KLUWER LAW INTERNATIONAL

Journal of WORLD TRADE

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Journal of World Trade is published six times per year.

Subscription rates, including postage (2009): EUR 844/USD 1126/GBP 621.

Journal of World Trade is indexed/abstracted in the *European Legal Journals Index*.

Printed on acid-free paper.

ISSN 1011-6702

Periodicals postage paid by Rahway, NJ, USPS No. 017-382. POSTMASTER please send all corrections to *Journal of World Trade*, c/o Mercury Airfreight International Ltd, 365 Blair Rd, NJ 07001, USA.

Printed in Great Britain.

All correspondence should be addressed to the Editor
under reference of:
Journal of World Trade
Email: edwin.vermulst@vvg-law.com

ISSN 1011-6702
Mode of citation: 43:1 J.W.T.

Reproductive Outsourcing to India: WTO Obligations in the Absence of US National Legislation

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This article examines the World Trade Organization (WTO) obligations that inhere from US persons or couples contracting with Indian women for gestational surrogacy. Surrogacy contracts are considered in the context of the General Agreement on Tariffs and Trade (GATT) and the differing laws on surrogacy of different US states. By exploring WTO Appellate Body (AB), Panel and GATT Panel decisions, this article endeavors to determine what WTO obligations bind the US in circumstance of cross-border surrogacy contract. This article addresses how the varying state laws on surrogacy affect the WTO obligations of the US in market access, national treatment and most-favoured-nation (MFN) treatment. The article concludes that there are a variety of ways in which the different state laws have the capacity to violate US trade commitments in relation to international surrogacy contracts. In addition, the analysis serves to illuminate the process under which US trade obligations can be scrutinized to determine what commitments are relevant to a service not contemplated in the US Schedule.

1. Introduction

India has long been a destination for corporations looking to use India's significantly lower prices to cut their costs of production.[1] Recently this phenomenon has extended to so-called 'medical tourism', which is being promoted by the Indian government.[2] Medical procedures can range from cardiology to cosmetology and, like other services, cost only a fraction of that charged in the United States.[3] A World Health Organization bulletin notes, 'Medical tourism is an example of how India is profiting from globalization and outsourcing.'[4] Outsourcing has now extended to the womb; in the vein of

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[1] E.g., Stephanie Overby, *Inside Outsourcing in India*, CIO, 1 Jun. 2003, <www.cio.com/article/31928/Inside_Outsourcing_In_India>.

[2] Government of India Department of Tourism and Ministry of Health and Family Welfare, *Incredible India: The Global Healthcare Destination*, <www.incredibleindia.org/PDF/medicaltourismbroacher.pdf> (last visited 18 Apr. 2008); see also Chinai, Rupa, & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, World Health Organization (2007) <www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

[3] Government of India Department of Tourism and Ministry of Health and Family Welfare, *Incredible India: The Global Healthcare Destination*, <www.incredibleindia.org/PDF/medicaltourismbroacher.pdf> (last visited 18 Apr. 2008).

[4] Chinai, Rupa & Rahul Goswami, *Medical Visas Mark Growth of Indian Medical Tourism*, World Health Organization (2007) <www.who.int/bulletin/volumes/85/3/07-010307/en/index.html>.

Stephenson, Christina. 'Reproductive Outsourcing to India: WTO Obligations in the Absence of US National Legislation'. *Journal of World Trade* 43, no. 1 (2009): 189-208.

medical tourism, Indian women are being paid to act as surrogates for women in the United States and other Western countries.[5]

Whatever the ethical position one takes on surrogacy in general, and international surrogacy in particular, it remains a legal practice in India and in some US states.[6] This exchange of money for services across international boundaries implicates the World Trade Organization (WTO). This note analyzes the US obligations under the WTO with regard to allowing free trade in cross-border surrogacy agreements. There is currently no national legislation on the topic of international surrogacy, thus, this note explores how the differing state laws on surrogacy interact with the US international trade obligations. Part I describes the process of cross-border surrogacy between Indian surrogates and US couples. It also describes the reasons why the practice is both desirable and controversial. Part II analyzes the US obligations under the WTO General Agreement on Trade in Services (GATS). In particular this section explores the national treatment and most-favored-nation (MFN) commitments under GATS. Part III explores how WTO obligations are implicated through individual state laws on surrogacy. In addition, this section examines relevant international trade precedent to illuminate the factors that may be relevant to this inquiry.

2. The Issue: Outsourcing Surrogacy

2.1. Surrogacy in general

In order to fully understand the debate about surrogacy, one must understand both the medical and social dimensions which are involved in the process. As many commentators have noted the phenomenon of surrogacy was documented as early as the Bible.[7] Surrogacy is a form of assisted reproduction in which a woman becomes pregnant with the intention of having the baby for another person or couple.[8] Traditionally, the surrogate would be impregnated through artificial insemination with the sperm chosen by the

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[5] Amelia Gentleman, India Nurtures Business of Surrogate Motherhood, *N.Y. Times*, 10 Mar. 2008, available at <www.nytimes.com/2008/03/10/world/asia/10surrogate.html?_r=1&oref=slogin>. International surrogacy would likely fit into the paradigm of 'fertility tourism' explored in Richard F. Storrow, 'Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory', *Hastings L. J.* 57 (2005): 295.

[6] Despite discussions on a formal law on surrogacy, as of yet there appears to be no law in India forbidding surrogacy. Mahendra Kumar Singh, 'New Laws to Rein in "Womb Business"', *The Times of India*, 31 Oct. 2007, available at <http://timesofindia.indiatimes.com/India/Govt_mulls_laws_to_regulate_surrogacy/articleshow/2503791.cms>; see also, e.g., Sam Dolnick, 'Pregnancy Becomes Latest Job Outsourced to India', *USA Today*, 2007, available at <www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm>. There are, however, guidelines, promulgated by the Ministry of Health and Family Welfare which regulate the practice of surrogacy; with these regulations in mind one can infer that at the very least surrogacy enjoys tacit approval by the Indian government. Indian Council of Medical Research, National Academy of Medical Sciences, & Ministry of Health and Family Welfare. *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India*, 2005, available at <www.icmr.nic.in/art/art_clinics.htm>; for state laws on surrogacy see notes 95-98 *infra*.

[7] E.g., B.R. Sharma, 'Forensic Considerations of Surrogacy', *Journal of Clinical Forensic Medicine* 13 (2006): 80, 81 (2005).

[8] Charles P. Kindregan, Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science, 187-188 (2006).

benefited person or couple and the egg of the surrogate mother.[9] In contrast, gestational surrogacy, which is the most common form in the Indian surrogacy scenario, involves the implantation of a fertilized egg into the surrogate mother.[10] In the case of gestational surrogacy the surrogate mother bears no genetic connection to the child; it will be the product of the gametes provided by the benefited couple from either their own bodies or from other donors.[11]

Surrogacy has long been a controversial subject in the United States.[12] Many commentators have assessed the legal and moral implications of the practice.[13] Proponents of paid surrogacy argue that women should be free in their reproductive choices and right to contract.[14] Opponents, however, argue that surrogacy commodifies both women and children.[15] Those opposed to surrogacy contracts point out that surrogates are usually of a lower economic stratus than the benefited couple, which creates an exploitative relationship where the surrogate is tantamount to a baby-making machine.[16] In the international surrogacy context these concerns have evolved into accusations that wealthy women will begin outsourcing childbearing to avoid the costs to their own bodies and careers.[17] International surrogacy compounds the socio-economic class issues by injecting concerns about *global* inequality and exploitation. While Indian surrogates are the subject of current media attention, the practice of international surrogacy has been documented in other countries; in most cases the benefiting parents often contract for surrogacy from a national of a less developed county.[18]

2.2. International surrogacy in India

The reproductive outsourcing involved in the case of Indian surrogates for US parents usually involves gestational surrogacy. Although the procedure varies, the US family will usually contract with a clinic in India which provides all of the surrogacy services for a fee.[19] The US woman may provide her own egg to be implanted into the surrogate or

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[9] Id.

[10] Id. This process is also known as in vitro fertilization.

[11] Id. Male gametes are sperm and female gametes are eggs. See The American Heritage College Dictionary 559 (3d ed. 1993).

[12] Consider the famous New Jersey case In re Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987); see also Christine Kerian, 'Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?', *Wis. Women's L.J.* 12 (1997): 113, 124-132 (discussing the case and its impacts).

[13] See Jean M. Sera, 'Surrogacy and Prostitution: A Comparative Analysis', *Am. U. J. Gender & L.* 5 (1997): 315.

[14] See Kerian, Surrogacy, *supra* at 158-165 (exploring the various arguments for and against surrogacy).

[15] See Id., at 161-165 (exploring the arguments of commodification of women and children); see also Sera, 'Surrogacy and Prostitution', *supra* at 321.

[16] See Kerian, *Surrogacy*, *supra* at 160-161.

[17] *Giving Birth the Latest Job Outsourced to India*, MSNBC, 30 Dec. 2007, *available at* <www.msnbc.msn.com/id/22441355/> ('You can picture the wealthy couples of the West deciding that pregnancy is just not worth the trouble anymore and the whole industry will be farmed out', comments Dr. John Lantos of the Center for Practical Bioethics in Kansas City, MO).

[18] Iris Leibowitz-Dori, 'Womb for Rent: The Future of International Trade in Surrogacy', *Minn. J. Global Trade* 6 (1997): 329. (Noting the relative prevalence of illegal international trade in surrogacy and arguing for legalization and international regulation.)

[19] Gentleman, *India*, *supra*.

choose one from a list provided by the Indian clinic or another egg provider.[20] Under Indian regulations the surrogate's own eggs cannot be used in the pregnancy.[21] Presumably this regulation was designed to guard against the emotional connection, forged through the genetic ties, which could endanger the success of the transfer. Some clinics require their surrogates to have been mothers previously, a policy which similarly protects against surrogates having second thoughts and also indicates the ability of the surrogate to bear healthy children.[22]

The information on the price of international surrogacy is sparse and variable.[23] One clinic in India, the Rotunda Clinic, put the price at $20,000 including care of the surrogate through the pregnancy, delivery, and the hormone treatment of the pre-selected egg donor.[24] If the clinic must acquire an egg donor, there is an additional cost of around $4,500.[25] The Administrator of a website facilitating Indian surrogacy noted that the cost of Indian surrogates had increased from $12,000 in 2005 due to surrogates demanding more for their services in the face of higher demand.[26] Demonstrating the popularity of the service, the website identifies 75 clinics and doctors around India that can assist in international surrogacy.[27] The price of surrogacy in the United States, on the other hand, can reach up to $90,000.[28]

Of the $20,000 for surrogacy in India, the surrogate retains $5,000 to $7,000.[29] Despite this being a significant sum in India, the fears of exploitation remain. Getting at the heart of the debate, AP reporter Manish Mehta chides, 'After IT services it seems it's now the turn of babies to be outsourced from India.'[30] On the other hand, in the opinion of one Indian surrogate, 'This is not exploitation. [Earning $25 month c]rushing glass for

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[20] Id.; see also Indian Council of Medical Research, *National*, *supra*. (Detailing the procedure regarding sperm and oocyte donation.)

[21] Indian, *National*, *supra* at Ch. 3, § 3.5.4. 'An oocyte donor can not act as a surrogate mother for the couple to whom the ooctye is being donated.' While they are the product of a Governmental Ministry, there are as yet non-binding regulations.

[22] *Rotunda IVF Clinic FAQ*. OneinSix. <//www.oneinsix.com/rotunda.html> (last visited 18 Apr. 2008). In addition, to assure maternal health Indian regulations prohibit a woman from acting as a surrogate more than three times in her life. Indian, *National*, *supra* at Ch. 3, § 3.10.8.

[23] Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, Christian Science Monitor, 3 Apr. 2006, *available at* <www.csmonitor.com/2006/0403/p01s04-wosc.html>.

('In India, the entire costs range from $2,500 to $6,500.') *cf.* Gentleman, *India*, *supra*. ('The cost comes to about $25,000 …'.) In addition, there does not appear to be any information on the number of persons or couples (US or otherwise) who use international surrogacy arrangements with either women from India or any other country. This is likely due to the fact the there are many independent operators and these arrangements rarely need to interface with current legal systems.

[24] *Rotunda*, *supra*; see also Posting of administrator to *Rotunda's Previous Years Costs* (4 Dec. 2007. 23) <http://1in640715.yuku.com/topic/363>. (Noting the recent increase in price of Indian surrogacy the administrator of the OneinSix website comments, 'The days of exploiting the poor are over [sob, sob].')

[25] *Rotunda*, *supra*.

[26] Posting of administrator to *Rotunda's Previous Years Costs* (4 Dec. 2007. 23) <http://1in640715.yuku.com/topic/363>.

[27] *Indian Clinics*, OneinSix, *available at* <www.oneinsix.com/india_clinics_page.html> (last visited 18 Apr. 2008).

[28] Mike Celizic, *More and More Couples Finding Surrogates in India*, MSNBC, 20 Feb. 2008, *available at* <www.msnbc.msn.com/id/23252624/>.

[29] Id.; Henry Chu, *Wombs for Rent Cheap*, Truthout, 19 Apr. 2006, *available at* <www.truthout.org/cgi-bin/artman/exec/view.cgi/59/19234>.

[30] Chopra, *Childless*, *supra*.

15 hours a day is exploitation. The baby's parents have given me a chance to make good marriages for my daughters. That's a big weight off my mind.'[31]

2.3. International adoption issues

Many of the same ethical issues regarding exploitation and commodification come up in international adoption debates.[32] Although surrogacy arrangements often involve bringing a child born in India to the US, these arrangements do not necessarily have to implicate adoption laws at all. Since the positions of the parties in relation to the child are uncontested, in the view of the surrogacy contractors the benefited couple are the rightful parents. In addition, when the gametes of the benefited couple are being used, the assumption is that as genetic parents the couple will not need to adopt the child after it is born.[33]

In surrogacy arrangements within the US, establishing parentage prior to birth, even in gestational surrogacy, can be difficult due to laws preventing birth mothers from relinquishing their parental rights for a statutory period of time.[34] In addition, hospitals usually use the name of the birth mother on the birth certificate, even when the child may be genetically the child of the recipient parents.[35]

Indian regulations regarding surrogacy circumvent this problem of birth certificates by requiring that the birth certificate must be in the name of the genetic parents.[36] Although regulations require both third-party donors and surrogates to relinquish any legal right to the child, a person or couple that does not have a genetic connection to the child will likely have to go through adoption procedures if they are unable to have the birth certificate reflect the desired parentage.[37] For couples that are able to establish that they are the genetic parents of the child born in India, with proof in the form of their names on the birth certificate, they will likely be able to bypass the international

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[31] Abigail Haworth, *Surrogate Mothers: Wombs for Rent*, Marie Claire, 2007, *available at* <www.marieclaire.com/world/articles/surrogate-mothers-india>.

[32] For a critical look at international adoption and market forces see Michele Goodwin, 'The Free-Market Approach to Adoption: The Value of a Baby', *B.C. Third World L. J.* 26 (2006): 61.

[33] In the case where a person or couple is using donated gametes the baby will be genetically unrelated to both them and the surrogate. In this case they will likely have to establish legal rights over the child pursuant to the adoption laws of the state.

[34] Kindregan, *Assisted*, *supra*.

[35] Id., at 134. Other problems involve gaining a pre-birth judicial determination of parentage. Id., at 141.

[36] Indian Council of Medical Research, *National*, *supra* at Ch. 3, § 3.5.4. ('The birth certificate shall be in the name of the genetic parents.')

[37] Id., at Ch. 3, § 3.5.5. ('A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring.') See also id., at Ch. 3, § 3.10.1. ('A child born through surrogacy must be adopted by the genetic (biological) parents unless they can establish through genetic (DNA) fingerprinting (of which the records will be maintained in the clinic) that the child is theirs.') This provision suggests that any child whose parents (the recipient parents) cannot establish a genetic link will have to go through adoption procedures. The Child Citizenship Act of 2000 allows parents to then establish US citizenship for their child adopted abroad. Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(1).

adoption laws by going through the consular processes of the United States in which a child born abroad to US citizens is afforded US citizenship.[38]

The legal climate, low cost, and well-developed health care system in India make international surrogacy using Indian surrogates an attractive investment. The practice has been growing exponentially in the past few years and will likely continue unabated.[39] In a system that values free trade, free trade in surrogacy presents questions for some about how far that freedom should extend. Concepts of absolute and comparative advantage seem vulgar in relation to producing human life but the growth of the international surrogacy industry demonstrates that, economically speaking, Indian surrogates and hospitals do have an advantage over their US counterparts.[40] In addition, in terms of local currency, Indian surrogates are well paid. The economic boon experienced by Indian surrogates and hospitals has the capacity to affect other aspects of Indian communities by injecting much needed capital into local economies.

Considering these economic benefits should the practice be allowed to continue unrestrained? Or do the ethical qualms about surrogacy in general, and international surrogacy in particular, justify limiting the operation of so-called market forces? In the absence of decisive answers to these questions on the national level, the laws of the states are left to fill the ambivalent void.

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[38] US Department of State, Acquisition of U.S. Citizenship by a Child Born Abroad, available at <http://travel.state.gov/law/info/info_609.html> (last visited 21 Apr. 2008).

Art. II, s. 1 of the US Constitution states that, 'No Person except a natural born citizen … shall be eligible to the Office of the President.' With no definition of a natural born citizen embedded in the Constitution, commentators have debated its contours. In the absence of a Supreme Court decision on the definition, it is unclear whether a surrogate child born in India through this gestational process would be eligible for the highest office in the United States. For an interesting take of the definition of natural born citizenship see Elwood Earl Sanders, Jr, 'Could Arnold Schwarzenegger Run for President Now?', *Fla. Coastal L. Rev.* 6 (2005): 331.

[39] Gentleman, *India*, *supra*. ('Rudy Rupak, co-founder and president of PlanetHospital, a medical tourism agency with headquarters in California, said he expected to send at least 100 couples to India this year for surrogacy, up from 25 in 2007, the first year he offered the service.')

[40] According to Graham Dunkley, '… mainstream economists have largely agreed that any nation can benefit economically by specializing and trading in production of goods and services for which it has a "comparative advantage"; that is the least cost in terms of other production forgone'. Graham Dunkley, The Free Trade Adventure 12 (Zed Books 1997). As Charles Kindleberger explains a country that can produce a good more efficiently than another country has an absolute advantage in that good. He further explains David Ricardo's theory of comparative advantage which is based on the assumption that, despite having an absolute advantage in everything it makes, that country should not continue to make every good for which it has an absolute advantage. A country that has an absolute advantage in two goods would have a comparative advantage in the one good, of the two, that it can produce the most efficiently. The theory holds that the country should choose the good in which it has the comparative advantage and trade to meet the rest of its needs. Charles Kindleberger, *International Economics*, 5th edn (1973), 17-21, 27, 33. But see David Morris, *The Case against Free Trade* (Earth Island Press, 1993), 150, 157 (assessing the assumptions built into the model of free trade and concluding, 'The theory of comparative advantage itself is fast losing its credibility … free trade as it is preached today nurtures and reinforces many of our worst problems.')

3. The US Obligations under the WTO in Relation to International Surrogacy

3.1. Which WTO agreement?

The exchange of goods or services across international boundaries implicates the obligations undertaken by the US under the WTO agreements.[41] The general principle guiding the commitments made by the US in international trade in goods and services is to reduce barriers to international trade.[42] When it comes to international surrogacy arrangements there is no national law in the US which infringes on this principle of free trade. There are, however, varying state laws throughout the country that regulate surrogacy contracts. Some states allow paid surrogacy while other states criminalize every part of the process.[43] For an Indian surrogate, clinic, or middleman that desires access to the lucrative US market of couples desiring a child, laws that hinder that access may be an illegal restraint on trade.[44]

In considering whether state laws restraining the trade involved in international surrogacy arrangements violate any WTO commitments, the first question that must be answered is which WTO agreement covers the type of surrogacy arrangement described above? There are two options: the agreement covering goods, General Agreement on Tariffs and Trade (GATT), or the agreement covering services, GATS.[45]

Although perhaps distasteful to characterize human beings as 'goods' it is not immediately apparent that they should not be qualified as such. Since there is no definition of goods in the GATT, the Appellate Body (AB) has resorted to Black's Law Dictionary to inform their definition of goods.[46] The second entry in Black's Law Dictionary defines goods as, 'Things that have value, whether tangible or not.'[47] Certainly children have value, both tangible and intangible. Yet this definition does not address the other elements involved in surrogacy contracts. The relevant definition of service in Black's is,

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[41] Under the GATT the US has made a variety of commitments with regard to trade in goods. In particular the GATT is driven by the principles of 'the substantial reduction of tariffs and other barriers to trade'. GATT, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Under the GATS, the US has similarly made commitments with regard to services guided by the desire for 'the early achievement of progressively higher levels of liberalization of trade in services'. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

[42] See n. 41, *supra*.

[43] In Michigan 'A participating party … who knowingly enters its to a surrogate parentage contract for compensation is guilty of a misdemeanor and punishable by a fine of not more than $10,000 or imprisonment for not more than 1 year, or both.' Mich. Comp. Laws Ann § 722.859 (West 2008) cf. Illinois surrogacy law which allows the voluntary establishment of parent-child relationship in the context of gestational surrogacy and does not prohibit payment in the surrogacy contract. 750 Ill. Comp. Stat. Ann. 45/6 (West 2008).

[44] If the US has in fact made any commitments to reduce barriers with respect to the trade implicated in international surrogacy a party to the relevant WTO agreement would be able to challenge the US laws which hinder this trade. For example, a state law that criminalizes the contracting of gestational surrogacy services limits Indian service providers to only consumers from states that do not criminalize the practice. This limited access to the entire US market would thus be a barrier to that international trade.

[45] See n. 41, *supra*.

[46] Appellate Body Report, *United States-Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, 2004 WL 77819 (W.T.O.) GATT does provide some guidance as to the definition of goods in that it states that, 'The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services' GATT, Ad Article XVII, para. 2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[47] *Black's Law Dictionary*, 8th edn (2004), 714.

'The act of doing something useful for a person or company for a fee.'[48] This definition also resonates in the surrogacy context, but neither definition alone captures the complete picture of international surrogacy.

Difficulty in delineating the difference between goods and services is not uncommon and commentators have endeavored to more precisely define the difference between the two. One distinction has pointed out the non-storability of services, emphasizing that services, unlike goods, must be consumed as they are produced.[49] This definition has limited use in the surrogacy context since the full service cannot be 'consumed' by the benefited couple until the child is turned over to them. In addition, once the child is produced, the existence of the child itself violates the conception of non-storability.

Another theoretical distinction between goods and services builds upon the concept of non-storability and notes that there must be user-producer interaction in the provision of a service.[50] This distinction recognizes that there are two types of services: those which require physical proximity of the provider and user, and those that do not.[51] International surrogacy can readily be adapted to this definition of service as it clearly does require that there be user-producer interaction. In the case of cross-border surrogacy arrangements, however, it is not necessarily the benefited couple and the surrogate that must interact. It is possible that the entire process could be arranged without the two parties ever interacting.[52] A couple that contracts with an agency that provides surrogates could foreseeably interact only with that agency. Regardless of the particular form the arrangement takes, it is clear that some sort of interaction is required in any conceivable version of surrogacy contracts. However, the user-producer interaction model is not capable of fully describing surrogacy contracts as services. Since the model contemplates a high level of contemporaneousness with provision and consumption in the course of the interaction, gestational surrogacy arrangements do not precisely meet this requirement.

The nature of surrogacy contracts seems to elude classification as the gestational element could intuitively be described as a service while the resulting child bears many of the characteristics of a good. The classification of humans as 'goods' is illuminated by how we treat other 'goods'. For example, live animals, with which we share as much as 98.5% of our working DNA, are considered goods.[53] Despite this, the 1.5% of our DNA that separates us from our closest animal relatives will likely keep us from classifying our

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[48] Id., 1399.

[49] Jagdish Bhagwati, 'Economic Perspective on Trade in Professional Services', *U.Chi.Leg. Forum* 1 (1986): 45, 45-53.

[50] Id.

[51] Id.

[52] Indeed some Indian surrogacy providers prefer that the clients and surrogates not meet. Gentleman, *India*, *supra*.

[53] Animals have generally been found to constitute goods within the meaning of the Uniform Commercial Code. 67 American Jurisprudence Sales § 49 (2d ed. 2008); Jean S Greek, *What Will We Do If We Don't Experiment on Animals?* (Trafford, 2004) 42-43 ('… mice and humans share about 97.5 percent of their working DNA- at most just two percent less than chimpanzees and humans …').

children as goods.[54] Reflecting the social distaste for the commodification of human bodies, courts and legislatures have declined to treat blood and organ donation as trade in goods.[55] Although there is a recognition that once disassociated with one's body, either an organ or blood can be traded in much the same was as a good, the desire to discourage body-part markets drives courts to create this sort of legal fiction.

Viewing human beings as goods has many of the same social and public policy considerations as does commodifying blood or organs. Thus, the tendency in surrogacy arrangements is to emphasize the service of gestation, not the end product of that service, the child. Certainly the surrogate does more than just hand over a child, she undergoes hormone treatment, implantation, and nine months of pregnancy. In fact, some have noted that contracts for surrogacy are better described as mixed contracts.[56] It is also argued that the benefited couple is doing more than renting a womb; they are also purchasing the parental rights to that child.[57]

While perhaps most accurately described as a mixed contract, the current framework of international trade requires trade to be described in terms of either goods *or* services. Borrowing from US contract law, in the case of a mixed contract, to determine whether the contract is for a good or service, one looks to the predominate purpose of the contract.[58] Much like other principles of law, the concept of predominate purpose fits awkwardly with surrogacy contracts. It is undoubtedly the child itself which is the goal of the surrogacy contract but the contract is also intimately concerned with the process used to produce that child.

Describing international surrogacy arrangements in terms of either goods or services is ultimately unsatisfying since the practice does not fit neatly in either box. However, our instinct to preclude classification of human beings as goods coupled with the policy implications of such a classification will likely secure a place for surrogacy among the definitions of services.

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[54] There are many so-called 'baby-selling statutes' which prohibit any exchange of valuable consideration for the adoption of a child. See, e.g., Minn. Stat. Ann. § 259.55. If, however, a baby is not a 'good' how can it be bought and sold? See also Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood* (Praeger, 1994), 29-38 (arguing that 'commercial surrogacy is indeed the sale of children …'. And pointing out that, 'Most surrogacy contracts are structured around the product, not the process or the service of surrogacy.')

[55] 67 American Jurisprudence Sales § 50 (2d ed. 2008) ('most courts have held that transactions involving blood constitute the furnishing of a service and not the sale of goods'.); just a few of the statutes define blood and organ transactions in terms of services: Va. Code Ann. § 2-108 (West 2008); Alaska Stat. Ann § 45.02.316 (West 2008); Ark. Code Ann. § 4-2-316 (West 2008).

[56] Kerian, *Surrogacy*, *supra* at 154.

[57] See Rae, *The Ethics*, *supra* (Praeger, 1994) at 31-38, 65; cf. Kerian, *Surrogacy*, *supra* at 154. (Arguing that, 'The fee paid to the surrogate is not to buy the child but rather to compensate the surrogate for her gestational services.')

[58] 67 American Jurisprudence Sales § 38 (2d ed. 2008) ('To determine the main objective of a "mixed" or "hybrid" contract or transaction, courts look to whether the rendition of a service or the transaction of a sale of goods is the contract's … predominant purpose.') (internal citations omitted)

3.2. GATS threshold questions

Trade in services are covered under the GATS.[59] GATS does not define what constitutes a service within the meaning of the treaty. But, as discussed above, surrogacy arrangements likely fall into the category of a service and would thus be subject to the obligations of the US under the GATS. The various US laws which forbid surrogacy may be in conflict with these obligations. In order to asses the US obligations under GATS, one must first address the threshold questions which make the GATS applicable to the actions of nations.

The first question that must be answered is what government actions are covered by the agreement. GATS 'applies to measures by Members affecting trade in services'.[60] A 'measure' within the meaning of GATS applies to laws, regulations, decisions and any other comparable formulation of a rule.[61] In addition, measures by Members which affect trade in services include, among other things, measures in respect of 'the purchase, payment or use of a service'.[62] Since US laws prohibiting paid surrogacy contracts are at issue, they are clearly measures in respect of payment of a service.

The threshold question in assessing the measure at issue is whether it is 'affecting trade in services'.[63] Whether a measure 'affects' trade in services is determined by whether it has an effect on the ability of a provider to supply a service.[64] Indian service providers that seek US customers would certainly find laws banning paid surrogacy arrangements to affect their ability to provide their service.

Since it has been established that laws forbidding surrogacy qualify as measures affecting trade under GATS, the final threshold question is whether measures by states are measures by members within the meaning of GATS. Article I, § 3 provides that

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[59] General Agreement on Trade in Services, 15 Apr. 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

[60] General Agreement on Trade in Services, *supra* at Art. I, § 1.

[61] General Agreement on Trade in Services, *supra* at Art,. XXVIII(a). ('[A]ny measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.')

[62] General Agreement on Trade in Services, *supra* at Art. XXVIII(c)(i).

[63] 'The threshold question that must be addressed in determining whether or not the GATS is applicable to the measures identified above … is whether those measures "affect trade in services" within the meaning of Article I:1 of the GATS.' WTO Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 192 (7 Apr. 2005) (adopted 20 Apr. 2005) [herein after *U.S.-Gambling*].

[64] *U.S.-Gambling* at ('The Appellate Body in *EC – Bananas III* indicated that the expression "measures ... affecting trade in services" in Article I:1 is to be interpreted broadly. Further, the Appellate Body in that case upheld the Panel's interpretation of that expression as meaning: "... no measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services".' See also, WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 220 (adopted 25 Sep. 1997) [hereinafter *EC-Bananas III*]. ('In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". … We also note that Article I:3(b) of the GATS provides that "services" includes *any service* in *any sector* except services supplied in the exercise of governmental authority' (emphasis added), and that Art. XXVIII(b) of the GATS provides that the "supply of a service" includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application for the GATS.) In this case, laws prohibiting surrogacy certainly affects trade in the provision of the 'service' of surrogacy.

'measures by members' for purposes of the agreement include measures taken by 'central, regional, or local governments and authorities'.[65] States would certainly qualify as a regional authorities so, measures taken by states,[66] such as laws prohibiting paid surrogacy, would be considered measures taken by the US. Being considered measures by the US, the state laws will have to meet the obligations undertaken by the US in the GATS.

3.3. Modes of Supply

There are a variety of ways in which a cross-border surrogacy arrangement could take place. Acknowledging the differences in how trade takes place, GATS commitments are designed in relation to how services are supplied. The four so-called 'modes of supply' under GATS are:

(a) from the territory of one Member into the territory of any other Member;
(b) in the territory of one Member to the service consumer of any other Member;
(c) by a service supplier of one Member, through commercial presence in the territory of any other Member; and
(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.[67]

The first mode of supply, 'from the territory of one Member into the territory of another Member', would apply to an international surrogacy situation in which the US couple sent money and fertilized eggs to India for gestation and, in exchange, an Indian surrogate sent the baby to the US. In this situation neither the mother nor the intended parents will have left their home country. The next mode of supply, 'in the territory of one Member to the service consumer of any other Member', best embodies the current practice of international surrogacy. In this case the US person or couple travels to India and has all of the services involved in the transaction conducted in India. If the US couple is providing the eggs or sperm, this would include the harvesting and in vitro fertilization required to impregnate the Indian surrogate.

The third mode of supply, 'by a service supplier of one Member, through commercial presence in the territory of another member', could become relevant as international surrogacy expands. This mode of supply would have an Indian company with an outpost in the US coordinating the supply of the Indian surrogacy service. Finally, the fourth mode of service, 'by a service supplier of one Member, through presence of

[65] General Agreement on Trade in Services, *supra* at Art. I, § 3(a). This obligation is tempered by the proviso that, 'each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory'. General Agreement on Trade in Services, *supra* at Art. I § 3(a) The US obligation under this proviso is discussed in more detail in Part III.

[66] In addition, the AB has stated that 'There is no reason why measures adopted by regional and local governments and authorities cannot *a priori* "affect the supply of a service" within the meaning of Article I:1 of the GATS, even if such measures cannot be enforced extraterritorially.' *U.S.-Gambling*, *supra* at 196.

[67] General Agreement on Trade in Services, *supra* at Art. I, § 2.

natural persons of a Member in the territory of any other Member', would be similar to the second mode of supply, only reversed. In the final scenario, an Indian surrogate would come to the US to offer her service as a surrogate. This is probably the least likely form international surrogacy would take since the only cost savings would be on the fee of the surrogate herself.

Although the second mode of supply is currently the most common way international surrogacies are conducted, any of the modes could be foreseeably implicated as the practice grows. Once the mode of supply for a practice at issue is determined, reference must be made to the US Schedule to determine whether the US has made a specific commitment in relation to that particular mode of supply. For now it is enough to say that current surrogacy arrangements clearly fall into at least one of the modes of supply contemplated by GATS, and so they are rightfully the subject of a possible GATS commitment.

3.6. Market access and national treatment

While state laws outlawing surrogacy may be measures affecting trade in services, they are not necessarily measures in contravention of GATS. Under GATS, the US has undertaken three major commitments in relation to trade in services: market access, national treatment, and MFN status.[68] If the US has not committed itself to give Indian service providers market access, national or MFN treatment, then US laws forbidding these surrogacy arrangements would be able to withstand scrutiny.

The first two main commitments, market access and national treatment, are concessions that are in reference to the US Schedule of Specific Commitments.[69] The US has made a number of specific commitments for each of the modes of supply discussed above for both market access and national treatment.[70] Specific commitments are made on issues ranging from engineering to real estate services.[71]

The US has not made a specific commitment regarding market access or national treatment in the realm of international surrogacy. This is unsurprising since it is a relatively new and comparatively infrequent form of trade. However, there are two possible sector-specific commitments that could implicate outsourcing surrogacy. The first is 'commission agents' services' and the second is 'tourism, other'.[72]

Considering the first possibility, 'commission agents' services', it is easy to imagine a clinic or middleman acting as a surrogate's agent, taking a commission for the successful pairing of surrogate and recipient couple. Similarly, an agent might work on commission

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[68] General Agreement on Trade in Services, *supra* at Art. II, § 1-3 (MFN); General Agreement on Trade in Services, *supra* at Art. XVI, § 1 (market access); General Agreement on Trade in Services, *supra* at Art. XVII, § 1 (national treatment).

[69] General Agreement on Trade in Services, *supra* at Art. XVI, § 1 (market access); General Agreement on Trade in Services, *supra* at Art. XVII, § 1 (national treatment).

[70] United States, Schedule of Specific Commitments, GATS/SC/90, 15 Apr. 1994 (US Schedule).

[71] Id., at 36-37.

[72] Id., at 49 (commission agents); Id., at 70-71(tourism).

for the couple seeking a surrogate. Indian surrogates are usually found through the work of clinics and middlemen rather than working directly with the couple seeking a child. Without the agents facilitating the connection of the surrogates and the recipient parents, there would be almost no international surrogacy. Laws that act to hinder these agents' services, if the US has made a commitment, could be a violation of the US obligations under GATS.[73]

The second sector where the US may have made a commitment is under 'tourism, other'.[74] As noted above, India has marketed itself as a destination for medical tourism.[75] There are already US companies facilitating medical tourism to India,[76] Indian service providers might endeavor to access this tourist market directly. State laws that impinge upon the ability of Indian service providers to access the market of willing US consumers of international surrogacy could violate US obligations under GATS if it is found to have made a specific commitment.[77]

While it is clear that the US has made sector-specific commitments regarding both 'commission agents' services' and 'tourism, other' it is unclear the scope of the services that are included in these sectors. Sectors are usually elucidated by reference to the United Nations Central Product Classification system.[78] Neither sector, however, has further explanation by the system.[79]

Although there is no guidance from the CPC in this instance, the WTO AB has dealt with the question of how broadly the US sector-specific commitments could be read.[80] In a recent case, the AB addressed whether the US Schedule could be read to include specific commitments on 'gambling and betting services', despite the fact that those particular words did not appear in the Schedule.[81] In its analysis the AB considered the US Schedule to be an integral part of the WTO treaty under Article XX: 3 of the GATS and thus applied the Vienna Convention and other supplementary principles of treaty interpretation to determine the extent of the US commitment under the Schedule.[82] The AB noted that the US was able to qualify and define the bounds of the sectors

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[73] Regarding market access the US has committed to have no limitations on market access only for the first three modes of supply. US Schedule, *supra* at 49. For national treatment, the US has committed to no limitations in regard to all four modes of supply. Id.

[74] US Schedule, *supra* at 91 (9D).

[75] See n. 2, *supra*.

[76] Planet Hospital, Surrogate, <www.planethospital.com/?page=procedure_details&id=177&name=Surrogate> (last visited 20 Apr. 2008).

[77] With regard to 'tourism, other' the US has committed to have no limitations on market access for the first modes of supply only. In addition, it has committed to have no limitations on national treatment with regard to all four modes of supply. P 71.

[78] WTO, Guide to Reading the GATS Schedule of Specific Commitments and the List of Article II (MFN) Exemptions, <www.wto.org/english/tratop_e/serv_e/guide1_e.htm> (last visited 20 Apr. 2008); see also *U.S.-Gambling*, *supra* at 158. ('The Panel is of the view that, even if it is not binding, the CPC, through the context of W/120 and the Scheduling Guidelines, remains relevant for the interpretation of the U.S. Schedule.')

[79] United Nations Statistics Division, Classifications Registry CPC, <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> (last visited 20 Apr. 2008).

[80] *U.S.-Gambling*, *supra*.

[81] *U.S.-Gambling*, *supra* at 145-169.

[82] Id., at 146-147.

in drafting its Schedule but it did not.[83] Including considerations of good faith, ordinary meaning, and the context of the commitments, the AB found that although the US may not have intended to make a commitment regarding gambling and betting services, it had.[84]

While it is unclear whether the AB (or the panel for that matter) would find that the US had made a specific commitment regarding the services involved in international surrogacy, two findings from the *U.S.-Gambling* case are instructive. First, the AB did not find it significant that the US claimed that it never intended to make a commitment on gambling services.[85] Second, the AB placed great emphasis on the common intention of the parties to the treaty in finding that the US had made a commitment in relation to gambling.[86]

So, it is not dispositive that the US likely never contemplated international surrogacy when developing its Schedule. As in any sector, the services that are comprised in that industry have both the capacity and tendency to evolve. However, the fact that likely *no* Member contemplated the services involved in international surrogacy will likely make it difficult for the AB to find that the US has made a specific commitment regarding market access and national treatment. If, however, trade talks continue to stall, and the US Schedule stagnates, it is not inconceivable that the AB will read the US Schedule even more liberally than in *U.S.-Gambling*, in particular giving great latitude to the overarching principles of the GATS such as the desire for the 'early achievement of progressively higher levels of liberalization of trade in services'.[87] If the AB finds that the US *did* make a market access or national treatment commitment for international surrogacy, state laws that disable this access would likely violate the US obligations under GATS.

3.5. MFN treatment

Even if the US is not bound to give market access or national treatment concessions on the basis of not making any commitments in its Schedule, it is still bound to give 'Most-Favoured-Nation Treatment' in regard to trade in services.[88] Since laws that affect

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[83] Id., at 158 ('The United States had the possibility to provide its own definitions for sub-sector 10.D. It did not. In the absence of any clear terms or any other clear indication of the meaning and scope of the US entries in sub-sector 10.D of its Schedule, the Vienna Convention points to a series of instruments that should be used to assist in the interpretation of the US Schedule. Such instruments include W/120, which refers to CPC definitions, and the 1993 Scheduling Guidelines which explains the relationship between Members' schedules, W/120 and the CPC.')

[84] Id., at 145-169. ('… the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the time of the negotiations'.)

[85] Id., at 169. ('… the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the time of the negotiations'.)

[86] Id. ('[T]he purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intention of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectation" of *one* of the parties to a treaty.') (quoting Appellate Body Report on *EC – Computer Equipment*, para. 84.)

[87] General Agreement on Trade in Services, *supra* at preamble.

[88] General Agreement on Trade in Services, *supra* at Art. II, § 1. ('With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.')

the ability of Indian surrogacy service providers are covered under GATS, Article II, § 1 MFN treatment is the floor, below which treatment of service providers may not fall. MFN treatment requires the US to afford suppliers of any Member country treatment 'no less favourable than that it accords to like services and service suppliers of any other country'.[89]

In examining the scope of MFN obligations the AB has noted, 'The text of Article II:1 requires, in essence, that treatment by one Member of "services and services suppliers" of any other Member be compared with treatment of "like" services and service suppliers of "any other country".'[90] Any law which impinges on an Indian service provider's ability to do business would likely similarly frustrate the purposes of a like international surrogacy provider in any other country; in this case, there would be no violation of MFN treatment.[91] As long as the US has not made any specific commitments, it can essentially discriminate equally against service providers from any country. This is does not end the inquiry, however, since there are two scenarios in which the MFN obligation of the US could be implicated.

The first of these scenarios is informed by one AB decision elucidating the scope of the MFN treatment obligation. Although there is relatively little AB jurisprudence on the MFN obligation, the AB has made clear that the provision applies to both de jure and de facto discrimination between member countries.[92] It is foreseeable that as the practice of international surrogacy gains more notoriety there may be a facially neutral law which has a discriminatory effect on Indian service providers.[93] In this case, Indian service providers would have a cognizable claim that the US had violated its MFN obligations.

There is a one additional scenario in which US surrogacy laws would result in a violation of MFN treatment. Since there are variable state laws, a surrogate from Poland, for example, would be able to contract with a couple from Illinois, which allows paid surrogacy; while a surrogate from India would not be able to contract with a couple from Indiana, which prohibits surrogacy. In this scenario the services suppliers in Poland would be receiving better treatment than 'like' service providers in India.

So, surrogacy service providers from different countries may receive variable treatment depending on the laws of the state in which they seek customers. If service providers from different countries seek customers from the same state, they will theoretically receive identical treatment based on the laws of the state. If service providers from different countries seek customers from different states, they may receive different treatment,

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[89] Id.

[90] WTO Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, para. 10.248 (adopted 19 Jun. 2000) According to the AB, 'to the extent that the service suppliers concerned supply the same services, they should be considered "like" for the purpose of this case'.

[91] There is still a question, however, as to how the AB would analyze discriminatory treatment in the absence of any other like service providers from other Member countries.

[92] *EC- Bananas III*, *supra* at paras 233-234.

[93] Among other things a law could require particular financial resources of the clinic overseeing the surrogacy, a particular level of education for the surrogate (informed consent), or a particularly high level of health insurance.

depending on the laws of the state.[94] Although in the two situations no laws or state practices have changed to intentionally exclude service providers based on national origin, service providers could receive different treatment by the US *as a whole* based on the individual laws of the states. In this case, the US would seem to be violating its MFN obligations under the GATS.[95]

4. State Laws and GATS

As discussed above, there are a few scenarios in which an Indian service provider may be able to substantiate a GATS-violating restriction on trade. First, by showing that the US made a specific commitment in regards to market access or national treatment, different state laws could result in a GATS violation. Or, in the absence of a scheduled commitment, the variable US laws could violate the US obligation to accord MFN treatment. This being the case, the next question is how the individual state laws interact with the US obligations under GATS. This inquiry is informed by the few relevant WTO decisions that broach the overlapping sovereignties of the states and federal government.

The national picture varies widely when it comes to laws on surrogacy: some state law allow gestational surrogacy, regardless of payment;[96] some only prohibit payment for surrogacy services;[97] some forbid any type of surrogacy arrangement;[98] and some allow surrogacy only for married couples.[99] In addition, in some states there is case law interpreting the statutes.[100] And of the states that do not have statutes, there is case law on the legality of surrogacy that is correspondingly varied.[101] Assuming that Indian surrogates are providing a legitimate service in their gestational surrogacy, they can expect

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[94] In the GATT case of *U.S.-Alcohol*, *infra*, a national treatment violation was found based on different treatment by different US states.

[95] Even if they could show that the US had not accorded them MFN treatment, the US could still justify its discriminatory treatment under one of the exceptions outlined in Art. XIV. The two most relevant to international surrogacy are measures (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health. For guidance on the analogous public health exception in GATT see WTO Appellate Body Report on *Brazil- Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 Dec. 2007). In addition, the public morals exception is elucidated in *U.S.-Gambling*, *supra*. The factor balancing test for 'necessary' in the public morals context in GATT is articulated in *U.S.-Gambling*, *supra* (Relying on *EC – Asbestos* and Appellate Body Report on *Korea – Various Measures on Beef*) as: (a) the importance of interests or values that the challenged measure is intended to protect; (b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and (c) the trade impact of the challenged measure. A test which at least some of the challenged gambling provisions could not survive. If it is found that the US has made a commitment on international surrogacy, any national legislation adopted by the US would have to conform to one of these exceptions.

[96] 750 Ill. Comp. Stat. 45/6 (2008). More precisely, Illinois allows genetic parents to establish parentage before the birth of the child by the surrogate and does not prohibit payment in the formation of a valid surrogacy contract.

[97] Wash. Rev. Code Ann. § 26.26.230 (West 2008) and Wash. Rev. Code Ann. § 26.26.240 (West 2008).

[98] D.C. CODE §§ 16-401, 402. ('Surrogate parenting contracts are prohibited and rendered unenforceable in the District.'); Ind. Code § 31-20-1-1 (West 2008).

[99] Fla. Stat. Ann. § 742.15(1) (West 2008). Florida also only allows payment for medical expenses relating to the surrogacy. Fla. Stat. Ann. § 742.15(4) (West 2008); Virginia allows surrogacy but limits it to 'a man and a woman, married to each other'. Va. Code Ann. § 20-156 (West 2008).

[100] E.g., *People ex rel. Dept. of Public Aid v. Smith*, 818 N.E.2d 1204 (2004). (Construing language in Illinois statute above.)

[101] See, e.g., *J.F. v. D.B*, 897 A.2d 1261 (Pa. Sup. Ct. 2004); *A.H.W. v. G.H.B* . 772 A.2d 948 (N.J. Sup. Ct. 200).

at least a few states inhospitable to their services, thereby limiting their freedom to serve customers in those states.

Neither the Panel nor the AB have decided any cases which specify the GATS obligations of a Member country in relation to its various state laws. Nor has there been a comparable GATT case decided since the WTO came into force in 1995. There are, however, a few cases decided by the dispute settlement panel under the original GATT 1947 agreement which help to illuminate the relationship between state laws and world trade obligations.[102]

4.1. Reasonable measures

As noted above, state governments constitute regional authorities for purposes of GATS. If the US has made commitments regarding market access, national or MFN treatment in relation to surrogacy service providers, it is also obligated to, 'take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory'.[103] For example, state laws forbidding surrogacy, if inconsistent with US obligations, would need to be overturned.

In *U.S.-Alcohol* the Panel elucidated Members' obligations under Article XXIV, § 12 to ensure GATT observance by regional authorities.[104] In its decision the Panel found the obligation to ensure compliance extends only to measures which are within the control of the national government.[105] In addition, the Panel noted that since GATT law was part of federal law, it necessarily preempted contrary state law and so was well within the power of the federal government to control.[106] Since Article I, § 3 of GATS virtually tracks the language of Article XXIV, § 12, the Panel's decision on the obligation to ensure compliance is persuasive with regard to the similar GATS requirements.[107]

Another Panel decision that builds on the obligation to ensure compliance by regional authorities is the decision in *Canada-Beer*.[108] In that case the Panel found that many of Canada's provincial restrictions were in violation of Canada's national treatment

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[102] In *EC – Bananas III*, the Appellate Body confirmed that jurisprudence under the GATT 1994 could be relevant for the interpretation of analogous provisions contained in the GATS. *EC – Bananas III*, *supra* at para. 231. Presumably this should also be the case for jurisprudence under GATT 1947.

[103] General Agreement on Trade in Services, *supra* at Art. I, § 3. ('In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.')

[104] GATT Panel Report, *United States- Measures Affecting Alcoholic and Malt Beverages*, DS23/R – 39S/206 (adopted 19 Jun. 1992) [hereinafter *U.S.-Alcohol*]; see also General Agreement on Trade and Tariffs, *supra* at Art. XXIV, § 12. This commitment was incorporated into GATT 1994 in the Understandings on the Interpretations of The GATT 1994, <www.worldtradelaw.net/uragreements/articlexxivunderstanding.pdf> (last visited 20 Apr. 2008) ('Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.')

[105] *U.S.-Alcohol*, *supra* at 79, para. 5.79.

[106] Id.

[107] General Agreement on Trade in Services, *supra* at Art. I, § 3.

[108] WTO Panel Report, *Canada- Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R – 39S/27 (adopted 18 Feb. 1992) [hereinafter *Canada-Beer*].

obligations.[109] The Panel and the parties agreed that the provinces constituted 'regional authorities' under the GATT and were thus subject to the obligations in Article XXIV, § 12.[110] Citing a previous Panel decision, the Panel noted that although Canada would ultimately be the judge of what specific measures could be taken, it was the burden of Canada to demonstrate to the other GATT contracting parties that it had indeed taken all of the measures within its power.[111] The Panel considered that in meeting this burden, Canada would have to show 'serious, persistent and convincing effort' to bring its regional authorities in compliance with its GATT obligations.[112] In the view of the Panel, Canada did not meet this burden.[113]

The question then becomes whether regulation of international surrogacy contracts is within the control of the national government. The power of the federal government to pass a law regarding international surrogacy is virtually assured. The fact Congress has not yet spoken on the issue does not suggest its inability to do so. In all likelihood, the US would have a heavy burden to show that it has no control over state laws regulating surrogacy.

Even if the US is able to show that state measures regulating surrogacy are beyond the control of the national government, it will still have to show that it made a 'serious, persistent and convincing effort' to get state laws in line with its GATS obligations.[114] In the absence of this effort the US will be unable to meet its obligation to ensure the compliance of the regional authorities under its control.

4.2. Discriminatory treatment

A final piece of insight from the Panel comes again from the *U.S.-Alcohol* case. In this case the taxes imposed by some states were found to accord worse treatment to imported

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[109] Id., at para. 6.1.
[110] Id., at paras 5.35 and 5.36.
[111] *Canada-Beer, supra* at 52, para. 5.36.
[112] Id., at 52, para. 5.37.
[113] Id., at 55, para. 6.2.
[114] A final twist is the Uruguay Rounds Agreement Act, 19 U.S.C.A. § 3512. The URAA applies to US commitments taken under GATS and provides 'No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.' And also that 'a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference.' In essence, the Act allows *only* the US national government to decide when a state law violates the US WTO Obligations. In addition, US courts have consistently held that WTO Appellate Body decisions (much less Panel decisions) are not binding on US courts. E.g., *Timken Co. v. U.S.*, 354 F.3d 1334, 1344 (Fed. Cir. 2004) Many courts, however, have found that WTO AB decisions can be considered by the court. E.g., in *Allegheny Ludlum Corp. v. U.S.*, 367 F.3d 1339, 1348 (Fed. Cir. 2004). So even if there was an adverse ruling by the Panel or AB, it is unlikely that the WTO decision would enjoy much force in the US unless the US government itself decides to abide by it.

products, in direct violation of the national treatment obligations of the US.[115] The panel noted that it, 'did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same treatment to products of other states of the United States as that provided to foreign products'. Essentially the Panel was arguing that it does not matter if state X affords worse treatment to state Y *and* nation Z, as long as nation Z is receiving worse treatment than producers from state X.

In terms of national treatment, if the US has made a commitment, it would not matter that surrogacy service providers from Illinois would be excluded from Indiana, just as are service providers from India. In addition, it seems plausible that the Panel's logic could be extended in the context of MFN treatment. In this case it would not matter if nation Y and nation Z receive the same bad treatment in state X, if nation Y receives better treatment in state A than nation Z receives in state X, then there would be a violation of MFN treatment. If there is discriminatory treatment somewhere, the possibility of a challenge to US laws becomes more credible.

5. Conclusion

Currently the US obligations in relation to international surrogacy are unclear. There is no question that the US has committed to a broad reduction of barriers to trade in the WTO agreements requiring market access, national and MFN treatment. This analysis has highlighted the myriad of issues implicated by the absence of a single national standard for surrogacy. First, as the AB has shown, it is incumbent upon the US to clarify what it intends to be bound by in its Schedule. If it does not it risks a broad reading of their Schedule with an eye towards grater trade liberalization in favor of greater market access and national treatment. In addition, absent a scheduled commitment, the US remains bound by MFN treatment. And finally, the US will not be able to hide behind its federalist system as it will need to take reasonable measures to secure compliance of all of the states to these obligations. Where the AB finds discriminatory treatment, the US will bear a heavy burden to justify that treatment. In the end although it is unlikely that the prejudice created by different state laws will spark a challenge by Indian surrogacy providers, it is still within the realm of possibilities as the lucrative practice grows.

In the US, about 7.3 million women have fertility problems.[116] As India continues to market itself as a destination for medical tourism, it is foreseeable that many of these women will continue to seek the various fertility treatments available there at lower costs.

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[115] Id., at 62, para. 5.16. Although this case deals only with national treatment obligations, it is still relevant to an analysis of US obligations. As discussed above, GATS requirement for national treatment are in relation to the US Schedule. While the US has made no specific commitments regarding international surrogacy in name, it may nevertheless be found to have made a commitment, in which case the jurisprudence regarding national treatment is directly relevant. In the case that MFN treatment is all that is required of the US, the discussions of national treatment are relevant in that the obligation undertaken is similar to that in MFN treatment.

[116] 'In 2002, 12% of US women 15-44 (or 7.3 million women) had impaired fecundity, a physical difficulty with getting pregnant or carrying a baby to term. This represents an increase of about 2 percentage points from the levels seen in 1988 and 1995.' <www.cdc.gov/nchs/products/pubs/pubd/series/sr23/pre-1/sr23_25.htm>.

Given the possibility of producing a child that is genetically that of the recipient parents, gestational surrogacy is likely to continue as well. As this phenomenon increases so too does the likelihood of surrogacy arrangements interfacing with international trade laws. The ethical questions provoked by surrogacy are the same that are involved in the sale of organs, tissues, and other elements of human life for pecuniary gain. Since there is no indication that these markets will disappear, the US must face the question of how to balance these questions against the ever expanding mandate of free trade. Technological advances ultimately force law makers to take sides and the US will no longer be able rely on federal ambivalence to dictate its obligations in international trade.

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