

National Policy Space in the WTO General Agreement on Trade in Services

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Propositions relating to the Dissertation

National Policy Space in the WTO General Agreement on Trade in Services:
with Special Reference to Public Health Services

by Nishara Mendis

1. WTO law is concerned with efficiency of the world trading system and the prosperity of its Members as a whole and assumes that the economic benefits of global trade would result in social benefits, while not actively assessing or directly pursuing those social benefits.
2. Like an artiste on a high wire, WTO Members ought to have the policy space to balance on either side, left and right, the different policies that on the one hand promote trade and entrepreneurship, and on the other hand protect non-trade social values. Putting a Member in a straight-jacket of rules without the required policy space risks the entire performance.
3. The GATS exists in the context of human beings, individually and collectively as societies, envisioning the role and form of services and the outcomes of their provision. The efforts which have been devoted to building and maintaining public health services, as social policy and as a vital part of the right to health, are an important example of how such visions for a better society have been realized.
4. The continuing relevance and societal value of public health services in both developed and developing countries and LDCs, has been highlighted in the Covid-19 crisis of 2020; and underscores the need for an analysis, interpretation and application of the provisions of the GATS which would allow for this value to be protected.
5. Interpretation of the GATS text is restricted within the methods encapsulated in the Vienna Convention on the Law of Treaties, which can result in a cage rather than giving wings for progressive interpretations.
6. Trade and human rights are two different languages which also need translation before a successful incorporation of human rights into GATS provisions through interpretation could be attempted; and bilingualism, meaning competency in both languages, is necessary for the interpretive exercise to be attempted with some measure of success.
7. The conceptual complexities of the intra-relationship between human rights concepts and the relationship between human rights and GATS provisions is no excuse for disregarding human rights such as the right to health in trade contexts.
8. The analysis of the flexibilities for policy space in the GATS reveals that they are apparently most often and best used by non-participation in opportunities that the GATS offers. Members have initiated few GATS disputes and have been cautious to take further liberalization steps, in terms of new commitments or clarifying disciplines not currently provided for in the GATS. The choice not to clarify or test the policy space and protections can also be seen in light of the estimation of the difficulty of interpreting the GATS and WTO Law in light of public services, non-trade objectives or a human rights-based approach.
9. Multilateral legal frameworks should not be Tolkienesque situations of *'One Ring to rule them all ... and in the darkness bind them'*, but rather, the creation of a cheerful voluntary community for the sharing of benefits, as declared in the 'Friends' theme song - *'I'll be there for you, cause you're there for me too'*.