

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

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## SUMMARY

The WTO GATS introduced a multilateral framework for international trade in services, and is part of the liberalization ethos that has influenced global economic, social and trade policy relating to services for the past quarter of a century. The purpose of this study is to make an objective appraisal into the apparent policy space and flexibilities in the GATS, from the perspective of both those more concerned with increasing the ease with which international trade in services is carried out and those concerned about the protection of core societal values.

The GATS exists in the context of human beings, individually and collectively as societies, envisioning the role and form of services and shaping the outcomes of their provision. The efforts which have been devoted to building and maintaining public health services which are 'universal', 'single payer' and free at the point of delivery, as social policy and as a vital part of the right to health, an important example of how such visions for a better society have been realized. Country snapshots are used in this study to emphasize the differing roots and growth of public health systems and the practical importance to those societies in terms of eradicating disease, providing basic health and a better standard of life. There are also references made to several important cases in domestic jurisdictions which compelled governments to improve their national health policy. This study of the GATS is with special reference to national policy space for the provision of public health services, considering whether such services could be unduly constrained by the trade liberalization obligations. It is difficult to assess and measure the overall constraint that the WTO approach to liberalization of services has had on public health services policy, yet it is important to discuss the GATS in light of public health services and vice versa.

The central question of this thesis is 'how much policy space for the protection of non-trade core societal values is available for a WTO Member under the GATS'? This assessment is done in the light of the State obligation in international law, and also in certain circumstances, according to national law and policy, to fulfill, protect and promote the right to health. The assumption is that there is governmental responsibility, which also aligns with standards of international human rights law, to retain and use as much policy space as possible in order to carry out policies supporting citizens' rights and benefits, with special reference to the chosen area of public health services. The 'red line' running through this study is the position that national decision-makers must be free to make the decisions that it is their duty to make, such as defending public health services. This study has implications beyond the GATS to the consideration of a socio-economic policy framework for supporting public health services in general.

In order to ascertain the extent of policy space in the GATS, one must grapple with the possibilities and limitations of treaty interpretation in situations where there are competing and conflicting interests. Thus, the methodology used is primarily treaty interpretation using the Vienna Convention on the Law of Treaties of 1969 (VCLT) and supplemented by the rulings of panels and the Appellate Body in WTO dispute settlement. The Chapters of this study assess the debates surrounding the rights and obligations of WTO Members through a combination of both the classic VCLT approach which is a codification of customary international law on treaty interpretation and the inclusion of human rights approaches, noting however, that the extent of the weight that can be given to other international rules, principles or norms within the interpretive

exercise, is limited. There is also a limitation in that there are very few GATS decisions in comparison with GATT jurisprudence; and no dispute reports that shed light on some of the most contentious terms, phrases and issues. It is hoped that this inquiry nevertheless leads to a better understanding of the content of the obligations of the specific provisions of the GATS chosen for analysis.

Throughout this study, there are inclusions on the relevance of the right to health as provided for in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is the key international human rights law provision on the right to health, the implementation of which also emphasizes the importance of public health services. The two regimes of trade and human rights have been identified at times as two distinct legal languages, therefore this study considers the application of the concept of ‘bilingualism’ and thus, of ‘language translation’, in addition to legal interpretation, with the hope that this bring a fresh perspective to the debates and controversies in the area of services, particularly with regard to the issue of the protection of public health services.

In order to answer the research question, an analysis was carried out of specific provisions of the GATS which are most often referred to as the ones allowing for policy space. The exemptions, the general and specific obligations, as well as the exceptions and special provisions are assessed from the angle of the available flexibilities for national policy space. The provisions which discussed in depth in this study include Article 1:3 of the GATS, which is sometimes referred to as a ‘public services exemption’ but which uses the phrase “services supplied in the exercise of governmental authority”; and Article XIV of the GATS, which is the general exceptions provision and includes “public morals” and “life or health” as policy objectives on which an exception can be argued. The discussion is not limited to these provisions but also included an analysis of provisions on non-discrimination, the scheduling of commitments and domestic regulation and their implication for national policy space. The study also critically discusses the extent of ‘extra’ policy space that may be available to developing countries and least developed countries in their implementation of the GATS while also developing their public health services using a right to health-based approach. There are also several as in the GATS that are still negotiating mandates where the processes of formulating further disciplines for trade in services but which have not generated the expected results. The negotiating mandates for subsidies under Article XV, government procurement under Article XIII and domestic regulation under Article VI:4 of the GATS, which may have far reaching implications for policy autonomy and the protection of public services, are referred to in this study.

This study comprises six chapters, with the Introduction to the study as Chapter 1 and the overall Conclusions as Chapter 7. The analysis is contained in Chapters 2 to 6.

Chapter 2 introduces the background to the research question, underlying concepts and the methodology, setting the scene for the legal analysis of the provisions of the GATS that is dealt with in the chapters that follow. The basic underlying concepts of the rule of law, liberalization, democratic participation in policy and law-making and human development, are discussed on the premise that these should be recognized as part of the larger picture behind the focused area of trade in services in the foreground. The second part of Chapter 2 deals with the opportunities and limitations of the standard approach to interpretation in the WTO context, based on the General Rule and supplementary rules of the Vienna Convention of the Law of Treaties, which is analyzed together with the

suggestions for a 'human rights approach' to the interpretation of WTO law. It is recognized that there is a lack of reference to human rights in WTO law or dispute settlement reports and the entryways for such attempts (using the VCLT) are not only difficult but may not be practically used by Members or accepted by the panels or Appellate Body. Bringing human rights into the equation has its own set of challenges. A broad theoretical approach based on language translation theory is suggested as a possible method of bridging the gap between the dichotomies of the trade and human rights regimes, which may not be able to be reconciled through the more conservative interpretative methods. It is also argued that before a successful interpretation of human rights into GATS provisions could be attempted, 'bilingualism', meaning competency in both trade and human rights languages, is necessary for the interpretive exercise to be attempted with some measure of success. The third part of Chapter 2 presents the international human rights framework for the right to health, specifically Article 12 of the International Covenant on Economic, Social and Cultural Rights (1977) and its interpretation through the General Comment No. 14 (2000). This discussion of the understanding of the right to health and its relationship with State responsibilities, including the delivery of public health services, flows into the chapters that follow.

Chapter 3 deals with the scope of the GATS, with particular focus on what is often referred to as the 'public services exemption' in Article I of the GATS. A Member has the possibility of using the exemption from the scope of the GATS in Article I:3(b) and (c) for exempting "services supplied in the exercise of governmental authority" - which suggests public services. However, the definition is also tied to the interpretation that the dispute settlement bodies may give to the concepts of "commercial" and "in competition with". Thus, even if a 'ring-fence' for public services exists in Article I of the GATS, there are contrary views on the breadth or the scope of application and it is not a sufficient protection in terms of being a clear exemption. The broader background of the debates on the protection of public services, particularly discussing the fears that have been expressed concerning privatization, corporatization and commercialization of public health services, also discussed in this Chapter. Since State subsidies of primary importance in the context of protecting public services, a part of this chapter focuses on the state of affairs with regard to rules on subsidies for services. The scope of 'measures' that come under the GATS, the unclear definition for 'trade in services', the GATS approach to monopolies and government procurement are also discussed in this Chapter.

Chapter 4 is structured in three main parts. The first part of Chapter 4 analyzed the differences in non-discrimination as a value in trade and human rights. Non-discrimination among trading partners in WTO law is concerned with efficiency and prosperity of the world trading system as a whole; but in human rights law, non-discrimination is concerned with whether individual human beings are protected from negative discrimination, and receive special treatment or positive action if that is necessary in order to redress social injustice. The dissimilarities between these two concepts on non-discrimination are usually underplayed in the trade law context, and thus attention is drawn to this before moving on to the second part of the Chapter; the process of the scheduling of commitments. This is one of the areas where negotiating power of Members can play a part, but at the same time determined Members can retain their policy space by not making commitments or by including limitations which specifically protect their public health services by avoiding national treatment and market access obligations for public funded health services. Chapter 4 also looked at Article II:2 and the Annex on Article II Exemptions, as well as other MFN Exemptions (Article II:3) and

Exceptions (Articles V, VII), concluding that while they may provide more space for Members than initially assumed, that they once again of limited usefulness unless Members have had and continue to have the legal expertise to expand their trade opportunities and policy space. The the obligations regarding transparency and confidentiality in Article III and IIIbis and the Most Favoured Nation Treatment Principle of Article II are also briefly discussed. The third part of the Chapter is on the area that is said to be more flexible and which is also referred to as the special feature of GATS; the Scheduling of Commitments by Members for either/both national treatment (Article XVII) and market access (Article XVI) obligations. A brief discussion of Article VI of the GATS, on domestic regulation, is also part of the third part of Chapter 4. The impact of GATS on domestic regulation is often referred to as the a where GATS could be most intrusive with regard to the domestic policy space.

Even in the situation where specific commitments have been undertaken by Members, there is recourse to a final safety net in the form of the general exceptions under Article XIV of the GATS (and probably useful to a lesser extent, Article XIVbis Security Exceptions). The exceptions are analyzed in Chapter 5. Of the available exceptions, the public morals exception in Article XIV(a) of the GATS and the human life and health exception in Article XIV(b) of the GATS are the most obvious points of entry for societal values, human rights and the right to health. Article XIV(c) also has potential to be used parallel to the other paragraphs. Yet most disputes are ultimately decided by the analysis of the nexus and the chapeau, and the interests in the exceptions are given deference but treated superficially in terms of analysis. This discussion in this Chapter takes into account the limitations of the VCLT, the realities of international relations and the challenges of incorporating other international rules, norms and principles such as human rights, particularly the right to health.

Chapter 6 looks at whether there is actually more leeway for developing country Members and least developed country (LDC) Members in the GATS framework, analyzing the relevant provisions as well as the definitions for developing country and least developed country within the WTO context, including the issue of self-definition. This is connected to the special interest such countries may have for developing their existing public health services capacity and implementing their 'progressive realization' steps relating to the right to health. The chapter noted that the WTO system does not have a gradation-type classification for developing countries that accurately traces the levels of development achieved and that the even the LDC definition which is used has flaws. The 'extra space' for developing countries and LDCs requires inter-State cooperation for implementation. It is argued that there should be improved policy space for public services protection for all Members and additional special assistance for the Members that most need it, and this would probably need more work and reform of some of the ways the WTO works with its Members and how their Members cooperate with each other in implementing the goals of the Preamble to the GATS and Article IV of the GATS.

The outcome of this research is that there are entryways for societal values and national policy space to implement them in the GATS, but that it is something to argue and struggle for and the support for it is not sufficiently strong. In terms of what Members could undertake, there could be a combination of methods: using MFN exemptions, refraining making commitments in sensitive sectors or scheduling very clear limitations and using the exceptions if commitments have been made – could retain the national policy space for measures taken in light of human development and right to health

objectives. Clarifications on the scope and definitions of the above-mentioned balancing mechanisms and safety nets can be done with the participation of the Members of the WTO. Authoritative interpretations and amendments to the GATS are theoretically possible, as would be a WTO Ministerial Declaration recognizing the role of public health services for the right to health and right to development (which would be preferable to terms such as “for health outcomes” or “public health” and “development”), which could be the basis for future Amendments to the GATS exempting public health services and protecting domestic policy objectives for universal service obligations in health. Members have been cautious in taking further services liberalization steps, in terms of GATS commitments or negotiations, however, there are alternatives available in the forms of services-related agreements as bilateral, plurilateral or preferential trade agreements, and attention should shift to the analysis of these agreements

All systems need to evolve and adapt in order to survive in changing circumstances; these include practical advances in technology, socio-political changes, conceptual advances in other regimes of international law, particularly human rights law; and more recently, the need for national policy protective of domestic public services capacity in pandemic situations. In the practical scenario, any hopes that progressive change could also occur in the WTO system has faced an additional blow with the crisis of the blocking of re-appointments and new appointments of Appellate Body. This means that the interpretation of the rules may have to depend in the future on diplomatic negotiations, consultations and perhaps mutually agreed solutions assisted by panel findings or based on arbitration or other regional or plurilateral mechanisms, in order to resolve trade disputes in the absence of an Appellate Body. It is to be hoped that the Members can come to an agreement on reforms and practical measures to respond to this situation, but this would be dependent on what developments or regressions in international relations and the international rule of law would occur during 2020.

This study has been in a way a tribute to the continuing relevance and value of the role of public health services, as much as it has been an analysis of the provisions of the GATS which may allow for this value to be protected. The conclusions of this research will be of relevance for those interested in WTO law and the GATS as well as those interested in the role of public health services in achieving higher levels of implementation of the right to health. This discussion of the policy space within the GATS, is also placed in the broader context of protection of socio-economic values and rights in the current framework of international economic law, and hopes to contribute to that wider debate.