Does the GATS undermine democratic control over health?

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General Agreement on Trade in Services
‘control over health’

- national control over structure of domestic health system

  - focus: degree of privatisation
    - ‘public’ vs. ‘private’ suppliers
      - whether there is a mix
      - balance of the mix
background premiss

- degree of privatisation in domestic health system
  - is properly a matter for national democratic decision
  - whether or not such decisions produce best outcome
main question

- does the GATS _unduly_ restrict national control over
  - degree of privatisation in domestic health system?
  - ‘unduly’: so as to
  - infringe democratic legitimacy
GATS debate

- critics: yes, unduly restrictive
- defenders: GATS obligations
  - triggered only by national decision: so, not ‘restrictions’
  - a fortiori: not undue
  - do not apply to ‘public’ services
candidate restriction(s)

1. Does the GATS clearly impose it?
2. What is its actual effect?
   - on the degree of privatisation?
   - on national control over this?
3. Is it undue?
candidate restriction(s)

1. Does the GATS clearly impose it?

3. Is it **undue**?
overview

- my discussion
  - public services exclusion
  - candidate restriction
    - treatment of monopolies
  - is this restriction undue?
Article I §3(c)

- “a service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’
Article I §3(c)

- makes any service subject to the GATS if it is supplied either:
  - on a commercial basis
  - in ‘competition’ with other suppliers
- what is status of ‘public’ supplier in a mixed system?
Article I §3(c)

- e.g., not-for-profit administrator in statutory ‘socialised’ health insurance system?
- taken literally, exemption seems not to apply here
- §3(c) has ‘no clear meaning’
- Krajewski (2001)
Article VIII

- provision on monopolies
  - §4 restricts a nation from introducing a new (or extending an existing) service monopoly
    - in ‘scheduled’ sectors
    - on pain of compensation
example: Canada

- public health insurance has a monopoly on services covered by the public medical system
  - presently, this excludes prescription drugs & home care
  - which are now covered by private insurance
example: Canada

- recent recommendation:
  - expand public system to include prescription drugs & home care
    - this involves extending insurance monopoly to services previously offered competitively
example: Canada

- but Canada has scheduled health insurance (as 76 have)
  - would reform violate VIII §4?
  - Sanger (2001)
- restriction: compensation
  - is restriction undue?
sovereignty

- do GATS obligations unduly restrict national sovereignty?
  - no: they are self-imposed
- after all, Canada signed the GATS scheduled health insurance
  - even ‘bound’ its commitment
however, does not follow that GATS obligations do not restrict democratic control unduly

• not all sovereign decisions are democratically legitimate
  • democracy is more demanding than sovereignty
3 easy cases

- A perfectly sovereign national decision will lack democratic legitimacy when government
  1. is a dictatorship
  2. claims to be democratic, but is not meaningfully representative
  3. decision lacks popular mandate
future generations

- once ‘bound,’ GATS scheduling commitments cannot be withdrawn, except by
  - quitting the GATS altogether
  - paying compensation
- so they are very difficult to change
future generations

- Canada is a democracy
- but even assuming decision to schedule had popular mandate
- there will come a generation that is also restricted from reform
- did not decide anything
analogy

- GATS obligations (when ‘bound’) are tantamount to constitutional obligations
  i. very difficult to alter
  ii. not chosen by subject generation
  iii. concern matters of fundamental importance
democratic legitimacy

- features (i) + (ii) do not rule democratic legitimacy out
- but they do require decisions to pass a higher bar of scrutiny
  - referenda
  - super-majority
GATS & democracy

- if binding commitments are not to undermine democratic control by future generations
  - must either pass special scrutiny higher than ordinary sov. decision
  - or become easier to withdraw