and the injuries caused to foreign citizens by U.S. corporations, remain safely out of reach from suit.

Progressive protections against human rights abuses such as child labor may be elusive in a Supreme Court whose fidelities supposedly rest in centuries-old legislation. On the other hand, perhaps anchoring domestic jurisprudence to outdated conceptions of commercial behavior gives justices the space and security to evolve. Declaring actors such as international organizations and corporations liable under federal legislation is far less controversial when the implications of such declarations are inconsequential. Justices like Sotomayor may be playing the long-game here, waiting until the Supreme Court composition enables a more global-facing and equitable decision. Until then, however, the victims of fundamental human rights abuses will have to look elsewhere for justice.

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Infringement procedure—WTO law/GATS—national treatment—direct effect—EU Charter of Fundamental Rights

Case C-66/18. Judgment. *At* http://curia.europa.eu/juris/document/document.jsf?text=&docid=232082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1828103.
Court of Justice of the European Union, Grand Chamber, October 6, 2020.

On October 6, 2020, the Court of Justice of the European Union (CJEU) handed down its judgment in *Commission v. Hungary*.[1] It found that Hungary had violated the General Agreement on Trade in Services (GATS), as well as internal European Union law—specifically the EU Charter of Fundamental Rights (EU Charter).[2] The case arose out of Hungary's 2017 amendment to its higher education law. The amendment imposed two novel requirements on foreign universities operating in Hungary. It barred any non-EU university from operating unless its country of origin concluded a specific enabling treaty with Hungary. Moreover, it required that the foreign university actually provide educational services in its country of origin. While framed in general terms, it is hard to avoid the conclusion that the 2017 amendment was aimed at ending the operations of the Central European University (CEU) in Hungary.

Although presented as a trade dispute, the case was at its core a fundamental rights debate. The European Commission (Commission) and ultimately the CJEU used the GATS as a means to achieve a rule-of-law end. The CJEU held that the Commission has an unfettered prerogative to enforce member states' compliance with World Trade Organization (WTO) law. For the first time, the CJEU applied WTO law not just as a tool of interpretation, but, in at least one way, as purely internal EU law. Yet, the CJEU remained firm that other actions

[1] Case C-66/18, Commission v. Hungary, ECLI:EU:C:2020:792, Judgment (Ct. Just. EU Oct. 6, 2020).
[2] This case note focuses on the judgment's findings as to the GATS.

based directly on WTO law were inadmissible—such as actions to annul EU and member state acts and actions for damages. The judgment thus entailed two apparent contradictions: first, it was a trade dispute that was not at all about trade; and, second, the CJEU treated the GATS as part of the EU's internal law, and yet denied its direct effect in the EU member states.

Since its foundation in 1991, the CEU's model was based on two pillars: registration (accreditation) in the United States, and a campus in Hungary. The CEU's aim was to provide U.S.-style, high-quality education in Central Europe. Although the University extended its geographical focus over the years, it never aspired to have any substantial operations in the United States. The 2017 amendment seemed tailor-made to shut down the University in Hungary. The CEU had operated lawfully for nearly three decades. However, the 2017 amendment came after several years of political clashes between the Orbán government, the CEU, and its founder (George Soros). Its effect was to immediately force the CEU to shut its doors because it failed to meet either of the amendment's core formal requirements: providing educational services in its home jurisdiction, and operating under a treaty between the United States and Hungary. It is difficult to escape the conclusion that this facially neutral law targeted and discriminated against the CEU in particular. The European Commission intervened on the CEU's behalf, ultimately filing suit against Hungary at the CJEU.

Ideally, *Commission v. Hungary* would have been a human rights case. However, the EU Charter has a limping purview. It has no diagonal application,[3] meaning that it does not apply to the member states when they act in purely internal, domestic matters. The Charter's vector of application is akin to the pre-incorporation U.S. Bill of Rights, which, until the Fourteenth Amendment, applied to the federal government but not to the states. The Charter has, however, an "agency exception." It applies to member states when they are acting as the long-arm of the EU in "implementing Union law."[4] Given this constitutional architecture, EU institutions occasionally need to show legal finesse in deploying EU law to protect fundamental liberties *from* the member states. Helpfully, from the Commission's perspective, the CJEU's case law tends to conceive of the agency exception broadly. The Commission also employs various other creative methods to enhance the protection of fundamental rights in the EU.[5] Frequently, the Commission uses the "supportive by-effects" of apparently unconnected EU norms—protecting fundamental rights by means of rules that apparently had nothing to do with those rights. For example, it has relied on the economic freedoms protected by the EU internal market to protect constitutional liberties.[6]

The Commission's invocation of the GATS in *Commission v. Hungary* represents a novel form of finesse in using EU law to protect fundamental rights. Under the GATS regime,

[3] Csongor István Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation À L'Européenne*, 21 GER. L.J. 838 (2020); Csongor István Nagy, *The EU Bill of Rights' Diagonal Application to Member States: Comparative Perspectives of Europe's Human Rights Deficit*, *in* THE EU BILL OF RIGHTS' DIAGONAL APPLICATION TO MEMBER STATES 7 (Csongor István Nagy ed., 2018).

[4] Charter of Fundamental Rights of the European Union, Art. 51, Dec. 14, 2007, C 303/1.

[5] Al Capone was not convicted for what he should have been but for what he could be (tax fraud).

[6] *See* Case C-286/12, Commission v. Hungary, ECLI:EU:C:2012:687; Case C-78/18, Commission v. Hungary, ECLI:EU:C:2020:476; Csongor István Nagy, *Do European Union Member States Have to Respect Human Rights? The Application of the European Union's "Federal Bill of Rights" to Member States*, 27 IND. INT'L & COMP. L. REV. 1, 9 (2017); Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights*, *supra* note 3, at 844.

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WTO member states make specific commitments to open up markets on a service-by-service basis. Per its GATS Schedule, Hungary had committed to allow market access and national treatment (non-discrimination) to foreign universities. Evidently, these economic rights overlapped with academic freedom. The Commission thus attempted to invoke the GATS—a treaty binding upon the Union—to constrain Hungary's actions against the CEU.

At least at first glance, the attempt to apply the GATS appeared unlikely to succeed. The CJEU has consistently held that WTO law has no direct effect: individuals may not invoke it directly before national courts, against member states themselves or against the EU. There did not appear to be any inclination by the Court to revisit this case law. The CJEU has consistently rejected WTO law as a valid legal basis for invalidation of EU measures and actions for damages against the EU, with only narrow exceptions for measures incorporating WTO law and using WTO law as a means of interpretation.[7] The Court's reasons have been pragmatic: WTO law leaves ample room for internal political action,[8] and none of the major trading nations grant WTO law direct effect (which, by opening the door to domestic suits by individuals, could sharply constrain that flexibility).[9] Hence, as a political matter, if the EU unilaterally opened its internal legal space to WTO law, it would seriously handicap its own bargaining position in international trade disputes—a serious competitive disadvantage.[10]

Commission v. Hungary was a case of first impression in that the CJEU had never addressed the applicability of WTO law in a Commission versus member state scenario (paras. 77–78, 80).[11] The dispute presented a difficult constitutional dilemma for the CJEU. At least seemingly, the Court would have to choose between protecting academic freedom and the EU's commercial policy interests. The intellectual challenge was to have the cake and eat it too, that is, to establish an EU (federal) competence without exposing the EU and its member states to WTO-law-based claims by private economic actors.

The Court managed to walk the line between European economic interests and academic freedom by introducing a novel approach, which I call "confined invokability." The Court's starting-point was that the applicability of WTO law is not a binary question. In particular, its application to the EU itself is meaningfully different from the application of WTO law to the

[7] EU law is required to be interpreted, as far as possible, in a way that is in harmony with the EU's international obligations, including WTO law. Furthermore, if a EU law instrument is meant to implement a WTO law obligation, WTO law may be applicable.

[8] According to the CJEU, the provisions of GATT (but this tenet may be extrapolated to WTO law at large) are "characterized by the great flexibility" and are based on a system of reciprocal and mutually advantageous arrangements, Joined Cases 21-24/72, International Fruit Company, [1972] ECR 1219, para. 21, and are "not capable of conferring on citizens of the community rights which they can invoke before the courts," *id.*, para. 27, WTO law "accords considerable importance to negotiation between the parties," Case C-149/96, *Portugal v. Council*, [1999] ECR I–8395, para. 36.

[9] As to the United States, see 19 U.S. Code § 3512, as to Japan, see the Kyoto District Court's judgment of June 29, 1984, in *Endo v. Japan*, 530 Hanrei Taimuzu 265, affirmed by the Osaka High Court's judgment of November 25, 1986, 634 Hantei 186, and the Japanese Supreme Court judgment of February 6, 1990, 36 Shomu Geppo 2242.

[10] C-149/96 *Portugal v. Council*, *supra* note 8, paras. 43, 46. This approach was confirmed, among others, by the CJEU's recent judgment in *FIAMM & Fedom*, where the CJEU rejected a claim for damages resulting from the EU's breach of WTO law as practically inadmissible. Joined Cases C-120-121/06 P, FIAMM & Fedom, [2008] ECR I-06513, ECLI:EU:C:2008:476.

[11] The only ambiguous exception is Case C-61/94, *Commission v. Germany*, [1996] ECR I-03989, where the CJEU reviewed a German measure in the light of an agreement concluded within the framework of the GATT. The CJEU's judgment does not refer to this as precedential authority, though the opinion of AG Kokott, in paragraph 63, does contain such a reference.

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member states by the Commission. While the CJEU continued to be skeptical of any invocation of WTO law against the Union itself, as the master of European commercial policy, it viewed the Commission's own endeavors to make member states comply with WTO law as a completely separate strand (para. 92).[12]

The first scenario would impair the EU's bargaining position, but the latter actually strengthens it. International commerce is an exclusive EU competence and the EU can be held to account not merely for its own infractions but also for those of the member states.[13] Hence, it should have the power to compel member states to comply with these international obligations. Furthermore, WTO law may be applicable without having direct effect. The Commission may launch an infringement procedure (and compel a member state to amend its law or withdraw a measure) even in cases where the legal instrument has no direct effect. Using the above distinction, the CJEU held that the Commission could validly rely on the provisions of the GATS in order to "ensure that the Union does not incur any international liability in a situation in which there is a risk of a dispute being brought before the WTO" (para. 81). Accordingly, WTO law's "confined invokability" implies that although WTO law does not give rise to a private right of action, the Commission may compel member states to comply with it.

Hungary argued that the interpretation of WTO law is the exclusive remit of the WTO Dispute Settlement Body (DSB), and that the European procedure ousted this jurisdiction (paras. 58–67). The CJEU acknowledged the interpretive priority of the DSB but did not consider this to be a hurdle to applying WTO law (paras. 68–93). In spite of this acknowledgment, the CJEU did not meaningfully engage with the DSB's own case law. The judgment's single reference to an Appellate Body (AB) decision was made in respect of the interpretation of Hungary's Schedule of Specific Commitments in light of GATS Article XX(2) (paras. 107–08). At least arguably, the Court's tendency to go it alone confirmed Hungary's point on interpretive ouster.

The case turned on the invokability of GATS. This step enabled the CJEU not only to establish Hungary's violation of the GATS principle of national treatment but, by way of the EU Charter's agency exception, also to apply the Charter and establish the impairment of some of the fundamental liberties it guarantees.

The Court established Hungary's breach of GATS in three steps. First, the Court found that Hungary had committed to affording a degree of *market access* and unqualified *national treatment* for foreign universities. In the GATS, these two principles apply only if a member state assumes them in respect of the specific industry concerned and the given mode of supply. The interpretation of the country's Schedule of Specific Commitments is thus of central import. As to commercial presence in the higher education industry, the Court found that Hungary had committed to unlimited national treatment, and market access qualified only by a licensing requirement. Hungary had a colorable argument that the licensing limitation also applied to national treatment. According to GATS Article XX(2), limitations on market access may also qualify as national treatment, provided they would be otherwise inconsistent with the latter principle. However, the Court found no inherent conflict between the

[12] "*Without prejudice to the limits placed on the possibility of reliance upon WTO law in order to review the legality of acts of the EU institutions before the Courts of the European Union*") (emphasis added).

[13] Treaty on the Functioning of the European Union, Art. 207, Dec. 13, 2007, C 115/47.

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licensing requirement and national treatment, as it was "intended to cover all educational institutions, regardless of their origin, and therefore does not have any discriminatory element" (para. 113). Hence GATS Article XX(2) does not authorize interpreting the licensing restriction on market access as referring also to national treatment. In its view, Hungary had committed not to discriminate between national and foreign higher education service providers with a commercial presence in its territory.

Second, the CJEU established that the 2017 amendment was facially discriminatory and, as such, violated national treatment (GATS Article XVII). Both of the amendment's requirements resulted in "formally different treatment" between foreign and national service providers. The requirement of an international treaty, whose conclusion and content were entirely at Hungary's discretion (para. 120), and the requirement to have a campus in the state of origin both modified "the conditions of competition" and entailed "a competitive disadvantage" for foreign universities (paras. 118–21, 146–49).

Third, the CJEU found that the 2017 amendment was not justified by any general exception (GATS Article XIV). Hungary claimed that the 2017 amendment was necessary to maintain public order and to prevent deceptive practices, but failed to substantiate its claims. Even if Hungary's allegations could, theoretically, be regarded as valid, the Court found that they were not put forward in a satisfactorily specific and detailed manner to demonstrate "a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society" (paras. 131, 154). In any case, the Court determined that Hungary's measures would have failed the *chapeau* of Article XIV—it noted that the requirement of an international treaty was arbitrary, because Hungary had complete discretion to conclude or not to conclude such a treaty (para. 136), and, further, a less restrictive regulatory alternative was available because "the objective of preventing deceptive practices could be more effectively met by monitoring the activities of such institutions in Hungary" (para. 137).

The CJEU could have stopped at this point. Given that the 2017 amendment infringed the GATS, which it now found had direct (if confined) applicability, the amendment was to be disapplied. Nonetheless, the Court went further and applied the Charter. As noted above, the Charter applies to member states only if and when they implement EU law. The Court established that, on account of the applicability of a treaty the EU is party to, the matter came under the scope of EU law and, hence, it also came under the scope of the Charter. It accordingly established that Hungarian law unjustifiably restricted academic freedom, the freedom to found educational establishments and the freedom to conduct a business (paras. 239–42).[14]

* * * *

The Judgment in *Commission v. Hungary* transforms the legal status of WTO law within the EU. For the first time, the CJEU applied WTO law not as an interpretive tool but as a set of self-sustaining legal rules that give rise to independent obligations that bind the member states. Yet the Court stopped short of according direct effect to WTO law. In other words, it only expanded the EU's "federal powers," without taking on any additional legal exposure of its own. Under the CJEU's new model, described here as "confined invokability," the Commission may rely on WTO law to compel member state compliance via an infringement

[14] *See* EU Charter, *supra* note 4, Arts. 13, 14(3), 16.

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procedure, but WTO law cannot be invoked against EU institutions. It also still lacks direct effect, which means that it cannot be invoked before national courts.

The "confined invokability" of WTO law also has consequences for remedies. As it stands, the application of WTO law is limited to infringement procedures, which aim at declaratory and injunctive relief (and possibly sanctions in case of non-compliance with the CJEU's ruling). This may ultimately result in the quashing of a member state law. However, as with dispute resolution within the WTO, actions for damages arising out of a GATS violation remain inadmissible (against either the EU or the member states).

In the Court's view, the EU's internal enforcement power is justified by its external liability: international commerce is an exclusive EU competence and, hence, the EU can be held to account for the infringements of the member states (para. 84). The external power should have its mirror-image in the internal legal sphere. Nonetheless, as a corollary of this rationale, standing is strictly limited to the Commission (EU institutions remain untouchable) and claims for damages are admissible neither against the EU nor the member states. Ultimately, the Commission has virtually unfettered discretion to decide whether to launch an infringement procedure or not. As a result, the judgment considerably increases the EU's powers without exposing it to any liability.[15]

The pivot of the CJEU's judgment was the unprecedented application of the GATS as EU law. This was the first case in CJEU's history where the Court applied WTO law as part of EU law, without caveat. In doing so, it established an unlimited European enforcement power for the Commission (but solely for the Commission), while confirming longstanding case law ruling out actions for damages. The Commission may compel member states' compliance with WTO law, although the latter constitutes no private right of action.

Nonetheless, the case will very probably enter into history as a milestone in the European rule-of-law crisis. The Court further expanded the scope of EU law as a trigger for the application of the Charter. In that sense, it represents another example where the CJEU sanctioned the Commission's artful use of what I call the "supportive by-effects" of unrelated legal norms to foster the rule of law. In other words, it seems to be a case where the end determined the means. The GATS is not meant to protect fundamental rights but to further cross-border transactions in services; yet the Commission made use of the overlap between economic and academic freedom to protect the latter.

It has to be noted, however, that the judgment also showcases the limits of the legal protection that the "supportive by-effects" approach can provide. It appears that while the operation was successful, the patient died. Notwithstanding the Commission's significant victory in the courtroom, the CEU had to move most of its operations to Austria in the meantime, incurring heavy expenses. It is highly unlikely that it will seek to return to Hungary. Given WTO law's "confined invokability," the CEU's chances to win any financial recovery are minimal. Opening the door to actions for damages would very much impair the interests of the EU's commercial policy, and the CJEU is unlikely to go so far. At the same time, the lack of any retrospective remedy creates a perverse incentive, by effectively allowing member

[15] For more on how international organizations bring about constitutional transformation through judicial interpretation of their constituent instruments, see Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 290 (2013); see, classically, Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

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states to engage in "hit-and-run" violations by innovating novel requirements and hurdles on foreign academic (or other) service providers as needed on the expectation that *faits accomplis* cannot readily be undone.

Hungary argued that the Commission was driven by political motivations, and that the concern of international trade in the infringement procedure was fabricated. This argument was apparently reinforced by the Trump administration's failure to voice any concerns regarding Hungary's expulsion of the CEU—suggesting that the 2017 amendment generated no genuine risk of international liability for the EU and that the GATS was used as a pretext to protect fundamental rights. These circumstances could have been relevant given that, in WTO law, member states are the sole legal beneficiaries of trade concessions and they alone have standing to enforce them. From a cynical perspective, the Commission made up a hypothetical trade dispute and then solved it by bringing an infringement proceeding. The Court rejected this objection rather summarily as irrelevant: "the Commission enjoys a [full] discretion as to whether or not to commence such proceedings, which is not for review by the Court" (para. 56). Stated another way, law is law and, so long as legal claims are based on a plausible interpretation of legal texts, the Court can adjudicate them.

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Inter-American Court of Human Rights—right to a healthy environment—Indigenous rights

Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations, and Costs, Judgment. *At* https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.
Inter-American Court of Human Rights, February 6, 2020.

On February 6, 2020, the Inter-American Court of Human Rights (Court) declared in *Lhaka Honhat Association v. Argentina* that Argentina violated Indigenous groups' rights to communal property, a healthy environment, cultural identity, food, and water.[1] For the first time in a contentious case, the Court analyzed these rights autonomously based on Article 26 of the American Convention on Human Rights (ACHR)[2] and ordered specific restitution measures, including actions to provide access to adequate food and water, and the recovery of forest resources and Indigenous culture. The decision marks a significant milestone for protecting Indigenous peoples' rights and expanding the autonomous rights to a healthy environment, water, and food, which are now directly justiciable under the Inter-American human rights system.

The case concerned a request for recognition of land ownership by over ninety Indigenous communities that make up the Association of Indigenous Communities Lhaka Honhat (Association) in the Argentine province of Salta. Although the communities have occupied

[1] Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020) [hereinafter *Lhaka Honhat*].
[2] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS123 [hereinafter ACHR].