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INTERNATIONAL LEGAL REGULATION OF TRADE IN MEDICAL SERVICES: DOCTRINAL APPROACHES AND THE PROBLEM OF TERMINOLOGICAL CERTAINTY

Abstract

Globalization has transformed cross-border trade in medical services into a fully developed large-scale industry. Roughly 14 million individuals seek medical care outside their home country on an annual basis, and the worldwide market for this practice is valued at close to 40 billion USD. Nevertheless, neither international law nor domestic legal systems provide a legally codified definition of "international medical services," leading to terminological ambiguity and legal risks when qualifying the relevant legal relationships. The article synthesizes existing doctrinal perspectives and, based on their integration, formulates an original authorial definition of international medical services. It examines the four modes of supply under GATS, explores the tension between trade liberalization and states' obligations to uphold the right to health, and highlights legal uncertainty in interpreting the governmental services exception. The study substantiates a presumption that public services fall outside the scope of GATS. Practical recommendations are offered for Kazakhstan. These include revising its WTO commitments, strategically employing specific commitment categories, and involving public health authorities in international negotiations. The findings may assist the country in shaping its national position regarding trade in international medical services.

Keywords: international medical services, trade in services, liberalization, healthcare, regulation, terminology, sovereignty.

Introduction

In the era of globalization, international trade in services has become one of the key drivers of economic development. The healthcare sector is no exception: approximately 14 million people travel annually for the purpose of obtaining medical care, thereby generating a multi-billion-dollar industry [1]. From 2000 to 2017, global expenditures on medical tourism increased from 2.4 billion US dollars to 11 billion US dollars.

The current cross-border healthcare market is estimated at USD 20–40 billion and is projected to exceed USD 100 billion [2, p. 5], demonstrating the growing scale and economic significance of international medical services. Patients seek medical care abroad primarily because certain treatments are unavailable in their home countries, domestic costs are prohibitively high, or specialized therapies can only be accessed in particular jurisdictions. At the same time, the expansion of telemedicine increasingly extends cross-border healthcare beyond physical patient mobility, allowing medical services and consultations to be provided remotely across national borders. As cross-border healthcare relationships expand in both scale and form, they inevitably raise complex legal questions concerning the regulation of medical services involving patients and healthcare providers located in different jurisdictions.

What's really pushing this trend isn't money. It's the fact that healthcare systems genuinely need to get better at providing quality care. The global burden of disease – manifested, inter alia, in the progression of non-communicable conditions and the growing threat of antimicrobial resistance – generates sustained demand for highly specialized medical interventions. Such services are often unavailable or remain in a nascent stage within the national healthcare systems of patients' countries of origin. So in this situation, patients traveling across borders isn't just a commercial matter anymore. This serves as a means for individuals to realize their right to health – the same right that Article 12 of the International Covenant on Economic, Social and Cultural Rights safeguards [3]. These processes objectively necessitate an adequate regulatory and legal framework which, grounded in a balance of interests, should simultaneously facilitate the liberalization of the medical services market while preserving for the state the necessary scope of sovereign prerogatives in safeguarding life and public health as paramount social values.

From a legal point of view, the problem of international trade in medical services is not only the lack of uniform terminology. It is essential to determine the legal nature of the emerging relations, since their qualification directly affects the choice of the applicable regulatory regime, the limits of state regulation, the content of the international obligations of the state, as well as the possibility of protecting public interests in the field of health. Depending on the form of cross-border provision of health care services, the relevant relations may simultaneously affect the norms of international trade law, national legislation on health care, the rules for admitting medical organizations and specialists to the market, requirements for licensing, protection of personal data, the responsibility of service providers and ensuring the rights of patients. Therefore, terminological certainty in this area acquires not philological, but directly legal significance.

Prior to examining the legal framework governing this phenomenon, it is essential to establish a clear understanding of the term 'international medical services. The academic literature contains a variety of overlapping terms that describe related notions, including 'wellness tourism,' 'medical tourism,' 'medical travel,' 'trade in health services,' 'cross-border healthcare,' and 'cross-border medical services [4]. Despite their widespread use in academic literature, these terms are interpreted differently by researchers and therefore lack a universally accepted meaning. The lack of a unified understanding of this concept gives rise to interpretative uncertainty, which complicates both its doctrinal analysis and the consistent application of the corresponding legal mechanisms in practice.

The study addresses two closely related dimensions of the subject under consideration. The first involves clarifying the concept and legal nature of international medical services, whereas the second examines the specific features of their regulation within the framework of the General Agreement on Trade in Services (GATS). On the basis of this analysis, the research aims to develop practical recommendations that may contribute to improving Kazakhstan's legal and institutional approach in this field. To achieve this objective, the following research tasks are undertaken:

- to systematize the principal doctrinal approaches to the definition of international medical services and to propose an original authorial definition;

◆ to assess the influence of GATS on the healthcare sector, with particular attention to the classification of modes of service supply and the scope of the public services exception;

◆ to examine the structure of GATS commitments and determine their relationship with the regulation of medical services;

◆ to identify the practical implications of the existing legal framework for Kazakhstan and to formulate proposals aimed at improving the country's commitments in the context of its WTO membership.

Materials and methods

The research is based on the scholarly works of Kazakhstani and foreign authors devoted to international trade law, the legal framework of the World Trade Organization, and the regulation of medical services in the context of international law. The normative basis of the study comprises both international and national legal instruments, including the General Agreement on Trade in Services (GATS), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Vienna Convention on the Law of Treaties, as well as the legislation of the Republic of Kazakhstan governing the healthcare sector.

The methodological framework of the study is based on the combined application of formal-legal, comparative legal, systemic, doctrinal, and legal modelling methods. The formal-legal method was employed to examine the normative content of the General Agreement on Trade in Services (GATS) and to clarify the legal meaning of its principal concepts. The comparative legal method facilitated a comparative assessment of prevailing doctrinal approaches and the analysis of the relationship between the regulatory frameworks established by GATS and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The systemic method made it possible to consider GATS as a coherent and internally interconnected legal instrument governing international trade in services. The doctrinal method was applied to the examination of academic discourse concerning the legal nature of international medical services and to the identification of the principal theoretical approaches developed within contemporary legal scholarship. The method of legal modelling provided the basis for formulating the author's definition of the concept of "international medical services" and for developing proposals aimed at improving the legal regulation of this sphere in the Republic of Kazakhstan.

Results and discussion

1. The Concept and Legal Nature of International Medical Services: Doctrinal Approaches

There remains no shared consensus in scholarly writings regarding the appropriate conceptual framework for cross-border mobility in the context of healthcare. In their work, Rodríguez Blanco and Gurgel propose a range of terms – primarily derived from Anglo-Saxon literature – to describe this phenomenon; however, none has yet achieved consensus in terms of usage or conceptual boundaries. According to these scholars, the most commonly employed terms include "wellness tourism", "medical tourism", "medical travel", "trade in medical services", "cross-border health", and "cross-border healthcare" [4].

Each of these terms describes international travel driven by the necessity of receiving medical treatment. At the same time, these concepts are not identical and reflect different aspects of the phenomenon under consideration. The conceptual differentiation of these categories is determined chiefly by their underlying objectives, the specific phenomena they examine, and the academic frameworks within which they are employed.

The concepts of "wellness tourism" and "medical tourism" primarily highlight the lifestyle-oriented and experiential aspects of consumer demand, treating such forms of travel as distinct segments of the tourism market that function according to commercial and market-based principles. The first concept relates to utilizing the natural environment as a healing space for preventive health purposes, while the second concerns the management of pre-existing illnesses within hospital environments, mostly located in major metropolitan areas. Both concepts are grounded in the global freedom of consumer mobility and the increasing accessibility of air travel. These terms are useful

in the context of consumer behavior and marketing analysis; however, they insufficiently capture the legal and regulatory dimensions of cross-border healthcare provision, as they reduce a complex set of relationships to a form of tourist service.

The concept of "medical travel" refers to mobility driven by the need to obtain medical services unavailable at the place of residence [5]. This may involve either regular cross-border movement or international travel. The term typically highlights the movement of foreign patients who purchase or utilize public healthcare services in another country, emphasizing geographical characteristics (country of origin and destination) as well as economic aspects (costs for healthcare systems) [5]. Unlike the "tourism" based terminology, "medical travel" focuses on the act of movement and its underlying reasons, rendering it more neutral. Nonetheless, it remains insufficiently defined from a legal perspective, as it leaves unresolved the question of the legal regime governing such movement.

The term "trade in medical services" originally appeared in economic research [6, p. 145] and serves as a framework for analyzing different forms of cross-border transactions and international production networks within the healthcare sector–covering the movement of patients, health professionals, and related goods and services. Within this framework, the World Trade Organization plays a central role as the key global actor regulating the acquisition of medical goods and services abroad [7, pp. 3–5]. The concept discussed above most closely aligns with the core focus of this research, since it explicitly draws on the principles of international trade law and allows cross-border medical care to be classified not under tourism services, but rather as a subject of international trade law regulation.

The notions of "cross-border health" and "cross-border healthcare" are less firmly established and are used across various disciplines to denote movements across borders. For example, Jovanovic et al. [8] characterized the need to expand genetic testing in Europe as a "cross-border necessity"; Brackx et al. [9] analyzed the implications of cross-border mobility for the health of populations in Belgian border regions during the pandemic; and Jiménez and Kozo [10] employed the term to examine cooperation among subnational entities during the public health crisis at the U.S.–Mexico border. The term 'cross-border' highlights only the act of crossing a national boundary, without indicating whether the movement is regular or irregular, legal or illegal. More importantly, it fails to clarify the economic and legal nature of the relationships that emerge in this context.

Another frequently used concept is "health-related mobility," which lacks a clear territorial linkage to border regions. It may refer to social mobility rather than geographical movement, or it may emphasize such parameters as spatial radius of activity, distance traveled, travel time, and geographical accessibility of healthcare services. Since this definition is grounded primarily in the category of movement as such, rather than in the specific spatial context in which such movement occurs, its applicability as a comprehensive theoretical framework for the study of border regions is limited.

In the legal framework of the Republic of Kazakhstan, only the general term "medical services" has a formal definition. It is described as the activities of healthcare providers aimed at prevention, diagnosis, treatment, rehabilitation, and palliative care for an individual (p. 181, Article 1) [11]). Kazakh legislation, in contrast, offers no definition for the term 'international medical services.' Nevertheless, academic literature employs the more general notion of 'cross-border healthcare' in its place. This term is based on the idea that national borders create a specific spatial context in which the health status of a population may differ from that observed in other parts of the same country [12, p. 1146]. As an analytical category, it was institutionalized in the 1980s in the context of European Union programs on cooperation in border regions, which were regarded as less developed territories [13, p. 4]. The concept enables the identification of strategies used by border residents to obtain medical care, who often cross national boundaries to improve access to services, taking into account everyday practices and local contexts. It also highlights the vulnerability of such territories due to their complex spatial positioning and limited access to healthcare services.

The above overview indicates that the literature contains a wide range of terms, which points to the complex and multifaceted character of the phenomenon in question. Given that this study focuses on international legal frameworks, the concept of "international medical services" is considered the most appropriate term, serving as a synonym for "health trade" or "the international exchange of health services." In contrast to "medical tourism," this phrasing avoids narrowing the scope to merely consumer-driven choices. Furthermore, unlike "cross-border healthcare," it is not limited solely to the

particular setting of frontier or border areas. The notion of "international medical services" directly refers to the trade-law nature of the phenomenon and makes it possible to employ the conceptual framework of the GATS, which corresponds to the subject matter of this research.

However, the mere selection of terminology does not in itself clarify its substantive content. It is therefore necessary to determine what constitutes an international medical service as a legal and economic category. In academic literature and in documents of international organizations, three principal approaches to defining international medical services have emerged. Each emphasizes particular dimensions of this multifaceted phenomenon and, taken together, they provide the basis for a working definition.

The first approach can be described as anthropocentric, as it takes the primacy of the physician-patient relationship as its starting point. As Zubatov and Pirogova argue, regardless of the form or setting in which a medical service is delivered, its essence always lies in the interaction between physician and patient. It is this very interaction that defines a medical service as such [14, p. 37]. On an international level, although this core aspect stays unchanged, the concept expands to encompass economic, legal, and regulatory considerations that go beyond the two-person relationship between doctor and patient. The most comprehensive development of this perspective is found in the writings of Michael Da Silva. He characterizes health care as "curative, diagnostic and preventive goods and services provided by medical professionals" [15, p. 343]. From this definition, it logically follows that when an individual crosses a border for the purpose of receiving treatment, he or she is obtaining an international medical service. Moreover, as Da Silva notes, the right to health, grounded in the principles of human dignity and non-discrimination, implies that states should not create unjustified barriers to access to such services. However, it should be stressed that the principle of non-discrimination does not guarantee unlimited market access. States remain entitled to impose legitimate restrictions – for example, licensing requirements for foreign medical personnel, procedures for recognizing professional qualifications, or mandatory compliance with safety standards. The criteria for the "justifiability" of such restrictions are addressed both within WTO law (Article XIV GATS – General Exceptions) and in the jurisprudence of the European Court of Human Rights.

The second approach – the economic approach – conceptualizes international medical services within the framework of the global economy. According to Jolita Butkevičienė and David Dias, international medical services constitute a dynamically developing segment of the global "health economy," encompassing a broad spectrum of activities – from medical practice to hospital management – and are delivered through the four modes of supply provided for under the GATS. Seen from this angle, international medical services can act as a tool that – when liberalized appropriately – may enhance both the health of populations and the economic growth of states, especially developing ones [16, p. 64]. The significance of the economic approach lies in its systematic linkage of medical services to the mechanisms of the GATS and in demonstrating their potential role in national economic development.

The third perspective – known as the regulatory approach – emphasizes the government's role and the effects of market liberalization. According to Blouin, Drager, and Smith, the term 'international medical services' encompasses health-related activities carried out under commercial or competitive conditions, such as hospital care and the administration of clinical facilities. Once a state allows these services to be provided through market mechanisms, they become subject to international trade regulations under the GATS. Central to this approach is the recognition of the dual nature of the phenomenon: on the one hand, liberalization creates opportunities for development and resource mobilization; on the other, it generates risks for equity and quality within national healthcare systems, thereby requiring states to adopt a balanced approach to market opening and to take into account the impact of trade measures on the broader social determinants of health [17, pp. 8–9].

The three approaches considered do not contradict but rather complement one another, enabling international medical services to be viewed simultaneously as an economic good, an object of trade law, and a social guarantee. For the purposes of the present study, a synthesis of the approaches advanced by Blouin and Da Silva appears most appropriate. This integrated perspective enables cross-border healthcare to be understood simultaneously as a commodity governed by trade regulations (subject to GATS provisions) and as a public good deeply connected to the right to health. Consequently, it imposes on states the need to strike a balance between trade liberalization and the discharge of their duties in the realm of public health.

Accordingly, for the purposes of this study, international medical services are understood as healthcare activities provided on a commercial or otherwise state-authorized basis, involving the cross-border movement of patients, medical professionals, information, or the service provider itself, and supplied through the modes of delivery provided GATS.

The formulated definition is of practical importance for improving the legislation of the Republic of Kazakhstan. In this regard, it is proposed to supplement article 1 of the Code of the Republic of Kazakhstan "On the health of the people and the health care system" with the concept of "international medical service", based on its legislative qualification the presence of a cross-border element, and not the citizenship of the participants in the relevant legal relations. Such an addition will make it possible to distinguish between domestic and international medical services and create a regulatory framework for determining the legal regime applicable to them.

The proposed definition allows us to determine the legal nature of international medical services. They are complex cross-border legal relations in which the private legal element of the provision of medical services is combined with public legal regulation of access to the relevant market. Their specificity is due to the fact that the freedom of cross-border provision of services is not absolute: the state retains the authority to establish requirements for licensing, professional qualifications of medical workers, accreditation of organizations, safety of medical activities, protection of personal data and ensuring sanitary and epidemiological well-being.

It is the complex nature of these relations that makes it possible to distinguish international medical services from tourist services and justifies the need for their independent international legal qualifications.

2. International Legal Regulation of Trade in Medical Services under the GATS

An understanding of the nature of international medical services inevitably leads to the question of their international legal regulation, within which the General Agreement on Trade in Services occupies a central position. The recognition of international medical services as an independent subject of international legal regulation developed gradually rather than at the initial stages of the evolution of international economic law. For a considerable period, the provision of such services was not classified as an economic activity and therefore remained outside the primary scope of international legal regulation governing cross-border commercial relations. However, rapid technological development has transformed services – including medical services – into a fully-fledged object of international trade [18, p. 105]. This shift necessitated the creation of systemic rules, and the GATS became the first and remains the only multilateral framework governing state measures affecting trade in services, thereby formally acknowledging their economic significance.

Nevertheless, the formal establishment of rules does not guarantee their adequacy in relation to the specific characteristics of the healthcare sector. Trade negotiations are traditionally conducted by specialists in trade and finance, often without the participation of public health professionals. There is a risk that the commitments undertaken will fail to take into account the social nature of medical services, their embeddedness in the right to health, and other socially significant interests. As a result, states may be deprived of the ability to fully harness the positive potential of the development of such trade while simultaneously mitigating the associated risks. A careful examination of the mechanisms through which GATS shapes the functioning and development of the healthcare sector is therefore required.

In the context of assessing this influence, attention should be directed to two interrelated dimensions. The first concerns the classification of healthcare services under the General Agreement on Trade in Services (GATS), while the second relates to the legal mechanisms incorporated into the Agreement to safeguard the regulatory authority of states. Within the GATS framework, healthcare services are organized according to four distinct modes of supply. These encompass four modes: cross-border delivery (e.g., telemedicine), consumption overseas (i.e., traveling abroad for medical care), commercial presence (setting up foreign-owned medical facilities or branches), and the movement of individuals (temporary work by foreign healthcare professionals providing services). This classification reveals the diversity of forms through which trade may occur and highlights the points of interaction with domestic regulation. In practice, the modes of supply are interconnected: treatment of a foreign patient (Mode 2) may require prior online consultations (Mode 1) and the

presence of medical personnel (Mode 4). As noted in WTO analyses, restrictions affecting one mode may effectively impede the overall provision of the service [2, p. 2].

Each of these delivery methods creates an independent set of legal issues. In the cross-border supply of medical services, primarily in the form of telemedicine, questions of jurisdiction, recognition of the professional status of a foreign doctor, protection of medical information and determination of applicable law arise. When consuming services abroad, the legal status of a foreign patient, contractual relations with a medical organization and mechanisms for compensation for harm in case of inadequate medical care acquire particular importance. The commercial presence of a foreign supplier is associated with the requirements of national legislation for licensing, investment, the legal form of a medical institution and state control. Finally, the temporary presence of foreign medical professionals directly affects the issues of recognition of qualifications, professional admission and compliance with national standards of medical activity.

Consequently, the GATS classification has not only economic, but also regulatory significance: it determines the nature of national regulatory measures that may fall under the international trade obligations of the state.

As a result, even when no formal commitments exist under a given mode, the regulation of related modes can still effectively limit trade in practice. This highlights the importance of adopting a holistic strategy when designing trade commitments.

Under Article I:1 of the GATS, the agreement applies to any measures taken by Members that "affect" trade in services. According to Munin, the term "affecting" is deliberately broad, designed to capture all measures that shape the competitive environment [19]. As a result, virtually any healthcare regulation – whether it concerns licensing requirements or the terms under which paid services are delivered in public facilities – could fall within the scope of the GATS. As emphasized in Fidler's review for the World Health Organization, both the scope of the GATS and the scope of health policy are extremely broad, and their substantial overlap renders the GATS a treaty of considerable importance with respect to its potential impact on national health systems. In other words, the GATS extend into an area traditionally regarded as falling within the core competence of the state.

Given such extensive coverage, the question arises as to the relationship between the trade regime and other international obligations. At first glance, in countries where healthcare is predominantly public, the sector might appear to fall outside the scope of the GATS. Nevertheless, under Article I:3(c) of the GATS, the only services that fall outside the scope of the Agreement are those provided through governmental authority. This means services that are supplied neither for a commercial purpose nor in competitive conditions with other providers [18]. Since in most countries medical services are also delivered by private actors, and public institutions frequently charge fees, the healthcare sector in practice falls within the scope of the GATS. The direct influence of liberalization on public policy priorities renders this sector particularly sensitive from the perspective of the realization of the right to health.

Moreover, the GATS and the ICESCR operate within distinct legal regimes: the former governs reciprocal trade obligations among states, while the latter enshrines inalienable individual rights. A potential conflict may therefore arise, as liberalization commitments could contradict a state's obligation to ensure universal access to healthcare services [20]. Under the principle of systemic integration set out in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, treaties must be interpreted taking into account other pertinent rules of international law that are binding on the parties involved. Consequently, this suggests that WTO adjudicative bodies ought to take into account the human rights obligations that states have assumed under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nonetheless, the way this interpretive rule has been applied in practice is inconsistent and piecemeal. This creates a risk that obligations arising from international trade may be accorded greater practical significance than commitments of a social nature, notwithstanding the fact that the preamble to the GATS expressly recognizes the sovereign right of Members to regulate the supply of services in accordance with their own domestic policy objectives.

The existence of this potential inconsistency makes it necessary to examine the provisions of the GATS in order to determine whether the Agreement itself contains legal safeguards capable of preserving a regulatory framework for socially significant services. In this regard, particular attention

should be given to the exclusion applicable to "services supplied in the exercise of governmental authority," established in Article I:3(b) and (c). According to the definition contained in the Agreement, this exemption extends exclusively to services that are, first, supplied on a non-commercial basis and, second, provided in circumstances where they are not subject to competition with other service providers. Consequently, the interpretation of these provisions is of fundamental importance for determining whether a considerable segment of publicly funded healthcare systems falls outside the substantive scope of the GATS. Within academic circles, no shared view exists on this matter. One group of scholars regards the exclusion as very limited, which means that a wide range of public services falls under GATS disciplines. In contrast, another group reads the same exclusion as giving public services a complete exemption from the Agreement.

In our assessment, the broader reading aligns more closely with the drafting history of the GATS, while the narrower interpretation better captures current trends in healthcare markets. Mixed financing systems and the outsourcing of services make it difficult to apply the exclusion in a straightforward manner: when a public hospital offers paid services, it may end up competing directly with private sector providers. Therefore, state ownership alone is not enough to shield an entity from the scope of the GATS. What really matters are the financing arrangements and whether a competitive environment exists.

The situation becomes even more complex because WTO bodies have yet to take a consistent stance on this matter. The position put forward by the WTO Secretariat–suggesting that public services fall outside the scope of the GATS–has not gone unchallenged. A good example is the exchange published in The Lancet: while WTO representative R. Adlung argued that public services should be exempt, his critics pointed out that the ambiguity of Article I:3, along with the possibility of a narrow reading, makes firm conclusions impossible [21, p. 451]. The term "non-commercial basis" is not defined anywhere in the GATS, which opens the door to interpretive flexibility and forces one to look to WTO case law–though that body of rulings remains largely undeveloped in this area. This legal uncertainty poses a serious challenge for any state that wants to keep its healthcare system under domestic control.

Given this situation, scholarly interpretations take on added importance when determining how far the exception reaches. As Fidler and others convincingly argue, the burden of proof ought to be placed on the WTO Member that claims a particular service is not covered by the exclusion. In practical terms, this means the complaining country should have to show that the service in question does not meet the requirements set out in Article I:3(c). This line of reasoning creates a meaningful presumption: any service provided by the state is treated as falling outside the GATS unless the opposite can be proven. Adopting such an approach could offer stronger safeguards for public healthcare systems and help preserve regulatory freedom in socially sensitive areas.

From a legal point of view, the proposed presumption should serve as a guarantee of the regulatory autonomy of the state. Its practical meaning is that the very existence of paid elements in the public health system should not automatically entail the qualification of all relevant activities as a commercial service in the understanding of the GATS. To apply the rules of international trade law, it is necessary to establish the nature of a particular service, the source of its financing, the existence of real competition with private suppliers and the degree of state participation in its provision.

This approach makes it possible to limit the overly broad interpretation of Article I:3 of the GATS and ensure that the state retains the ability to independently determine the scope and form of the provision of socially significant medical care. At the same time, it creates a more predictable criterion for distinguishing between public health and services that are truly involved in international commercial circulation.

For the law enforcement practice of the Republic of Kazakhstan, it is proposed to use a four-factor assessment of the medical service in order to apply the exception provided for in Article I:3 of the GATS, taking into account the source of its financing, the nature of the fee charged, the presence of actual competition with private suppliers and the degree of state participation in determining the conditions for its provision. It is advisable to consolidate this approach in the Rules of Interaction on issues related to the membership of the Republic of Kazakhstan in the World Trade Organization, approved by order of the Deputy Prime Minister – Minister of Trade and Integration of the Republic of

Kazakhstan dated June 13, 2023 No. 224-NҚ, supplementing them with a provision on the assessment of government regulation measures affecting medical services. This will make it possible to determine the applicability of Article I:3 of the GATS to a specific medical service based on the totality of the specified criteria, and not on a separate sign of its payment or the legal form of the provider.

Inclusion of a service under the GATS framework does not, on its own, imply that a Member has breached any of its obligations. That finding only marks the starting point of the legal assessment. From there, one must look at the particular commitments that the Member has listed in its Schedule. If there are no sector-specific commitments, or if substantial limitations have been entered, the Member may retain a wide degree of regulatory flexibility.

Once a service falls within the scope of the GATS, the next step is to figure out which obligations actually apply. These WTO rules can be sorted into four main groups. The first group includes what are known as general obligations–these affect all measures that relate to trade in services, regardless of whether a Member has listed that particular sector in its Schedule of Commitments. The key rule here is the most-favoured-nation principle: every WTO Member must treat services and service providers from any other Member at least as favourably as it treats similar services and providers from any other country. So, even if a country hasn't made specific promises about its healthcare sector, it still cannot discriminate between foreign suppliers coming from different WTO Members. In real terms, this can restrict a state's ability to sign bilateral deals on mutual recognition of qualifications with just a few countries, unless it extends the same favourable treatment to all WTO Members.

Another category consists of specific pledges made by WTO Members. Unlike general obligations, these pledges are voluntary in nature, and their application is limited strictly to the sectors listed in each Member's Schedule of Commitments (which forms an integral part of the overall Agreement). These commitments relate to two main frameworks: market access and national treatment. Through them, a country defines the terms under which its market for medical services is accessible. The built-in flexibility of this system enables countries to strike a balance between liberalization and the protection of socially important sectors. As noted by Blouin et al. [17], three types of commitments typically appear in GATS Schedules: (1) full commitments – no restrictions on market access or national treatment; (2) no commitments – full regulatory autonomy; and (3) partial commitments – existing restrictions are maintained, along with an obligation not to tighten them further. Even limited information about partial commitments improves transparency and can create a basis for future liberalization. Thus, by choosing a specific type of commitment, states can control how open their healthcare markets will be.

Under the third category of GATS provisions, a requirement is introduced that obliges every WTO Member to take part in successive negotiation rounds aimed at steadily raising liberalization levels. Hence, GATS is designed as an evolving framework in which liberalization commitments are progressively developed over time. This establishes a long-term setting where current voluntary choices may later become targets for negotiation demands. As Butkevičienė and Dias point out, future multilateral negotiation rounds are expected to generate growing pressure to liberalize medical services. Such a projection seems reasonable, considering the broader tendency to widen the coverage of trade agreements.

The fourth category comprises institutional dispute settlement arrangements, most notably the dispute settlement system established within the WTO framework. Through this mechanism, domestic regulatory measures affecting the healthcare sector may be challenged where they are considered inconsistent with a Member's obligations under the WTO agreements. At the same time, the absence of binding jurisprudence dealing specifically with medical services continues to create uncertainty regarding the interpretation and practical application of several provisions of the GATS in the context of healthcare regulation.

Although the concept itself has not yet been formally defined in international or domestic law, the legal relations associated with it are regulated through a range of international legal instruments. As Smith and Chanda emphasize, the expansion of cross-border trade in health services has significant implications for healthcare systems and public policy and is expected to play an increasingly important role in the future, making a comprehensive understanding of these processes essential for health sector stakeholders. The absence of an explicit legal definition in national legislation should therefore not

be interpreted as evidence of a regulatory gap. Rather, it creates legal uncertainty by increasing the likelihood that states may undertake international obligations without a sufficiently clear assessment of their legal scope and practical consequences.

For the Republic of Kazakhstan, the issues under consideration are of particular practical relevance because, as a Member of the World Trade Organization, the State must ensure that domestic regulation of healthcare services is aligned with the obligations arising from the multilateral trading system. In this context, the international circulation of medical services should be regarded not only as a source of legal challenges but also as an important factor contributing to the modernization and sustainable development of the national healthcare system. As noted by Fidler and Drager, countries with developing economies, including Kazakhstan, may derive substantial benefits from participation in international trade in health services when the available mechanisms are properly understood and incorporated into national policy. Such benefits encompass access to highly specialized medical expertise that remains unavailable within the domestic healthcare sector, the establishment of institutional partnerships aimed at improving efficiency and reducing operational expenditures, as well as the wider integration of telemedicine technologies into healthcare delivery, both as supporting components of medical practice and as independently provided healthcare services.

For the Republic of Kazakhstan, the legal significance of the analysis is primarily in the need to harmonize the internal regulation of the health care system with the international obligations of the state in the field of trade in services. When making regulatory decisions in the field of telemedicine, admission of foreign medical organizations, recognition of the qualifications of foreign specialists and attracting foreign investment in medical infrastructure, it is necessary to preliminary assess their compliance with the current obligations of Kazakhstan under the GATS. It seems appropriate to apply a preliminary legal assessment of draft international trade obligations in the health sector. Such an assessment should include identifying the specific mode of delivery of the GATS service; establishing the applicability of the GATS Article I:3 exemption; analysis of Kazakhstan's market access and national regime obligations; verification of the feasibility of justifying the necessary restrictive measures under Article XIV of the GATS; as well as assessing the impact of the undertaking on the State's ability to ensure the quality, accessibility and safety of health care. In the most sensitive areas, the use of GATS restrictions, including the Unbound category, can help maintain regulatory autonomy.

When forming the position of Kazakhstan in the negotiations within the WTO, the participation of state bodies responsible for health care should be systemic. This will make it possible to assess international trade obligations not only from the point of view of expanding the market for services, but also from the point of view of maintaining the regulatory powers of the state necessary to ensure the right of citizens to health protection.

The preceding analysis provides a basis for several practical conclusions relevant to WTO Members striving to reconcile the objectives of trade liberalization with the fulfillment of social responsibilities. Given the extensive substantive coverage of the GATS, together with the absence of a uniform interpretation of the governmental authority exception, regulatory measures adopted in the healthcare sector may be exposed to legal scrutiny within the WTO framework. Under these circumstances, States should ensure that any restrictive regulatory intervention is supported by a clear and well-reasoned justification demonstrating its necessity for the protection of public health in accordance with Article XIV of the GATS.

Countries continue to hold considerable freedom when designing their Schedules of specific commitments. By strategically employing the designations "unbound" and "limited commitments," they can protect domestic regulatory autonomy–especially concerning supply modes that raise sensitive issues related to the oversight of medical professionals and institutional investment (namely, commercial presence and the presence of natural persons).

The prospect of future negotiating rounds requires Kazakhstan not only to reassess its current commitments but also to develop a long-term strategy that anticipates potential pressures toward further liberalization. This entails a comprehensive analysis of the economic and socio-legal consequences of liberalization, as well as the active participation of health authorities in shaping the national negotiating position [18, p. 106]. Achieving a balance between trade liberalization and the preservation of state sovereignty in the social sphere thus requires a thorough understanding of the mechanisms of the

GATS and a consistent approach to the formulation of international commitments, particularly in the most sensitive aspects of the healthcare system.

In order to improve the law enforcement practice of the Republic of Kazakhstan, it is proposed to supplement the Rules of interaction on issues related to the membership of the Republic of Kazakhstan in the World Trade Organization, approved by order of the Deputy Prime Minister – Minister of Trade and Integration of the Republic of Kazakhstan dated June 13, 2023 No. 224-НҚ, with a special procedure for preliminary legal assessment of projects of international trade obligations and state regulation measures affecting medical services. Such an assessment should include the identification of the cross-border element and mode of delivery of the GATS service, verification of the applicability of Article I:3 of the GATS, an analysis of the market access and national treatment obligations of the Republic of Kazakhstan, and the basis for the application of Article XIV of the GATS. The result of the assessment should be a reasoned legal opinion prepared with the obligatory participation of the authorized state body in the field of health.

Conclusion

The study allows us to formulate four main legal results.

Firstly, it is proposed to consider international medical services as comprehensive cross-border legal relations, in which the private legal element of the provision of medical services is combined with the public legal regulation of its admission and provision. Such qualifications make it possible to distinguish between international medical services and medical tourism and determine their independent place in the system of international legal regulation.

Secondly, it was found that the four modes of delivery provided for by the GATS have separate regulatory significance, since each of them corresponds to a certain range of national regulatory issues – from licensing and recognition of professional qualifications to the protection of medical data, the admission of foreign suppliers and the determination of liability.

Thirdly, with regard to the exception provided for in Article I:3 of the GATS, it is necessary to assess not only the legal status of the health care provider, but also the nature of its financing, the presence of a competitive environment and the degree of state participation in its provision. This approach makes it possible to specify the limits of the GATS application to public health and preserve the necessary regulatory autonomy of the state.

Fourthly, for the Republic of Kazakhstan, a mechanism has been proposed for a preliminary legal assessment of international obligations in the field of trade in medical services, including qualification of the method of delivery of the service, analysis of existing obligations on market access and national regime, assessment of the applicability of Articles I:3 and XIV of the GATS and determination of the possible impact of obligations on the availability, quality and safety of medical care. The practical implementation of this approach involves the systematic participation of health authorities in the formation of Kazakhstan's position within the WTO.

Thus, the practical significance of the study lies in the possibility of using the proposed criteria in assessing the new international obligations of Kazakhstan and in improving the national regulation of the cross-border provision of medical services.

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ХАЛЫҚАРАЛЫҚ МЕДИЦИНАЛЫҚ ҚЫЗМЕТТЕР САУДАСЫ: ДОКТРИНАЛЫҚ ҚАТЫНАСТАР МЕН ТЕРМИНОЛОГИЯЛЫҚ НАҚТЫЛЫҚ МӘСЕЛЕСІ

Аңдатпа

Жаһандану медициналық қызметтердің трансшекаралық саудасын толыққанды әрі ауқымды индустрияға айналдырды. Жыл сайын шамамен 14 миллион адам медициналық көмек алу үшін өз елінен тыс жерлерге жүгінеді, ал осы қызметтердің әлемдік нарығының көлемі 40 миллиард АҚШ долларына жуық бағаланады. Сонымен қатар халықаралық құқықта да, ұлттық құқықтық жүйелерде де «халықаралық медициналық қызметтер» ұғымының заңнамалық тұрғыдан бекітілген анықтамасы жоқ, бұл тиісті құқықтық қатынастарды саралау барысында терминологиялық белгісіздік пен құқықтық тәуекелдерді туындатады. Мақалада қалыптасқан доктриналық көзқарастар жинақталып, оларды синтездеу негізінде халықаралық медициналық қызметтердің авторлық анықтамасы ұсынылады. ГАТС шеңберіндегі қызметтерді жеткізудің төрт тәсілі қарастырылады, сауданы ырықтандыру мен мемлекеттердің денсаулық сақтау құқығын қамтамасыз ету жөніндегі міндеттемелері арасындағы қайшылық талданады, сондай-ақ мемлекеттік қызметтерге қатысты ерекшелікті түсіндірудегі құқықтық белгісіздік айқындалады. Жария қызметтерді ГАТС қолданылу аясынан шығару презумпциясы негізделеді. Қазақстан үшін ДСҰ шеңберіндегі міндеттемелерді қайта қарауды, арнайы міндеттемелер санаттарын стратегиялық тұрғыдан пайдалануды және денсаулық сақтау органдарын халықаралық келіссөздерге тартуды қамтитын практикалық ұсынымдар ұсынылады. Алынған тұжырымдар халықаралық медициналық қызметтер саудасы саласында еліміздің ұлттық ұстанымын қалыптастыруға ықпал етуі мүмкін.

Тірек сөздер: халықаралық медициналық қызметтер, қызметтер саудасы, ырықтандыру, денсаулық сақтау, реттеу, терминология, егемендік.

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ТОРГОВЛЯ МЕЖДУНАРОДНЫМИ МЕДИЦИНСКИМИ УСЛУГАМИ: ДОКТРИНАЛЬНЫЕ ПОДХОДЫ И ПРОБЛЕМА ТЕРМИНОЛОГИЧЕСКОЙ ОПРЕДЕЛЕННОСТИ

Аннотация

Глобализация превратила трансграничную торговлю медицинскими услугами в полноценную крупномасштабную индустрию. Ежегодно около 14 млн человек бращаются за медицинской помощью за пределами своей страны, а объем мирового рынка таких услуг оценивается почти в 40 млрд долларов США. Вместе с тем ни международное право, ни национальные правовые системы не содержат законодательно закрепленного определения понятия «международные медицинские услуги», что порождает терминологическую неопределенность и правовые риски при квалификации соответствующих правоотношений. В статье обобщаются существующие доктринальные подходы и на основе их синтеза формулируется авторское определение международных медицинских услуг. Рассматриваются четыре способа поставки услуг в соответствии с ГАТС, исследуется противоречие между либерализацией торговли и обязанностью государств обеспечивать право на здоровье, а также выявляется правовая неопределенность в толковании исключения в отношении государственных услуг. Обосновывается презумпция исключения публичных услуг из сферы действия ГАТС. Для Казахстана предлагаются практические рекомендации, включающие пересмотр обязательств в рамках ВТО, стратегическое использование категорий специфических обязательств и привлечение органов здравоохранения к международным переговорам. Полученные выводы могут способствовать формированию национальной позиции страны в сфере торговли международными медицинскими услугами.

Ключевые слова: международные медицинские услуги, торговля услугами, либерализация, здравоохранение, регулирование, терминология, суверенитет.

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