



GATS AND HEALTH RELATED SERVICES

MANAGING LIBERALIZATION OF TRADE IN SERVICES FROM A HEALTH POLICY PERSPECTIVE

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Liberalization of Trade in Health-Related Services: The Importance of GATS to Health Policy

Since the establishment of the World Trade Organization (WTO) in 1995, the importance of international trade law to public health and health care has become obvious. Traditionally, the multilateral trading system regulated the trade in goods between nations. The WTO's creation expanded trade rules into new areas, such as aspects of intellectual property protection and trade in services.

The provision and consumption of services have become an increasingly important part of modern economies. The incorporation of services into the multilateral trading system through the General Agreement on Trade in Services (GATS) represents one of the most important developments to emerge from the creation of the WTO.

Services of many kinds play important roles in the protection of public health (e.g., sanitation services) and the delivery of health care to individuals (e.g., hospital services). GATS affects health-related services in many ways that are essential for health policy-makers to comprehend. In addition, GATS establishes a process designed to progressively liberalize trade in

services and health policy-makers must be prepared to participate in this process to ensure that such liberalization unfolds in a way sensitive to the needs of national governments in ensuring the provision and regulation of health-related services.

Health Policy Principles to Inform the GATS Process

Any liberalization under GATS should aim to produce better quality, affordable, and effective health-related services, leading to greater equity in health outcomes.

Liberalization should also ensure the necessary policy and regulatory space governments require to promote and protect the health of their populations, particularly those in greatest need.

GATS creates health opportunities and challenges, especially for developing countries. GATS accords countries considerable choice, discretion, and flexibility so that proper management of the process of liberalization of trade in health-related services can adequately protect health. Countries are encouraged to embed the health policy principles summarized in Box 1 in the process of managing GATS.

Box 1: Health Policy Principles to Guide Liberalization of Health-Related Services.

- > Liberalized trade in health-related services should lead to an optimal balance between preventive and curative services.
- > Involvement of both private industry and civil society is important to ensure that liberalization of health-related services promotes participatory health policy towards achieving national goals.
- > Improving access and affordability of health-related services should be a goal of liberalization of trade in health-related services.
- > Developing countries, and least-developed countries in particular, deserve special consideration in the process of liberalizing trade in health-related services.
- > The status of health as a human right should inform and guide proposals to liberalize trade in health-related services.

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Choices under GATS

In key areas of GATS, governments face choices about the breadth and depth of liberalization of trade in health related services and the impact of such liberalization on health policy. In fact, countries are free to decide whether liberalization in the health sector should be pursued or not and to what extent. Countries are not obliged to liberalize health services if they do not wish to do so. These choices make it imperative that health officials understand the structure and substance of GATS, collaborate with other government agencies on GATS implementation and liberalization, and act to ensure that the GATS process does not adversely affect national health policy (see Box 2).

Key Provisions of GATS

GATS creates the multilateral legal framework for international trade in nearly every type of service. The Agreement's 29 articles establish the scope of its rules' coverage, impose general obligations, structure the making of specific commitments, construct a process for progressive liberalization of trade in services, and link the treaty to the WTO's dispute settlement mechanism. The key provisions for health policy are described below and summarized in Table 1.

Scope of GATS

GATS applies to all measures by WTO members affecting trade in services (Article I:1). GATS defines all elements of this rule-"measures," "affecting," and "trade in services"-broadly. For example, GATS covers all possible ways in which services are provided (see Box 3). GATS' scope is expansive and overlaps significantly with the wide range of activities governments undertake in regulating health-related services.

The Agreement excludes from its coverage services supplied in the exercise of governmental authority (Article

I:3(b)). Services supplied pursuant to governmental authority only fall within this exclusion if the services are provided neither on a commercial basis nor in competition with one or more service suppliers (Article I:3(c)). The scope of this exclusion remains ambiguous and controversial, meaning that this provision deserves close attention from health ministries. Various members have used different techniques to avoid the ambiguities associated with Article 1:3. Some have decided not to undertake commitments at all, others have sought to narrow the scope of commitments to the commercial segment only.

General obligations and disciplines

For all measures affecting services within GATS' scope, the Agreement imposes general obligations and disciplines. From a health policy perspective, the most important general obligations involve rules on domestic regulation of services, specifically disciplines on granting or extending monopoly or exclusive service rights and the duty to engage in negotiations to develop rules on domestic regulation, subsidies, government procurement, and emergency safeguards. While some general obligations, such as the rules on extending monopoly or exclusive service rights, present health policy with challenges, the development of rules on domestic regulation, subsidies, government procurement, and emergency safeguards remains an on-going process that health ministries should monitor.

Specific commitments

GATS creates a structure for countries to make specific market access and national treatment commitments in service sectors in which they wish to liberalize trade. Market access commitments remove barriers to foreign services, and national treatment commitments require that foreign and domestic services be treated the same. Under GATS, each WTO member decides for itself whether to

Box 2: Points for Policy-Makers

- > GATS establishes the multilateral legal framework for international trade in services among WTO members.
- > The scope of GATS is very broad, which means it applies to a wide range of health-related services.
- > GATS covers policies, practices and laws that affect trade in services among WTO members.
- > GATS contains general obligations and disciplines, such as most-favored-nation treatment, that apply to all measures affecting services within the scope of the Agreement.
- > GATS allows WTO members to make specific commitments on market access and national treatment and to tailor those commitments to national policy ends.
- > GATS sets the objective of progressive liberalization of trade in services, meaning that WTO members will negotiate over new specific commitments in service sectors subject to the Agreement.
- > The process of progressive liberalization under GATS requires the active involvement of health policy-makers.
- > Before making any specific commitment under GATS, governments should ensure they have thoroughly assessed the implications of opening health systems to foreign services and the potential costs and benefits of making legally binding commitments. Countries may wish to experiment through autonomous liberalization of certain health related services, and only make commitments under GATS after a careful assessment of its effects.

Table 1: Articles of GATS of Greatest Relevance to Health Policy

Topic (GATS Article)	Substance of the GATS Provision (Note that a number of articles contain further detail that are spelled out in GATS)
SCOPE OF GATS (PART I)	
Scope and definitions (Article I)	GATS applies to measures by WTO members affecting trade in services. Trade in services is defined as the supply of a service (1) from the territory of one WTO member into the territory of any other WTO member; (2) in the territory of one WTO member to the service consumer of any other WTO member; (3) by a service supplier of one WTO member through commercial presence in the territory of any other WTO member; and (4) by a service supplier of one WTO member through presence of natural persons of a WTO member in the territory of any other WTO member.
	"Services" includes any service in any sector except services supplied in the exercise of governmental authority.
	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.
GENERAL OBLIGATIONS AND DISCIPLINES (PART II)	
Most-favored-nation treatment (Article II)	With respect to any measure covered by GATS, each WTO member shall accord immediately and unconditionally to services and service suppliers of any other WTO member treatment no less favorable than that it accords to like services and service suppliers of any other country.
Domestic regulation (Article VI)	The Council for Trade in Services shall develop any necessary disciplines on measures relating to qualification requirements, technical standards, and licensing requirements to ensure that such measures do not constitute unnecessary barriers to trade in services. Such disciplines shall aim to ensure that such requirements are, inter alia, not more burdensome than necessary to ensure the quality of the service.
Monopolies and exclusive service suppliers (Article VIII)	If a WTO member grants monopoly or exclusive service rights regarding the supply of a service covered by specific commitments, then that WTO member must make compensatory arrangements with any WTO member adversely affected by such granting of monopoly or exclusive service rights.
General exceptions (Article XIV)	WTO members may restrict trade in health-related services in violation of general obligations or specific commitments when such restrictive measures are necessary to protect human, animal, or plant life or health, and the application of which does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.
SPECIFIC COMMITMENTS (PART III)	
Market access (Article XVI)	With respect to market access through the modes of supply identified in Article I, each WTO member shall accord services and service suppliers of any other WTO member treatment no less favorable than that provided for under the terms, limitations, and conditions agreed and specified in its Schedule of Specific Commitments. WTO members must list measures restricting market access they wish to maintain in sectors subject to a market access commitments.
National treatment (Article XVII)	In the sectors inscribed in its Schedule of Specific Commitments, and subject to any conditions and qualifications set out therein, each WTO member shall accord to services and service suppliers of any other WTO member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.
PROGRESSIVE LIBERALIZATION (PART IV)	
Negotiation of specific commitments (Article XIX)	WTO members shall enter into successive rounds of negotiations with a view to achieving a progressively higher level of liberalization in trade in services.
Modification of schedules (Article XXI)	To withdraw or modify a Schedule of Specific Commitments, a WTO member must make compensatory arrangements for WTO members adversely affected by such withdrawal or modification; and such compensatory arrangements are then available to all WTO members on a most-favored-nation basis.
INSTITUTIONAL PROVISIONS (PART V)	
Dispute settlement and enforcement (Article XXIII)	Disputes that arise under GATS are subject to the WTO Dispute Settlement Understanding.
Council for Trade in Services (Article XXIV)	The Council for Trade in Services shall facilitate the operation of GATS and advance its objectives.

make binding market access and national treatment commitments.

At the same time, GATS imposes a "list it or lose it" process on countries making specific commitments. When making market access or national treatment commitments, countries have to list all measures they wish to retain that would otherwise violate the specific commitment being made. Some measures that restrict market access may be important for health policy reasons, such as limitations on the number of service suppliers through an economic needs test, which illustrates the importance of thoroughly analysing proposals to liberalize trade in health-related services.

Progressive liberalization

Countries will face decisions whether to liberalize trade in services through market access and national treatment commitments in periodic negotiations designed to produce the progressive liberalization of trade in services. The current round of liberalization talks, known as "GATS 2000," is now under-way.

Managing the GATS 2000 Process from a Health Policy Perspective

The structure and substance of GATS create a challenge for ministries of health to develop capabilities to manage

the GATS 2000 process effectively from a health policy perspective in two key areas: (1) evaluating requests for, and offers of, specific commitments; and (2) negotiations on GATS rules.

The request/offer process and specific commitments

At the heart of this challenge will be the assessment of other countries' requests for, and a country's own offers of, liberalization in health-related services. Requests will seek, and offers will make, new specific commitments on market access and national treatment. Health policy analysis of GATS indicates that requests for new market access commitments will pose the most difficulties for health policy-makers because measures that restrict market access may be used by health ministries to pursue health service objectives.

The tabling of requests for, and making offers of, specific market access and national treatment commitments will raise questions health-policy makers will have to address (see Box 4).

Negotiations on GATS rules

The GATS 2000 process also involves negotiations on GATS rules on domestic regulation, subsidies, emergency safeguards, and government procurement. These

Box 3: Modes of Service Supply under GATS and Health Opportunities and Risks		
Supply Modes	Opportunity	Risk
Mode 1: Cross-border supply of services (telemedicine, e-health)	Increased care to remote and under-served areas	Diversion of resources from other health services
Mode 2: Consumption of services abroad (patients travelling abroad for hospital treatment)	Generates foreign exchange earnings for health services of importing country	Crowding out of local population and diversion of resources to service foreign nationals
Mode 3: Commercial presence (establishment of health facilities in other countries)	Creates opportunities for new employment and access to new technologies	Development of two-tiered health system, with an internal brain drain
Mode 4: Presence of natural persons (doctors or nurses practicing in other countries)	Economic gains from remittances of health care personnel working overseas	Permanent outflow of health personnel, with loss of investment in educating and training such personnel

Box 4: Key Questions for Monitoring the Impact of GATS 2000 on Health Policy
In connection with a request for, or offer of, market access and/or national treatment commitments in a health-related service sector:
> To what extent is the sector already open to foreign service providers, and what have been the regulatory concerns posed by existing foreign competition?
> Do the commitments fit the strategies and directions identified by national health policy?
> What effect would the commitments have on government-provided health-related services?
> What regulatory burdens would the commitments create for the government in health-related sectors?
> Would the commitments eliminate or weaken regulatory approaches necessary for the protection and promotion of health?
> What scientific and public health evidence and principles can be brought to bear to analyze the possible effect of the commitments?
> Can the commitments be crafted both to protect health policy and to liberalize trade progressively?

negotiations also deserve the attention and analysis of health ministries because these negotiations have the potential to adopt rules that would affect health policy, especially with regard to rules on domestic regulation.

Building capacity at the national level to inform the GATS negotiations and monitor health implications of GATS

Although experts acknowledge that GATS has not, to date, significantly affected trade in health-related services, the potential for GATS to do so through the progressive liberalization process is tremendous. In the GATS 2000 negotiations, countries may be receiving requests from and may consider submitting offers to other WTO members for market access and national treatment commitments in many different health-related service sectors.

Such requests/offers will place a premium on a government's ability to develop inter-agency cooperation and collaboration in order to ensure that decisions made on new specific commitments do not adversely affect national health policy and regulatory capabilities. Health ministries were not actively involved in the Uruguay Round negotiations on GATS but should be pro-active about their responsibilities with respect to the GATS 2000 process (see Box 5).

Building GATS capacity at the national level will require countries, among other things, to analyze their current level and types of trade in health-services, the benefits and

costs existing trade has produced, the barriers to expanding such trade and the policy objectives behind those barriers, what gains and losses can be anticipated by liberalization proposals and who gains and loses, and what regulatory and policy changes would be needed to harness liberalization for the maximum benefit to health (See Box 6).

WHO's work on GATS and policy recommendations to date

WHO's work on GATS has, to date, focused on collecting evidence on the potential and actual impact of GATS on the functioning of health systems. These efforts involve:

- Collecting data on trade in health-related services;
- Undertaking a wide range of country-based studies;
- Conducting regional and national training programs;
- Supporting a legal review of GATS from the perspective of health policy;
- Developing a Handbook on Trade in Health-Related Services and GATS; and
- Tracking and disseminating information on the GATS 2000 negotiations.

Box 5: Checklist for Policy-Makers on Trade in Health-Related Services

- > Identify a focal point for trade in health-related services within the Ministry of Health.
- > Establish contacts and systematic interactions (e.g., a GATS working group) with trade and other key ministries and with representatives from private industry and civil society.
- > Collect and evaluate relevant information on the effect of existing trade in health-related services within the country.
- > Obtain reliable legal advice not only on GATS but also on other international trade and investment agreements (e.g., bilateral investment agreements) that may affect trade in health-related services.
- > Develop a sustainable mechanism for monitoring the impact of trade in health-related services generally and the GATS 2000 process specifically.
- > Utilize the information and technical assistance provided by WHO on matters concerning trade in health-related services.
- > Subject all requests for, and offers of, liberalization of trade in health-related services to a thorough assessment of their health policy implications.

Box 6: Elements of a General Framework for Country Analysis of GATS

- > General macroeconomic and trade environment in the country.
- > State of the domestic public health and health care systems.
- > State of trade and investment in health-related service sectors.
- > The quality of information on the health sector.
- > Institutional capacity and capabilities for handling liberalized trade in health-related services.

The following general policy recommendations are based on this work to date.

- *Get Your House in Order*: National stewardship of the health system in the context of GATS requires a sophisticated understanding of how trade in health-related services already affects and may affect a country's health systems and policy.
- *Know the Whole House, Not Just Select Rooms*: The GATS process can affect many sectors related to health, and this fact places a premium on health ministries understanding the importance of a comprehensive outlook on trade in health-related services.
- *Remember Who Owns the House*: GATS provides countries with choices and does not force them to make liberalization commitments that are not in their best interests. If a country is unsure about the effects of making specific commitments, it is fully within its rights to decline to make legally binding commitments to liberalize.
- *Home Improvement Means Health Improvement*: Health principles and criteria, as outlined in Box 1, should drive policy decisions on trade in health-related services in the GATS negotiations.

Conclusion

GATS constitutes one of the most important trade agreements from the perspective of health. Unlike the relationship between health and other WTO agreements, the GATS and health interface will be most significantly shaped by the on-going and subsequent efforts to liberalize progressively trade in services. In light of this reality, countries must develop informed and sophisticated approaches to managing the GATS 2000 process, its results, and future liberalization efforts. WHO is developing capabilities to assist countries in this endeavor but, without commitment by national governments, the protection and promotion of health in the GATS process may be compromised.

Further Reading

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