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# Introduction: GATS and Human Rights

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## HOT TOPICS IN GATS AND HUMAN RIGHTS

This panel was convened at 10:45 a.m., Thursday, March 25, by its moderator, James Thuo Gathii of Albany Law School, who introduced the panelists: Michael Santoro of Rutgers Business School; Jane Kelsey of University of Auckland; Marion Panizzon of the University of Bern; and Obijiofor Aginam of the United Nations University.\*

### INTRODUCTION

*By James Thuo Gathii*<sup>†</sup>

This panel on GATS and human rights will explore the intersection of the General Agreement on Trade in Services (GATS) on the one hand, and international human rights norms on the other. Four panelists will present a variety of perspectives and discuss examples in their areas of expertise. While the panelists will draw from a broad range of examples, they in particular will zero in on trade in health and financial services, as well as the effect of the different modes of supply, and in particular the migration of health professionals and guest workers from poor to rich countries. All the panelists will trace the impacts of these developments on human rights.

The first panelist will be Jane Kelsey, a professor of law from the University of Auckland. She is an expert on the political economy of GATS, and on neoliberal economic governance and globalization. She will be followed by Marion Panizzon, an assistant professor of international law from the University of Bern. Her expertise is on international law of economic migration, particularly as it relates to the GATS Agreement and bilateral migration agreements. Next comes Michael Santoro, a professor of business ethics and human rights at Rutgers Business School. His expertise is in business ethics and human rights particularly as they relate to business in China. Last but not least we have Dr. Obijiofor Aginam, Director of Studies on Policy and Institutional Frameworks, United Nations University, Tokyo, Japan. His expertise is on the intersection of GATS and public health. All four panelists have published widely, and we expect an interesting conversation on the panel.

All the speakers take it as a premise that a major consequence of GATS is that services that were once provided by governments are now being made available in the marketplace. However, they differ regarding whether that privatization is a good thing or not. For example, Professor Santoro's examination of hi-tech sector actors like Google will conclude that GATS provides a framework for promoting human rights in China. Jane Kelsey by contrast argues that GATS has had negative consequences for human rights and in fact linked liberalization in trade in financial services to the global financial crisis. She argues that services commitments in free trade agreements (FTAs), have in particular been a major source of these negative consequences.

While Jane Kelsey addresses the role of FTAs in financial services liberalization, Marion Panizzon focuses on bilateral labor migration agreements and their negative human rights consequences. Unlike Professor Kelsey, Professor Panizzon argues that there may be better consequences for human rights in using the multilateral process that GATS provides. Dr. Aginam is skeptical of using GATS, and focuses on how migration impacts the health sector by facilitating brain drain in developing countries. WHO recently passed a resolution aimed

\* Michael Santoro did not submit remarks for the *Proceedings*.

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at addressing some of these concerns, but the question remains, he argues, whether WTO regimes trump public health concerns as they seem to do most of the time.

What follows are the excellent brief papers upon which their remarks were drawn.

### **TRADE IN SERVICES AGREEMENTS, THE FINANCIAL CRISIS, AND HUMAN RIGHTS IMPLICATIONS**

*By Jane Kelsey\**

Much of the discussion on trade in services occurs at the micro-level of sectoral issues, like public services, labor mobility, or rights to water. In order to assess the broader human rights implications, it is necessary to step back and examine the systemic nature and effect of trade in services agreements as an international law regime.

Their origins date to the later 1970s when U.S. commercial interests, principally in the finance sector, sought to harness the GATT rules on trade in goods to remove national barriers to the international expansion of services markets and investments. The aim is to discipline the policy and regulatory choices of governments in a wide range of services, from finance, telecoms, and construction to education, environment, and entertainment. By creating binding and enforceable obligations that are premised on progressive liberalization and deregulation, they seek to embed a market-driven approach to domestic policy and regulation of services in perpetuity.

The subject matter of these agreements often overlaps with international human rights regimes and instruments, whose obligations frequently guide government policy in a different direction. To the extent that their objectives and rules conflict, the trade agreements are more potent because they are enforceable by economic sanctions.

The nexus between trade in services agreements and human rights is rarely perceived. There are two main reasons for this. First, “trade” is assumed (correctly, in my view) to relate to exchanges of goods. Extension of “trade” to services is an artificial construct that few even know exists.

Second, human rights discourse sees services as holistic and intrinsically social. Services appear in trade in services agreements as a barely recognizable commodity that is bought and sold in an international market through classical contracts that are devoid of social relations among the buyers, sellers, their communities, and society. The legal form of the service is abstracted from its social context, stripped of its social content, and designated by a three- to five-digit product classification.

Only a limited number of non-trade objectives, conceived as externalities, are recognized as legitimate reasons for governments to regulate in ways that would breach their obligations under the agreement. Even then a government must choose the response that has the least impact on international commercial transactions.

Trade in services agreements therefore take precedence over the range of competing legal obligations in constitutions and in international law, as well as diverse policy objectives.

The complex nature of the initial General Agreement on Trade in Services (GATS), let alone the rapidly expanding raft of FTAs, makes them very difficult for trade lawyers to understand, and almost impenetrable for human rights lawyers or domestic policy makers.

A classic illustration is health services. A government that wants to understand the domestic impacts of rules and commitments will find it very difficult. Health-related services are

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