

Viewpoint

The public health implications of world trade negotiations on the general agreement on trade in services and public services

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Trade ministries from the World Trade Organization's (WTO's) 144 member states are presently deciding which public services to open to foreign competition under the complex liberalisation rules of the general agreement on trade in services (GATS). A frequent criticism of the WTO system is that it reduces national autonomy over public policy. However, respect for national sovereignty is asserted in the GATS treaty. Here, we examine claims made by the WTO and others that GATS exempts public services and does not require their privatisation. We discuss trade treaty processes that can subject public services to commercial rules, the treaty's flexibility with respect to national autonomy, and the effect of GATS in situations in which national autonomy is not protected. We conclude that national autonomy over health policy is not preserved under GATS, and that accordingly, there is a role for international standards that protect public services from the adverse effect of trade and market forces.

Trade ministries from the World Trade Organization's (WTO's) 144 member states are presently deciding which public services they proposed to open to foreign competition under the complex liberalisation rules of the general agreement on trade in services (GATS). The largely secret negotiations, which started 2 years ago, have fuelled the continuing controversy about the introduction of market forces in health, social services, and public utilities such as water.^{1,2} In an attempt to answer critics' complaints that WTO negotiations erode national control over crucial services and deny citizens a democratic voice in major decisions about their welfare,³ regional and state governments have published summaries and mounted public consultation exercises.⁴⁻⁶

One of the most common criticisms of the WTO system is that it reduces the ability of governments to protect the welfare of their citizens because of the ways in which the WTO's trade treaty regime intrudes into public policy and governance. However, respect for national sovereignty is asserted in the preface to the GATS treaty in the form of a right to regulate.^{7,8} Various provisions within the body of the treaty give substance to this right. First, the treaty's scope is defined so as to exclude from coverage "services supplied in the exercise of governmental authority".⁷ This provision has been interpreted both by the UK Department of Trade and Industry⁹ and by WTO staff as exclusion of public services.¹⁰ Second, the treaty avoids provisions requiring privatisation of public services. Third, the treaty, while allowing member states to choose what to liberalise, provides them with various opt-outs and exemptions from GATS so as to protect national policy objectives. This flexibility, according to the WTO secretariat, allows governments "to determine the level of obligations they will assume".⁸

Here, we examine claims made by the WTO and others that GATS neither applies to public services nor requires their privatisation, and then we discuss trade treaty

processes that can subject public services to commercial rules, the treaty's flexibility with respect to national autonomy, and GATS provisions in situations in which national autonomy is not protected. A background to the WTO is shown in the panel.

Are public services excluded from trade agreements?

National autonomy is affected by the scope of GATS. Article 1.3 states that "services supplied in the exercise of government authority" are exempt from the treaty, and it further defines government authority services as those that are neither commercial nor supplied in competition with other providers. But the treaty does not define commercial or competition, and it has frequently been pointed out that the exclusion could be ineffective because few public services are entirely free from commercial arrangements or competition.¹²

The UK and several other WTO members originally maintained that article 1.3 excluded public services,¹³ but they are now seeking legal clarification.⁶ The WTO has also changed its position by stating that exemption of public services is based on member choice not the scope of the treaty: "WTO members can choose not to make commitments in any sector where this ambiguity could compromise a country's reliance on this exclusion".⁶ The European Commission has stated that choice can be exercised to protect national health services, and the UK Government—like Canada and New Zealand—has said it does not intend to take commitments "that could lead to the continued provision of public services via the NHS being called into question".⁶ We return to this claim later in the article.

Does GATS require privatisation?

Privatisation is one of the most hotly contested issues to emerge in the debate about GATS and national autonomy. Defenders of WTO agreements have repeatedly rejected claims that GATS requires privatisation of public services.⁸ However, a condition of membership of the WTO is that market forces operate more widely after accession. For example, eastern bloc countries' accession to the WTO entails a programme of privatisation under accession agreements, and WTO members must be kept informed about the process of privatisation.

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Furthermore, the WTO's trade policy review mechanism or peer-group assessments, undertaken jointly by member governments and the WTO secretariat, show that structural reform and privatisation rates are monitored after accession.¹⁴⁻¹⁶

Although no GATS provisions address the issue of ownership per se, there are several restrictions on public monopolies such as health and education services.¹⁷ Article 16 of GATS makes clear that public monopolies are inconsistent with market access commitments. A full market access commitment indirectly obliges a WTO member to dismantle special or exclusive rights granted in its country to any provider of health services for the supply of these services.

Moreover, the complicated and cross-cutting nature of GATS makes it difficult to predict its capacity to force privatisation. Privatisation takes several forms ranging from contracting out, through management contracts, to full divestiture of new assets under 30-year concession agreements, sometimes known as public-private partnerships (PPPs). The effect of the GATS obligations on this range of policies is not well researched, even though PPPs are increasingly an important component of health-reform efforts worldwide.

How WTO rules interact with other trade laws

The right of governments to control domestic policy—their right to regulate—is modified by the complex interaction between WTO rules and case law about what constitutes trade and therefore what is subject to trade rules. The European Court of Justice is an example of a regional trade court at which this issue is decided.

Background to the WTO

The WTO is an international organisation that promotes free trade. Created in 1995, it evolved out of the general agreement on tariffs and trade (GATT), extending trade policy from goods to service industries through the general agreement on trade in services (GATS) treaty. Unlike the GATT, the WTO is backed by a dispute settlement mechanism, or trade court, the findings of which are mandatory on member governments. Through this court the WTO acts as an arbiter when members' non-trade objectives conflict with their free trade undertakings.¹¹

GATS contains a set of rules for government conduct that apply to all measures affecting trade, whether "law, regulation, rule, procedure, decision, administrative action, or any other form".⁷ The treaty also gives the WTO a mandate to develop rules that will allow countries to challenge the way governments regulate services, and enable WTO dispute panels to decide when restrictions on private enterprise are necessary.

GATS consists of general and specific obligations. General obligations are assumed as soon as a country joins the WTO. Specific obligations arise when a WTO member decides to liberalise, or open to the market, a particular service industry. Market openings are used as bargaining chips by members during successive rounds of trade talks when requests for and offers of liberalisation are exchanged. The promises are listed in binding or legally enforceable schedules that are intended to be virtually irreversible.

At the last WTO ministerial conference in Doha, November, 2001, all member states were required, by June 30, 2002, to request the services they would like to see other countries open to markets and to respond to requests with market opening offers by March 31, 2003. Final agreement should be reached in January, 2005, when binding promises to open public services to market forces are set out in schedules of market access commitments.

The European Court of Justice determines which activities are covered by European competition and trade rules, or open to competition, and which are reserved to the state or state-owned enterprises as "true welfare state activity".¹⁸ Member governments' policy autonomy is restricted to welfare state activity. The European Court has been continually moving the dividing line between economic and social activities and therefore between what is subject to the European Community's (EC's) rules of competition, and potentially to WTO rules, and what is controlled by national governments. For example, the court's rulings on the free movement of patients forced European member states to amend national policy with respect to paying for patients seeking treatment abroad, including treatment by private providers.¹⁹ In August, 2002, a tribunal of the UK Competition Commission interpreted European competition rules as covering services contracted out by a health and social care trust, under public ownership and control.²⁰

Exemptions do not fully protect EC member states

The WTO says the right of individual members to regulate is protected by the voluntary character of GATS requirements and by a set of exemptions or opt-outs that they can invoke. Thus members are described as being free to decide for themselves which services are reserved for the state or state-owned enterprises and which they wish to open to competition.⁶ When services are opened to competition there is a general non-discretionary obligation to open competition to the whole WTO membership. But when a country joins the WTO it can also enter exemptions that give special protection to regional agreements such as the EC.⁷ However, not all decisions taken within the EC are exempt from WTO rules and some affect governments' rights.

Exemptions allow countries to pursue liberalisation on a state-by-state basis (bilaterally) or continue to enjoy benefits through membership of regional integration agreements without having to extend concessions to all WTO members. European court rulings that compel member countries to introduce competition to public services have wider importance because, according to the WTO, GATS rules are triggered when services are offered on a competitive basis. By bringing public services under EC commercial rules, European Court of Justice judgments could submit national health policies to GATS rules even though national trade negotiators did not choose to submit them.

Do limits on liberalisation commitments protect national autonomy?

WTO members can limit the effects of GATS on their autonomy by reserving certain policy areas for national rather than international control when they voluntarily liberalise service industries. Liberalisation promises consist of commitments to open services to markets (market access commitments) and to remove barriers to foreign suppliers (national treatment commitments). National treatment is a fundamental free-trade principle that outlaws discrimination against foreign suppliers when liberalisation promises are made. It is expressed as a prohibition on treatment of like foreign suppliers differently from domestic ones. National treatment and market access principles are specific GATS obligations that only apply to industries in which WTO members choose to make liberalisation commitments. WTO members can restrict the effects of both principles by attaching limitations.

Limitations can take the form of protection for public services. For example, governments wishing to restrict public funding to national health service (NHS) providers can do so under national treatment limitations. Alternatively, horizontal limitations can be entered that apply across-the-board, that is, to all services. On behalf of its members, the EC has entered a horizontal market access limitation intended to protect public utilities in liberalised industries.

These complex rules are themselves subject to legal interpretation. For example, it is not clear that the EC horizontal limitation protects publicly funded health care that is not also publicly provided. If it does not, the UK's 1995 commitment to liberalise hospital services under WTO rules has today different implications from those originally intended, for in 1995, almost all NHS-funded hospital care was also publicly provided, whereas the government has since introduced much greater private-sector provision. However, unlike other EC members, the UK did not limit its free trade promise with a national treatment limitation that restricts the ability of foreign health care investors to compete for publicly funded health services.⁴ As a result, the UK could now find it is unable to restrict private-sector access to public funds.

The WTO has authority to decide what constitutes trade discrimination

WTO trade courts have power to interpret the national treatment principle and therefore also the power to impose on member states their own version of free trade. Public policies that courts deem discriminatory between foreign and domestic producers are so-called disguised barriers to trade, and can be ruled invalid unless they can be justified within WTO rules by the responsible government.²¹ Because of this interpretative power, it is usually not clear in advance what limitations on the non-discrimination rule governments will need to protect their autonomy, and limitations cannot be inserted retrospectively. The problem arises because governments cannot second-guess how WTO disputes panels will define what are like services and like providers.

A France/Canada WTO court case about a ban on asbestos imports shows the unexpected effect of the national treatment rule on public health policy. In 1998, Canada used the WTO non-discrimination rule to challenge a French ban on the import and use of fibre products containing the known carcinogen asbestos. The Canadian government argued that the ban was invalid because asbestos and non-asbestos products were identical (or like in WTO language) so that a ban on one but not the other constituted trade protectionism.²² Although a WTO dispute panel found that asbestos posed a substantial health risk and that the ban was therefore proportional to the risk, it agreed with the Canadian argument that the panel could not distinguish between products in terms of their degree of toxic effect,²³ although the decision was overturned on appeal. It would have been difficult for France to have anticipated judgments of this type by entering limitations in advance.

The national treatment principle has another potential effect on domestic policy because of its application in cases in which the conditions of competition are affected irrespective of whether treatment is formally identical, that is to say, irrespective of whether like producers and products are treated in the same way.⁷ The scope of this provision remains unclear but its effect is potentially far-reaching. For example, a national regulation such as a high-quality standard for medical professionals could be deemed to affect the conditions of competition if domestic suppliers found it easier to comply with than foreign suppliers.

The WTO's use of dispute settlement to judge the necessity of public policies

The most substantial power vested in the WTO when it was formed in 1994 was a dispute settlement mechanism, the findings of which are mandatory on member states. The WTO's forerunner, the general agreement on tariffs and trade (GATT), relied on consensus in dispute settlement. The necessity test is one of the key mechanisms available to WTO courts of the dispute settlement mechanism. The test allows the WTO to determine when a domestic policy that is discriminatory—as a WTO panel ruled in the French asbestos ban above—is nevertheless necessary because it furthers a legitimate governmental objective. Only discriminatory policies that are also necessary for the pursuit of accepted non-trade objectives like public health are permissible. In effect, necessity tests make member states justify the reasonableness of domestic policies. The WTO has defined the necessity test as the mechanism whereby governments' right to regulate is squared with their duty to liberalise.²¹

GATS includes provision for a necessity test on the basis of the earlier article 20 of GATT. GATT article 20 can be used by WTO disputes panels to weigh the benefits of a public health or environmental protection measure against the costs of that measure to industry. The WTO can throw out policies that it deems too costly to industry.²⁴ The WTO has stated in a joint publication with the WHO that some of the 20 or so multilateral environmental agreements containing trade provisions are in potential conflict with WTO principles of non-discrimination and could be subject to a trade court test of necessity.²²

A necessity test was used to overturn a public health measure in 1990, when a decision by Thailand's government to ban the import of foreign cigarettes for public-health reasons was ruled by the WTO to be unnecessary.²² In response to this judgment the WHO introduced, in 1996, the tobacco control framework, but last year, in a joint publication with the WTO, it could not assert unequivocally that the framework would pass a WTO necessity test.²² In January, 2003, a revised draft framework was published that stopped short of an outright ban on tobacco advertising. The draft, which deletes earlier provisions to phase out cross-border advertising and is described by ASH UK (Action on Smoking and Health UK) as a "feeble response to the world's worst public health problem", has been represented as a sop to the US tobacco industry.²⁵ However, earlier collaboration between the WHO and WTO on the issue suggests that the WTO necessity test might also have been a formative influence.

Necessity as a means of imposing international standards

GATS necessity tests are widely thought to lack the potency of their forerunners in GATT.²⁴ However, GATS includes a commitment to negotiate new necessity test provisions that would give WTO courts more power. These negotiations could reduce governmental discretion under GATS by introducing international standards for the organisation of service industries. Standards of the Codex Alimentarius on food safety are already the basis of rulings under the necessity test of the WTO's sanitary and phytosanitary agreement.¹¹ In 1996, Canada and the USA jointly challenged an EC import ban on hormone-fed beef on the grounds that the ban was not justified by international standards of food safety. An appellate body of the WTO eventually ruled that the EC ban was neither lent support by international standards nor justified by "sufficient scientific evidence".²⁶ EC countries are therefore continuing to violate WTO rules by banning hormone-fed beef.

This last judgment, which has been described as a watershed in WTO affairs,²⁷ shows how a necessity test can be used to judge the reasonableness of government action not only when trade discrimination takes place but also when an international standard exists. Consideration is being given to the adoption under GATS of a sanitary and phytosanitary type necessity test that would allow trade courts to enforce such standards.²¹

Who sets standards is clearly vital. For example, the Codex is a standard setting agency that has been criticised for over-reliance on food-industry personnel and funding.³ But there is also much uncertainty about the purpose of any standard that might be applied to traditional public service provision under WTO agreements. The WTO's sole mandate is trade liberalisation, but neither liberalisation nor the trade obstacles removed by it are defined in WTO texts.²⁸ In some WTO agreements, liberalisation means non-discrimination among trading partners; in others it means promotion of market solutions to service provision.

Conclusion

There is compelling evidence to show that GATS and the WTO involve national governments in trading some of their sovereignty for the putative economic gains of liberalisation. In the process, governments lose rights to regulate and to protect non-economic values and the principles that shape provision of public services. The claim that governments can completely protect the services they want to is undermined by the cross-cutting pressures of GATS and uncertainty about the exemptions, limitations, and discretion the treaty permits. The trade-off between policy autonomy and economic growth raises urgent public health and public policy questions.

The first question concerns the relative weight given to trade and non-trade objectives when policy control is ceded to the WTO. The example of the WTO's agreement on trade-related aspects of intellectual property rights (TRIPS) provides disturbing evidence. Despite agreement at Doha to reform the treaty, TRIPS continues to be a tool available to those wishing to curtail the discretion of governments pursuing access to medicines for all.^{29,30}

The second question concerns how to establish autonomous, enforceable public health standards separate from the standards of trade law. But where should these standards be set?

The need for global standards set by a dedicated health body grows more pressing. WHO has an unrivalled reputation in setting of global standards. It remains the most credible international health standard setter, which rests in part on its governance system, of near universal coverage. Accordingly, the WHO should take the lead in the main issues confronting policymakers. The first concerns data on the outcomes of trade liberalisation, including the privatisation of essential services, on equity in health and human rights. Second is the need for an international body with a public health mandate that is a counterweight to the WTO's trade mandate. Finally, with a real shift to internationalism in health, there is a need to consider powers of enforcement for the WHO.

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