

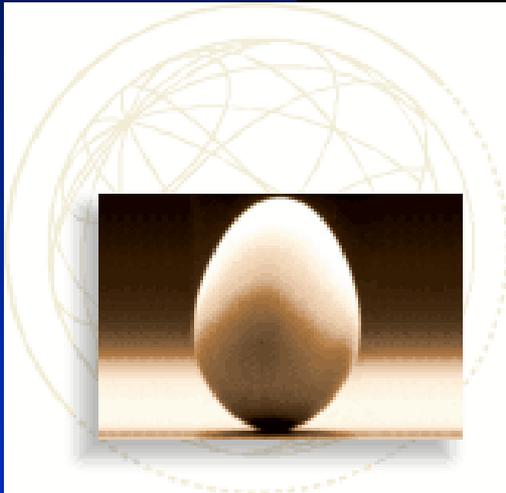
Does the GATS undermine democratic control over health?

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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?
2. Is it necessary?
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

democratic legitimacy

- 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

