

Trade Agreement Threats to Health Care Policy

The World Trade Organization – Wrong RX for Health Care?

Traditionally, trade agreements have dealt with trade in goods. Such pacts have focused on reducing trade barriers, such as border taxes (tariffs) and quotas, applied by the federal government at the border. In contrast, the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) establishes binding legal obligations limiting federal, state and local government policy regarding service sectors of our economy, including health services.

When the GATS was first negotiated, the United States made commitments to bind elements of its services economy, including health insurance, hospitals and other health care facilities, data services related to health records, and pharmaceutical distribution services, to meet GATS' constraints. Congress approved the agreement with little discussion or understanding, in part because the deal was done using the "Fast Track" procedure that limits Congress' role and debate.

While health services can be provided across borders (diagnostic services provided over the phonenumber, drugs purchased over the internet, and more Americans traveling abroad to receive cheaper health services), GATS is not limited to setting rules about cross-border trade in services. Rather, it also sets rules about the health care policies that federal, state and local governments can pursue domestically, and how foreign insurance, hospital and other health firms operating within the United States can be regulated. Thus, GATS delves deeply into domestic regulatory issues that have little or nothing to do with the traditional concept of trade between nations.

The GATS represents a 180-degree turn from the U.S. approach to health care policy – away from regulating industries for the benefit of the consumer, and towards regulating governments for the benefit of multinational firms and industries.

Unless the United States acts to take back the health-related services it committed to WTO jurisdiction in 1995, U.S. GATS commitments can limit the ability of federal and state governments to adopt innovative solutions to some of our most pressing health-care problems, including creating low-cost health-care alternatives for working families, and addressing the high cost of prescription medicines.

The WTO's GATS delves into "areas never before recognized as trade policy... Neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments."

-Renato Ruggiero, former Director of the WTO, 1998

State Health Care Policies at Risk

Universal Health Care Coverage: GATS makes plans for a national health care program (“single-payer”) and many state initiatives to improve access to health care much more difficult to achieve, because a country cannot grant new public-service monopoly rights in a WTO-covered service sector without first compensating trading partners for lost business opportunities.

Bans on For-Profit Service Providers: Studies have shown that for-profit hospitals and dialysis centers have higher death rates than their not-for-profit counterparts, and for-profit hospices provide less care for the dying. Sixteen states have proposed banning for-profit provision of certain health services. Yet current GATS rules would subject such state initiatives to protect quality and safety to challenge as illegal trade barriers in WTO tribunals.

Preferential Tax Treatment for Nonprofit Hospitals: Most U.S. hospital services are provided by nonprofit institutions that enjoy tax-exempt status. If a foreign firm bought a chain of U.S. hospitals and decided to run them on a for-profit basis, it could demand the preferential tax treatment that domestic nonprofits are given because it provides identical or nearly identical services.

Prescription Drug Reform: The majority of U.S. states have Medicaid programs that utilize Preferred Drug Lists (PDLs), which encourage the use of medicines that are clinically effective and low cost. PhRMA, the powerful lobbying arm of U.S. drug manufacturers, and its international counterparts have attacked PDLs as overly burdensome trade “market access barriers.”

State Certificate of Need Laws: Economic needs tests are an important policy tool for controlling costs in the health care arena. Thirty-eight states have “Certificate of Need” or “CON” laws for health care facilities such as hospitals, outpatient clinics and nursing homes. CON laws are intended to bring oversight to health care construction and major capital expenditures which fuel skyrocketing health care costs. Unfortunately, GATS prohibits economic needs tests in a covered service sector. U.S. negotiators safeguarded needs testing under hospital services, but not under construction of health buildings. This contradiction will need to be clarified to safeguard these important cost-saving laws from challenge.

How a WTO challenge of a U.S. state or federal law would work:

- The other 152 WTO signatory countries are empowered to challenge nonconforming federal and state policies as GATS violations before trade tribunals in a binding WTO dispute resolution system.
 - State government officials have no standing before these tribunals and thus must rely on federal officials to defend a challenged policy.
 - The tribunals are staffed by trade officials who are empowered to judge if state policy violates WTO requirements.
 - Policies judged to violate the rules must be changed, or trade sanctions can be imposed.
 - The federal government is obliged to use all constitutionally available powers – for instance preemptive legislation, lawsuits and cutting off funding – to force state and local governments to comply with trade tribunal rulings.
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