services between Members, through four different modes of supply.
legal standing to claim such rights. Therefore, these obligations remain due process requirements for the WTO Member State, as opposed to obligations with direct effect. However, since their subject matter affects the individual, by improving the due process standards a country provides to its citizens, such due process minimal standards, as Articles III and VI express, can be described as individual rights-“like” norms.

This section discusses the case of individual-rights-like norms of GATS, where the “failure of anther Member to carry out its GATS obligations”,54 amounts to that Member violating either of one of GATS two individual rights-like norms (Article III transparency or Article VI domestic regulation). In comparison to the ius cogens human rights violations described above, it is the violation of a GATS provision with an individual-rights impact, which engages WTO Members’ responsibility, and not a non-WTO norm. The ground of the complaint is the positive treaty obligation, namely of Article VI or Article III GATS.

Articles VI and III call upon governments to comply with certain minimal standards vis-à-vis foreign service suppliers. Article VI imposes minimal requirements of due process on the domestic laws relating to the cross-border services trade.

While the transparency requirement in Article III GATS applies to all horizontal (modal) and sectoral commitments, the requirements for domestic regulation, including an objective and impartial judicial and administrative system, are only applicable to sectors in which WTO Members have undertaken specific commitments.55

Article VI posits the exceptions from regulatory discretion of governments by imposing certain standardized rules of governmental conduct applicable to sectors in which WTO Members have undertaken specific commitments.

Such due process requirements of Articles III and VI GATS act as individual-rights-“like” norms in Articles III and VI and include firstly, a government’s obligation to install enquiry points, secondly, its obligation to inform an applicant for work permits of the status of his/her application, thirdly, to provide for independent, impartial and objective judicial, arbitral or administrative tribunals and procedures, fourthly, to offer the possibility for review and fifthly, to provide remedies for administrative decisions affecting trade in services.

Switzerland’s horizontal commitment in mode 4 is conditioned on the foreign service provider getting an authorization in the form of both a residency and work permit from the Swiss government.56 Pursuant to Article VI

54 Cf GATT Article XXIII:1(a).
55 See Article VI GATS, para. 1.
56 See Switzerland—Schedule of Specific Commitments, Appendix 5 to Annex VIII, Horizontal Commitments, p. 3f., available at: http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/CL/CL RUAP/annexes/CL_FTA_Appex_VIII -
GATS, Switzerland would have to take decisions on the authorization of foreign service providers promptly, as well as provide information, without undue delay, on the status of the authorization to the foreign service provider applying for a permit of stay and a work permit in Switzerland pursuant to Article VI:3. In addition, the Swiss government would have to ensure, under Article VI:2(a), that a judiciary, arbitral or administrative review of decisions on authorization is possible. If Switzerland denies an authorization to work to a foreign service provider and fails to provide for a review proceeding, the sending WTO Member State could claim before the WTO DSU that Switzerland has violated Article VI GATS.

An example for a lack of transparent authorization requirements and the failure to provide for the review of denied authorizations under Article VI GATS relate to the wording of China’s market access commitments for education services. In addition to the right of foreign-majority owned schools to establish a commercial presence under mode 3, China also opens its education services to the access of natural persons under mode 4, to so-called “foreign individual educations service suppliers”. Unlike the Swiss horizontal commitments on mode 4, where an authorization is required for any foreign natural person providing any type of service on Swiss territory, no such horizontal limitation market access commitments exists in China. Instead, the threshold for the foreign professor or teacher is that he or she be “invited” or “employed” by Chinese schools and education institutions.57 The question is how transparent are such invitations and what are the conditions for receiving employment contracts? In the author’s view, the invitation and employment requirement of China fails to fulfil the requirements Article VI GATS relating to “permits of stay” and “work authorization”.

The Chinese education services market is limited to those foreign teachers, professors and other education professionals that have been invited or employed by the respective Chinese university. Such a restriction on a market access commitment may be a way to circumvent the due process requirements GATS Article VI.

There is usually no possibility for a judicial, administrative or arbitral review for having been refused an invitation to teach at a university or to be employed by a firm. The process of invitation is one fraught with subjectivity, partiality and delay. It may also entail bribing and the renunciation of the foreign service supplier to certain of his/her human rights (such as freedom of expression, freedom of association). As such, an “invitation” stands in contrast to an “authorization” as defined by GATS. Thus, in view of this paper, China’s GATS mode 4 specific commitment on education services, that is the limitation of market access to “invited” and “employed” foreign

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professors and teachers is a violation of the GATS Article VI requirement of an objective, impartial and prompt authorization process and review of such results.

The WTO Member State whose service suppliers are moving abroad may claim under the WTO DSU that the receiving WTO Member State is violating individual-rights like norms (Articles III or VI). However, the GATS does not provide standing for the natural person having applied for an authorization to supply the service, to actually submit to review the denial of his/her authorization. Articles III and VI GATS nevertheless set up institutions and procedures for the protection of the individual as a service provider. Domestic regulation and transparency requirements form the basis for such individual-rights like norm in GATS, listed below, and their violation forms the basis of a violation-type complaint.

- To install judicial, arbitral or administrative tribunals for the review of administrative decisions affecting trade in services (Article VI para. 2(a) first sentence).
- Tribunals are to review administrative decisions affecting trade in services promptly (Article VI para. 2(a) first sentence).
- If the same agency taking the decision is also in charge of reviewing the decision, the review shall be objective and impartial (Article VI para. 2(a) second sentence)
- To inform the service provider applying for an authorization to supply the service within a reasonable time:
  - Of the decision concerning the application (Article VI para. 3 first sentence)
  - At the request of the applicant and without undue delay, of the status of the application (Article VI para. 3 second sentence)
- To provide adequate procedures for verifying the competence of professionals of another WTO Member (Article VI para. 6).
- To establish enquiry points (Article III, para. 4, but it is questioned in this article whether natural persons also have the right to access and be informed by the enquiry points, or whether this right is reserved to government officials of the other WTO Member State).

Articles III and VI GATS are the only human rights-like provisions expressly codified under positive GATS/WTO treaty law. They do not codify human rights, since the individual service provider is not granted standing under WTO law. However, both the jus cogens violations of human rights and the violations of GATS human rights-like norms of Articles III and VI, fall under GATS jurisdiction as questions of law and therefore form the basis of a GATS violation-type complaint.

2. Non-Violation Type Complaints
Since there are no WTO treaty provisions making a reference to customary human rights law, WTO Member States are not bound to respect customary human rights in order to comply with WTO treaty provisions, with the exception of jus cogens human rights. Nonetheless, there may be situations where customary human rights form the grounds of a complaint under the WTO dispute settlement. This is the case where the human right violation is relevant enough to damage services trade. The WTO Dispute Settlement Understanding’s non-violation nullification and impairment instrument is the tool to redress the depreciation of a tariff reduction or of services market access commitment even in the absence of an outright WTO treaty law violation. Thus, where a measure by a WTO trading partner restricts human rights of foreign natural or juridical persons to the point that it affects and impairs mutually agreed GATS commitments, the WTO non-violation type complaint offers a ground of complaint not so much because non-WTO law has been violated, but because economic damage has been done since the multilaterally agreed trade commitments have been detrimentally relied upon.

2.1. Non-Violation Nullification and Impairment under GATS

The WTO Dispute Settlement Understanding has a tool to sanction measures or actions taken by its Members, which do not amount to a violation of WTO treaty law, including the GATS, but impair the level of negotiated trade liberalization when such non-violation frustrates the legitimate expectations of another WTO Member State. This so-called non-violation type complaint codified under Art. 26 DSU and Art. XXIII para. 3 for GATS, is especially useful for resolving conflicts in trade-related areas. For human rights violations impacting upon trade in services the non-violation type complaint will thus provide the procedural tool to sanction a WTO member for infringing human rights that fall short of forming jus cogens. Such a non-violation complaint for failing to respect human rights would claim that the value of the negotiated level of market access in a services sector had been nullified and impaired by the human rights violation that and that another WTO Member State had been relying on this trade benefit. The burden of proof on the defendant is relatively high, since a WTO Member State must show that its economic operators had been relying on outsourcing their services by moving natural persons abroad, these are now refusing to take advantage of a liberalized mode 4 or mode 3 commitment, because the non-jus cogens human rights violations poses a too high risk for either the natural or juridical person to supply such a service abroad.

58 There is no “a priori hierarchy” of custom over treaty law, with the exception of the priority of jus cogens over treaty law, as described above.

2.2. The Example of Filtering Internet Search Engines

Restrictions on free speech by internet filtering in China, Bahrein, Burma, Iran, Saudi Arabia, Singapore, Tunisia, Vietnam, and Yemen may be another example of GATS relevant human rights violations. The internet filtering case with the most prominent media coverage occurred in January 2006, when the Chinese government required foreign internet search engines and blogs sites to filter undesirable content. By restricting the freedom of speech of internet search services, China, but also other WTO Members operating such filtering, have demonstrated how countries receiving foreign services but violating human rights has nullified and impaired the level of trade benefits it had agreed to offer to other WTO Members.

Even if China had agreed to undertake a radical reform of its services industry when it became a WTO Member on 11 December 2001, it still is among the world’s more proficient internet services filterers. While at first glance, such a restriction does not seem to fall into the scope of services liberalization under the GATS and the relationship between free services trade and human rights is far less obvious, at a second glance, one realizes that internet filtering relates to human rights and impacts on trade.

In the example of China, one regulation restricting the human rights of foreign internet service providers may have been the Telecommunications Regulations of the People’s Republic of China, effective from September 25, 2000. Article 57 of the Telecommunications Regulations states that “No organization or individual may use telecommunications networks to make, duplicate, issue, or disseminate information containing the following: (2) Material that jeopardizes national security, reveals state secrets, subverts state power, or undermines national unity; (6) Material that spreads rumours, disturbs social order, or undermines social stability; (7) Material that spreads obscenities, pornography, gambling, violence, murder, terror, or instigates crime; […]” In addition, the Measures For Managing The Internet Information Services make service providers responsible for the content they display. Article 14 says that the service providers must record their subscribers’ access to the Internet, their account numbers, the Web addresses


they call up as well as the telephone numbers they use, and store this information for sixty days. Such regulations curb the freedom of expression of both domestic and national internet and other telecommunication services providers. While it is China’s sovereign right to restrict free speech, China is responsible for the effects of this piece of legislation may have on the GATS commitments it has entered into when becoming a WTO Member in 2001. For a non-violation complaint against China under the GATS to be successful one would have to evidence that the adoption of human rights restrictive legislation, such as the Telecommunications Regulation and the Measures for Managing the Internet have lead to a decline of foreign direct investment in telecommunications or related services or to foreign internet operators moving out of China. For a non-violation complaint to be successful, a trading partner would have to show that China had made specific commitments in the telecommunications sector, which had been relied upon by the trading partner. China would then be held accountable not for violating human rights of foreign service suppliers per se, but for having violated GATS law by frustrating the legitimate expectations of its trading partners in the assurances of a free market it had given to foreign service suppliers in its GATS commitments. Using the much publicized example of google.com, one will demonstrate how a conflict between human rights violations and the supply of services emerges and how it can be solved.

When google.com, the US internet search engine was threatened with closure of their services provided in China, unless they self-restrict the content their search machine was able to offer, the filtering of that search engine’s content could have formed the basis of a non-violation complaint under the WTO/GATS..

Instead, google.com decided to comply with the Chinese government’s request, and self-censored its content with the argument that providing less information is better than pulling out altogether. Even though google.com

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65 Many NGOs, but also the US Congressional Human Rights Caucus, have criticized google.com, yahoo and Microsoft which had agreed to self-censor their content and have thus cooperated with the Chinese government to maintain restrictions on freedom of expression and information; see, eg remarks by Congressman Tom Lantos Co-Chairman, Congressional Human Rights Caucus Caucus Members’ Briefing Human Rights and the Internet — The People’s Republic of China, stating: “These massively successful high-tech companies which couldn’t bring themselves to send their representatives to this meeting today, should be ashamed. With all their power and influence, wealth and high visibility, they neglected to commit to the kind of positive action that human rights activists in China take every day”, available at:
has cooperated with the Chinese government, it is argued here that the restriction on freedom of expression and information and the threat of closure has negatively impacted on the depth and reach of foreign internet search services providing services in China.

Under WTO/GATS law, China can only be held responsible for blocking the content of foreign search engines, if it has made market access commitments for foreign internet service providers under its GATS Schedule of commitments.

China has undertaken such GATS commitments in mode 1 on data-processing services, including their provision by internet.\(^66\) It has also liberalized through mode 3 value added telecommunications services, however, being unclear on the amount of foreign ownership it allows for commercial presence in this sector.\(^67\)

In its defense China could firstly state that it is up to the foreign internet service provider wishing to take advantage of China’s market access commitments to comply with national legislation on the internet service provider.\(^68\) Thus, google.cn would have to accept that China is limiting the content of its search services.

However, a counterargument, would be to say that many human rights, including free speech have the validity of customary international law and are thus no longer a matter of national law, but have the authority of an international legal obligation binding upon China.

A second line of argumentation would be to draw from the provision on domestic regulation of GATS Article VI. The minimum requirements stated in Article VI GATS may imply the prohibition to violate human rights relating to the authorization, technical standards and licensing requirements for foreign service providers.

A third solution and the one suggested in this paper, is that the WTO Member sending service providers to China bring a non-violation nullification and impairment complaint against China. One would argue that China has made a GATS commitment to open its market to foreign internet service providers and that a blocking of content will have the effect of nullifying and impairing the value of that commitment to its trading partners and thus upset the level of concessions. It would be up to China to justify, for example by resorting to the GATS exception of Article XIV, its restriction on cross-

\(^66\) Wu, pp. 23-28.

\(^67\) Wu, p. 29 says that the CPC classification of Telecommunication services contains more of a sampling than an exhaustive listing of internet services.

\(^68\) Wu, pp. 23-28.
border trade in services, which it operationalizes through a restriction on free speech (internet filtering).

Assessing the economic damage that the restriction has most probably done to the US, will be necessary to frame the claim that China has nullified and impaired the value of its commitments in the internet services sector, upon which the US had relied upon. Unlike with jus cogens violations, the violation of non-jus cogens human rights will not be considered as an issue of law under the WTO. To the WTO, benefit of multilateral trade that has been nullified or impaired, ie the economic damage, is not the violation of the human right itself, but it is the effect of the human rights violation, which damages the economic opportunities to the WTO Member concerned. Thus, if the effect of the human rights violation forms the grounds of a non-violation type complaint, it is a non-legal, factual issue, which causes the nullification and impairment of the benefits of trade. Therefore, the WTO Panel will consider the effect of a human right violation as a question of fact.

In addition to having to show an impact on trade (there is no presumption of an impact on trade in non-violation complaints, unlike in violation-type cases, where such a presumption exists), the defendant will have to show that it had relied on the benefit of trade liberalization and that its legitimate expectations as to the benefit have been frustrated. Thus, the defendant WTO Member will have to show an economic damage in addition to a showing of a detrimental reliance.

Thus, the question is whether or not other foreign internet service providers were deterred by the google.com case from delivering services to China. If so, the respective (sending) WTO Member States could have brought a nullification and impairment of GATS benefits complaint against China claiming that China’s human rights violations and threats thereof had deterred foreign service providers from benefiting from China’s market access commitments on mode 1 or mode 3.

However, in the google.com case, specifically, google.com had chosen to self-censor its contents in order to avoid having to pull out of China altogether. Thus, while in the google.com case the economic damage was much smaller, because Google could continue to operate in China with little loss due to censored searches (Tiananmen, Tibet, Falun Gong, other free churches cannot be found on google.cn), the human rights violations persisted.

Were China to justify its filtering and blocking of foreign internet search services with the GATS general exception in Article XIV, it would argue that WTO Members are allowed to impose restrictions on their market access commitments for reasons of “protection of public morals” or “maintenance of public order” under Article XIV (a) or it would find that the foreign internet service provider compromises “safety” under Article XIV(c) (iii). However, it is questionable whether China can justify under GATS Article XIV a restriction of human rights. It is questionable whether it is legitimate under WTO law for China to restrict google.cn’s free speech by engaging in filtering practices in order to establish public order and safety, which, it claims are at risk if its citizens can research about Tienanmen, Falun Gong, Tibet etc.
However, as Tim Wu writes, “while WTO law leaves much room for exceptions, some of China’s restrictions may not be easily justifiable under the GATS.”

Since WTO law implicitly subscribes to the “basic law” of the UN Charter and the protection of human rights included therein, it should not allow its exceptions to be used to violate such rights. Moreover, footnote 5 to Article XIV expressly prevents the abuse of the public order exception by stating that “the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” Thus, a human rights-consistent interpretation of the public order/moral exception of GATS Article XIV would prohibit justifying restrictions on internet search services for purposes of public order, if the restriction operates as a human rights violation, which cannot be in the “fundamental interest of society.” As Tim Wu, an expert on China and internet law goes on to say: “In light of that language, [limits on use of the public order exception are suggested in footnote 5 of Article XIV GATS] WTO panels and Appellate Bodies face the unappetizing prospect of trying to decide when a given part of China’s system of information control represents a measure that combats ‘a genuine and sufficiently serious threat’ that affects ‘one of the fundamental interests of society.’ That’s a hard question when the content blocked may be more of a threat either to the Party or to a favored local company.”

As of today the “google.cn” or any similar cases have not been challenged before the WTO, neither by the US nor by any other sending country. Most probably, the WTO judiciary would deny a justification by China under the GATS Article XIV, based on the fact that restricting the human right to internet access cannot be in the interest of public order/moral.

5. Human Rights GATS Commitments

The difference between a human rights violation entering GATS jurisdiction through a violation-type complaint and one falling into GATS jurisdiction by forming the basis of a non-violation type complaint is one of degree of human rights violation (jus cogens or not) but also one of relatedness of the human right and services trade.

The human rights and trade-in-services linkage mostly plays out at the level of GATS commitments. The yet unclarified legal nature of such commitments adds to their uncertain legal authority and paves way for human rights violations in the context of the GATS. A brief overview will draw from the examples discussed above to classify into four groups how human rights may impact on GATS commitments. A fourth and final example, the one of human rights-conditioned specific commitments, will terminate this chapter on how human rights and their violations occur at the level of GATS commitments.

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69 See Wu, p. 2.

70 Wu, p. 29.
Firstly, human rights will not only affect trade in services when their violations hinder the foreign service provider from taking full advantage of the host country’s market access commitments. This was the example of China restricting google.cn’s right to free speech by filtering and impeding google.cn’s business activity in China despite China’s GATS mode 1 commitments to market access for value-added telecommunications services discussed above.

Secondly, human rights may be violated in order for the receiving country to realize the full extent of market access commitments it has pledged to offer to foreign service providers. While the causal link between human rights violation and trade obligations will be more difficult to show in this case, a possible example of this human rights and GATS nexus could have materialized when the Indonesian government evicted by force its own citizens from their land in order to attract the commercial presence of foreign investment it had offered in its GATS mode 3 commitments in the hotel tourism sector.

Thirdly, human rights may also be violated when a WTO Member imposes in its GATS market access or national treatment commitments conditions upon the foreign service provider that may violate customary international human rights law. This may be the case, but will not be discussed in more length in this article, when a country expressly denounces wage and labour conditions parity in its GATS commitments. While such a condition may be consistent under the GATS national treatment obligation, it is not in accordance with human rights law, as it violates core labour standards, which current law and practice find to express customary international law.

Fourthly, human rights may impact on services trade is where a country expressly posits in its commitments certain human rights standards, such as wage and labour conditions parity. This fourth example is the opposite of the third example, insofar as in the fourth example, the country actively pursues human rights, while in the third example it neglects human rights. The following section will illustrate how

6. Special Status of the UN Convention on Migrant Workers
   Human Rights in GATS

The International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families (MWC) provides a comprehensive framework for the protection of migrant workers, including undocumented migrant workers, by transit countries, sending countries, and host countries alike. Regardless of their legal status the MWC calls upon governments to treat migrant workers in full compliance with domestic labour law, core labour standards (right to join a trade union), jus cogens (right to life and prohibition of slavery) and customary human rights (freedom of expression, freedom of religion). The Migrant Worker Convention’s rights against illegal detention and protection of security of migrant workers has gained visibility in cases when governments post 9/11 started detaining migrant workers illegally and under harsh conditions on charges of terrorism, which often has been a disguised protectionist attempt to curb illegal labour immigration.
In turn, the effects of the Convention on the GATS scheme for temporary labour movement has had a low profile.\textsuperscript{71}

At first glance, only such human rights violations can be claimed under the violation-type complaints of the WTO, which are prohibited by either an express GATS provision, which, with the exception of the “human rights-type” due process obligations of GATS Articles III and VI, does not (yet) exist, or which form part of jus cogens. In addition to jus cogens or due process rights norms of GATS Articles III and VI, there may exist some human rights, which affect trade in services more closely than others and, as a result, fall under GATS jurisdiction as grounds of violation type complaints. Such GATS-relevant human rights, whether contained in a treaty or forming part of international customary law, are those related to the protection of temporary moved natural persons.

The International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families codifies and seeks to ensure an internationally coordinated protection of most of such labour mobility-related human rights. It has predominantly been signed by developing countries, many of which are WTO Member States, but not by many industrialized countries.

In relation to the initial question of this article of knowing which is the relevancy of human rights in GATS, this section examines firstly, whether migrant workers human rights have or not a closer linkage to temporary movement of natural persons compared with other, non-mobility-related human rights, such as freedom of expression or freedom of establishment. The answer to this first question will illustrate what is the linkage of the UN Convention on Migrant Workers’ Human Rights to the GATS, including the Annex on the Movement of Natural Persons.

1. International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families

The International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families adopted by General Assembly resolution 45/158 of 18 December 1990,\textsuperscript{72} is the seventh core UN human rights convention. It proposes standards for the protection of migrant workers’ human rights. It has entered into force on 1 July 2003 and counts 34 ratifications, mostly by developing countries (Turkey, Serbia-Montenegro and Bosnia-Herzegovina are the only ones in Europe to have ratified the Convention.

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Argentina, Philippines and Indonesia have as well, but Brazil has not). Typically, the receiving states, mostly industrialized countries, such as EU, US, Japan, Australia, Switzerland, Brazil all have not (yet) ratified the Convention.\textsuperscript{73}

The Convention on Migrant Workers’ Human Rights operates through a Committee on the Protection of the Rights of All Migrant Workers and their Families (CMW), which may hear individual communications from individuals that their rights have been violated. As an independent body of experts, it is believed that the CMW could become an effective tool for the protection of migrant workers’ human rights since the migrant workers usually bypass reporting violations to the government bodies of the receiving state for fear of losing their employment contract, their permit of stay or endangering their prospects for application for residency. However, 10 States have to agree, in accordance with Article 77 of the Convention, to vest the power to conduct such hearings to the CMW, which as of this date has not yet happened and is not very likely to happen soon.

The Convention on the Rights of Migrant Workers and their Families proposes model laws, which States ratifying the Convention may use to create the necessary rights and obligations in their laws and administrative procedures. As such, the Convention is neither binding nor does it have a dispute settlement system by which a non-compliant State could be held responsible for violation of migrant workers’ human rights.

The Convention does not establish a liberalization scheme, whereby Member States to the Convention commit to de-restrict the entry into and residency requirements for migrant workers. It only addresses the problems of “host governments not wanting to spend extra resources to provide fair and equal labour and social welfare benefits to migrants; and of the sending countries reluctantly asserting the protection of their nationals, fearing the loss of their share of invaluable migrant remittances provided by the international labour trade.”\textsuperscript{74}

The questions on the relationship of the Convention and the GATS will be the following: What is the Convention’s relationship to GATS commitments? Do these have to be interpreted in the light of the UN Convention? Would a country, which is expressly denying wage parity and labour conditions parity for foreign service providers in its GATS commitments be violating the GATS, if that country is also a member of the Convention on Migrant Workers’ Human Rights?

\textsuperscript{73} For more information on ratifications, see www.migrantsrights.org, last accessed 23 August 2006.

1.1. Migrant Workers and the Category of Temporary Service Providers

For WTO members parties to the MWC the question is whether their respective GATS mode 4 commitments have to respect the human rights the MWC prescribes. If the category of temporary service provider as put forth by GATS falls outside the scope of application of the MWC, because the MWC and the GATS target different groups of persons, the temporary moved natural persons under GATS does not enjoy the human rights a migrant worker would under the MWC. However, pursuant to Article 2.1 MWC the convention applies to all migrant workers whether they are documented or undocumented, ie illegally staying for work in the host country. The only precondition is that are “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

There are three questions to be asked always under the premisse that the WTO Member hosting a foreign temporary service provider is also a party to the MWC: firstly, if the category of temporary natural persons conflicts with certain rights of the MWC, does the GATS or the MWC prevail? This question arises with respect to the right to seek alternative employment in the host state (Articles 51 and 52 of the MWC). Under the GATS, the temporary moved natural person is only authorized to stay in the host country for the duration of the service. When the service is provided, the natural persons loses its right to stay. Thus, even if a natural person finds a new employment during his/her stay as a foreign service provider, he/she loses that status if employed by an alternative employer providing a service not covered by GATS or not in the service sector, ie exporting/importing goods. Thus, even if that natural person is still a migrant worker in the terms of the MWC, he/she no longer is a temporary moved natural person under the GATS.

The second question is whether a GATS Member which is also a MWC Member State would have to apply the MWC principle of equality of treatment as to wage and labour conditions (Articles 25-28) to temporary moved natural persons under GATS and thus inscribe this principle (together with all other MWC rights) in its Schedule of Mode 4 commitments.

The third issue relates to “migrant workers’ human rights”, the GATS will not recognize because these are rights that are preconditioned on a perma-

nency of stay, such as the right to family reunification and the right to stay. GATS only allows for temporary movement of natural persons. Whether this temporariness of stay as defined in GATS is in and of itself a human rights violation, will not be examined further here in more detail, but it suffices to say that the GATS may conflict here with the UN treaties according a natural person the right to stay.

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1.2. Art. XXVI GATS “Relationship with Other International Organizations concerned with Services”

For finding an answer to the question of whether migrant workers’ human rights do or do not have a special status in the GATS due to the fact that the GATS defines the status of temporary moved natural persons supplying services abroad, is one concerning the resolution of conflicts of law. General public international law has some rules to resolve overlaps in competences and law. As a first resort, such rules suggest to look for answers in the treaties themselves. The UN Convention on Migrant Workers Human Rights has with Article 81 a provision that establishes a hierarchy: If a bilateral or multilateral treaty affords migrant workers or their families “more favourable rights or freedoms” than those guaranteed by the Convention, the Convention will not “affect” those more favourable rights.\textsuperscript{76} Thus, Article 81 of the Convention implies that where another treaty conveys less favourable rights or freedoms, the ones guaranteed by the Convention shall take precedence to the effect that the provisions of the other treaty will have to be interpreted in the light of the Convention.

Article V “Relations with other International Organizations” of the WTO’s constitutional agreement\textsuperscript{77} and Article XXVI GATS, which mirrors Article V Marrakech Agreement, have such a conflict of laws provision. It is a prerogative of the General Council, the WTO’s “legislative” body, to decide upon which international agreement to link up to the GATS.

According to Article XXVI GATS, it is up to the WTO Member States convening at the General Council to decide which international treaties the GATS should cooperate with. Thus, the question is whether in the absence of any understanding on a cooperation between the WTO General Council and another international treaty, the WTO judiciary, that is, the Panels and the Appellate Body, may decide, on a case-by-case basis, whether and how to associate to the GATS to an international treaty dealing with services trade or, in the context of natural persons moving abroad, an international agreement on labour migration or on human rights of migrant workers. Since Art. XXVI GATS speaks of “cooperation and consultation with United Nations, its specialized agencies as well as with other intergovernmental organizations concerned with services”, it is questionable whether the WTO judiciary is to interpret GATS provisions consistently with the law of such organizations. Since the General Council is expressly empowered to establish the GATS’ external relations to other organizations, the GATS negotiators’ intent, one could assume, was to exclude the judiciary from drawing inspiration from “related” treaties.\textsuperscript{78}

\textsuperscript{76} Article 81(1)b International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families.

\textsuperscript{77} See Article V WTO Marrakech Agreement.

\textsuperscript{78} See Panizzon, Marion, The Status of Related Treaties in WTO Law, manuscript with the author, exposing the different types of association of non-WTO treaties to the WTO: incorporated treaties (Berne, Paris Convention in TRIPS), applicable law trea-
According to Art. XXVI GATS, a two-thirds majority of WTO Member States is required, to associate a non-WTO treaty to the GATS. Therefore, it is unlikely, that GATS Council will associate ILO Declarations or UN HR Conventions, such as the Convention on Migrant Workers’ Human Rights to GATS, when most WTO/GATS Members are neither party to such treaties or worse, have a record of human rights violations.

However, another approach would be to say that even when both parties to a WTO case are Members of the Convention on Migrant Workers’ Human Rights, one could argue, that neither the Panel nor the Appellate Body would have the power to link a treaty dealing with services to the GATS by way of effective, teleological or evolutionary interpretation to migrant workers’ human rights, the way the AB did link the GATT general exception of Article XX to the CBD, CITES and UNCLOS for establishing a broad interpretation of the GATT Article XX term of “natural resources” to encompass living natural resources, in *US-Shrimp*, is more likely to happen for treaties which form the institutional framework of international intergovernmental organizations that have been granted observer status to WTO bodies, such as legal instruments emanating from OECD, UNCTAD etc.⁷⁹

Since no migration-related international intergovernmental organization (UNHCR, International Organization on Migration (IOM), ILO) has either applied or been granted observer status at the WTO, the question of interpreting GATS mode 4 commitments and the GATS Annex on Natural Persons consistently with the UN Convention on Migrant Workers’ human rights, or an ILO or UNHCR declaration has not yet posed itself.

1.3. **Annex on Movement of Natural Persons Supplying Services under the Agreement**

As described above, Article XXVI GATS is too unspecific for associating the International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families to the WTO legal system. Thus, it is not through Article XXVI GATS that the Convention will become WTO applicable law.

Paragraph 4 of the Annex on Natural Persons allows WTO Member States to introduce and maintain border control measures and regulations on the en-

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try, stay, movement and residency of migrant workers within their borders. The plain meaning of paragraph 4 posits that governments remain in control of immigration laws.\textsuperscript{80}

The GATS thus seems to tolerate that within this domestic regulatory and policy space migrant workers’ human rights may be violated. However, in the last section of paragraph 4, the GATS limits governments exercise of such policy space to such measures that “are not applied in a manner to nullify and impair the benefits accruing to any Member under the terms of a specific commitment.”\textsuperscript{81} Thus, if the other WTO Member targeted by an immigration law of the host state, which is in violation of the UN Convention on Migrant Workers’ Human Rights, is also a Member to the UN Convention, the immigration law of the host state may be “nullifying and impairing a benefit accruing” to the sending WTO Member under paragraph 4 of the Annex on Natural Persons, and the sending WTO Member may have a case to bring before the WTO DSU based on the UN Convention.

1.4. Presumption Against Non-Violation Nullification and Impairment of GATS Commitment

It is maintained here that Membership to the UN Convention on Migrant Workers Human Rights functions as a presumption against having nullified and impaired the benefits another WTO Member could have expected to accrue from a mode 4 commitments. Thus, if a WTO Member would want to protect itself against a non-violation complaint, where another WTO Member would claim that too restrictive domestic immigration laws had nullified or impaired the benefit accruing to it under that first Member’s GATS specific commitments on mode 4, then that first Member could bring forward that it has ratified the International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families and that none of its immigration laws are in violation of human rights and thus too restrictive.

The ratification of the International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families by WTO Member States would thus function as a presumption of compliance with the minimum standard put forth in paragraph 4 of the GATS Annex on Natural Persons. By this bias, the International Convention on the Protection of The Rights of all Migrant Workers and Members of their Families would become GATS applicable law and enter into WTO jurisdiction through non-violation type complaints of Article XXIII paragraphs 2 and 3 in combination with Article 26 DSU. If a WTO Member has ratified the Convention, another WTO Member, of course, could still bring a claim on non-violation nullifica-

\textsuperscript{80} See Lavenex, Sandra, p. 28 for a brief discussion of paragraph 4 of the GATS Annex on Natural Persons.

\textsuperscript{81} GATS Annex on Movement of Natural Persons Supplying Services under the Agreement, paragraph 4.
tion and impairment against the first Member on the grounds that the domestic immigration laws, even if compliant with the Convention, are nevertheless too restrictive for the benefit of a specific commitment to be effectively realized. In such a situation however, the difficult burden of proof of nullification and impairment of a benefit, which exists in non-violation complaints would have to be brought by the claimant. If a WTO Member has ratified the Convention, the burden of proof is a difficult one for the complainant in a non-violation type case. The complainant would have to show the nullification and impairment of benefits (economic damage). In contrast, against the WTO Member State not having ratified the Convention, there is a presumption that its immigration laws nullify and impair the benefits of other Members to the effect that the respondent has the burden of showing that its immigration laws are not nullifying and impairing benefits (no economic damage) of the defendant WTO Member State.

Thus, it is maintained in the paper that the UN Convention on Migrant Workers, firstly, can be brought into the GATS scope of jurisdiction and secondly, that it functions similarly to the Codex Alimentarius and other international agreements in the SPS Agreement, namely, that it sets a minimal standards. The only difference is that since the UN Convention on Migrant Workers is not expressly mentioned in the wording of the Annex on Natural Persons, its attenuation of the burden of proof for the respondent applies only to non-violation type complaints as opposed to violation type complaints. Thus, the violations of migrant workers’ human rights in the GATS should be treated under this chapter of human rights violations constituting the basis of non-violation type complaints, as opposed to the one above of violation-type complaints.

7. Conclusions

Human rights violations affect the institutional legitimacy of the WTO and destabilize the legal security and predictability of its multilateral trading rules. Human rights fall outside the scope of the positive law of the WTO covered agreements. Respect for human rights in WTO law, if at all, has been traditionally implied as justifications for imposing restrictions on national treatment, MFN or other eliminations of trade barriers in the exceptions of Articles XX GATT and XIV GATS.

Firstly, the WTO should only prosecute the economic effect of human rights violations, unless of course, the violation amounts to one of jus cogens violation. It does not have the mandate nor should it aim at having one to pursue human rights violations as such, the latter being the domain of other IGOs, such as the UN Covenants and the ICJ.

Secondly, instead of expanding on the traditional substantive law linkage between trade and human rights through human rights-consistent interpretation of the GATT Art. XX and GATS Art. XIV exceptions, the paper uses the procedural actions of the WTO dispute settlement understanding (DSU) to address not so much the fact of violations itself (which a substantive legal
approach to trade and human rights would do), but rather the effects of human rights violations, on the negotiated levels of trade liberalization.

However, human rights, as a “non-trade” value, not only enhance the legitimacy of WTO governance.\textsuperscript{82} Human rights also have significant economic welfare enhancing effects, are important factors for the stability and growth of the multilateral trading system.\textsuperscript{83} Thus, the acquis of trade liberalization law and the WTO dispute settlement should be put to use to protect human rights. Since there is evidence that human rights promote growth through trade, trade rules should be used prosecute human rights violations that affect trade.

If human rights violations occur in the receiving State, there are two grounds of complaint based in GATS law for a sending State to bring a claim of human rights violations.

Firstly, the case is one of a violation of a human right universally binding on all States (jus cogens right of prohibition of torture, slavery and genocide). A jus cogens violation however, may only be prosecuted before the WTO DSU when it has targeted a services sector in which a WTO Member has made a specific commitment.

Secondly, it is claimed that if the violation becomes so serious as to prevent the other WTO Member States from benefiting of the market opening scheduled in the receiving country’s specific commitments, and the sending Member had relied on being able to draw a benefit from sending service suppliers abroad, the human rights violations in the receiving country may form the basis of a non-violation type complaint under Article XXIII GATS in combination with 26 DSU.

Thus, as the table below shows, the following entry points for redress of human rights violations relating to the GATS are possible in the WTO dispute settlement system.


Entry Points for Human Rights Considerations in GATS Jurisdiction

<table>
<thead>
<tr>
<th>Type of Complaint</th>
<th>Type of HR violated</th>
<th>Grounds of Complaint</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violation</td>
<td>Jus Cogens HR</td>
<td>GATS Article III and VI due process norms</td>
</tr>
<tr>
<td>Non-Violation</td>
<td>Non-jus cogens HR</td>
<td>HR-conditioned specific commitments</td>
</tr>
</tbody>
</table>

The human rights and trade-in-services linkages mostly play out at the level of GATS commitments. The yet unclarified legal nature of such commitments adds to the uncertainty that paves way for human rights violations in the context of the GATS.

Human rights may be read into WTO applicable law through a human rights-consistent interpretation of the positive law of the WTO covered agreements. The far the more promising entry point for human rights is a procedural one. Human rights will not always be so closely related to the subject matter of a WTO covered agreement to form WTO applicable law, therefore, human rights should enter WTO jurisdiction through the procedural means of violation and non-violation type complaints. Because not all human rights violations are stringent enough to be violations of jus cogens forming the basis of a violation-type complaints, for non-jus cogens violations, it will suffice to show that the human rights violation has nullified and impaired the benefit of trade (a tariff or services commitment) another WTO Member had relied on.

8. Bibliography

Disclaimer: Documents of International Organizations and Newspaper or other news-related sources are not listed in the bibliography but are only referenced in the footnotes


Bagwell, Kyle and Staiger, Robert, W., The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labour


