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ESTABLISHING AN INTERNATIONAL ORGAN EXCHANGE THROUGH THE GENERAL AGREEMENT ON TRADE IN SERVICES

INTRODUCTION

As the baby boomer generation ages and prominent figures like Dick Cheney and Steve Jobs attract attention with their high profile organ transplants, the question is now ripe in the minds of many people around the world: what happens when *my* body fails me?¹ While modern medical technology and advanced health care² now allow people to live longer—well beyond what one could ever imagine in the past³—many people will find that their own organs prove to be the limiting factors in reaching a ripe, golden age. When contending with organ failure, one must face either the difficult task of finding a matching transplant donor or death. Increased trade in organ transplant services can help address this critical shortage by creating opportunities both for an organ exchange and for a system that brings patients to transplant services located abroad.

1. William Saletan, *Help the Next Steve Jobs*, SLATE (Oct. 4, 2011), http://www.slate.com/articles/health_and_science/human_nature/2011/10/steve_jobs_liver_transplant_organ_donation_is_the_best_way_to_ho.html (Steve Jobs suffered liver cancer that required him to have a liver transplant. Because the transplant list was too long in his home community in Northern California, he moved to Tennessee to receive the transplant. Jobs's move solely for transplantation purposes made headlines because other needy people in Northern California did not have the financial resources to move to an area with a shorter waiting list.); Scott Shane, *For Cheney, 71, New Heart Ends 20-Month Wait*, N.Y. TIMES (Mar. 24, 2012), <http://www.nytimes.com/2012/03/25/us/politics/dick-cheney-recovering-after-getting-a-new-heart.html>.

2. Max Kasriel, *Organ Transplants, deny to those not registered as donors*, IDEA (Sept. 5, 2009), http://www.idebate.org/debatebase/topic_details.php?topicID=923.

3. END OF LIFE CARE: AN ETHICAL OVERVIEW, CENTER FOR BIOETHICS AT UNIVERSITY OF MINNESOTA 2 (2005), *available at* http://www.ahc.umn.edu/img/assets/26104/End_of_Life.pdf [hereinafter *End of Life Care*].

While many countries attempt to increase organ donation rates through domestic legislation,⁴ the practical effect of these laws is to discourage international cooperation and restrict the efficient movement of organs and people. This Note suggests a regulated international organ exchange within the framework of the General Agreement on Trade in Services ("GATS"), whereby countries voluntarily commit to lower trade barriers in all services related to the organ transplantation process. Increased trade and legitimate exchange in transplantation services within the GATS framework would result in a more efficient organ allocation system and increased donation rates.

Part I of this Note will provide background on the organ supply shortage, highlighting common problems arising in current organ allocation policy, using the United States, the European Union, Spain, Israel, and England as case studies. Part II of this Note will develop an international exchange program, explaining why countries should and will participate in the exchange. Additionally, Part II will describe potential modes of international cooperation and analyze whether these modes can be applied effectively in the context of international organ procurement and allocation. Part III of this Note will discuss first why multilateral cooperation promulgated through the General Agreement on Trade in Services ("GATS") is the best framework for encouraging trade, then how the exchange will operate, and finally, how the exchange will interact with current domestic policy in other countries. Part III will also examine potential limitations to an international organ exchange and the GATS framework.

4. Melisa Martínez et. al, *The Potential for Bi-lateral Agreements in Medical Tourism: A Qualitative Study of Stakeholder Perspectives From the UK and India*, 7 GLOBALIZATION AND HEALTH at 6 (May 3, 2011), <http://www.globalizationandhealth.com/content/7/1/11>; Council Directive 2010/45, 2010 O.J. (L 207/14) 1, 1 (EC)[hereinafter *Directive*]; J. Lavee et. al, *A new law for allocation of donor organs in Israel*, LANCET 1131, 1131, March 27, 2010, available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(09\)61795-5/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(09)61795-5/fulltext).

I. THE CURRENT STATE OF THE ORGAN TRANSPLANT CRISIS

A. *Global Organ Shortages*

Countries worldwide have faced dire organ supply shortages for decades, and the problem has become more severe due to decreasing fatalities from traffic accidents in developed countries.⁵ Except for Iran, which allows organs to be sold, the waiting lists in every country are extremely long and the process is very costly.⁶ These costs are not only exorbitant for patients, but also for the governments that often pay for end-of-life health care.⁷ In 2005, 14,000 people in the United States died with transplantable organs that were not used for needy patients, and yet even if every one of these people had elected to be donors, there would still be an overwhelming shortage.⁸ With the United States health care system already hemorrhaging dollars, the government is seeking to cut costs, and the baby boomers—aging and thus increasing the demand for organ transplants—will feel the effects of the government's tight budget constraint.⁹

5. *Opting Out of Opting Out: Britain Rejects "Presumed Consent" for Organ Donors—For the Time Being*, ECON. (Nov. 20, 2008), <http://www.economist.com/node/12641944>.

6. *Organ Transplants: Psst, Wanna Buy a Kidney: Governments Should Let People Trade Kidneys, Not Convict Them For It*, ECON. (Nov. 16, 2006), <http://www.economist.com/node/8173039>.

7. *Id.*

8. Mark S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donation*, YALE J. HEALTH POL'Y L. & ETHICS 293, 293–295 (2005); Gil Siegal and Richard J. Bonnie, *Closing the Organ Gap: A Reciprocity-Based Social Contract Approach*, 34 DNA FINGERPRINTING & CIVIL LIBERTIES 415, 415 (2006); *The gap between supply and demand: As demand for life-saving transplant surgery grows, the idea of paying donors is gaining support*, ECON. (Oct. 9, 2008), <http://www.economist.com/node/12380981> [hereinafter *The gap between supply and demand*]; Only 43 percent of adults in the United States are registered organ donors, leaving a waiting list of nearly 114,000 people in 2012. Michelle Healy, *Now Facebook Wants You to Give Up Your Organs*, USA TODAY (May 2, 2012, 10:21 AM), <http://www.businessinsider.com/now-facebook-wants-you-to-give-up-your-organs-2012-5>.

9. Teck Chuan Voo et. al.; *The Ethics of Organ Transplantation: Shortages and Strategies*, 38 ACAD. MED. SINGAPORE 359, 359 (2009), available at <http://www.cwsl.edu/content/faculty/05%20voo%20et%20al%20-%20the%20ethics%20of%20organ%20transplantation.pdf>; *An Overview of Health Care: A Population Perspective*, JB LEARNING 17, available at http://www.jblearning.com/samples/0763749745/49745_Ch01.pdf.

Most countries are unwilling to let needy patients buy organs, and disapprove of the use of methods by a minority of countries that may be morally objectionable, such as harvesting organs from executed prisoners.¹⁰ Some individuals and even some national governments have tried radical or illegal strategies to alleviate the shortages, including open organ sale, organ trafficking, and transplant tourism. The World Health Organization ("WHO"), however, maintains their official position is that the sale of organs in a commercial transaction, or their exchange for valuable consideration, should be banned in all countries.¹¹ Similarly, in the United States, the "National Organ Transplantation Act ([“NOTA”])...[also prohibits the exchange of]... ‘valuable consideration’ for organ donation.”¹²

Although organ trafficking is illegal in most countries,¹³ it still is highly appealing to wealthy sick patients and to groups who look to benefit from this desperation. Organ trafficking through the black market is flourishing even in the early twenty-first century.¹⁴ In many cases this illegal organ trafficking

10. Jiefu Huang et. al, *Government Policy and organ transplantation in China*, LANCET 1937, 1937 (Dec. 2008), [http://www.lancet.com/journals/lancet/article/PIIS0140-6736\(08\)61359-8/fulltext](http://www.lancet.com/journals/lancet/article/PIIS0140-6736(08)61359-8/fulltext). In “China, more than 90% of transplanted organs are obtained from executed prisoners.” *Id.*

11. *Directive*, *supra* note 4, at 1.

12. Siegal & Bonnie, *supra* note 8, at 416.

13. Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors*, 12 HUM. RTS. BRIEF 20, 20 (2005), <http://www.wcl.american.edu/hrbrief/12/2glaser.pdf?rd=1> (“Organ trafficking violates fundamental human rights, such as the rights to life, liberty, security in person, and freedom from cruel or inhumane treatment. As such, several international organizations have established standards on organ trafficking. These include the World Health Organization’s Guiding Principles on Human Organ Transplantation (1991); the World Medical Authority . . . ; the Council of Europe’s Convention on Human Rights and Biomedicine (1997) and its Optional Protocol Concerning Transplantation of Organs and Tissues of Human Origin (2002); and the Bellagio Task Force.”)

14. Jeneen Interlandi, *Not Just Urban Legend*, DAILY BEAST (Jan. 9, 2009, 7:00 PM), <http://www.thedailybeast.com/newsweek/2009/01/09/not-just-urban-legend.html> (“international organ trafficking—mostly of kidneys, but also of half-livers, eyes, skin and blood—is flourishing The World Health Organization estimates that one fifth of the 70,000 kidneys transplanted worldwide every year come from the black market.” Organ trafficking even involves U.S. hospitals and often “for about \$150,000 per transplant . . . organ brokers [can] reach across continents to connect buyers and sellers,

preys on the poor and exploits them, subjecting them to dangerous operations that carry the risk of spreading diseases and killing both the donor and recipient.¹⁵

The common perception of organ trafficking is that it takes place in a dark, dirty, “back room” in a developing country and that it often involves organized crime. In reality, organ trafficking also occurs in many developed countries like the United States and countries within the European Union.¹⁶ Such perceptions, and the horror stories precipitating them, negatively impact the legitimate organ transplant processes, and thereby discourage the principle of altruism that most systems around the world depend upon for their organ supply.¹⁷

Another model individuals utilize to increase their chances of obtaining a life-saving organ is by engaging in transplant tour-

whom they then guided to “broker-friendly” hospitals here in the United States.”). Dan Bilefsky, *Black Market for Body Parts Spreads Among the Poor in Europe*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/world/europe/black-market-for-body-parts-spreads-in-europe.html?_r=1&adxnnl=1&adxnnlx=1346432663-VPWTbOQ+snTT/8JIM12XSg; Matthew Brunwasser, *Trial Opens for 7 Kosovars in Organ-Trafficking Case*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/world/europe/trial-opens-for-7-kosovars-in-organ-trafficking-case.html?_r=1&emc=eta1.

15. Claire Suddath & Alex Altman, *How Does Kidney-Trafficking Work?*, TIME (July 27, 2009), <http://www.time.com/time/health/article/0,8599,1912880,00.html>; see also Interlandi, *supra* note 14 (Lawrence Cohen, an anthropologist at UC Berkeley, discovered that there are pressures on many women in developing countries, such as India, to sell organs either voluntarily or out of fealty to their husbands demands that they “contribute to the family’s income, or to provide for the dowry of a daughter.”)

16. Suddath, *supra* note 15; see also Interlandi, *supra* note 14 (a needy Israeli citizen was even able to find “an organ broker through a local paper in Tel Aviv who arranged to have the transplant done at Mount Sinai Medical Center in New York.”); Bilefsky, *supra* note 14. *The gap between supply and demand*, *supra* note 8, at 4 (Many U.S. citizens were outraged when an “investigation by the Los Angeles Times [that] found that four notorious Japanese criminals received transplants at the Medical Center of the University of California Los Angeles, apparently jumping a queue of needy Americans.”); Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, 85 BULL. WORLD HEALTH ORG. 955, 956 (2007), available at <http://www.who.int/bulletin/volumes/85/12/06-039370.pdf> (“Finding a “transplant package” is easy with a simple online search, which reveals that “the price of a renal transplant package [ranges] from US\$70,000 to 160,000.”)

17. *The gap between supply and demand*, *supra* note 8.

ism.¹⁸ Transplant tourism is a concept similar to medical tourism where a citizen of one country travels to another country for a variety of health services.¹⁹ The term “transplant tourism” is often used with a negative connotation and the WHO even adopted resolution WHA57.18, which “urges Member States to ‘take measures to protect the poorest and vulnerable groups from ‘transplant tourism.’”²⁰ Some scholars refer to transplant tourism as “the purchase and sale . . . of organs . . . and other elements relating to the commercialization of organ transplantation” including any “intermediaries and health-care providers who arrange the travel and recruit donors.”²¹ Critics of medical tourism find fault in this means of obtaining treatment because it is often only available to the wealthy and in the case of transplant tourism, specifically, may encourage the rise of a black market for organs in countries with a weak regulatory system or with a large poor population, such as India or China.²²

Putting aside the negative connotations of the term “transplant tourism,” it is essential for this analysis to examine the term in its most literal and legal sense: transplant tourism occurs when a person travels internationally to seek an organ transplant or related services. Utilizing this neutral definition of transplant tourism reveals the potential positive aspects of transplant tourism within a well-structured and legitimate regulatory framework.

B. Current Allocation Systems in the International Community

Throughout the world, the two most popular organ procurement systems are embodied in two systems, known as “opt-in”

18. *Id.* at 2.

19. *Id.*

20. *Id.*; WHO Resolution WHA57.18, WORLD HEALTH ORGANIZATION 56, 57, available at http://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R18-en.pdf (2004).

21. Yosuke, *supra* note 16.

22. *The gap between supply and demand*, *supra* note 8 (In 2008, an investigation found that “109 [patients], mainly Israelis, each paid up to \$120,000 for a ‘transplant holiday’); Yosuke, *supra* note 16.

or “opt-out” systems.²³ The United States’ organ procurement system is an example of an opt-in system, in which individuals must make an explicit decision to donate their organs, and relies on altruistic organ donors to support organ supply.²⁴ In an opt-out system—also referred to as presumed consent—“an individual is treated as having consented to donate organs absent express instructions to the contrary.”²⁵ The world’s most successful organ donation system, in Spain, is an opt-out system.²⁶

The United States regulates organ donation through the United Network for Organ Sharing (“UNOS”).²⁷ “The allocation of organs among those on the UNOS waiting list is based, to a large degree, on compatibility. For most organs, [however], consideration is first given to recipients located within the same donation service area (“DSA”) as the donor.”²⁸ The current system gives higher priority to patients in these DSA areas, despite the fact that with modern medical advancements, other needier patients that are longer distances away may be capable of receiving them.²⁹ UNOS’s regulations also effectively create a 5% maximum cap on transplants that can go to non-resident aliens through an audit mechanism.³⁰ UNOS recogniz-

23. *Eurotransplant: Legislation within the Eurotransplant Region*, EUROTRANSPLANT.ORG (Apr 29, 2011), 1, <http://www.eurotransplant.org/cms/mediaobject.php?file=legislation.pdf>.

24. Siegal & Bonnie, *supra* note 8, at 416.

25. Nadel & Nadel, *supra* note 8, at 307.

26. *Id.* at 302–303.

27. Nadel & Nadel, *supra* note 8, at 299.

28. *Id.* at 300 (“Nationwide, there are fifty eight DSAs, which are regional combinations of organ procurement organizations (or OPOs) and their transplant center networks.”).

29. *The Gift of a Lifetime, Understanding Donation: The Organ Transplant Waiting List*, ORGANTRANSPLANTS.ORG, <http://www.organtransplants.org/understanding/unos/> [hereinafter *Gift of a Lifetime*]; D.L. Segev et. al, *Transporting Live Donor Kidneys for Kidney-Paired Donation: Initial National Results*, 11 AM. J. TRANSPLANT 356, 360 (2011).

30. *Transplantation of Non-Resident Aliens*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/PoliciesandBylaws2/policies/pdfs/policy_18.pdf [hereinafter *Transplantation of Non-Resident Aliens*] (last updated Sept. 1, 2012) (specific policies for non resident aliens); UNOS’s regulations in regard to non-resident aliens state that “all member transplant centers agree to allow the Ad Hoc International Relations Committee to review and audit, at its discretion, all center activities pertaining to transplantation of non-resident aliens. The Committee will review the activities of each member transplant

es that “international exchange of organs for transplantation is technically feasible but remains an uncommon procedure.”³¹ Under this policy, “[e]xportation of organs from the United States or its territories is prohibited unless a well documented and verifiable effort, coordinated through the Organ Center, has failed to find a suitable recipient for that organ on the [w]aiting [l]ist.”³² Because thousands of Americans die every year awaiting a transplant,³³ almost all organs will be transplanted domestically.

Opt-out or presumed consent organ procurement systems have been very successful for countries that have implemented them.³⁴ Spain celebrates the highest donation rates in the world.³⁵ Many scholars suggest that Spain’s public relations campaign and widespread knowledge and information about organ donation is the reason for their successful organ allocation program.³⁶ In the “Spanish Model . . . a specially trained team, separate from the medical transplant teams, is responsible for increasing organ donations” by educating families about the positive aspects of organ donation, and providing them with all of the information they need to make an informed decision based on correct information.³⁷ The Spanish model also emphasizes comforting families and respecting the donor’s wishes and creates legitimacy for the allocation system.³⁸ Because of its positive results, other countries, including the United States, have attempted to implement similar educational programs but without major success.³⁹

center where non-resident alien recipients constitute more than 5% of recipients of any particular type of deceased organ.” *Id.*

31. *Id.*

32. *Policy Management – policies*, 3.2.1.4, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK (last updated Sept. 1, 2012) Sept. 1, 2012, <http://optn.transplant.hrsa.gov/policiesAndBylaws/policies.asp> (Links to general policies) [hereinafter *Policy Management- policies*].

33. *The gap between supply and demand*, *supra* note 8.

34. *Opting Out of Opting Out*, *supra* note 5.

35. *Id.* (Spain is considered the “the world champion of cadaveric organ donation, with 34.4 donors per million inhabitants compared with Britain’s meager 10.6.”).

36. Nadel & Nadel, *supra* note 8, at 302–303.

37. *Id.*

38. *Id.*

39. *Id.* “A study in the United States showed that “about half of families asked to donate refused. In addition to the reasons noted above, some fami-

Facing familiar dire organ shortages, other countries have also attempted to reform their allocation systems in other innovative ways. In late summer 2012, the European Union adopted and implemented a directive relating to the harmonization of health and safety standards across Member Nations in order to facilitate donations and ensure the highest quality of organ donation services.⁴⁰ The EU legislators suggest that one way to help the organ shortage within the EU is to promote standardized health and safety standards through a directive named the European Union Organ Donation Directive (“EUODD”).⁴¹ The EU believes that “the exchange of organs is an important way of increasing the number of organs available and ensuring a better match between donor and recipient and therefore improving the quality of transplantation . . . available organs should be able to cross borders without unnecessary problems and delays.”⁴² Another major aspect of the EUODD is making organs traceable, especially when there is an organ exchange with a developing country.⁴³ Although this requirement attempts to prevent the spread of diseases and adverse reactions, this stringent requirement is harsher on developing countries that will find this policy overly burdensome and prohibitive because their organ procurement and medical systems are not as advanced as the EU’s.⁴⁴

Israel also reformed its organ donation laws in an unprecedented and controversial way.⁴⁵ Israel, an opt-in country, adopted a law that went into effect in January 2010 with a “plan to increase the national number of individuals who have

lies are unwilling to delay funerals, and many act out of concern that the deceased ‘has already suffered enough.’” *Id.* at 299.

40. *Directive, supra* note 4, at 1; NHS Blood and Transplant, *EU Directive on the Standards of Quality and Safety of Human Organs Intended for Transplantation*, NHS BLOOD AND TRANSPLANT (Sept. 27, 2012), http://www.nhsbt.nhs.uk/downloads/board_papers/sept12/r12_91_EUODD_Board_Paper_September_12_3.pdf.

41. *Id.*

42. *Id.*

43. *Directive, supra* note 4, at 1.

44. *Id.* (The text of the EUODD with respect to third world and developing countries reads as follows: “Organ exchange [...] shall be allowed only where the organs ... can be traced from the donor to the recipient and vice versa; ... meet the quality and safety requirements equivalent to those laid down in this Directive.”).

45. Lavee, *supra* note 4, at 1131.

a donor card by giving priority in organ allocation to transplant candidates who had signed a donor card before their listing date.”⁴⁶ Organ allocation priority would also be “granted to transplant candidates with a first-degree relative who was a deceased organ donor and to any live donor of a kidney, liver lobe, or lung lobe who subsequently needs an organ.”⁴⁷ This new prioritization scheme is very controversial because it allows people to “skip the line,” and bases allocation decisions on factors other than medical need.⁴⁸ It may also generate problems with religious observers; religious Jews, for example, require that a body be treated in a particular way so as to not blemish the body or disgrace the dead, and observe prompt burial practices.⁴⁹ Although most rabbis support organ donation, some people’s faith may not allow them to elect to be a donor.⁵⁰ One commentary suggests that yet another “potential ethical implication of the law is that it favours larger families with more first-degree relatives who are, on paper, willing to be donors.”⁵¹

In recent years, Great Britain has changed their allocation rules, as well.⁵² In July 2009, “the British government said . . . that it plan[ned] to ban private organ transplants from dead donors to allay fears that prospective recipients can buy their way to the front of the line.”⁵³ Although in practice this policy would only affect the foreign patients coming to Great Britain

46. *Id.*

47. *Id.*

48. *Id.*

49. Gabrielle Loeb, *Judaism’s perspectives on Organ Donation After Death*, PHILADELPHIA JEWISH VOICE (Sept. 2008), <http://www.pjvoice.com/v38/38700judaism.aspx>.

50. *Id.*

51. Victoria Y. Fan et. al, *A New Law for Allocation of Donor Organs in Israel*, LANCET (July 24, 2010), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)61138-5/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)61138-5/fulltext) (referring to Wright and Silva, scholars in the field who have written articles in The Lancet).

52. *Opting Out of Opting Out*, *supra* note 5 (“Great Britain recently rejected a proposal to switch from an opt-in system to a presumed consent or opt-out policy, because of concerns about eliminating ‘the emotional benefit to recipients and their families of knowing that the organ had been freely surrendered—as a gift.’”).

53. *Private Organ Transplants Banned in the UK*, ASSOCIATED PRESS, July 31, 2009, available at http://www.msnbc.msn.com/id/32234139/ns/health-health_care/t/private-organ-transplants-banned-uk/#.UHcdY8VZXSG.

to receive private transplants and publically funded transplants for domestic patients would still be permissible, this system would implement a protectionist policy, disadvantaging any private transplant tourism and would effectively close the borders to those non-citizens seeking to utilize Great Britain's sophisticated facilities or resources.⁵⁴

II. INTERNATIONAL FRAMEWORK AND JUSTIFICATIONS FOR EXCHANGE

Why should countries trade in or exchange organs and organ transplantation services rather than keeping these valuable resources domestically? Countries should exchange because of the gains from international trade, which are typical for other goods,⁵⁵ and because of the altruistic principles upon which most allocation systems are built.⁵⁶ There are numerous ways that international actors can exchange, including unilateral trade, reciprocity-based trade, bilateral trade, and multilateral trade. It is important to utilize the right method of cooperation in order to increase the welfare of needy and sick patients worldwide. This section introduces the possible modes of international cooperation and introduces the idea that organ transplantation services should be multilaterally traded, specifically using the GATS.

A. Why Countries Should Trade or Exchange Organ Transplantation Services

Basic economic theory suggests that there are important gains from trade and exchange in commercial goods in open markets.⁵⁷ There are also benefits from liberalizing trade in other international markets, regardless of whether the goods and services are being traded for valuable consideration in a traditional open market.⁵⁸ In the context of organ procurement and allocation, systems that previously operated only in small

54. *Id.*

55. *GATS: Fact and Fiction*, WORLD TRADE ORGANIZATION 3 (2001), http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf (last visited Oct. 11, 2012) [hereinafter *GATS: Fact and Fiction*].

56. *Gift of a Lifetime*, *supra* note 29.

57. *The Case for Open Trade*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (last visited Oct. 11, 2012).

58. *GATS: Fact and Fiction*, *supra* note 55, at 3.

local areas are becoming more geographically widespread⁵⁹ and an international exchange is possible. Before Congress promulgated national legislation regarding transplantation, organ transplants were performed on a local basis, establishing local primacy.⁶⁰ As a consequence, along with medical criteria, geographic distances, the cost of transport, and the high risk that an organ could perish during transport became prominent criteria in local priority schemes in the early years of NOTA.⁶¹ Because of medical advancements, faster transportation methods, and preservation techniques, this system is now outdated, and organs can reach people outside of the regional transplant center's area.⁶² These outdated geographic center-based allocation systems need to be expanded and incorporate international cooperation.⁶³

1. Altruistic Justifications for Exchange

A move towards an international organ exchange is supported by the ethical underpinnings of the principle upon which most countries in the world base their systems: altruism.⁶⁴ Altruism in this context suggests that it is morally right to donate your organs at death because your generosity could save you neighbor's life.⁶⁵ Some scholars argue that "organs donated from deceased donors should be considered a national resource and are not 'owned' by the local or retrieval team," and that or-

59. Segev, *supra* note 29, at 360.

60. John P. Roberts, *Prioritization and Distribution of Organs for Liver Transplantation*, CENTER SPAN, <http://www.centerspan.org/pubs/liver/roberts1.htm> (last visited Oct. 17, 2012).

61. *Id.*; John M. Coombes and James F. Trotter, Development of the Allocation System for Deceased Donor Liver Transplants, 3 CLINICAL MED. & RES. 87, 88-89 (2005), available at <http://www.clinmedres.org/content/3/2/87.full.pdf>.

62. *Id.*

63. See also Alvin E. Roth, *Repugnance on a Constraint on Markets*, 21 J. OF ECON. PERSP. 37, 38 (2007) (explaining that gains from exchange in kidneys can be realized and have been realized in kidney exchange programs in New England).

64. Siegal & Bonnie, *supra* note 8, at 416.

65. *Id.* (noting that all allocation systems depend to some degree on the generosity of society to donate).

gans should be distributed nationally to needy patients.⁶⁶ The idea that organs do not belong to any one area or country aligns with the general motivations of altruistic donation. Evidence suggests that when a person elects to be a donor, they do not do so solely to benefit their small geographic area and that they will not be deterred from donation if they knew their organ would be distributed to another area.⁶⁷

Since organ transplantation can easily save a life, it is hard to rationalize the United States' outdated domestic geographic system; the same reasoning applies to keeping organs as a national resource and not an international resource. John Donne's famous saying that "no man is an island now extends with equal force to communities, regions, nations, continents—and, for that matter, to islands."⁶⁸ When someone in Brazil or Russia desperately needs an organ, why is that person more-or-less deserving than an American or EU citizen? The current geographic limitations on organ donation "lead to some arbitrary variation," which do not align with the principle of altruism.⁶⁹

2. Theoretical Justifications for Exchange

Framing global justice in terms of the philosopher John Rawls's difference principle, a society should redistribute wealth to increase the welfare of "the status of the least well-off members of society."⁷⁰ Restricting organs to one locale or one country not only violates this principle, but it also unfairly favors people in a country with good transplantation, allocation, and regulatory systems, even if those people would never altruistically donate themselves. Modern liberal philosopher Loren Lomasky explains that in Rawls's later works he recognized that the difference principle itself might not apply globally. Rawls believed that "many people believe that their obligations

66. James Neuberger & Gill Thomas, *When the Law Meets Organ Transplantation: The Experience from the United Kingdom*, 92 *TRANSPLANT J.* 262 (Aug. 15, 2011).

67. Institute of Medicine (U.S.) Committee on Organ Procurement and Transplantation Policy, *Organ procurement and transplantation*, NATIONAL ACADEMY OF SCIENCES 52 (1999) [hereinafter *Institute of Medicine*].

68. Loren E. Lomasky, *Liberalism Beyond Borders*, *SOCIAL PHILOSOPHY & POLICY FOUND.* 206, 207 (2007).

69. Neuberger & Thomas, *supra* note 66, at 262.

70. Lomasky, *supra* note 68, at 208.

to co-nationals are weightier and more extensive than those owed to extra-nationals.”⁷¹ Similarly, current domestic-oriented organ allocations systems place a higher weight on the lives of citizens in that particular country. Nonetheless, Lomasky believes that there are still important moral obligations to those outside one’s close community.⁷² In particular, Lomasky argues that it is important to not cause inadvertent harm through policies that restrict the movement of goods or people.⁷³ Since organ failure has no direct connections with a person’s place in society, either financially or geographically, restricting organs to one DSA causes harm to those outside the area by restricting the efficient movement of organs. These geographic restrictions are not only hurting needy patients, they are “an unjustifiable restraint on liberty . . . [just like many] cross-border employment and residence agreements.”⁷⁴ International cooperation in the context of organ transplantation may achieve better results for the welfare of people around the world.

Governments and countries also have practical considerations that should motivate them to adopt a system of international cooperation, including increasing efficiency, reducing health care and transaction costs, responding to strong political pressures, and increasing overall donation rates. These practical motivations, discussed in Part IV, may combat the traditional skepticism of sharing organs within countries and across borders that plague many current allocation systems.

B. Methods of International Cooperation

Countries must interact efficiently with each other in their international dealings, and this can be achieved through various strategies of international cooperation.⁷⁵ Countries may decide to take unilateral action with respect to other countries, utilize reciprocity agreements to trade or exchange commodities between countries, or cooperate through bilateral or multilateral agreements. Each of these alternative modes of coopera-

71. *Id.*

72. *Id.* at 218.

73. *Id.* at 228.

74. *Id.* at 226.

75. William Zartman & Saadia Touval, *Introduction* to INTERNATIONAL COOPERATION: THE EXTENTS AND LIMITS OF MULTILATERALISM, 4 (William Zartman & Saadia Touval eds., 2010) [hereinafter Zartman].

tion in the context of organ transplantation has important implications on domestic and foreign needy patients.

1. Unilateral Action

Countries often unilaterally dictate their own policies for the treatment of other countries or foreign citizens.⁷⁶ A country bases its domestic laws on its own laws, values, and its citizens' preferences.⁷⁷ In an immigration law context, for example, a country unilaterally chooses its policies regarding the movement of foreigners in and out of the its territory, despite the fact that these laws may affect other countries.⁷⁸

Similarly, in the context of organ transplantation, countries like the United States and the United Kingdom unilaterally implement laws based on their own policy concerns.⁷⁹ This restricts foreigners' access to organs and organ transplantation services.⁸⁰ Currently the most common method that countries utilize in the context of organ transplantation is the unilateral method with little to no coordination with other countries.⁸¹

2. Reciprocity

Countries may also choose to adopt a system of reciprocity, where countries trade goods or favors and keep track of the levels of exchange, in effect creating a commodity-type trading regime. This also could be characterized as "tit-for-tat" trading.⁸²

Visa reciprocity provides an example of this kind of relationship. Brazil, Argentina, and Chile are all countries that practice visa reciprocity, which requires foreigners to obtain expen-

76. Shashi Tharoor, *Why America Still Needs The United Nations*, FOREIGN AFF. (Sep./Oct. 2003), <http://www.foreignaffairs.com/articles/59184/shashi-tharoor/why-america-still-needs-the-united-nations>.

77. *Id.*

78. Gordon H. Hanson, *The Governance of Migration Policy*, 2009 UCSD AND NBER 1, at 1 available at <http://irps.ucsd.edu/assets/037/11123.pdf>.

79. *Transplantation of Non-Resident Aliens*, *supra* note 30; Martínez et al., *supra* note 4, at 6.

80. *Transplantation of Non-Resident Aliens*, *supra* note 30; Martínez et al., *supra* note 4, at 6.

81. *Opting Out of Opting Out*, *supra* note 5; *Policy Management – policies*, *supra* note 32, at 3.2.1.4.

82. Zartman, *supra* note 75, at 6.

sive visas—sometimes up to \$150—if their home country requires a visa for citizens of the destination country when they enter the traveler's home country.⁸³ For example, the United States does not require a British traveler to obtain a visa to visit the United States, but does require Brazilians to obtain a visa.⁸⁴ In response, Americans traveling to Brazil are required to obtain a visa prior to traveling in Brazil.⁸⁵ This method is based on tit-for-tat exchange where countries keep track of the treatment by others and treat them accordingly in the future.⁸⁶

Scholars often approach agreements in health services, and specifically organ transplantation, through the lens of reciprocity or tit-for-tat organ trading between centers.⁸⁷ In organ allocation reciprocity “those who committed to donate organs would be granted a preference in the event that they later required a transplant.”⁸⁸ Some scholars suggest that a reciprocity or “payback scheme” may be the solution to the organ shortage “whereby a center (or sometimes a country) which provides an organ to another center or country for a ‘high priority’ recipient will be paid back when another organ becomes available.”⁸⁹ A group of scholars suggests one version of a reciprocity arrangement that is based on a social contract in the form of insurance: a person would receive a bonus for electing to be a donor and in exchange they would have a better chance of receiving an organ if they needed it in the future.⁹⁰ Because these reciprocity and insurance ideas use the fear of needing a transplant in the future in order to motivate people to donate, they are subject to criticism that they do not align with the tradi-

83. Eileen Smith, *Argentina Joins the Reciprocity Club: U.S. Visitors Pay \$131 on Entry*, MATADORNETWORK.COM (Dec. 14, 2009), <http://matadornetwork.com/trips/argentina-joins-the-reciprocity-club-u-s-visitors-to-pay-131-on-entry/>.

84. Tim Rogers, *Let Them In: How Brazilians Could Help the U.S. Economy*, TIME (June 3, 2011), <http://www.time.com/time/world/article/0,8599,2075717,00.html>; *Visa & ESTA Information*, VISIT USA (2011), <http://www.visitusa.org.uk/Visa-and-ESTA-Information/125>.

85. *Id.*

86. Zartman, *supra* note 75, at 6.

87. Nadel & Nadel, *supra* note 8, at 294.

88. *Id.*

89. Neuberger & Thomas, *supra* note 66, at 263.

90. Nadel & Nadel, *supra* note 8, at 314 (This “bonus would be phased in, based on how long a patient had been registered as willing to donate.”)

tional principle of altruism.⁹¹ Countries do not allow organs to be exchanged for “valuable consideration” because they believe that altruism and generosity should be the driving force for donation.⁹² Reciprocity does not promote the moral underpinnings of altruism, and thus is not a realistic policy change.⁹³ Reciprocity is not consistent with the spirit of an international exchange because it emphasizes the idea that an organ belongs to one country, while in reality, no country “owns” an organ.⁹⁴

3. Bilateral Cooperation

Another theory of international cooperation is based on bilateral agreements regarding the treatment of the citizens of both countries. Bilateral cooperation may occur in the context of any specialized trade agreement between two countries,⁹⁵ or other direct interactions, such as those pertaining to countries’ establishment of their surrounding borders.⁹⁶ By their very nature, border disputes require countries to work bilaterally to generate common laws and policy that complement each other.⁹⁷ For example, the United States and Mexico have bilaterally negotiated to put into place particular regulations and procedures concerning the maintenance and integrity of their common border.⁹⁸

In the context of organ transplantation, another potential mechanism for cooperation is a bilateral agreement to trade services. A group of scholars conducted a survey of subjects in India and England to measure their attitudes toward a possible bilateral trade agreement concerning organ transplantation.⁹⁹ The study found that while trade may be mutually beneficial for both countries, the public was skeptical of such an agree-

91. *Id.*

92. Siegal & Bonnie, *supra* note 8, at 416.

93. *Gift of a Lifetime*, *supra* note 29.

94. Neuberger & Thomas, *supra* note 66, at 262.

95. *Forms of International Cooperation*, INT’L ORG. FOR MIGRATION, <http://www.iom.int/jahia/Jahia/migration-management-foundations/international-cooperation/forms-international-cooperation/cache/offonce;jsessionid=0772943C72A9DAE54A6F84D915923AFF.worker01> (last visited Oct. 4, 2012).

96. *Id.*

97. *Id.*

98. *Id.*

99. Martínez et al., *supra* note 4, at 1.

ment.¹⁰⁰ The public perception of the bilateral agreement was prohibitory because there was no regulatory framework or public relations campaign to reveal how the agreement actually operated or could be beneficial.¹⁰¹ Any bilateral cooperation in organ transplant services will suffer from the same pitfalls because, with just two countries participating in exchange, the public will question if there will be any real gains from trade and question the quality of the other country's health care.¹⁰² This is due to the fact that bilateral exchange can exacerbate inequities in bargaining power between countries, especially when there is a lack of a legitimate, regulated system.¹⁰³ "Bilateral deals with other countries [often create] unbalanced . . . one-on-one negotiations, [which] opens the way for all manner of lobbies to ram their self-serving demands into the agreements."¹⁰⁴ A system that could offer more transparency, legitimacy, and a more sophisticated regulatory framework—like multilateral exchange—would be more beneficial in the organ transplantation context.

4. Multilateral Cooperation

The final example of international cooperation is multilateral cooperation, where countries come together and make agree-

100. *Id.*

101. *Id.* The study established that the best framework in this context would be a bilateral relationship, with contract-based terms, which could be individually customized. *Id.* at 2–3. It conducted "a total of 30 semi-structured interviews . . . , 20 in India and 10 in the UK." *Id.* at 3. The interviews revealed that Indians generally thought their medical services were undervalued. *Id.* at 5. From the other perspective, the British questioned the quality and safety of procedures in India and did not think they could benefit from a bilateral arrangement with India, despite the reality that Indian medicine is very sophisticated. *Id.* at 5. In fact, 70–80% of Indian doctors are trained in the United Kingdom and safety standards are comparable to those in the United States and Britain. *Id.* at 5.

102. *Id.* at 1

103. Jagdish Bhagwati, *The Wrong Way to Free Trade*, N.Y. TIMES (July 24, 2011), <http://www.nytimes.com/2011/07/25/opinion/25bhagwati.html>. As noted economist and professor at Columbia University, Jagdish Bhagwati, argued in the *New York Times*, "bilateral trade agreements are not the same as free trade. Yes, they liberalize trade for the parties involved, but outsiders then face a handicap. The discrimination comes in the form of barriers like tariffs and antidumping charges, which countries impose on imports that they believe are priced artificially low." *Id.*

104. *Id.*

ments with each other in order to lower transaction costs and decrease trade barriers.¹⁰⁵ Multilateral agreements may come in various forms, but often contain non-discrimination agreements between countries, or in some cases most-favored and national treatment clauses, where countries agree to treat all parties to the agreement as favorably as all other countries.¹⁰⁶ The General Agreement on Tariffs and Trade (“GATT”), signed originally in 1947, is a well-known example of a multilateral cooperation in which over 100 countries eventually came together diplomatically in “Rounds” (or diplomatic summits) and established standards for the international trade in goods.¹⁰⁷ The GATT treaty was designed to coordinate tariff concessions and included national treatment, most favored nation (“MFN”), and non-discrimination clauses in order to ensure the integrity of the system and to presumably level the playing field for the member countries.¹⁰⁸

Although countries have not attempted any multilateral cooperation in the context of organ transplantation and allocation, there is potential for cooperation. While some groups of countries, like the EU, have begun to coordinate their organ allocation systems through harmonization of health and safety standards,¹⁰⁹ countries need more multilateral negotiations to achieve the optimal level of international organ exchange and

105. Zartman, *supra* note 75, at 67.

106. Douglas A. Irwin, *Multilateral and Bilateral policies In the World Trading System: A Historical Perspective in New Dimensions in Regional Integration*, CENTRE FOR ECON. POL’Y RES. 91 (Ed. Jaime De Melo, Arvind Panagariya 1993); *Principles of the Trading System*, WORLD TRADE ORGANIZATION,

http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 3, 2012). Under the concept of most-favored nation, “countries cannot normally discriminate between their trading partners . . . [if a country grants] someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.” *Id.* Under the national treatment principle, “imported and locally-produced goods should be treated equally—at least after the foreign goods have entered the market.” *Id.*

107. *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION,

http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited October 3, 2012).

108. *Id.* (noting that the GATT was eventually replaced in 1994 with the WTO, another multilateral effort to govern international trade relations).

109. *Directive*, *supra* note 4, at 3.

to establish a transparent and legitimate system. Instances of individuals attempting to begin a grassroots international organ exchange occurred recently where an American woman donated a kidney to a Greek man and because of this generosity the Greek man's wife donated her kidney to a patient in Pennsylvania.¹¹⁰ Countries now have the opportunity to facilitate this type of exchange between international patients with multilateral cooperation and to assist individuals who would like to spread their generosity internationally. For these reasons, and others discussed below, multilateral efforts to create an international organ exchange, specifically through the GATS, is the preferable mode of cooperation, and could potentially inspire the international community to be more inclined to donate, thereby alleviating the international organ shortage.

III. THE GATS'S APPLICATION TO AN INTERNATIONAL ORGAN EXCHANGE

This Part will more fully introduce the GATS, describe its relation to health services, and explain why the regulation of organ transplantation is best achieved through the GATS framework. It will also explicate how the regulation would practically operate, and outline other necessary and complimentary characteristics that should accompany regulation through the GATS. It will then discuss this proposal's interaction with current domestic laws in countries around the world, possible limitations to an exchange, and regulation of that exchange through the GATS.

A. Introduction to the GATS

The GATS was created in 1995 through the adoption of measures under the Uruguay Rounds, which also created the WTO.¹¹¹ In contrast to the well-known GATT, which focuses on trade in goods, the GATS focuses on "measures affecting international trade in services—including health services such as health insurance, hospital services, telemedicine, and acquisi-

110. Lindy Royce-Bartlett, *infra* note 185.

111. *Services Trade, WORLD TRADE ORGANIZATION*, http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (last visited October 3, 2012) [hereinafter *Services Trade*].

tion of medical treatment abroad.”¹¹² The purpose of the GATS is to create an international business climate where trade barriers are low in order “to promote efficiency and economic growth.”¹¹³ Currently, not all countries have made concessions under the treaty in order to increase the flow of services.¹¹⁴ The GATS agreement is overseen by the WTO and “requires countries to provide national treatment to foreign-service providers in those service industries which they have agreed to liberalize under GATS.”¹¹⁵

The GATS contains a “framework text[,] which sets out the general concepts, principles, and rules that apply to measures affecting the trade in services,” but also “annexes [] to the agreement, which establish principles and rules for specific sectors and complement the framework text [and] specific commitments liberalizing trade within the service sectors and sub-sectors listed in the national schedule of member countries.”¹¹⁶ Unlike the GATT, countries can limit their commitments to particular service sectors; “some countries have limited their commitments to just a few of the 160 possible service sectors, while others have opened their markets (at varying degrees of openness) to more than 140 sectors.”¹¹⁷ Therefore, the GATS represents a “list of the specific commitments to market liberalization made by each member country,” which some countries have used to open their markets, while others are less willing to decrease trade barriers.¹¹⁸

There are two types of rules or commitments that can potentially bind a country that is a GATS signatory: conditional and

112. Leah Belsky et. al, *The General Agreement On Trade In Services: Implications For Health Policymakers*, 23 HEALTH AFF. 137, 137 (2004).

113. *Id.* at 138.

114. Ian S. Mutchnick et. al, *Trading Health Services Across Borders: GATS, Markets and Caveats*, HEALTH AFF. 43-44 (2005), <http://content.healthaffairs.org/content/early/2005/01/25/hlthaff.w5.42.full.pdf+html>.

115. Anthony Amunategui Abad, *Annex 25. General Agreement on Trade in Services (GATS): Health Services*, TA ADVISORY SERVICES 1 (Feb. 20, 2010).

116. *Id.*; see generally *Case Summary: WTO Internet Gambling Case*, CITIZEN.ORG (March 2007), <http://www.citizen.org/documents/Gamblingsummary2007.pdf> [hereinafter *WTO Internet Gambling Case*].

117. Mutchnick et al., *supra* note 114, at 42–43.

118. *Id.*

unconditional commitments.¹¹⁹ Unconditional commitments are general commitments by which all countries must abide and to which they are all bound.¹²⁰ MFN treatment is an example of an unconditional commitment, under which a country must not discriminate between trading partners; if a country wants to afford better treatment to one country, they must afford that more favorable treatment to everyone.¹²¹ Countries also may not put limitations on national treatment, meaning that countries must afford "like" foreign services no less favorable treatment than domestic services.¹²² The other type of commitment that may bind a country is a conditional commitment, where a country may voluntarily lower barriers to trade on a given schedule with regard to a specific service in a specific industry.¹²³

The GATS contains different "Modes" of the service transactions including:

Mode 1: Cross-border movement of service products . . . Mode 2: consumption abroad or movement of consumers to the country of importation . . . Mode 3: commercial presence of the establishment of a commercial presence in the country where the service is to be provided . . . [and] Mode 4: movement of natural persons or temporary movement of natural persons to another country, in order to provide the service there.¹²⁴

The conditional obligations only apply if a country identifies a particular service sector with respect to opening trade.¹²⁵

The GATS also contains exceptions similar to the GATT.¹²⁶ GATS section XIV, for example, creates an exception for a country that wants to protect "human, animal or plant life or health."¹²⁷ Another important exception is contained in GATS Article I(3) which "excludes services supplied in the 'exercise of governmental authority,'" defined as services supplied neither

119. Abad, *supra* note 115, at 2.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Belsky et al., *supra* note 112, at 139.

126. *Id.* at 140.

127. *General Agreement on Trade in Services* 294–95, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (follow "pdf format" hyperlink) (last visited Oct. 6, 2012).

“on a commercial basis” nor “in competition with one or more services suppliers.”¹²⁸

B. The GATS's Relation to Health Services

One way countries use the GATS is to lower barriers in health-related services by “opening national markets to foreign health services . . . [through a series] of trade agreements that prohibit discriminatory treatment of foreign suppliers” as well as encouraging the consumption of medical services abroad (Mode 1).¹²⁹ Because the health sector is a lucrative market and has an enormous potential for growth, countries may want to voluntarily liberalize their policies relating to the exchange of health care services.¹³⁰ “Of greater significance, however, [scholars argue that] these markets are opening and will do so with or without the knowledge, experience, and perspective of the academic and commercial health care community of the developed world.”¹³¹ As countries close their borders and create restrictive policies, needy patients often have no choice but to turn to a preexisting black market for organs, which is often dangerous and can exploit many people in the process.¹³² There is a strong incentive to liberalize trade in health-related or transplantation-related services in order to crowd-out the black market and establish a legitimate and regulated market.

GATS's category consumption of medical services abroad (Mode 1) is particularly applicable to organ transplantation because of the profits and revenue involved.¹³³ “Trade in mode 2 is an important source of revenue for countries such as Cuba . . . and China . . . [and] the Mayo Clinic provides highly specialized services for wealthy foreigners, while specialty hospitals in India attract U.S. patients by providing international-quality liver transplants for one-tenth the U.S. cost.”¹³⁴

128. Belsky et al., *supra* note 112, at 140.

129. Mutchnick et al., *supra* note 114, at 42.

130. *Id.*

131. *Id.* at 2.

132. Interlandi, *supra* note 14; *see also* Brunwasser, *supra* note 14.

133. *Id.*

134. *Id.*

C. Regulation Through the GATS is the Preferable Option

Upon examination, the services involved in organ transplantation do fit into the context of the GATS. Organ procurement and allocation systems around the world are largely established upon geographic boundaries, giving preference to people in a certain geographic location before looking outside of these areas for other matches.¹³⁵ Just like the gains from international free trade that each country can experience, countries and sick patients can benefit from an international organ exchange system that is not based on geographic protectionism.¹³⁶ For example, “[t]he cross boarder exchange of donor organs allows rare matches and help to specific transplant candidates.”¹³⁷

In order to be governed by the GATS, organ transplantation needs to be considered a service. Medical services such as complex surgeries, cosmetic surgery, and other types of advanced medical treatment are considered services because they involve a team of medical staff performing services on a patient.¹³⁸ A procured organ, for example, would be useless without the operation that transplants it into a new patient; the skill, safety, and technique of the operation is just as important as the actual organ itself. Also, the surgery involved in procurement—a service—is very important in order to effectively extract, preserve, transport, and transplant the organ from the donor to its future recipient.¹³⁹ Although organ transplantation may not at

135. *Gift of a Lifetime*, *supra* note 29 (“80 percent of all organs donated and used in the same geographic area.”); *also see* Directive, *supra* note 4, at 1; Martínez et al., *supra* note 4, at 6.

136. Press Release, *EU Commissioner Dali meets Eurotransplant*, EUROTRANSPLANT 2 (July 25, 2011), <http://www.eurotransplant.org/cms/index.php?page=newsitems&oid=458&action=viewitem&id=1615> [hereinafter *EU Commissioner Dali*].

137. *Id.*

138. Tom Harris, *How Organ Transplants Work*, HOWSTUFFWORKS, <http://science.howstuffworks.com/environmental/life/human-biology/organ-transplant2.htm> (last visited Oct. 6, 2012).

139. *Id.* The characterization of an organ transplantation as a multi-jurisdictional service in the context of the GATS becomes more transparent by examining the steps involved in an organ transplant starting with the donor and ending with the donee receiving a transplant. The first service involved is the procurement process. Organ procurement occurs when the healthy organ is removed from a deceased or living donor. *Id.* Removing an organ from a donor requires a complex surgery in order to ensure it is har-

first glance meet the definition of a service as clearly as does general surgery, it is certainly a hybrid of services and can be treated as a service under the Modes relating to health services under the GATS.

Once organ transplantation services can be thought of as a multiple jurisdictional service, the rules and jurisprudence commonly connected to the GATS will apply. One notable WTO case analyzed the GATS as it pertained to gambling companies.¹⁴⁰ In this case, “the Caribbean Island nation of Antigua challenged three U.S. anti-racketeering statutes and four state laws as ‘barriers to trade’ in ‘cross-border gambling services’ under . . . [the] GATS.”¹⁴¹ Antigua argued that the American laws “prevented the supply of gambling and betting services from Antigua-domiciled Internet gambling providers to U.S. customers on a cross-border basis.”¹⁴² The “U.S. lost [the case] because it violated the ‘market access’ obligation” and they were unable to exercise the exception laid out for “public morals” because that exception is limited.¹⁴³ This case was a classic example of how the GATS prohibits countries closing their borders to foreign service-providers.

vested in a way that can be successfully transplanted in the future. *Id.* The next service involved is the transportation of the organ. *Id.* Organs can be very unstable and fragile, and need to be transported in a very specific way in a preservative chemical and under ice. Doctors must then follow a particular protocol and transport the organ from the hospital where procurement occurred to a regional transplantation center usually on a helicopter or plane. *Id.* The final service involved not only involves a complex surgery by specially trained doctors, but also requires doctors and hospital staff to administer antibiotics and other anti-rejection drugs. *Id.* “While other surgery patients typically can move on from the experience, most transplant recipients must continue medical treatment for the rest of their lives” because of a weakened immune system. *Id.*

140. Panel Report, *United States –Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (Mar. 30, 2007); *WTO Internet Gambling Case*, *supra* note 116 (The name of the WTO case involving foreign gambling companies is named “United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services.”).

141. *WTO Internet Gambling Case*, *supra* note 116 at 1.

142. *Id.*

143. *Id.* at 2.

The major goals of the GATS are to lower trade barriers to both providing and consuming services abroad.¹⁴⁴ Trade barriers can develop when a country provides services to a foreign national or when a citizen of one country goes abroad to consume services.¹⁴⁵ These two types of trade barriers can be illustrated through a hypothetical relationship between France and the United States. Suppose that an American doctor procures an organ, and an American transportation service or a non-profit organization attempts to transport the organ to France. The French government may have passed a law stating that French transplant centers can only transplant organs that are procured in French regional hospitals. A French doctor would be prohibited from transplanting the organ procured using American services to anyone in France. In such an instance, a government would be preventing a foreign-service provider from providing a service domestically. Just as in the GATS gambling case, this would represent a violation under the GATS.

The other major example of a classic GATS principle applied to this context is when a country prohibits a citizen from consuming a service abroad.¹⁴⁶ This would occur if a U.S. law prohibited a qualified needy American from traveling to France to obtain the services involved in an organ transplant. Under Mode 2 of the GATS, consumption of medical services abroad is considered a service and a country should not implement laws to prevent people from traveling and receiving medical services in another country, because this is a restraint on the free exchange of services internationally.¹⁴⁷

A common perception of the GATS is that it regulates services where there is a competitive open market and involves monetary consideration or exchanges.¹⁴⁸ While this is true in most cases, traditional market exchanges are not the only reason to encourage trade liberalization in the exchange of services. Countries may still want to create a market regulated through the GATS absent a traditional open market. In their

144. *Understanding the WTO*, WORLD TRADE ORGANIZATION, 33–34, http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited October 4, 2012).

145. *Id.*

146. *Id.* at 34.

147. Mutchnick et al., *supra* note 114, at 4.

148. *GATS: Fact and Fiction*, *supra* note 55, at 3.

article "GATS: Fact and Fiction," the WTO emphasizes the benefits that trade liberalization in services would provide to consumers, especially, "[i]n markets where supply is inadequate, [for example] imports of essential services can be as vital as imports of basic commodities."¹⁴⁹ Organ shortages are a problem in almost every country around the world and "[t]he benefits of services liberalization extend far beyond the service industries themselves; they are felt through their effects on all other economic activities," similar to potential savings in the health care sector.¹⁵⁰ Countries may benefit from the liberalization of trade in services for other reasons, including foreign direct investment in a developing country.

The altruistic theory that underlies most transplantation systems provides another reason why countries would benefit from trade liberalization in services absent an established open market. If governments believe in the value of altruistic donation and want organs to be exchanged or to be available for needy people around the world, then they may want to prevent barriers to the trade in services or organs even though no money is changing hands. It is a well-established principle, reinforced by the WHO, that organs are not to be exchanged for valuable consideration, but countries still may want to use the mechanism of the GATS to reap the benefits of exchange, absent a traditional for-profit organ market.

The opportunity to utilize the preexisting black market for organs constitutes yet another significant reason that countries may want to use GATS to regulate the exchange of transplantation services. Countries will want to create a legitimate organ exchange in order to crowd out the exploitive black market. Crowding out the black market may be a very effective tactic for countries, especially in light of the recent boom of social media. Organ traffickers could use social media to find poor donors with wealthy sick patients and use these sites to sell organs or exchange organs for valuable consideration. Because of people's ability to use social media to reach beyond their social circles and communicate with people around the world, it is unrealistic to think that one country's laws can stop people from using social media sites like Facebook or Twitter to find

149. *Id.*

150. *Id.*

organs.¹⁵¹ Social media has the potential to worsen the problem of organ trafficking because it easily could connect buyers and sellers,¹⁵² and therefore countries may want to embrace the fact that people want to look outside their borders for life-saving resources and regulate the process so it is more controlled and safe.

If human organ transplants are considered to be a service under the GATS, then what is now labeled as “transplant tourism” can be a legal, regulated, and positive advancement in the global organ shortage dilemma.

D. How Regulation of Organ Transplantation Will Practically Operate

Under the optimal framework proposed, countries would voluntarily commit themselves to a schedule of commitments made up of market access, national treatment, and MFN treatment in health services relating to organ transplantation, which would create an international organ exchange based on medical need, efficiency, and practical considerations. Countries would follow a GATS framework, which allows countries to open their markets on their own schedule, and tailor their commitments to a narrow sector relating to certain services.¹⁵³

151. See, e.g., *New Kidney on the Block: Woman Finds Organ Donor via 80's Singer Donnie Wahlberg and Twitter*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-1380817/New-Kidney-block-Woman-finds-organ-donor-80s-singer-Donnie-Wahlberg-Twitter.html#ixzz1ZwCYRqN> (last updated Apr. 26, 2011, 2:21 PM). The power of social media is exemplified through the story of Bobbette Miller, who desperately needed a kidney transplant but “faced a grueling five year wait for a new organ.” *Id.* Her friend started a “Twitter campaign” to find her an organ donor and Donnie Wahlberg, New Kids On The Block band member and teen idol, offered to help. *Id.* He tweeted to his over 180,000 Twitter followers and among the numerous responses he found a perfect match. *Id.* Social media can now be used as a tool to match patients with donors, but social media may also be used as a dangerous interface for trafficking. *Id.*; Healy, *supra* note 8.

152. See, e.g., Healy, *supra* note 8; Matt Richtel and Kevin Sack, *Facebook Is Urging Members to Add Organ Donor Status*, N.Y. TIMES (May 1, 2012), http://www.nytimes.com/2012/05/01/technology/facebook-urges-members-to-add-organ-donor-status.html?_r=1 (“[E]xperts say Facebook could create an informal alternative to such registries that could, even though it carries less legal weight, lead to more organ donations.”).

153. *Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORGANIZATION,

Under a GATS schedule of commitments each country lists “which services sectors and under what conditions the basic principles of the GATS[—]market access, national treatment and MFN treatment—apply within that country’s jurisdiction.”¹⁵⁴ These commitments are also listed “with respect to each of the four modes of supply”: “cross-border supply; consumption abroad; commercial presence; and presence of natural persons.”¹⁵⁵ With respect to organ transplantation services, a country could choose to voluntarily commit to open their markets in organ and health related services in the cross-border supply sector, where “non-resident service suppliers . . . supply services cross-border into the Member’s territory” or the consumption abroad sector, where there is “freedom for the Member’s residents to [consume] services in the territory of another Member.”¹⁵⁶ When countries agree to bind themselves to commitments in a given sector “a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service.”¹⁵⁷ Countries will be allowed to list exemptions and limitations on their commitments in their schedules with a description of what the exemption is and to whom it applies.¹⁵⁸ They also must list how long it will last and “the conditions creating the need for the exemption.”¹⁵⁹ In relation to organ transplantation services, countries may want to develop their own systems, or slowly phase-in to this drastic change in the market. The GATS allows countries to clearly state in writing any limitations to market access and list any conditions upon which their total market access may be conditioned, such as a certain level of

http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Oct. 6, 2012).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (“Specific commitments thus have an effect similar to a tariff binding—they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.”).

158. *Id.*

159. *Id.*

health and safety standards, or internationally recognized organ need criteria.¹⁶⁰

E. Other Necessary Complimentary Aspects of the Proposal

In conjunction with multilateral commitments through the GATS, participating states need to establish a set of minimum health and safety standards in order to monitor and encourage the trade of organ and transplantation services between countries. Regulations relating to health and safety standards are essential to maintaining the quality and integrity of existing organ transplantation systems that exist within countries, improving developing transplantation centers, and ensuring that organs are being safely procured, transported, delivered, and transplanted. Requiring these minimum standards, however, is not only about ensuring safety during the transplantation process, but also inspiring confidence in the public, increasing the legitimacy of the organ exchange system and increasing donation rates. One of the fundamental reasons that Spain is considered the "world champion of cadaveric organ donation" is because of its successful public relations campaign, which increases the awareness and integrity of the system to the general public.¹⁶¹ When the international community is confident that there are minimum standards and a relevant enforcement mechanism, it will increase the credibility of the program, and

160. *SERVICES: COMMITMENTS: Schedules of commitments and lists of Article II exemptions*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (last visited October 3, 2012). For example, in the United States' schedule of commitments, under the category "08. Health Related and Social Services," market access is unbound except for the following conditions: "Establishment of hospitals or other health care facilities, procurement of specific types of medical equipment, or provision of specific types of medical procedures may be subject to needs-based quantitative limits," as well as limitations on corporate ownership of hospitals in New York and Michigan. *Id.* In this sector, the United States is unbound in national treatment except for the fact that "Federal or state government reimbursement of medical expenses is limited to licensed, certified facilities in the United States or in a specific US state." *Id.* In this same sector the European Community is unbound in national treatment except for a limitation on market access of "the number of beds and use of heavy medical equipment is limited on the basis of a health plan" and the commitments are subject to a "needs test," which is further defined in detail in the schedule. *Id.*

161. *Opting Out of Opting Out*, *supra* note 5.

dispel common misconceptions and horror stories that currently discourage donation.

The EUODD's system of minimum standards may be a step to initiate a conversation on organ exchange, but the EU's proposed system falls short. The minimum standards aspect of the instant proposal creates more overall equity between developing and developed nations by allowing developing countries more flexibility to develop their own legitimate organ allocation systems. The EUODD may de jure discriminate against developing countries or countries without a comprehensive organ procurement and allocation system because it immediately imposes strict health and safety standards in an "all or nothing" way and does not allow any time or flexibility for them to develop and adapt to meet the standards. Under the EUODD proposal, there is a traceability requirement where in order to have any organ exchange a country needs to know high levels of information about the donor, the process and health and safety information.¹⁶² This is a very hard standard to meet if a country did not already have such a system in place. A more widespread multilateral agreement to bind countries through voluntary commitments and based on schedules reflecting countries' own situations will allow countries to develop their infrastructure, allow the medical services sector to gradually meet the minimum health standards, and provide opportunities for private health companies or other countries to invest in the health sectors in developing countries. This suggestion aligns with the enabling clause idea found in the GATT, which gives a special exception to developing countries in order to allow them to develop.

It will also be essential for countries to commit themselves to nationalizing transplantation lists within countries. A country maintaining a unified allocation list not only makes logical sense, but also is essential for the implementation of an international exchange. It is more beneficial to society if organs are shared between nations, so it is important for countries that have many transplantation centers to nationalize lists and not utilize the same outdated geographic system that this plan attempts to replace. This is especially true at a domestic level, where shorter geographic distances can easily allow for organs to be shipped to different centers provided the organ and medi-

162. *Directive*, *supra* note 4, at 3.

cal technologies are available.¹⁶³ Internationally, as in other aspects of international relations, countries will need to interact with each other on a state-by-state basis in order to practically implement an international organ exchange.

F. Interaction with Domestic Laws and Transplant Policy

It is important to also examine how this proposal would interact with existing domestic law and transplant policy in participating countries. Most countries and the international medical community would agree that the convergence of health and safety regulations is positive progress and not difficult to implement. Most developed countries operate their procurement and allocation systems with medical health and safety standards that are up to date with current medical practice. Countries like the United States, EU member countries, and many other developed nations all have legal standards regarding health and safety based on scientific and medical information.¹⁶⁴ Adopting domestic regulations to adhere to these standards would likely be a welcomed and relatively easy transition. Through the EUODD protocol that was implemented August 27, 2012, EU members now have standardized health and safety standards;¹⁶⁵ and expanding this to the international community is essential to the operation of the proposal. With harmonized quality control and safety standards, countries can share information about health and medical advancements that will benefit organ procurement, transportation, and transplantation worldwide. Leading doctors and professionals in the international medical community would generate the particulars of the minimum standards and all countries could elect to adopt these standards. Minimum standards and a regulatory framework would increase donation rates as transparency would dispel common fears and misconceptions that often keep people from donating.

Financial considerations, such as who will carry the monetary burden of the surgery and transportation will continue to

163. Segev, *supra* note 29, at 360.

164. Directive, *supra* note 4, at 3; see, e.g., *Minimum Procurement Standards for an Organ Procurement Organization (OPO)*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, http://optn.transplant.hrsa.gov/PoliciesandBylaws2/policies/pdfs/policy_2.pdf (last revised Sept. 1, 2012)

165. Directive, *supra* note 4, at 3.

be managed as they are currently. Under the proposal, the cost of the exchange will continue to be borne by the patient and their insurance company. While transplants are very expensive, it makes sense for the person who will benefit from the live organ to pay for the procedure. Transporting organs internationally will drastically increase these costs to a level that may be prohibitively high for certain patients, but this does not subtract from the virtues of an exchange that will allow more patients to be matched efficiently and accurately. Also, the more countries that actively participate in the exchange with minimal restrictions, the more that the incidental costs borne by the donor country will eventually equalize.

The proposal would be compatible with most domestic procurement laws that exist in a majority of countries. It would not force countries to change their organ procurement regimes, which are based on their moral standards and preferences. An opt-in country like the United States could continue with their procurement preferences, and an opt-out country like Spain could continue with their methods, and this proposal would not force a certain ideal upon any given country.

Few countries use systems that would fundamentally conflict with this proposal. Those conflicting systems are ones that either allow the sale of organs or have internal reciprocity arrangements. Iran is the only country that currently has an open market for organs, and they would not be able to participate with this proposal because most countries around the world ban the exchange of organs for valuable consideration. Israel's new organ procurement law—creating a hierarchy within the country and a weighted list based on a person's willingness to donate or their family members' willingness to donate¹⁶⁶—is one example of a system that would not be compatible with the protocol, and Israel would either need to change its law or be excluded from the international organ exchange. A country exchanging transplantation services internationally cannot rank or give preference to citizens, because this almost certainly will put foreign patients at the bottom of the list. Practically, countries may still want to give a certain level of preference to domestic candidates under certain circumstances, but Israel's law would never allow a foreigner to gain enough

166. Lavee, *supra* note 4, at 1131.

preference on the list to receive a transplant.¹⁶⁷ As noted earlier, Israel's new law has come under scrutiny because of religious and ethical concerns, but would also have to be overhauled to include the real possibility of foreigners receiving transplants and decreasing its overall protectionism.¹⁶⁸

G. Challenges and Limits to Establishing an International Organ Exchange

A major consideration when analyzing the proposal's vitality is whether multilateral cooperation for organ allocation is practically feasible, regardless of the use of the GATS framework. Commentators may doubt that cooperation is a realistic option because nationalism is very powerful and countries are often selfish with their scarce and coveted resources. As noted, human organs are not a resource that can be legally exchanged for monetary consideration,¹⁶⁹ raising legitimate questions regarding countries' incentives to essentially surrender organs and exchange them with the unfamiliar populations of other nations. Countries may need practical motivations in order to engage in international cooperation absent a formal reciprocity contract. In addition, these motivations must appeal to local constituencies because a lawmaker's suggestion to send organs abroad may prove to be politically unpopular when it is a well-known fact that there is already a domestic shortage of organs.

Though these are valid concerns, there are very compelling motivations for countries and governments to cooperate internationally in the context of organ allocation and transplantation. These considerations include increasing efficiency, reducing health care and transaction costs, creating a more productive workforce, responding to strong political pressures, and increasing overall donation rates. In light of these practical benefits, an international organ exchange under the GATS is a realistic possibility for the future of organ procurement and allocation.

1. Increasing Efficiency and Decreasing Costs

First, consider organ allocation from an efficiency perspective. The traditional model of organ allocation prioritizes the

167. *Id.*

168. *Id.*

169. *Directive, supra* note 4, at 1.

sickest patients first and restricts exchange to small geographic locales.¹⁷⁰ This creates large inefficiencies that lead to “huge disparities in waiting times—and hence deaths—across the country as organs frequently do not go to the sickest patients.”¹⁷¹ An increase in the size of the potential population “pool” for distribution will create fewer disparities and save more lives, especially if patients can be matched faster with donors around the world.¹⁷² Speed is essential to the success of transplants.¹⁷³ Additionally, because some organs are matched based on biological similarity, the benefit of a wider genetic pool of patients and donors would drastically increase the success rate of transplants.

The case of kidney transplants provides a helpful example in this context. Kidneys are largely allocated based on genetic compatibility.¹⁷⁴ Currently “the one-year organ-graft survival rate for well-matched kidneys is 13% higher than that for poorly matched ones.”¹⁷⁵ If the donor pool expanded worldwide, there would be more genetically suitable kidneys to match with more patients, and the success rate of each transplant would increase. Health care costs to support a patient with kidney failure are extremely high and are most often paid for by governments.¹⁷⁶ Dialysis is very costly because of frequent hospital stays and necessary long-term care; in addition, most long-term dialysis patients fund their treatment through government programs such as Medicare and Medicaid.¹⁷⁷

170. Nadel & Nadel, *supra* note 8, at 300.

171. Charles Carlstrom & Christy Rollow, *ORGAN TRANSPLANT SHORTAGES: A Matter of Life and Death*, USA TODAY, Nov. 1999, at 50.

172. Roth, *supra* note 63, at 52 (There may exist gains from exchange that “come . . . from extending the possibility of exchange to all regions of the country, and from the additional exchanges arising as a result of a thicker market consisting of more available patient–donor pairs.”).

173. *Id.* (noting that “the two-year organ-graft survival rate for patients who are in intensive care before their liver transplants is approximately 50%, compared to 75% for transplantees who are still relatively healthy”).

174. *Id.*

175. *Id.*

176. Siegal & Bonnie, *supra* note 8 at 415.

177. *Id.* (“The costs attributed to organ shortage [were] substantial—Medicare paid over \$15.5 billion in 2002 for treating patients with end-stage renal-disease, who predominate on organ waiting lists.”); Nadel, *supra* note 8, at 293–295 (noting that every year “over 85,000 candidates remain on the transplant waiting lists, . . . [the majority] waiting for kidneys, resulting in

Governments, therefore, have a strong financial incentive to broaden the pool and match people with kidneys that will be the most genetically suitable. Matching patients with kidney transplants sooner will eliminate significant costs because "it is cheaper to have a transplant than to stay on dialysis for more than two and half years, even among the sickest patients."¹⁷⁸ The savings are even greater for high risk patients, or patients "with heart disease, diabetes or older age," which will be increasingly more common with an aging baby boomer population.¹⁷⁹ In a 1999 study, United States researchers found that the medical system could save \$27,000 per patient per year if they were to get a kidney transplant instead of receiving dialysis treatment for that year.¹⁸⁰ At the time there were 220,000 people on kidney dialysis in the United States; thus, if everyone receiving dialysis were able to receive a transplant, the savings result for just one year would be \$5.94 billion.¹⁸¹ Even if just 20% of patients in one year were able to receive kidney transplants instead of remaining on dialysis, the savings would be almost \$2 billion.¹⁸² Biological matching is the way of the future in medicine and governments will feel pressure to use these new methods to more efficiently and effectively match patients, necessarily favoring an allocation system with a wider geographic reach.¹⁸³

increased use of dialysis, which is not only burdensome for patients, but also costs taxpayers tens of millions of dollars per year").

178. *The "Break Even" Cost of Kidney Transplants Is Shrinking*, UNIVERSITY OF MARYLAND MEDICAL CENTER, <http://www.umm.edu/news/releases/kidcost.htm> (last updated Apr. 10, 2009).

179. *Id.*

180. *Id.*

181. *Id.*; *The gap between supply and demand*, *supra* note 8 (These costs account for "\$21 billion a year, more than 6% of Medicare's total budget.").

182. *The "Break Even" Cost of Kidney Transplants is Shrinking*, UNIVERSITY OF MARYLAND'S MEDICAL CENTER (May 1999), <http://www.umm.edu/news/releases/kidcost.htm>. These immense savings are due to "shortening the length of hospital stay from an average of 10 to 7 days after the transplant, and eliminating the use of expensive anti-rejection drugs that were given intravenously in the hospital following the operation. Better oral anti-reject medications are now available which patients can take at home," resulting in even further savings. *Id.*

183. *Biotech Hurdles Facing Personalized Vaccines*, *Human Genome Project*, HUMAN GENOME PROJ. (Sept. 23, 2010), <http://www.folderol.org/biotech-hurdles-facing-personalized-vaccines.html> ("Scientists are researching how to

2. Decreasing Transaction Costs

Second, governments will want to cooperate internationally in order to save on transaction costs and research and development expenses. When overhead costs can be spread over a larger number of units, the unit price decreases.¹⁸⁴ Countries invest large amounts of money on their organ transplantations and allocations systems, and increasing the scope of these programs will decrease costs for all parties. Nationalizing lists and coordinating donor pools with other countries will avoid the cost of maintaining separate functioning allocation schemes and high administrative costs. Research and development is also expensive, and encouraging international cooperation through a new international forum will encourage intellectual collaboration in order to find more effective ways to save lives.

3. Strong Political Pressure on Governments

Third, strong political pressure may compel governments to cooperate internationally. Because government policy against organ sale and transplant tourism prevents citizens from receiving the services they demand, citizens are likely to pressure their elected officials to adopt a system of international organ exchange.¹⁸⁵ Under current allocation systems, unless a citizen is willing to move or engage in dangerous and illegal transplant tourism, they are left without recourse. Transplant tourism is already a growing industry and governments must face this fact.¹⁸⁶ Because governments respond to constituent pressure, countries will be motivated to adopt a scheme of international cooperation as a means of legitimately allowing their citizens to engage in regulated transplant tourism. With large amounts of people independently engaging in transplant tourism, it is neither effective nor good policy for governments to simply outlaw an activity that their constituents demand. Citi-

replace one-size-for-all vaccines with personalized vaccines that are tailored for the genetic make-up of the individual.”).

184. Industry Matters, *Economies of Scale*, <http://www.industrymasters.com/academy/economic-models/economies-of-scale.html> (last visited Jan. 11, 2013).

185. See, e.g., Lindy Royce-Bartlett, *Kidney Donors Begin 1st Intercontinental Organ Exchange*, CNN, <http://www.cnn.com/2012/06/01/us/intercontinental-organ-exchange/index.html> (last updated June 1, 2012, 8:21 PM).

186. *The gap between supply and demand*, *supra* note 8.

zens will therefore lobby their governments to move toward an international organ exchange regime.

Governments also may receive political pressure because in some respects geographic-based and country-based allocation systems can be viewed as legally discriminatory. It is a medical fact that "the quality of the biological match is usually better when both the donor and recipient are of the same race."¹⁸⁷ Geographic limitations lead to small biological samples and a relatively homogeneous pool of donors and recipients. Thus, in purposely restricting the pool by refusing to adopt an international system, a government is essentially discriminating against minorities who have statistically less compatible matches in the donor pool, and therefore a lower chance of receiving a lifesaving kidney. "To back away from a national system [or international system] or to minimize the importance of biological matching on this basis alone would essentially be placing a higher value on the lives of some patients than others, which would be discriminatory."¹⁸⁸ Governments, especially in countries that have had sensitive histories involving racial discrimination will be highly motivated to broaden the genetic pool of donors and recipients in order to combat any claim of racial discrimination.

4. Potential Increase in Donation Rates

Finally, governments will be motivated to use the GATS as a means of international cooperation because it may increase donation rates. Donations increase when a domestic allocation system is perceived to be legitimate and may be hindered when it is perceived to be discriminatory or not transparent.¹⁸⁹ For example, people can become skeptical of a country's allocation system when they hear rumors of wealthy or foreign citizens being prioritized because of their status. Many people are discouraged from donating because of common misconceptions and fears about their country's organ allocation system.¹⁹⁰ Using the GATS to allow countries to cooperate in a familiar context—through the WTO—will dispel many fears that inhibit donation. The Spanish model highlights the importance of pub-

187. Carlstrom, *supra* note 171.

188. *Id.*

189. Nadel & Nadel, *supra* note 8, at 302–03.

190. *The gap between supply and demand*, *supra* note 8.

lic perceived legitimacy and how this can translate into increased donation rates.¹⁹¹ Governments would be highly motivated to cooperate internationally if more organs were available to its own citizens through higher donation rates because of the system's legitimacy and transparency.

H. Specific Limitations Relating to the Use of the GATS

While the GATS provides a useful framework for countries to create an international organ exchange, there are some limitations associated with the GATS itself that may impede the effectiveness of the exchange. One main criticism of the GATS, which also may apply in its relation to organ transplantation services, is that countries have "the right to maintain public services and the power to enforce health and safety standards."¹⁹² If countries believe that their own regulation of public health services preempts all international cooperation in the area, then an international exchange could not function. The GATS in this context, however, does not limit a country's ability to manage their own health care systems because countries can personalize their commitments under the exemptions and schedules.¹⁹³ Additionally, "the GATS allows countries to impose domestic regulations on services, if they do so in a nondiscriminatory way."¹⁹⁴

Another potential criticism may be that under the Article XIV exception, a country does not have to abide by GATS rules if they are attempting to protect "human, animal or plant life or health."¹⁹⁵ Although the language is broad, this exception does not mean that countries are not allowed to create commitments related to health services. For example, countries do have schedules of commitments on health and hospital services.¹⁹⁶ The exception does allow a country to use Article XIV to avoid liberalizing trade with respect to a certain area because they are attempting to protect health. However, under

191. Nadel & Nadel, *supra* note 8, at 302–03.

192. *GATS: Fact and Fiction*, *supra* note 55, at 2.

193. Belsky et al., *supra* note 112, at 140.

194. *Id.* at 141.

195. *General Agreement on Trade in Services* 294–95, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (follow "pdf format" hyperlink) (last visited Oct. 6, 2012).

196. *See, e.g.*, Services Database, WORLD TRADE ORGANIZATION, <http://tsdb.wto.org/default.aspx>.

the framework of the GATS, "countries . . . have the option of establishing limits on market access or national treatment commitments . . . [and in fact, f]ew countries have made 'full' commitments in the health service sector—that is, commitments without any limitations."¹⁹⁷ Thus, because the GATS is comprised of voluntary commitments, a country need not use this exception if they wanted to limit trade, because they would simply choose not to liberalize with respect to that area.

Countries may also attempt to use the GATS Article I(3) exception in order to avoid liberalization. The Article I(3) exception excludes "services supplied in the 'exercise of governmental authority,' defined as services supplied neither 'on a commercial basis' nor 'in competition with one or more services suppliers.'"¹⁹⁸ A country may argue that organ transplants are not offered on a commercial basis and that the regulation of transplantation is an exercise of governmental authority. Scholars and regulators have not explored this part of the GATS in depth, but as discussed above, countries may have strong practical and theoretical incentives to regulate organ transplantation using the GATS.¹⁹⁹ Since participation in GATS is voluntary, and countries can personalize their obligations, Article I(3) should not raise any additional issues.

Due to these exemptions and a country's ability to choose their own level of liberalization with respect to each sector, there is a legitimate worry that these limits could undermine the creation of the exchange itself. While exemptions do exist, countries would ideally use these exemptions to personalize the agreement for their country, and not to defeat the objectives and purpose of creating an international exchange in this service sector.

Critics may be skeptical of the GATS's actual ability to increase market access and liberalize. Scholars argue that there has been "very little progress in terms of increased market access and elimination of discriminatory treatment."²⁰⁰ Furthermore, scholars describe that "[a]s agreements start to take shape, countries may still restrict the entry and practice of foreign providers and may limit foreign direct investment with

197. Belsky et al., *supra* note 112, at 140.

198. *Id.*

199. *Id.*

200. Mutchnick, *supra* note 114, at 46.

discriminatory tax and regulatory policies. The GATS encourages these types of rules if they demonstrably protect the public's health."²⁰¹ If the GATS did not effectively liberalize the market in the exchange for organ transplantation services, the proposal would not have its desired effects. Although this is a valid concern, countries will have incentives to use the GATS to liberalize their trade policies with respect to procurement and transplantation services, and not to perpetuate their protectionism, because of the strong public support of this unprecedented initiative.

CONCLUSION

The international community is beginning to entertain the idea of drastic reform for organ exchanges. The correct step is for countries to adopt a multilateral system of international exchange in organ transplantation services and eliminate the protectionist laws that limit organ supply and that disadvantage developing countries. If countries continue to look inwards for solutions, the black market will thrive and dangerous organ trafficking and unregulated transplant tourism will become even more prominent. Countries also have strong practical incentives for adopting a system of international cooperation, and will receive domestic political pressure to make serious changes to their current allocation schemes if left unaltered.

Any solution must be compatible with communal and highly valued moral ideals, particularly altruism. The GATS is attractive because it is a pre-existing treaty and the WTO serves as a built-in enforcement mechanism; countries can use the WTO's dispute resolution forum if real disputes arise over the application of the treaty. Using the GATS to regulate and increase exchange between countries is not only a means to help needy patients worldwide, but furthers the goals of altruistic donation and increases the legitimacy of organ donation.

But what country will take the lead in these efforts? The EU has taken steps to create a harmonized system, but this does not go far enough because the EUODD does not emphasize a true international organ exchange. The answer may be that this is an opportunity for non-profits and NGOs to take the lead in order to convince countries to cooperate and interna-

201. *Id.* at 7.

tionally exchange transplantation services. Organizations such as Eurotransplant and NHS Blood and Transplant are already aiding the EU with its changes in its organ transplant policy.²⁰² Potentially, other non-profits can provide support, data, and expertise in the transition to an international exchange.

The GATS framework is capable of regulating organ procurement and transplantation and is a valuable tool for countries. A well-regulated international organ exchange would literally save lives and should be seriously considered by the international community.

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202. *Eurotransplant*, *supra* note 23; *NHS Blood and Transplant*, *supra* note 40.

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