

International Commercial Surrogacy: A mission for GATS?

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By

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There is nothing either good or bad but thinking makes it so (Hamlet, William Shakespeare, Act II, scene 2 line 259)

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Chapter 1 Introduction

Being pregnant and having your own children is one of the biggest events in life for many couples. However, some couples face fertility problems, which hinders them from having children. Although several treatments exist such as artificial insemination¹ (AI) and in vitro fertilization² (IVF), some women are still not able to have children by themselves. An alternative for this problem is to have another woman carry their child. This is called a surrogate mother (Trimming & Beaumont 2011; Humbyrd 2009). There are two types of surrogacy that can be distinguished: commercial surrogacy and altruistic surrogacy. This thesis will focus on commercial surrogacy.

International commercial surrogacy (ICS) is a phenomenon that has been criticized by many due to its sensitivity on ethics. Critics on the ICS involve the commodification of the surrogate mother, the commodification of the conceived child and the commodification of the reproduction (Humbyrd 2009; Smerdon 2008; Anderson 1990).

Aside from the ethical issues, ICS market is a complex system in itself. The ICS market involves several other markets such as the market in which the broker supplies his services to the prospect parents. The second market is the health care market wherein the fertility centre performs IVF procedures. The surrogacy market is the third market whereby the surrogate mother delivers her gestational service. The fourth market is the sperm- and egg market that supplies the reproduction materials (Spar 2006).

However, regulating trade for ICS on a global level is becoming more and more necessary, as currently there are no international regulations (Sanger 2007). The necessity of an international regulation is motivated by the need to protect the conceived child from becoming 'stateless or parentless³'. In order to explain this, it is essential to put the focus on the filiation problem (Krim 1996). This implies that the definition of a mother in the ICS is problematic because it is not clear who 'the mother' is. Is it the surrogate mother who has been carrying the conceived baby for nine months? Or is it the intended mother who pays for the gestational service of the

¹ Artificial insemination (AI) is procedure whereby the sperm of a man is being captured and artificially inseminated into the woman (Spar 2005).

² In vitro fertilization (IVF) is a procedure whereby the egg is being extracted from the woman and the sperms are being captured of the man. The egg and the sperms are being artificially put together outside the womb. The conceived child will then be put back into the womb of the woman (Spar 2005)

³ The words of MR. Justice Hedley in the case of X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

surrogate mother? Or is the egg donor the mother of the conceived child? In other words, the conceived child could have up to three 'mothers'. At the same time the child could have legally no mother at all, because the legal definition of a mother differs between countries. This results in court cases⁴ whereby intended parents are not being recognized as the parents of the conceived child in their home country (Ergas 2012; Sanger 2007; Ryznar 2010). As a result the child becomes stateless due to legal incompatibility between countries.

Also, the existing framework such as the Hague adoption convention is not capable of regulating the adoption process in the ICS market, because the convention is aimed at the existing child. In the case of surrogacy, the child does not exist yet at the moment that the surrogate mother decides to give up the forthcoming baby. Thereby, it is important to protect the surrogate mothers in third world countries from being exploited by intended parents from first world countries (Spar 2006). However, on the positive note, the ICS market allows the surrogate mothers to improve their economic position when compared to other occupations (Humbyrd 2009:112; Hämäläinen, Takala & Saarela 2006:145).

This thesis stresses the fact that the ICS is a growing market. It is predicted by the Confederation of Indian Industry that in 2012 the surrogacy market will reach a revenue of \$2.3 billion annually (Maranto 2010). The demand, supply and economic transaction characterize this domain as a market (Spar 2006; Trimmings & Beaumont 2011; Sanger 2007). The ICS market will continue to exist with or without an international regulatory framework. Therefore it is necessary to regulate it by setting boundaries in order to limit the negative consequences of the ICS market and thereby protecting the most vulnerable actors: the surrogate mother and the conceived child.

The focal point of this thesis is to describe the ICS in relation with the current international trade law. Hereby, the focus will be on the General Agreement of Trade and Services (GATS). Up to present, little scientific investigations (Stephenson 2009) have been made that apply GATS on the ICS market. This thesis contributes to the current ICS literature by developing a framework for regulating the ICS market via GATS. The research question of this thesis is: *How would the current GATS impact the international commercial surrogacy market?*

Sub questions that support the main research question are the following:

- *How is the ICS market constructed?*

⁴ Re X and Y (Children) [2011] EWHC 3147 (Fam), Case Nos:EU11P00024; Re:IJ (a child) [2011] 921, case No:FD10P02162

- *Why is the regulation of the ICS market needed on a global level?*
- *How can GATS be applied on the ICS market?*
- *What is the acceptability status of ICS?*

An important remark concerning this thesis is that it will not focus on resolving moral issues. Furthermore, this work is written under the assumption that ICS is a health service and that it is seen as a service for which trade is possible. This thesis is divided into three main parts. Part I outlines the theoretical framework of the current situation of the ICS market. In this theoretical framework, chapter 2 discusses the methodology for this thesis. Chapter 3 answers the sub questions concerning the construction of the ICS market and the development of this market. Chapter 4 shows the need for an international regulation.

Part II focuses on the potential implication of GATS for ICS. This part starts with chapter 5 wherein an introduction is given concerning the international trade law (ITL). Chapter 6 provides an overview of the advantages and disadvantages of trade in services on a global level. Then chapter 7 discusses how the GATS can be applied to the ICS market alongside with the economic advantages and disadvantages.

Part III will address issues that are related to the acceptability of the ICS market from the perspective of various countries and institutions. Part III consists of the chapters 8 and 9. In Chapter 8 the acceptability of GATS as a regulation instrument for the ICS market will be examined. Chapter 9 is the discussion and conclusion.

Chapter 2 Methodology

This chapter shall explain the methodology that has been used in this thesis. This thesis has adapted a legal research approach whereby the author has taken a trade perspective. With regard to the current literatures concerning the surrogacy market, many have written it from its ethical point of view and almost no literature has been found that has applied the international trade law on the ICS market in depth. The next paragraph shall explain why the thesis has been structured as it is.

2.1 The Structure of the Thesis

For this thesis, the structure of the surrogacy market has been identified by analysing the available literature that describes this market. The literature that has been selected were for instance, articles that has been written by the field researcher Pande and the author of the book *the baby business* which was written by Professor Spar. Therefore, the following sub question was addressed: how is the ICS market constructed?

In order to understand the fundamental problems in the ICS market this was an essential aspect of the thesis to incorporate. In addition, the explanation why prohibition or regulation with the current adoption convention was not sufficient in regulating the ICS market was also addressed. These regulation and prohibition tools showed for instance, that it has its deficiencies and therefore, other alternatives might be better to regulate this market. This led to the next sub question: why is regulation needed on a global level?

Because the ICS market is a domain wherein demand and supply exists, there has been chosen to apply the international trade law on this domain. By analysing the applicability of the international trade law on the ICS market, many features of the market could be defined in terms of similarity to other markets. Also characteristics of the ICS market that makes it difficult to characterize it as a market has been identified. In addition, some economic benefits and downsides have been analysed when regulating the ICS market with the GATS. Based on the previous reasoning, the following sub question has been formed: how can GATS be applied on the ICS market?

In order to understand the impact of regulating the ICS market through trade laws, further analyses has been done about the current acceptability of this market. This has been done by analysing researches concerning the public opinions of several countries related to surrogacy. Therefore, the following sub question has been formed: what is the acceptability status of the ICS market?

2.2 Search strategy

The search for literature has been done by using instruments such as google scholar and Seurch (searching machine of the Erasmus University Rotterdam). Furthermore, law cases have been addressed in order to illustrate the legal problems of the ICS market. In addition, two books: making babies (Warnock 2002) and the baby business (Spar 2006) have been used in order to gain a better understanding of the surrogacy market. Moreover, in order to have a better comprehension of the international trade law, the book essential international trade law (Sansou 2005) has been used alongside with the website of the WTO.

Part I Theoretical Framework

Part I provides the theoretical framework of the current situation of the ICS market. This part contains chapter 3 and 4. Chapter 3 gives the construction of the ICS market, the main actors and the development of this market. In chapter 4, the need for regulation is given.

Chapter 3 International commercial surrogacy (ICS) market

This chapter focuses on the following questions: how is the ICS market constructed? Who are the main actors and what motivates them to enter the ICS market? And how has the ICS market developed over time? The ICS market has the same basic components as any other markets: demand, supply and economic transactions. In this chapter this construction is described. Furthermore, the main actors of the ICS market are described along with their motives to enter the ICS market. Moreover, the relationships between the main actors are explained. The main actors are the intended parents, the intermediary and the surrogate mother.

3.1 The construction of the ICS market

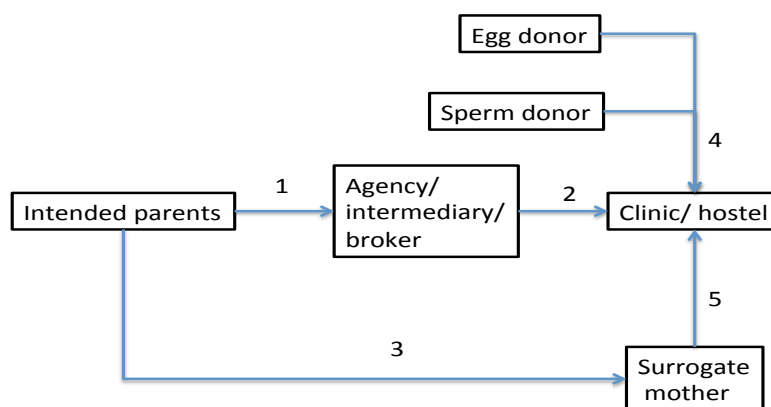


Figure 1 services between the parties in the international commercial model (author's own compilation based on Pande (2010) and Spar (2006)).

This section provides a model in which the ICS is examined. In Figure 1, the model of ICS is shown which distinguishes different steps in the ICS process. It can be seen that the ICS market involves a set of services. As can be observed in this construct, several actors are involved. The model shows that the intended parents contact the agency for its services (1). In order to provide information regarding surrogacy and helping the prospect parents in having a child, the agency contacts his counterpart abroad (2). This can be a clinic that delivers medical services, provides surrogate mothers (5) and buys genetic materials (4) such as eggs and sperms. In the end, the surrogate mother delivers

the conceived child to the intended parents (3) (Pande 2010; Spar 2006). The remainder of this chapter will provide a more detailed description of the ICS market process along with the motives of the various parties to enter the ICS market.

3.2 Main actors in the ICS market and their relationships with each other

3.2.1 The intended parents

The first actors that are discussed in this section are the intended parents. They are the demand side of the ICS market. Commissioning parents can be seen as consumers, although they differ from consumers in other normal markets on certain domains. For example, they tend to be less rational because of their desire to have children. Therefore, the intended parents are less critical about the service that is being provided. In addition, infertile parents often blame themselves for medical failures rather than the provider of the treatment (Spar 2006). Hereafter, various arguments are given why prospect parents want to enter the ICS market.

There are several reasons why commissioning parents shift from the domestic market into the international commercial surrogacy market. One of the reasons to cross borders is because of the limited supply of surrogate mothers in the home country of the intended parents. Therefore it is attractive to travel to countries where surrogate mothers are available to provide gestational services (Spar 2005).

A second reason is the legal restrictions in the country of the prospect parents. Legislations that prohibit surrogacy can be a reason to cross borders. An example of a legal restriction is that some consumers, such as lesbian couples, are not eligible for reproductive care. Other factors that can restrict access to reproductive care are age and marital status (Palattiyil et al.2010:689; Pennings et al. 2008:2182).

The third reason is the financial argument, which concerns affordability. Lower costs of surrogacy arrangements abroad can be incentives to motivate infertile couple with financial constraints to cross borders. It has been shown that the total cost of surrogacy in a developed country such as the United States can range between \$59.000 and \$80.000 for the infertile couple. But in a developing country such as India, it only ranges from \$4.000 to \$35.000 (Smerdon 2008:32; Humbyrd 2009:111; Pennings et al. 2008:2182; Palattiyil et al. 2010:690). However, when affordability is not a problem for the infertile couple, they do not perform extensive price comparison or negotiate about the fees (Sanger 2007; Krawiec 2008; Leibowitz-Dori 1997). In other words, the demand side of the ICS is relatively inelastic, when compared to other markets. This is due to the

fact that infertile parents want to have their own child so much that as a consequence, they are not being rational in choosing their provider and making price comparisons.

The fourth argument to resort to other countries can be due to privacy reasons (Palattiyil et al. 2010:690). One could imagine that some couples may be ashamed of being infertile and therefore want to have children by means of a surrogate mother abroad without other people knowing.

3.2.2 The surrogate mother

The second actor is the surrogate mother who represents the supply side of the ICS market. The surrogate mother offers her gestational services via clinic and broker to prospect parents in exchange for payments. The reason for becoming a commercial gestational carrier was for instance shown in the field research of Pande (2010). Her study showed that overall women, who were recruited for surrogate mother purposes, were of a low socio-economic status. Due to their financial need, these women were willing to become a surrogate mother. For example, the earnings of a surrogate mother in India sometimes equal a family income of five years.

3.2.3 The broker and his relationships with the demand and the supply side

Another important actor in the ICS market is the broker. This section will provide a better understanding of the broker and his intermediary function. The term middleman, broker and intermediary will be used interchangeably in this thesis. A definition of an intermediary is: *'an economic agent that purchases from suppliers for resale to buyers or that helps buyers and sellers meet and transact'* (Spulber 1996:135).

Based on this definition of an intermediary, three functions of a broker can be derived that can be applied on the ICS market. The first function of an intermediary is setting prices and clearing markets. The second function is coordinating buyers and sellers. The third function is guaranteeing quality and performance. These three functions are the most important tasks of an intermediary in general. Hereafter, these three functions shall be applied to ICS (Spulber 1996).

Firstly, with setting prices and clearing markets is meant that the intermediary performs analysis of the demand and the supply in the market in order to set a price (Spulber 1996). In the ICS market, the intermediary can observe the demand of the consumers e.g. the infertile couples that wish to have a child through surrogacy. By observing this demand, the intermediary can try to match it with the available supply in the form that the consumers want. In other words, intermediaries offer packages that

include different kind of services and products such as a package that includes a surrogate mother, IVF and gamete donor (Sanger 2007).

The second function is coordinating buyers and sellers, this means that the intermediary searches and matches the infertile couples with the supply, which are services that can help the infertile couples with having a child of their own (Spulber 1996; Sanger 2007). This function of the middleman is important due to cost reductions for the consumers and the suppliers. For example, without an intermediary the prospective parents have to find a surrogate mother themselves. Also, the prospect parents have to decide whether the surrogate mother is appropriate for her function as a surrogate. Thereby, commissioning parents might have to find an oocyte or sperm donor. Eventually, the prospect parents have to search for a clinic that provides assisted reproduction technology (ART) services (Krawieck 2008). All these procedures can cost the prospective parents a lot of time and effort. Employing an intermediary can therefore save time and effort for the prospective parents.

Besides offering efficiency for the prospective parents, the intermediary also provides efficiency for the supply side of the market (Krawieck 2008; Sanger 2007). In absence of an intermediary, the suppliers (e.g. clinics) would have to search for their consumers. As shown in Figure 1, the ICS market is also related to other markets such as the sperm and the oocyte markets. In order to provide a certain service, these other markets are dependent on one another. If the prospect parents want to have a surrogate mother, they might have to find reproductive cells first, before they can demand for a certain ART service. It will take time before the consumer could engage in an economic transactions with the supplier of the services. Thus, having intermediaries is beneficial for the demand and supply side because they can match the consumer and suppliers more efficiently.

The third function is guaranteeing quality and performance (Spulber 1996). The consumers, prospective parents, often do not know what the quality and performance are of the supplied products and services. The broker can fill this knowledge gap by overcoming the information asymmetry between the consumers (i.e. commissioning parents) and suppliers (i.e. surrogate mothers). The broker can also reduce uncertainties by contracts, guaranteeing the quality of surrogate mothers and by screening surrogate mothers on physical and psychological aspects (Sanger 2007; Krawieck 2009). Hereby can be concluded that the broker offers a set of services that involves the provision of information to prospective parents and arranging the supply in the desired format for the consumer.

3.3 The development of the ICS market

In order to explain the development of the ICS market, it is essential to understand that the ICS is dependent on other markets. In order to have a market for ICS, the development of assisted reproductive technology (ART) was essential (Sanger 2007:72; Posner 1989). This new technology has resulted in a new way of thinking concerning infertility. In the past infertility was seen as something that could not be overcome, however now it is regarded as a disease that can be solved through ART (Sanger 2007:72; Posner 1989). Nevertheless, ART could not resolve the problem of a woman that was not able to carry her own child. Therefore a substitute was needed for the infertile woman, a surrogate mother. This is the point where the combination of ART and a surrogate mother leads to the beginning of a commercial surrogacy market.

Moreover, the different legislations between countries concerning commercial surrogacy leads to commercial surrogacy at an international level. At a national level, some countries have prohibited (commercial) surrogacy. Some countries do not have any regulations. This leads to a variety of regulations in different countries in terms of allowing or prohibiting surrogacy (Ryznar 2010). When the home country of the infertile couple prohibits surrogacy or commercial surrogacy, they will travel to countries where surrogacy is allowed. For example, based on Indian clinics reports, the increasing growth of surrogacy market in India is due to the fact that commercial surrogacy is permitted in India. Infertile couples from abroad drive the demand in India where commercial surrogacy is allowed since 2002 (Smerdon 2008:45; Krawieck 2009).

The commercial surrogacy business in India is estimated at \$500 million (MSNBC 2012). In the US the surrogacy industry is estimated at \$22 million per year. However, this number is calculated roughly because there are no records available concerning the number of children born through surrogacy. Nevertheless the US government estimated the number of children born through surrogacy at more than 1000. Per pregnancy the surrogate mother receives approximately \$22,000 dollars for the first time. The estimated total costs that the prospect parents' pay is approximately between \$75,000 – \$150,000 dollars. This results in a total of \$75 million – \$150 million dollars per year (Holcomb & Byrn 2010). Furthermore, brokers are also a factor for the development of the ICS market. Intermediaries have the incentives to expand the market internationally in order to increase the supply of surrogate mothers (Leibowitz 1997). Which leads to more market share and turnover for the intermediaries.

3.4 Chapter summary

This chapter addressed several questions regarding the construct, the main actors and the development of the market of international commercial surrogacy. It has been shown that the main actors in the ICS market are the surrogate mother, the intended parents and the intermediary. Each of these actors has different reasons to enter the ICS market. The surrogate mother has a financial need, the intended parents have a child wish and the broker can benefit financially from this market. Due the introduction of ART and the supply of surrogate mothers the ICS market is growing fast. Therefore regulation is needed in order to limit the negative effects of this market.

Chapter 4 The problems of the ICS market

Due to the absence of an international regulatory framework for the ICS market, problems arise on many domains (Leibowitz-Dori 1997; Trimmings & Beaumont 2011). This chapter shall address the need for regulation of the ICS market by describing the fundamental problems in the international market for commercial surrogacy for which international trade law could provide a solution. Importantly is that the issues in the ICS market are regarded from a trade perspective wherein surrogacy is part of a fertility health service. Furthermore, regulating the ICS market has its difficulties due to its complex nature and the lack of basic definitions concerning filiation. This implies that, from a global perspective, there is no clear answer to the question: who should be the mother of the child that is conceived under a surrogacy arrangement? Is it the intended mother, the gestational carrier or the egg donor?

Another problem that arises within the ICS market is the suitability of the prospect parents. For instance, one can imagine that when the intended parents do not want to become parents anymore during the surrogacy process, this could lead to questions such as: who will take responsibility for the child and the provided service of the surrogate mother? Moreover, the suitability of the prospect parents also concerns whether they are capable of being appropriate parents. For instance, there should be some indicators in order to screen intended parents for inter alia mental illness and violent behaviour.

Furthermore, what is the position of the gestational carrier in the surrogacy arrangement? From the perspective of a health care service, the position of the surrogate mother is rather complex when compared to actors such as the physician and the patient. Similar to patients, the surrogate mother has to face the problem of information asymmetry. The surrogate mothers have to provide for example, an informed consent for applying medical procedures. Nevertheless, the surrogate mother can also be regarded as a health care worker, as she is providing a health care service to the infertile couple. Thus, the position of the surrogate mother in the ICS market is not clearly defined.

Additionally, it is essential to address the working of the gestational carrier. For example, the surrogate mother must be protected against suboptimal or even risky working conditions. Also, she has to be protected against exploitation and receive adequate payment for her gestational services. Thereby, surrogate mothers must be safeguarded from the possible negative consequences of the provided services such as side effects of medical procedures on both the short term and the long term.

In addition to the arguments for regulation, this chapter shall also address why prohibition is not the best option to erase the ICS market problems. Furthermore, an explanation shall also be given why the current adoption convention that sets guidelines for child adoption is not applicable in the case of ICS.

The aforementioned problems in the ICS market shall be explained in further detail in this chapter. It will aim at answering the following questions: Why is the regulation of the ICS market needed on a global level? Why is prohibition not a solution for the existing problems of the ICS market and why is the adoption convention not the most suitable tool in regulating the ICS market. In succession the best interest of the child and the second best interest of the surrogate mother will be discussed. Thereafter, the problems of prohibiting a market will be analysed. In addition, the limitations of the adoption convention shall be highlighted when it would be applied in the ICS market.

4.1 The best interest of the child

4.1.1 The filiation problem

One of the main problems within the global ICS market is the following question: who are the mother and the father of the conceived child? There are different types of surrogacy. The two types of surrogacy arrangements are the traditional surrogacy and the gestational surrogacy (Smerdon 2008:17; Watson 2007:529). Figure 2 shows traditional surrogacy. Traditional surrogacy involves artificial insemination, which is used to inseminate the sperm into the surrogate. Therefore, the conceived child will be genetically related to the surrogate.

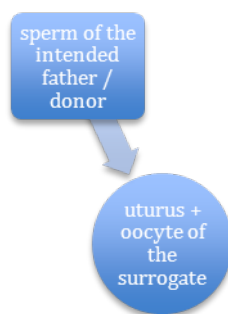


Figure 2 Traditional surrogacy

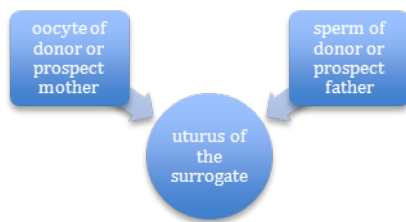


Figure 3 Gestational surrogacy

The second type of surrogacy arrangement is gestational surrogacy, which involves in vitro fertilization (IVF). Hereby the oocyte, that is not from the surrogate, and the sperm are put together which turns into an embryo. After that, the zygote will be implanted in the surrogate through IVF. This implies that the surrogate mother is not genetically related to the child she is carrying. Figure 3 provides a graphical representation of gestational surrogacy (Smerdon 2008:17; Watson 2007:529; Palattiyil et al. 2010:688).

The conceived child can be genetically related to both of the intended parents or one of the commissioning parents or be related to neither of the prospect parents. Table 1 shows the possible combination of filiation for the conceived child. For example in Table 1 can be seen that a child can be conceived with a donor sperm and an oocyte of the intended mother. However, the child can also be conceived with the sperm and oocyte of the intended parents. The problem that arises with the various possible combinations is that different countries maintain a different definition of a mother and a father. In the remainder of this section, the three methods concerning the establishment of the mother and the father are being discussed.

Sperm / Oocytes	Intended father	Donor sperm
Intended mother	Gestational surrogacy: Child is genetically of the prospect parents	Gestational surrogacy: Child is genetically related to the prospect mother only
Surrogate mother	Traditional surrogacy: Child is genetically related to the prospect father and the surrogate mother	Traditional surrogacy: Child is genetically related to the surrogate mother
Donor oocyte	Gestational surrogacy: Child is genetically related to the prospect father	Gestational surrogacy: Child is genetically not related to the prospect parents nor the surrogate mother

Table 1 possible relationships between the child, surrogate mother and prospect parents (authors' own compilation on the basis of Smerdon (2008), Watson (2007) and Palattiyil et al. (2010))

There are three approaches in order to decide who the parents of the conceived child are. These are given in

Method	Who is the mother?
Birth test	The woman who gives birth to the child i.e. surrogate mother
Genetic test	The woman who is genetically related to the child i.e. the oocyte provider
Intent test	The woman who wants to become the mother of the conceived child i.e. intended mother

Table 2. The first method is the *birth test*. This means that the woman who carries the child and gives birth to the child is the legal mother. A country that uses this approach is the UK⁵. Although the prospect parents are genetically related to their child, by law the surrogate mother, would still be the legal mother (Trimmings & Beaumont 2011).

The second method is the *genetic test*, which means that the genetically related parents are the parents of the conceived child. One of the countries that uses this approach is Israel⁶. A problem with this method arises when the child is conceived with the help of a donor sperm and/or donor egg. If the child would be conceived by a donor

⁵ <http://www.legislation.gov.uk/ukpga/2008/22/section/33>

⁶ <http://www.jta.org/news/article/2012/03/07/3092038/tel-aviv-court-sets-surrogacy-birth-precedent>

sperm and a donor egg, the donors would be the legal parents of the child (Trimmings & Beaumont 2011). Nevertheless, it would lead to complex situations whereby the donors have to be traced in order to let them relinquish their parental rights.

The third method is the *intent test*. One of the countries that uses this method is Ukraine⁷. The intent test refers to the intention of becoming a parent. In the case of the surrogacy, this would be the commissioning parents (Trimmings & Beaumont 2011). In other words, the intended parents would obtain the parental rights over the conceived child without giving birth to the child or without being genetically related to the child.

Method	Who is the mother?
Birth test	The woman who gives birth to the child i.e. surrogate mother
Genetic test	The woman who is genetically related to the child i.e. the oocyte provider
Intent test	The woman who wants to become the mother of the conceived child i.e. intended mother

Table 2 Methods for establishing filiation (Authors' own compilation based on Trimmings & Beaumont 2011)

The problem of these different approaches arises when the prospect parents enter the ICS market. Different countries maintain different methods in order to set the definition of a mother. One of the cases that illustrate the who-is-the-mother-problem is the Balaz case⁸. Balaz and his wife went to India in order to have a child through surrogacy. With the help of an egg donor the surrogate mother gave birth to a twin. According to the Indian Council Medical Research (ICMR) guidelines, the intent test is applicable. In other words, the intended parents are the legal parents of the children who are born through surrogacy. Thus, the Balazes received the birth certificates that stated that Balaz and his wife were the legal parents of the twins.

When the Balazes wanted to bring their children back to Germany, the German authority refused to provide German passports for the children. This was due to the legislation in Germany that prohibited surrogacy. Therefore, in Germany the birth certificates were not valid. Thus, the Balazes applied for an Indian citizenship instead.

⁷ <http://www.irts.com.ua/en/legislation/ukraine.html>

⁸ Jan Balaz vs Anand Municipality, case can be found on <http://blog.indiansurrogacylaw.com/2009/11/gujarat-high-court-rules-on-surrogacy-case/>

However, this was not possible as the Indian law stated that children born out of surrogacy are not to be treated as Indian citizens as the parents are not Indian citizens. The case was solved as the Supreme Court in India gave the children an Indian citizenship and Balaz and his wife received their parental rights through adoption.

Another case was the case *Re: IJ(a child)*. In this case, IJ was born in 2010 in Ukraine. In Ukraine the surrogacy agreement between the surrogate and the applicants was valid due to the fact that commercial surrogacy is allowed in Ukraine, therefore there was payment involved above reasonable expenses. Nevertheless, in the home country of the applicants, which was UK, commercial surrogacy is forbidden. The problem arises when under the Ukrainian law the applicants were the legal parents of baby IJ, whereas under the British law, it would have been the surrogate mother and her husband. This gave problems concerning the immigration of baby IJ into the UK. The High Court decided to grant the applications for parental orders. An important reason for this judgement was also the wellbeing of the child⁹.

Nevertheless, these cases illustrate that the differences in laws between countries can result in difficulties concerning the parental rights and nationality. In both of the cases, the conceived children were at risk of becoming stateless and parentless¹⁰.

Another issue that arises is whether the child, may seek for the identity of the genetic parents (Annas 2011). In article 7 of the Convention on the Rights of the Child¹¹ is stated that the child has the right to know his parents. However, the privacy of the donors should also be maintained. It remains difficult to decide, to what extent this private information of the donors could be revealed. For the best interest of the child, an international regulation is needed in order to overcome the filiation problem in the ICS market. The child will therefore be assured of a nationality and will be prevented of becoming parentless. Additionally, a balance should be set between the right of the child to know his parents and the privacy of the gamete donors and the surrogate mother.

4.1.2 The status of the child

An important issue in the ICS market is the status of the conceived child. How must the child be regarded in this commerce context? Are there any differences between trade in children and trade in other commodities? To a certain extent, the conceived child in a commercial surrogacy arrangement is a commodity. Humbyrds argues that the

⁹ *Re: IJ (a child)* [2011] 921, case No: FD10P02162

¹⁰ The words of MR. Justice Hedley in the case of *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)

¹¹ <http://www2.ohchr.org/english/law/crc.htm>

commodification of children is limited. She explains that the process, gestation and birth might be seen as a commodity as there is payment involved. However, the intended parents will still have the same responsibilities for the child as any other parents to their children (Humbyrd 2009).

Moreover, Stephenson (2009) has shown in her article that the difference between goods and services is the non-storability of services. In the case of the commercial surrogacy, a child is non storable. Therefore, by that definition, there would only be the surrogate mothers' service. Nevertheless, this still does not give clarity about what the child in the surrogacy market is.

4.1.3 Suitability of the prospect parents

Another aspect that is important when looking at the best interest of the child is the appropriateness of the commissioning parents. Comparable with adoption, the parents must be screened for their suitability of becoming a parent of the conceived child. In The Hague Adoption Convention article 5¹² is stated that the State has to establish whether the prospective adoptive parents are eligible and suitable for adopting a child. For the best interest of the child, this similar requirement should also be set in the case of ICS.

4.2 The second best interest of the surrogate mother

4.2.1 Informed consent

Another adverse effect of the ICS market is that the surrogate mother might not fully understand the consequences of being a gestational surrogate. The surrogate mothers might enter into a surrogacy arrangement without knowing the burden that they will have to carry, which can be both physically and mentally. It is questionable, to what extent the prospect surrogate mother knows the danger of being a surrogate (Smerdon 2008:54).

The study of Pande (2010) showed for example, that surrogate mothers in India were not well informed about the services the gestational surrogate had to provide. For instance, the surrogacy contract in which the rights of the surrogate mother were written down, was in English. However, most surrogate mothers were not capable of reading English. Although some essential parts of the contract were translated, it seems that the surrogate mothers were still not sufficiently informed. Some surrogate mothers said the following regarding the contract:

¹² http://www.hcch.net/index_en.php?act=conventions.text&cid=69

“We were told that if anything happens to the child, it’s not our responsibility but if anything happens to me, we can’t hold anyone responsible. I think the legal contract says that we will have to give up the child immediately after the delivery—we won’t even look at it. Black or white, normal or deformed, we have to give it away.” (Pande 2010)

This shows that the surrogate mothers were strongly aware of the fact that they had to give up the child after delivery. However, it seems that the surrogate mother were not aware of the physical and mental burden that they had to come across such as the side effects of the fertility treatments. Or what the consequences would be if the contract would be cancelled.

The position of the surrogate mother in the ICS market is comparable with a patient-doctor relationship. Health care services in general have to be regulated due to reasons such as information asymmetry between the health care provider and the patients, and protection of the patients for malpractices of the provider (Cattaneo 2009:3). In the ICS market, the patient is the infertile couple and the health care provider would be the physician who provides the health care service. The surrogate mother can be seen as a health care worker as she is providing a health service in order to help the infertile couple to overcome their infertility problem. Nevertheless, the surrogate mother has a special position because she also faces the problem of information asymmetry like the infertile couple. In addition, the surrogate mother is the actor who will have to undergo medical procedures. The surrogate mother should have the right to be fully informed about the procedures that is going to be applied on her. Therefore, regulation is needed in order to protect the surrogate mother physically and mentally from unexpected effects of providing a gestational service, and to limit the problem of information asymmetry.

4.2.2 Exploitation and payments

One of the problems that have been a point of discussion is that surrogate mothers in developing countries are at risk of being exploited by wealthier infertile couples from another country. This is because of the economic disparity between the infertile couples and potential surrogate mother (Leibowitz-Dori 1997: 331; Rimm 2009).

Humbyrd (2009) acknowledges that there should be a more fair trade for the surrogacy mothers in developing countries. The surrogate should be compensated in a fair way when compared to the broker (Humbyrd 2009:117). For example, the total cost of a surrogacy arrangement in the US is approximately \$80.000. From that amount,

about \$15.000 goes to the surrogate mother and \$30.000 going to the intermediary¹³. While in India, the total costs ranges between \$10.000 and \$30.000 including the pay for the surrogate mother and the medical expenses (Rimm 2009). These numbers show that due to the international price competition in the surrogacy market, international clients will be attracted to the lower prices of surrogacy in developing countries, which could potentially lead to exploitation of the surrogate mothers. Eventually, this could lead to a so-called 'race to the bottom'.

Without any regulation on a global level, competition can arise between potential surrogate mothers, which puts a downward pressure on its price (Rimm 2009). This will result in fees that are unreasonable for the amount of effort that has been exerted by the gestational surrogate. If ICS is to be regulated, it is important to set a minimum amount of compensation for the gestational service in order to limit the exploitation of the surrogate mother (Watson 2007).

4.2.3 Working conditions

The occupation of surrogate mother is an emotionally loaded job in which the surrogate mother has to distance herself from the conceived baby, while at the same time she has to care for the child as if it were her own. In addition, the surrogate mother uses her own body whereby she exposes herself to medical procedures that could potentially be harmful. The surrogate mother has to face both physical and psychological strains. In order to protect the surrogate mother from these health-damaging effects, regulation is needed concerning the wellbeing of the surrogate mother. For example, there should be access to health care for the surrogate mother whenever she is facing health problems resulting from her occupation as a surrogate mother (Smerdon 2008:5; Watson 2007).

Furthermore, the working environment of the surrogate mother must not affect the gestational carrier negatively such as unhygienic environment wherein she has to live and work in. It is essential for the surrogate mother to be able to have access to health care. Also, there should be minimum standard for the working environment of the surrogate mothers. They are most vulnerable when compared to other occupations, as they have to be pregnant.

4.2.4 Provided service and contract

Holcomb and Byrn (2010) pointed out that surrogate mothers can be seen as professionals in the surrogacy industry who are providing a service in order to receive a payment. In a normal market, both parties, consumer and seller can make a contract

¹³ In the literature was not mentioned where the last \$35.000 was, nevertheless, I assumed that it is probably the cost for the medical procedures.

whereby they set down to trade away property rights and their right to change their mind. From an economic point of view, the surrogate mother has to deliver the baby to the prospect parents when she finishes her services. This is comparable with a building contractor who delivers a house to his client when he finishes work.

However, in the market for commercial surrogacy, the prospect surrogate mother is not fully aware of how she will feel concerning giving away her child. During the pregnancy, it is plausible that the surrogate mother might develop a bond with the child she carries. Therefore, she might want to change her mind with respect to keeping the baby (Rimm 2009). In a normal market for services such as the case of the building contractor, it is not possible to keep the house for the reason that the building contractor was attached to it during his service delivery. In the case of commercial surrogacy, the gestational carrier should also not be attached to the conceived child as she is only providing a service.

However, although both occupations provide a service, the main difference between a building contractor and the surrogate mother is that being a gestational carrier is an emotionally loaded job. Similar to other occupations whereby attachment sometimes occurs are nannies and babysitters. They provide a service in which it is required that they get attached to the child or children up to a certain extent. No parent would like to hire a cold and distant nanny. Nevertheless, neither nannies nor babysitters are allowed to be attached to such an extent that they want to keep the child they are looking after. These occupations require the provider of the service to find a balance between behaving professionally on the one hand and caring for the children on the other hand.

Another issue is the question concerning the control over the pregnancy. Who may decide to terminate a pregnancy (Rimm 2009; Holcomb and Byrn 2010)? From an economic point of view, the client may not cancel an established contract for no reason. In the case of building a house, the client must then pay a fine for breaking the contract and perhaps some amount of money for the delivered service. In the case of the gestational carrier, it is difficult to follow the same procedure. If the intended parents would pay the fine and the costs for the provided services to the surrogate mother, it does not necessarily mean that the pregnancy is terminated. The contract may end, but the pregnancy might have to go on due to reasons that it is too late to end a pregnancy. Therefore, the problem of the child and the surrogate mother still maintain. Who is taking the responsibility for the surrogate mothers' her time and who will take the responsibility of the child? For that reason, regulation is needed in order to set clear rules about the responsibilities for the surrogate mother and the child.

4.3 Why prohibition is not the best option: the prostitution policy

Many authors have suggested a solution for the problems of the ICS market: prohibition. Moreover, arguments that are given are for instance the problem of using women's body and buying and selling children (Anderson 1990, Smerdon 2008). Nevertheless, prohibiting a not desired phenomenon can have negative consequences that could even enhance the already existed problems even further. This section shall make the analogy between surrogate mothers and prostitutes. Thereby two different prostitution policies between the Netherlands and Sweden shall be described along with its effects.

4.3.1 Sweden VS The Netherlands

This section will compare the prostitution market with the ICS market whereby in both market bodies are being used for payment in return. Furthermore both markets go against widespread cultural values. Women in the prostitution market can be seen as a worker who are doing their job or as persons who are victims of exploitation or other form of violence against the women. In the article of Kilvington, Day and Ward (2001) two approaches towards the prostitution market are explained.

The first approach is the abolition of the prostitution market that was done in Sweden en the second approach is regulation of the prostitution market that was done in the Netherlands.

In 1999 Sweden introduced the law that prohibits the buying of sexual services. Prostitutes in Sweden are seen as victims because they tend to have a weaker position when compared to the buyers of the sexual services. Therefore the Swedish government wants to protect the prostitutes and support them in leaving the sex industry. The legislation therefore prohibits men from buying the sexual services and protects the prostitutes by not punishing them for their occupation. In essence, the goal of the prostitution legislation is to reduce the demand of men who buy sexual services. (Kilvington, Day & Ward 2001).

In 1911 the Netherlands prohibited prostitution by law. However, the implementation of this law at local policy was less strict as prostitution was already accepted as a way of life before the law came into force. Consequently, a tension developed between the national legislation and the local policy. In 1983 a bill has been proposed in order to legalize voluntary prostitution. The bill was passed in October 1999 (Kilvington et al. 2001).

The legalization of the prostitution market has two goals. The first goal was to legalize voluntary prostitution and the second goal is to prohibit involuntary

prostitution. Hereby can be thought of any form of exploitation, violence or coercion. The law is implemented by the local authorities who set the specific conditions. Such specific conditions are size of brothels and the area in which they can perform their occupation. Furthermore, the health and safety aspects such as safe working environment and the availability of condoms are also to be addressed. The local authority has to some extent the flexibility in regulating and controlling the prostitution market. This prostitution policy meets to a certain extent the right to work (Kilvington et al. 2001).

The effect of the prohibition of buying sexual services in Sweden led to a tenfold decrease in the number of prostitutes who were working visibly. The Netherlands also experienced a reduction of numbers of prostitutes, as some prostitutes cannot comply with the set requirement. Both policies suggest that the prostitutes who cannot comply with the law shifted to the black market. However, the advantage of regulating the prostitution market is that prostitutes, who operate visibly, can have the benefits such as occupational health and safety. The negative side is that prostitutes who cannot comply with the legislation will cross borders or move to the illegal market (Kilvington et al. 2001).

4.3.2 The link between the prostitution market and the surrogacy market

When comparing the ICS market with the prostitution market, many similarities can be seen. For example, both markets involve women who are selling services using their body. Thereby, the women in both markets tend to have a weaker position with regard to the consumers who want to buy their services. Similar to the prostitution market, two schools of thoughts are available in approaching the ICS market: prohibition and regulation.

If the ICS market would be prohibited in the same way as the Swedish government prohibits the prostitution market, it seems almost straightforward that the ICS market would shift to the black market and therefore being invisible. Furthermore, the Swedish government treats prostitutes as victims and stimulates them to leave the sex industry. When comparing this situation with that of the surrogate mothers' situation, this would mean that the surrogate mother has to be stimulated to leave the surrogacy industry.

However, other occupations might be of greater danger for women than being a surrogate mother. In countries such as India, the accident rate is 8763 per 100.000 workers compared to established market economies countries such as the EU and United States where the accident rate is 3240 per 100.000. This is almost two and half

times less than the accident rate in India. Also the fatality rate is much higher in a country such as India with 11.5 per 100.000 compared to 4.2 per 100.000 of the established market economies countries (Humbyrd 2009:112; Hämäläinen, Takala & Saarela 2006:145). The question is whether being a surrogacy mother would be more health damaging than other occupational alternatives. No literature has been found yet, concerning the mortality rate or disability rate of surrogacy mothers. Nevertheless, it is desired to have healthy surrogate mothers in order to deliver healthy babies.

On the other hand, if the ICS market would be regulated as the Dutch government regulates the prostitution market it could result in better occupational environment and better health safety for the surrogate mother. Also, the ICS market would be more transparent. However, in regulating the ICS market, minimum standards need to be set. If these standards are too difficult to comply with, this would result in policy failure and the movement of the surrogate mothers into the black market would be the consequence.

4.4 Why regulation through the adoption convention is not appropriate for the ICS market

4.4.1 How the adoption market works

When infertile couples cannot conceive a child of their own, they can choose for child adoption. Similar with the commercial surrogacy, there is a demand, which are the infertile couples with a child wish and there is supply. The supply side can be distinct by three different categories. The first category consists of children who in a lot of cases have special needs and are therefore less attractive for adoption. The second category involves new-borns who were put up for adoption. Hereby, the market is more commercial because the intended parents make use of adoption agencies, attorneys or independent brokers in order to find the new-born of their preferences. The third category consists children who are coming from abroad (Spar 2006). The third category will be the focus of this section.

The market for international adoption works as follows. The prospect parents contact an adoption agency, whereby they have to specify from which country they want to adopt their child and which features the child should have. The agency will contact its counterpart in that country where the child has to come from. Then, the potential children for adoption are selected and showed prospect parents. This will be done through photos or videos. The prospect parents select the child of their choice and after

that they will begin an adoption procedure. Furthermore, the prospect parents have to be checked for their suitability of becoming a parent (Spar 2006).

The critique on the procedure of choosing a child is that it is similar in choosing a product. Some agencies have an Internet site with pictures of children ready for adoption. Another critique is that poor families in developing countries are supplying the children for adoption as the rich families in developed countries consume these children. The fact that there are different prices for different children proves that for adoption there is a commercial market (Spar 2006).

In order to protect these children and their families, an international convention on adoption has been developed. This convention is the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, also referred as the Hague Adoption Convention (Spar 2006; HCCH 2012).

The black market for adoption has some features that distinct itself from the legal adoption market. The first characteristic is that the adoption is illegal, hereby is meant that there is an unlicensed broker involved, no check for the suitability of the would-be parents, and no transparency. The second characteristic is the payment to the biological mother for giving up her child. In a legal situation, the mother of the child is only being paid for her pregnancy and childbirth. The third characteristic is that there is the possibility that the child is being bought for resale (Spar 2006).

Nevertheless, it remains difficult to identify illegal adoption cases as such because it is difficult to determine the provenance of the child or the circumstances in which the adoption has been occurred. Thereby, the competition between intermediaries makes it hard to distinguish the appropriate payments from the inappropriate payments. Furthermore, if child trafficking would be prohibited, this would mean that the intermediaries would lose a part of their task. Compared with agencies of the State, private agencies are more efficient and therefore faster in delivering a child through the adoption process. If it would be prohibited, it can be assumed that the number of children who can be adopted within a certain period would diminish (Spar 2006).

4.4.2 The link between the adoption market and the surrogacy market

There are some similarities and differences between the adoption market and the surrogacy market. Firstly, the international adoption market and the international surrogacy market face similar problems. Although the regulation of the surrogacy market is less clear than the adoption market, the surrogacy market can involve

adoption procedures. However, the application of the Hague Adoption Convention in the surrogacy market has its limitations.

One of the limitation is that surrogacy cannot comply with article 4(c) of the Hague Adoption Convention in which is stated that the consent of giving up the child for adoption can not be induced by payment or compensation. Thereby the consent may not be given before the birth of the child. In the case of surrogacy, the prospect parents and the surrogate mother have already made an arrangement about giving up the child before the child is even conceived.

Although adoption is part of the procedure that the prospect parents have to come across when they want to bring their conceived child home, this adoption remains difficult. The Hague adoption convention is not applicable in its total, because it is aimed at existing children who are available for adoption. Nevertheless, The Hague adoption convention could be used as a blue print when designing, if possible, an international surrogacy convention. This is because the goal for regulating the international surrogacy market is similar to the goal for regulating the adoption market namely as mentioned in article 1(b) the Hague Adoption Convention the goals are to prevent child trafficking, sales of children and abduction. Thereby, it is important to take into account the procedures such as a suitability check of the prospect parents as mentioned in article 5 of the Hague adoption convention and accreditations for intermediaries as mentioned in article 10 of the Hague Adoption convention.

Another aspect of the international surrogacy that is similar to the adoption market is the risk of exploitation and human trade. In the adoption market, there is a chance that more wealthier prospect parents are exploiting the poorer biological parents who are giving up their child for adoption. This could also be the case in the international surrogacy market whereby the surrogate mother can be exploited by a wealthier couple. This scenario could also be another way around. One could imagine that the surrogate mother takes advantages of the prospect parents by keeping the baby in order to blackmail the prospect parents for more money. In the case of surrogacy, the prospect parents have from an emotional perspective a vulnerable position. They would do anything to have their own child. In contrary with the adoption case whereby the parents could just pick out another child to adopt.

Another possible scenario is that in the adoption market, women can become intentionally pregnant in order to put their child for adoption in order to get money in return. This resembles the case of international surrogacy whereby the surrogate mother become pregnant intentionally. The differences between these two scenarios are that the prospect parents and the agency has arranged everything from the beginning, in

other words, before the child is conceived the surrogate mother knows who she will hand over the child that she has been carrying. Furthermore, it was clear from the beginning of the surrogacy procedure that the surrogate mother would only be delivering a service.

4.5 Chapter summary

This chapter addressed many issues relating to the ICS market. The main question in this chapter that was addressed was: *Why is the regulation of the ICS market needed on a global level?* It was shown that regulation is needed in order to protect children and surrogate mothers. One of the main problems related to the best interest of the child is the filiation problem. There are no clear answers to the question who the mother and the father of the conceived child are, due to different laws in different countries. Moreover, the suitability of the parents should also be established for the best interest of the child. Another point that was addressed in this chapter was the regulation concerning information for the surrogate mother in order to achieve a fully informed consent. She must know that being a surrogate mother will have a mental and a physical impact on her. Additionally, this chapter explained that there is a risk that the surrogate mother is being underpaid and therefore being exploited. By setting international regulations, this exploitation problem can be limited. Furthermore, being a surrogate mother is an occupation. Therefore, regulations with respect to working conditions should be applied, in order to give further protection to the surrogate mother when supplying her service. Furthermore, contracts should be clearly set so that every party knows what is expected from them. Also the consequences of a possible contract breach should be taken into consideration in the contract so that the negative consequences for the surrogate mother and child will be limited. Thus, regulating the market will create more transparency, clarity and protect the different actors within the market.

Furthermore, this chapter has focussed on two analogies with regard to the market for ICS: the adoption market and the prostitution market. It has been shown why the international adoption convention would be difficult to apply on the ICS market. The convention for adoption only addresses the well being of the child. Thereby, the international adoption convention focuses on existed children and not on children who will be conceived after a surrogacy arrangement. Moreover, the adoption convention does not include any of the following domains that need regulation such as financial transaction in the commercial surrogacy market, safeguarding the health and work environment of the surrogate mothers. Another domain that also needs governance is

the enforceability of commercial surrogacy contracts so that each party knows what to expect from the arrangement. The second market that has been discussed in this chapter is the prostitution market. As has been shown, the Netherlands and Sweden have approached the prostitution market in two ways. Both has it own consequences. The prohibition policy in Sweden drove the prostitution market under ground and the regulation policy of the Netherlands secured safety of the prostitutes concerning health and working environment. With regard to the surrogacy market, it is therefore better to establish a set of requirements that ensures the safety of the surrogate mother.

Part I illustrated the current situation of the ICS market. Furthermore, it also showed that regulation is needed for the international market of commercial surrogacy and that prohibition or regulation through the international adoption convention would not be an appropriate solution. This part provides an alternative for regulating the ICS market, namely regulation through the international trade law. Part II puts the focus on the implication of GATS on the ICS. Part II contains chapter 5, 6 and 7. Chapter 5 will provide a short description of the international trade law and the WTO. Furthermore, chapter 6 gives an overview of the advantages and disadvantages of health service trade. Chapter 7 illustrates the impact of the four modes of GATS on ICS alongside with the economic costs and benefits.

Chapter 5 The framework of International Trade Law (ITL) applied on ICS

International trade law has been defined as followed: *'the regulation of the conduct of parties involved in the exchange of goods, services and technology between nations'* (Sanson 2005). This chapter will discuss the World Trade Organisation (WTO) and its function and goal. Thereafter the General Agreements in Trade and Services (GATS) will be discussed more specifically.

5.1 World Trade Organization

In 1995 the World Trade Organization (WTO) was established for the purpose of trade liberalisation. In May 2012 the WTO has a total of 155 members (WTO 2012). In order to join the WTO, the particular country must be able to adapt its national law to the WTO rules. The power between countries is equally divided by a one-country-one-vote system. However, the WTO is a forum whereby countries can negotiate with each other about trade. Voting is often not needed in the WTO (Molle 2003).

The WTO covers many trade areas such as goods, services and intellectual properties. Trade in goods falls, for instance, under the General Agreement on Tariffs and Trade (GATT). Trade in services falls under the General Agreements on Trade in Services (GATS) and trade that involves intellectual properties falls under the Trade-Related aspects of Intellectual Property Rights (TRIPS) (WTO 2012). Essential for the reader is to be clear about the difference between GATT and GATS as these two are sometimes being confused with each other.

The goal of WTO is to remove trade barriers that can be tariffs- and non-tariffs barriers. The difference between these two is that tariffs barrier, has to do with financial methods that protects a country from competition outside the country. This can be done by for example, putting taxes on imported products. The second barrier is the non-tariff barrier that is law or regulation that affects trade such as policies concerning food safeties and health services. Thus, by reducing these two barriers, more trade liberalisation is being stimulated (Shaffer et al. 2005:24; Molle 2003).

In order to fulfil its goal the WTO has five basic principles about how a trading system should be. The first principle is a trade without discrimination. This means that a member of the WTO cannot favour one WTO member over another member. The second principle is the freer trade, which encompass that barriers will come down through negotiations. The third principle is predictability, in other words, countries that are members of the WTO should be clear about their promises in raising and lowering trade

barriers. The fourth principle is promoting fair competition. The last principle is about encouraging development and economic reform, so that developing countries can also enter the market (WTO 2011).

In the case of ICS, these principles must be applied to the countries whereby trade in services is wanted. For example trade without discrimination means that if country A allows another WTO member to establish a commercial surrogacy company under specific conditions, then those specific conditions must also be valid for other countries who are members of the WTO that wants to set up a commercial surrogacy company in that country A. Another example of the non-discrimination principle is that country A cannot favour her own companies with regards to companies from abroad.

The second principle encompasses that freer trade should be created through negotiations. In the situation of international market for commercial surrogacy, this means that trade barriers have to be lowered. This can be done by allowing commercial surrogacy so that trade can be established in an open market, instead of a market that is only available within a country such as India. The third principle is predictability. With regard to ICS this encompasses that when it is clear how the trade situation is, investment is being encouraged. Thus, when ICS would be allowed in certain countries, it would be essential for investors to know the stability of the business environment in that particular country.

The fourth principle is promoting fair competition. In the case of ICS this could relate to fair trade in terms of fair compensation for the surrogate's mother labour. Other requirement would be, for instance better working environment that would meet minimum working standards. The fifth principle concerns the entering of developing countries into the market. This is related to for example, minimum requirement of labour standards such as a qualified degree in order to perform certain work. In the situation of ICS this could mean foreign companies can invest in third world countries in order to meet with the desired minimum standard in order to enter the market. For instance, introducing new medical technologies that can decrease potential medical harm to the surrogate mother.

In this section different goals and basic principles have been discussed concerning the WTO. One of the WTO agreements that is important when discussing the health care sector is the General Agreement on Trade in Services (GATS). In the next section GATS will be explained in more detail.

5.2 General Agreement on Trade in Services (GATS)

5.2.1 Goal of GATS

In 1995 GATS came into force, which was a result of the negotiations of the Uruguay round. The growth of the service sector leads to more international trade and therefore GATS is needed in order to regulate these international trades. The goal of GATS is to stimulate private corporation to take part in human services such as health care services, hospitals and clinics. According to GATS trade in services should be done *“under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries”* (WTO 2011). Thus, GATS contributes to trade in services in two ways namely, more transparency and more liberalization.

5.2.2 Services that GATS covers

GATS covers twelve core services¹⁴. These twelve core services are specified in subservices (WTO 2012). Health care services fall under two core services: Business services and Health related and social services. Under business services fall the professional services, which contain inter alia medical and dental services, services provided by midwives and other services. Health related and social services contain for instance hospital services. Figure 4 gives an overview of health related services covered by GATS.

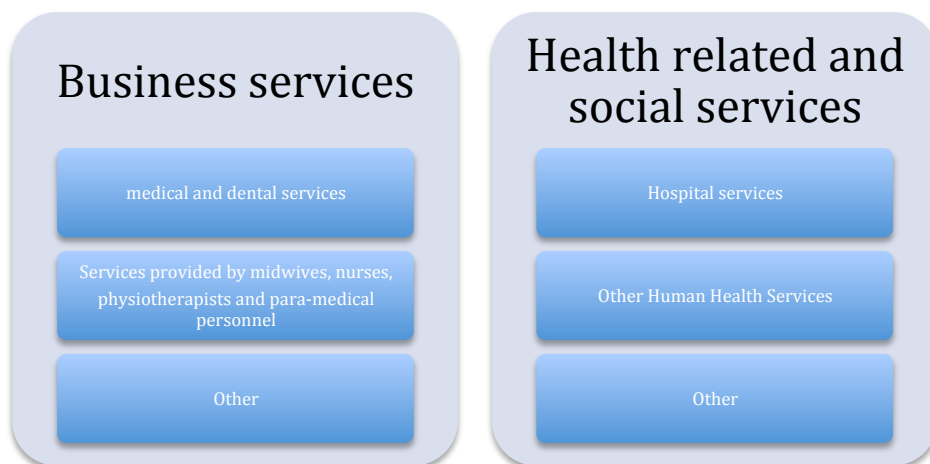


Figure 4 health services covered by GATS

¹⁴ Twelve core services that GATS cover: business services (1), communication services (2), construction and related engineering services (3), distribution services (4), educational services (5), environmental services (6), financial services (7), health related and social services (8), tourism and travel related services (9), recreational, cultural and sporting services (10), transport services (11), other services not included elsewhere (12).

If surrogacy would be seen as a health service, it has to be decided under which of the core services in Figure 4 it would fall. It seems most appropriate, if surrogacy would fall under the main category business services and under a new separate sub category third party reproduction, which would involve surrogate mothers and reproduction donors.

Furthermore, the services of the broker can be placed under one of the core services that GATS covers: distribution services, under the sub services commission agents' services. Another possibility for making a commitment, is a commitment that belongs to the sector: tourism and travel related services (Stephenson 2009). The next section will discuss several rules that have to be maintained when countries want to establish trade in services according to GATS.

5.2.3 The rules of GATS

This section will explain the rules that GATS set for countries that want to trade in services. The most important general obligation of the GATS is article II the most-favoured nation (MFN) principle, which means that one WTO member cannot favour a certain member over another member. This would mean that if a country allows foreign competition for commercial surrogacy, this should be equal for all WTO members.

In addition GATS has two rules that applies when a country has made a specific commitment. These are market access (art. XVI GATS) and national commitment (art. XVII GATS). Market access means that a country allows foreign companies to enter the domestic market. This market access can be limited by for instance, allowing a certain number of companies to enter the domestic market (WTO 2012). In the case of ICS, it could be that a country allows a certain amount of surrogacy clinics into the domestic market. This is called a market access limitation (WTO 2012).

National commitment means that the country that made a commitment in a certain sector will not favour one's own domestic service supplier in comparison with service suppliers from other countries. Nevertheless, the country that made a commitment is allowed to set requirements for the provided services (WTO 2012). This means that a country that allows surrogacy clinics in the domestic market, can set qualification rules. National commitment can also be limited. This is called exception to the national treatment principle. An example of this exception is when a country would allow only one particular branch such as IVF into the national market instead. It then would not allow foreign companies to compete with the national companies on other branches such as surrogacy services or reproductive materials.

5.2.4 General Exceptions

Article XIV of the GATS, provides members exceptions with regard to the obligations (WTO 2012). Exceptions can enter into force when obligations cannot be fulfilled due to inter alia health and public policy issues. In the case of ICS, one of the exceptions can be applicable.

The general exceptions in article XIV of GATS can be applied when it concerns protection of public morals or maintaining public order (Art. XIV(a) GATS). In order to decide whether ICS is related to public morals or public order, these two terms has to be defined. The Report of the Appellate Body in *UNITED STATES –GAMBLING* public morals have been defined as “standards of right and wrong conduct maintained by or on behalf of a community or nation” (WTO 2005, p.99). Public order has been defined as “the preservation of the fundamental interest of a society, as reflected in public policy and law” (WTO 2005, p. 99).

It could be that a country, that is a member of the WTO, can avoid obligations in the GATS agreement. For example, a member state that allows ICS can use art. XIV:a of GATS in order to take measures that is inconsistent with the agreement by stating that the measure is necessary to protect public morals.

Another article that could applied is article XX(a) of the General Agreement on Tariffs and Trade (GATT). This article also concerns the protection of the public morals. In this case, if the conceived child that is the outcome of a surrogacy arrangement would be considered as a good, article XX(a) can be applied. An example would be that when a government prohibits trade in children, art. XX(a) can be invoked.

5.2.5 Modes of GATS

GATS identifies four modes of trade in health services (article I:2 GATS): cross-border supply, consumption abroad, commercial presence and presence of natural persons. This is one of the differences between the GATT and the GATS. GATT has one supply mode, which is the cross border supply (WTO 2011). The four modes of supply will be discussed shortly hereafter.

Mode one: cross-border supply are services that cross borders but the patient and the supplier do not cross border, for example telemedicine (Cattaneo 2009:5; WTO 2011). *Mode two: consumption abroad* encompasses cross-border care, such as a patient who is willing to travel to another country to seek a certain health service. Under *mode three: commercial presence* is for example the existence of a mother organization in one of the member countries with several daughter organizations in other member countries. *The Fourth mode: presence of natural persons* means that the independent

supplier of care is willing to travel to the patient in another country in order to supply a health care service to the patient (Cattaneo 2009:5; WTO 2011). The four modes are illustrated in Figure 5.

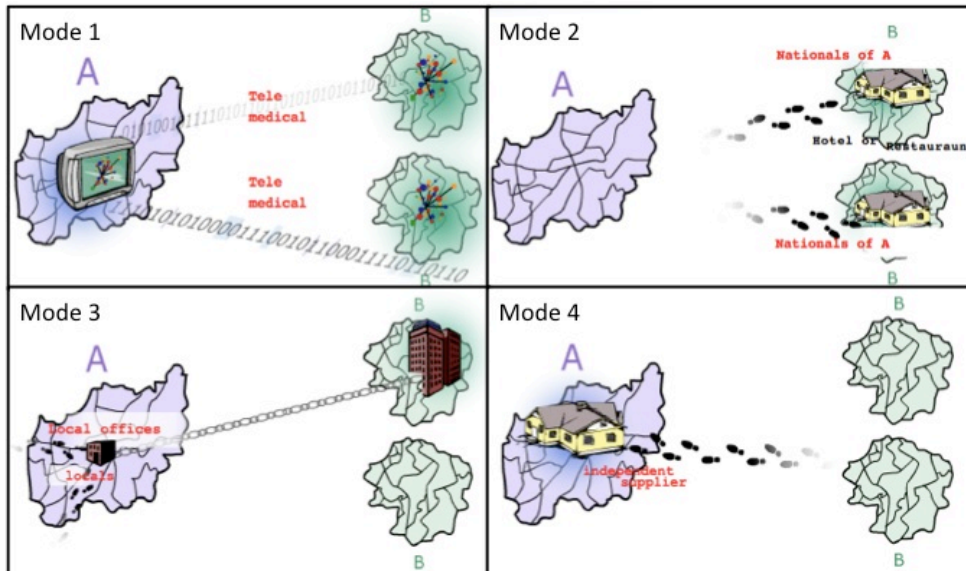


Figure 5 Modes of supply (Source: Adapted from WTO 2011)

In this framework, international surrogacy could be seen as a health service. When ICS is theoretically seen as a health service, it would fit into mode two: consumption abroad. However, in theory ICS could be seen in mode three also if organizations were going to be established in order to foresee a developing country of a higher quality of surrogates. If commercial surrogacy would be allowed, it would be the best to have a high-income country regulate the quality of surrogates working in a developing country such as India. This option will be discussed more in detail further in this thesis. The last mode is presence of natural persons, which could also be applied on international surrogacy. For instance, when an infertile couple wants to have a surrogate mother from India, they might ‘import’ the surrogate to the country of the couple in order to have the surrogacy mother offering her services at the home country of commissioning parents. After the surrogate has delivered her service, she can be send back to her fatherland. In part II, this framework will be worked out in more detail.

5.3 Chapter summary

This chapter has focussed on the WTO and its international trade law, with emphasis on the General Agreement on Trade and Services. It has been showed that the goal of the

WTO is more trade liberalisation. Alongside with this goal, the WTO has established basic principles that must be applied for all trades. These principles are: non-discrimination, freer trade, predictability, promoting fair competition and encouraging development and economic reform. This chapter has put a focus on trade in services that falls under the GATS agreement. Furthermore, the obligations that fall under the GATS have been discussed: the most favoured nation principle, market access and national commitment. In addition the four modes of GATS has been explained: cross border supply, consumption abroad, commercial presence and presence of natural persons. The next chapter shall discuss the general economic benefits and downsides of health service trade for each mode of supply.

Chapter 6 Economic advantages and disadvantages of health service trade

International trade has been an essential activity for centuries as every country has different resources such as different climates, number of labour forces and other resources. By establishing trade, countries with different resources can still gain goods and services, which they do not produce by themselves. Trade establishes therefore a win-win situation as both parties in a trade will gain something that they had not before the trade (Baumol & Blinder 2006).

There are several benefits of trade in health care sector in general. For instance, more specialisation leads to more efficiency and therefore more quality of the health care services. Furthermore, increasing trade in health care sector results in more consumer choice and cost containment in the public sector. Also further development of technologies and skills are being stimulated (Connell 2006; Smith, Chanda & Tangcharoensathien 2009).

However, downsides of trade in health care sector are for instance a brain drain of health professionals to other areas. Moreover, the distribution of health care services might not be equally divided. For example, a two tier systems will be created whereby domestic poor people are obliged to use public founded hospitals and foreign, rich people accesses private hospitals. Many literatures (Smith, Chanda & Tangcharoensathien 2009; Cattaneo 2009) have summarized a list of possible advantages and disadvantages concerning medical trade on a global level for the four modes of GATS. This will be discussed hereafter.

6.1 Economic benefits and downsides per mode

6.1.1 Trade in mode one

As aforementioned trade in mode one concerns the cross border supply of services such as e-health. E-health has been defined by Eysenbach (2001) as follows:

“e-health is an emerging field in the intersection of medical informatics, public health and business, referring to health services and information delivered or enhanced through the Internet and related technologies. [...]” (Eysenbach 2001)

One of the main advantages of e-health services is that it can save costs. For instance, e-health services can improve efficiency through many ways. Firstly, the patient does not have to travel to the health professional for a consult. This provides the consumer certain flexibility, as they are not location bounded. Also, the patient is able to have a teleconsult with medical professionals who can be located abroad (Cattaneo 2009). Secondly, medical professionals can store patient data digitally which can be retrieved from other locations. This enhances more efficiency and flexibility to both the medical professional and the patient. The medical professional who will treat the patient can save time by not performing the medical procedures that already have been done by other physicians. Instead, the medical professional would have access to the medical document of the patient. Moreover, the communication among patients and physicians can also be improved (Eysenbach 2001; Smith, Chanda & Tangcharoensathien 2009).

Another advantage of e-health is that it could enhance the quality of health care services by comparing health service suppliers on their costs and quality. However, determining quality in the health care sector is difficult, as consumers do not have required set of knowledge to evaluate medical procedures. The consumers could merely judge on aspects such as how health care workers treated the patient and whether the environment was good. This thesis shall not go further into depth with regard to operationalizing the health care quality as it goes beyond the subject.

The countries that are leaders in exporting e-health services at the moment are India, Philippines and Cuba. For instance, in India the revenue of health services that falls under mode one increased from \$264 million in 2000 to \$4076 million in 2005. This illustrates the increasing growth of services that is provided under mode one (Smith, Chanda & Tangcharoensathien 2009).

Although, e-health may sound as a solution to the health care sector as it would lead to more cost effectivity, efficiency and affordability. Nevertheless, e-health has many issues on national and international level such as protection of privacy, licensures and quality of care. Furthermore, trade under this mode can increase the equity gap between several groups such as the rich and the poor, people from rural and urban areas. Governing e-health on an international level is complex and difficult. Which result in low number of commitments of trade in this mode (Cattaneo 2009; Eysenabach 2001; Smith, Chanda & Tangcharoensathien 2009).

6.1.2 Trade in Mode two

Trade in mode two is like aforementioned related to consumption of health services abroad. Medical tourism generates on a global level \$20-40 billion and it is estimated that this market will be \$100 billion in 2012. The combination of high quality medical professionals who are often trained in the USA or UK with low labour costs in developing countries leads to lower medical prices when compared to developed countries. Besides attracting the medical tourists due to the lower costs, different countries and their governments develop policies in order to enhance more flexibility to the medical tourists. For instance, they invest more in world-class hospitals and provision of medical visas (Smith, Chanda & Tangcharoensathien 2009).

One of the disadvantages considering medical tourism is the portability limitation of health insurance (Smith, Chada & Tangcharoensathien 2009). For instance, in the Netherlands emergency care is being reimbursed on a global level, which means that when a Dutch citizen becomes ill unexpectedly, access to care is still guaranteed. However, when it concerns non-emergency care, permission needs to be given by the health insurance company when it concerns health care services abroad (Brouwer, van Exel, Hermans & Stoop 2003). Furthermore, seeking health care services abroad can stimulate competition between the domestic health care providers and suppliers abroad. This can lead to lower costs care, which can improve the sustainability of the health insurance system (Cattaneo 2009).

Trade within this mode also has its disadvantages such as uncertainty about the quality of health care services that are provided abroad. This quality relates to standards of care, patient safety and legal liability (Smith, Chada & Tangcharoensathien 2009). For instance, patients who receive low quality care abroad might need extra health care when they return back to their home country. Another example is when medical mistakes have been made by a hospital abroad, the health insurance company will receive more medical expenses. Thus, low quality of care can lead to more health care expenses for the patient and thus for the health insurance company when the patient has a health insurance.

Regarding the health care quality on an international level, there is an accreditation institution that secures a minimum standard of care on an international level. This organisation is the Joint Commission International (JCI). The JCI can ensure the quality of hospitals in developing countries that have received accreditation (Smith, Chanda & Tangcharoensathien 2009). Such institution can therefore stimulate further globalisation of the health care sector when it concerns quality standards.

6.1.3 Trade in Mode three

Mode three is related to foreign investment in a particular country. This foreign investment from developed to developing countries has been growing rapidly. For instance, between 1990 and 2000 the foreign direct investment (FDI) has increased from \$36 billion up to \$155 billion. More than half of the foreign direct investment concerned services. Nevertheless, trade in this mode is small due to regulatory barriers and health services that have already been provided by the government (Smith, Chanda & Tangcharoensathien 2009).

An advantage of FDI in developing countries is that it can improve the infrastructure, improve the quality standards, technology and skills on medical domain. Additionally, foreign investment can create more jobs and reduces the need of patients to seek health care services abroad. However, FDI can also have downsides such as foreign control of health care provision. Another disadvantage is that FDI can result in domestic brain drain as medical professional can be attracted to private medical sector because of better wages when compared to the public hospital. This would result in having the best medical professionals in private hospitals, reducing the chance of poorer patients to have access to good doctors in public hospitals (Cattaneo 2009; Connell 2006; Smith, Chanda & Tangcharoensathien 2009).

6.1.4 Trade in Mode four

Mode four is related to health professionals who cross borders in order to work in foreign countries. The demand for foreign workers of a country is driven by an insufficient number of health care workers. The supply of health workers to other countries where there is a shortage of a particular type of health care workers depends on several factors. These factors are for example, job satisfaction, resources and occupational risks (Smith, Chanda & Tangcharoensathien 2009).

By exporting health care workers to foreign countries, the exporting country can gain the so-called foreign-exchange earnings (Smith, Chanda & Tangcharoensathien 2009). This means that the exported health care workers who earn their salary abroad, will send a share of their wage back to their home country. Therefore, the exported country will receive income into their country. The importing country will also gain advantages such as reduction of medical education and training, high quality health workers who are specialised and knowledge transfer (Cattaneo 2009).

Barriers for exporting health workers to other countries are qualities / licenses requirement of the health care workers. Furthermore, in order to proceed the export

and import of health care workers efficiency, trade arrangements have to be set between countries. A disadvantage of health workers migration to other countries is the so-called brain drain, which means that the human capital resources decrease as a result health care worker migration (Smith, Chanda & Tangcharoensathien 2009). Another downside of exporting health care workers is that their work employer abroad can exploit them. In addition, the importing country can perceive foreign employees as a threat due to different labour conditions such as cheaper labour prices (Cattaneo 2009).

6.2 Chapter Summary

Trade can establish mutual gain between countries due to variety in resources among nations. This chapter has provided the economic gains and losses of the four modes of GATS. The main economic benefits of trade are the increased efficiency and more income for developing countries. Furthermore, foreign investment can stimulate infrastructure, improve the quality of medical care, and create more jobs for local people. However, the economic downside of trade under the four modes of GATS is the limited portability of health care insurances, which could lead to out-of-pocket payments. Moreover, the quality of care and the patient safety can be lower than the medical standards resulting in medical malpractice and thus higher medical costs for undoing the mistakes. All in all, there are many advantages and disadvantages for the four modes of GATS. In the coming part, the implication of GATS on the ICS market will be worked out further in detail.

Chapter 7 The impact of the four modes of GATS on ICS

In chapter four a short development of the international trade was shown and in chapter two it was shown how ICS market has developed. This chapter will describe how GATS impacts ICS. As shown in chapter four, GATS has four modes of trade in health services. These modes will be discussed in more detail in this chapter. The following questions will be addressed: how can ICS be put under the current framework of the four modes of GATS, and what are the possible advantages and disadvantages of these modes in relation with the ICS?

7.1 Scenario one: Cross border supply

This scenario describes the possible situation whereby mode one of the GATS can be applied on. The cross border supply mode could be applicable in the case of the intermediaries. These middlemen can provide different kinds of information on the Internet, which can be directly or indirectly related to the surrogacy market. This information market can fulfil various information demands that can range from providing knowledge to giving advices to infertile couples. Three types of information can be distinguished. Firstly, this information can encompass information about how a couple can have a child through a surrogacy mother. Secondly, the broker can also provide information about how to become a surrogate mother. On Internet sites such as http://www.thesurrogacysource.com/sg_about.htm an explanation of the procedure is given. Thirdly, information can also be given concerning being a sperm or an egg donor. Websites also provide information on how to become donors and what they have to do.

It is important to set a framework for this scenario, because the information that is provided on these sites to the prospect couples, potential surrogate mothers and sperm or egg donor should be transparent. With transparency is meant that all the information that is provided should be objective and reliable. Okamura, Bernstein and Fidler (2002) conducted a study about the quality of infertility resources on the Internet. They used four criteria in order to establish the quality of infertility websites. The criteria were authorship, attribution, disclosure and currency. Authorship refers to the persons who are accountable for the website. Attribution refers to citations and references. Disclosure refers to the (financial) support for constructing the Internet site. Currency refers to whether it is visible to see when the page was uploaded or updated. The selected Internet sites could be placed under one of the three categories: educational sites, commercial sites and support/ organizational sites. Educational sites

were defined as providing facts about the treatments and diagnosis. Commercial sites have the purpose to sell products or advertising services. Support/ organizational sites refer to sharing experiences or providing emotional supports.

The results of the study showed that from a total of 197 infertility websites, only 2% met all four criteria. Approximately 70% of the commercial sites did not meet any of the criteria (Okamura, Bernstein & Fidler 2002). This study provides evidence that the reliability of infertility websites is low and that visitors should be more cautious when visiting the sites.

Although, the study of Okamura, Bernstein & Fidler did not specifically investigate surrogacy websites. It still provides indirect evidence that the quality of surrogacy websites is to be questioned similarly as the infertility websites. Furthermore, Cattaneo (2009:10) also mentions the risk of malpractice due to absent of regulations concerning the qualifications criteria and deontological rules for health care providers abroad. Additionally, there should also be regulations with regard to confidentiality of medical records (Cattaneo 2009:9).

In the case of ICS, mode one can provide several economic advantages that have been discussed earlier in chapter five. For instance, the costs of medical consulting would be lowered due to time efficiency by having consults via the Internet, so called telemedicine. Infertile couples can contact every physician with access to the Internet. Another advantage by using telemedicine is that patients do not have to travel to the health care provider or broker. The infertile couple would save time and costs associated with travelling (Cattaneo 2009:5)

Furthermore, access to medical documents by means of a medical network can contribute to efficiency as well. For example, the physician can immediately know the results of various medical tests that are related to the current health of the infertile couple. Based on that, the physician can be more efficient and effective in advising further medical procedure or alternatives.

7.2 Scenario two: consumption abroad

The second mode is going abroad in order to consume a health care service elsewhere. This mode is straightforward, in the sense that when an infertile couple is not able to consume a health care service in their own country, they might consider going across borders to consume this health service somewhere else. This phenomenon is often called medical tourism (Carrera & Lunt 2010).

In the case of the surrogacy, prohibiting commercial surrogacy creates an incentive for prospective parents to travel to countries where commercial surrogacy is

allowed and ART is accessible. In practice, this is already occurring in some countries such as India (Smerdon 2008).

Several literature studies (Scott 2009:49; Cattaneo 2009) have already noticed the major problem of the absence of an international regulation in this area. There is no legal framework set for ICS. Without any international regulation, there is no clarity concerning the legality of having surrogates abroad. In addition, there are no supervisions on the quality of care provided abroad. This could result in medical complications with the surrogates and the baby they are carrying. The most essential question that would rise is who will be taking the responsibilities of the additional costs of the complication and the consequences of the health status of the surrogate and the baby? Therefore, clear rules should be set concerning the responsibility.

The economic advantages that are associated with this mode related to ICS are firstly, more efficiency as the medical costs involved with surrogacy is lower than in Western countries (Palattiyil et al. 2010). Secondly, developing countries can gain more income by attracting more foreigners from developed countries, which can stimulate living standards of the surrogate mothers (Pande 2010).

7.3 Scenario three: commercial presence

The third mode is commercial presence, hereby is meant that there might be multinationals such as a mother organization with several daughter organizations in different countries. The problem with this scenario is similar to the second scenario with the cross border supply. There are no regulations between countries concerning surrogacy. An additional point when compared to the second scenario is that this scenario involves organizations and not natural persons. This scenario is related to companies who are doing business on the long-term and at an international level. Important issues regarding this scenario are the frameworks in which these countries may operate.

If surrogacy would be seen as a job, which women can do, different kinds of minimum working circumstances could be applied in order to protect these women from being exploited. With working environment is meant the situation in which the surrogacy mothers are being pregnant and the aftercare of the surrogacy mother posterior the pregnancy.

Another point is that in a regular market, there is competition between organizations. A possible scenario of the surrogacy market is that several surrogacy organizations will try to compete with each other, which can have different consequences for different actors. One possible consequence is the price quality ratio.

Hereby is meant that it could be that organizations will compete on price, which can reduce the quality of the surrogate mother and therefore the quality of the baby she is carrying.

Figure 6 demonstrates how the quality of the surrogacy mother can be reduced as a result of competition. Competition can lead to cheaper prices in order to attract more customers, in other words attracting infertile couples/prospect parents. Lowering prices can also have an impact on the available attributes for the surrogates. This can be for example, vitamin pills or pregnancy check-ups. A lower quality of the surrogate during her pregnancy might be the result of this. However, it is not only a lower quality during the pregnancy of the surrogate, but it could also be a lower quality for the surrogate after the pregnancy when there might be no after care for the surrogacy mother. Thus, competition might reduce the quality of life for surrogates through price reductions of the service. Another consequence that is shown in Figure 6 is that reducing prices will not lower only the quality of the surrogate, but it might also lower the quality of the baby that the surrogate is carrying.

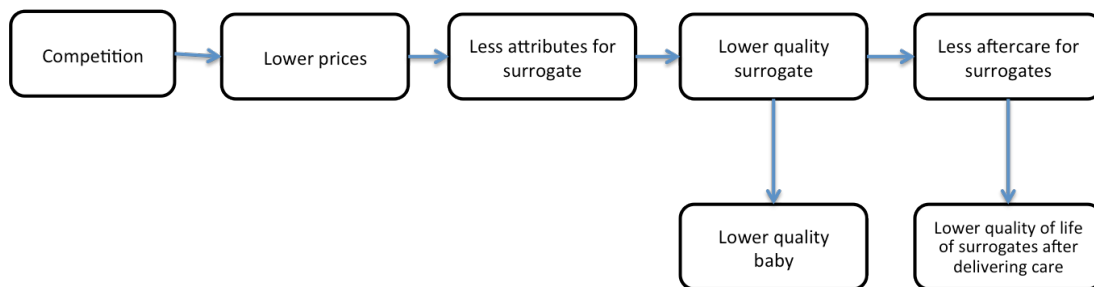


Figure 6 Negative consequences from competition for surrogates

A possible scenario that could be within this mode is that mode three would contribute to the rising quality of the health care services instead of lowering it. Cattaneo (2009:7) points out that foreign investment could lead to new resources for the health care system and more competition between health care providers. This could lead to better quality of health care, higher standards of care and lower prices due to efficiency. In addition, foreign investment could also bring along the newest technology and knowledge concerning the health care service (Cattaneo 2009:7). Ehrbeck, Guevara, and Mango (2008) showed in their study that advanced technology would probably be the main driver of trade in health services. Figure 7 shows how this mode could contribute positively to the surrogacy case.

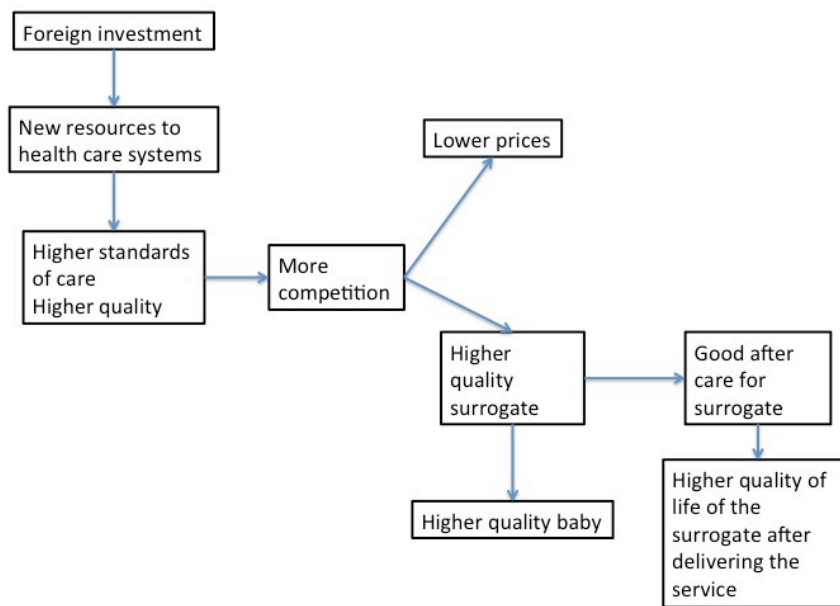


Figure 7 positive consequences for surrogates from competition

On a national level, foreign investment can create more job opportunities for the local inhabitants. This can improve the living standards of the people in developing countries. The disadvantage is the brain drain problem. For instance, local medical professionals might be attracted to work in a private surrogacy organisation due to better wages. This could result in a drain of doctors from the public to the private sector. Which would mean that the number of physicians in the public sector decreased, which results in less access to health care services for the local people.

7.4 Scenario four: presence of natural persons

This scenario encompasses that the supplier of the health service is willing to travel to the demander of the health service. In the case of international surrogacy, this could mean that the surrogate mother has to travel to the country of the prospect parents in order to deliver the health service as a health care provider. There are also different advantages and disadvantages in this scenario, which will be explained hereafter.

Cattaneo (2009:9) points out that mode four might be a solution to a shortage of a certain health care provider in a particular country. For example, in the Philippines, nurses are being specially trained for exporting purposes (Brush & Sochalski 2007). This is due to shortages of nurses in developed countries. One could imagine that in the situation where commercial surrogacy would be allowed, there might be a scarcity of surrogate mothers in a particular country. By importing the surrogate mothers from

abroad could solve the shortage problem. For this scenario, regulations are needed for the temporary movement of the surrogate mother to the destined country.

7.5 Chapter summary

This chapter has shown that the four modes of GATS can be applied on the ICS. Mode one of cross border supply illustrated the information provision for intended parents, surrogate mothers and gamete donors. This information supply can be regulated through the first mode of GATS in order to have more transparency about the information provision. The second mode of GATS is consumption abroad, whereby consumers are willing to cross border in order to receive a health care service abroad. In the case of the ICS, the infertile couple travel to other countries in order to make use of a surrogate mother. Mode three of GATS is commercial presence, which means that there can be an international organisation whereby several daughter organisations are established in many countries. In the case of surrogacy, this would mean that multinational firms who are engaged in surrogacy have to be regulated internationally by GATS. The fourth mode is presence of natural persons. Hereby can be thought of a surrogate who crosses border in order to provide her gestational services in the country of the infertile couple.

Part III Beyond the end: the future of ICS

Part III contains chapters 8 and 9. Chapter 8 will discuss the acceptability of commercial surrogacy in several countries by analysing the available research on public opinions. In chapter 9 a discussion and conclusion will be drawn.

Chapter 8 Acceptability of the ICS

Many countries prohibit ICS such as France and Germany, others are regulating it such as the UK, Israel and Canada and some countries do not have any regulation concerning surrogacy such as Belgium and Finland. Regulating the ICS market means that countries acknowledge the existence of the market (Trimming & Beaumont 2011; Spar 2006). In order to regulate the ICS market, acceptance and acknowledgement of the market must be created. Legislation comes primarily forth out of the sociocultural vision of the society. Therefore, assessing the opinion of a society is a starting point in order to create a legislation that is in accordance with the accepted vision of the society (Baykal, Korkmaz, Ceyhan, Goktolga & Baser 2008).

This chapter shall provide a general view about the acceptability of the international commercial surrogacy market. Firstly, an overview of countries will be given concerning the acceptability of commercial surrogacy. Secondly, research related to the opinion of the (commercial) surrogacy will be provided.

8.1 Countries and the legality of commercial surrogacy

Prohibition on surrogacy can have several forms. For instance, a distinction can be made between hard law and soft law. With hard law is meant legislation whereby surrogacy is allowed or prohibited. Soft law are not determined by a nation but for example by a professional group such as medical doctors who develops a guideline for medics about a certain topic (Pande 2009:381; Crozier 2010:300). This section will only treat hard law.

In Table 3 countries are being divided in one of the three categories: all forms of surrogacy prohibited, non-commercial surrogacy is allowed and commercial surrogacy is allowed/ no legislation.

All forms of surrogacy prohibited	Non commercial Surrogacy is allowed	Commercial Surrogacy is allowed / no legislation
China ¹⁵	Brazil ¹⁶	India (Luckey 2010)
France ¹⁷	Belgium (Luckey 2010)	Ukraine (Gamble 2009)
Some US States	UK	US (some states)
Germany (Gamble 2009)	Canada (Kashmeri 2008)	Russia (Svitnev 2012)
Turkey (Baykal et al.2008)	The Netherlands	Japan* (Suzuki et al.2005)
Taiwan (Pande 2010)	Some states of Australia	Israel ¹⁸ (Luckey 2010)
Italy (Gamble 2009)	Greece ¹⁹	Georgia (Svitnev 2011)
Mexico (Pande 2010)	Denmark ²⁰	Armenia (Svitnev 2011)
Spain (Pande 2010)		Kazakhstan (Svitnev 2011)
Switzerland (Pande 2010)		Kirgizia (Svitnev 2011)
Australia (some States)		
Czech Republic (Pande 2010)		
Austria (Svitnev 2011)		
Jordan (Caster 2010)		
Norway (Caster 2010)		
Poland (Caster 2010)		
Portugal (Caster 2010)		
Singapore (Caster 2010)		
Sweden (Caster 2010)		

Table 3 Countries and surrogacy prohibitions; *no legislation (authors' own compilation on the base of diverse resources)

8.2 All forms of surrogacy prohibited

8.2.1 Opinion: Turkey

Turkey prohibits all forms of third party reproduction by law (Baykal et al. 2008). In the study of Baykal et al. (2008) opinions of 368 infertile women in Turkey were asked concerning third party reproduction. The results showed that 15.1% of the 357

¹⁵ In 2001 the ministry of Health in China prohibited surrogacy procedures. Article can be found on (accessed on 24 august 2012): <http://www.taipeitimes.com/News/editorials/archives/2012/02/21/2003525979>

¹⁶ http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402140_text

¹⁷ France prohibits surrogacy since 1991: <http://nyujilp.org/the-prohibition-of-surrogate-motherhood-in-france-2/>

¹⁸ http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf

¹⁹ Law 3305/2005 (article 13) can be found in the article of 'the regulation of surrogate motherhood in Greece' written by Aristides N. Hatzis. Access on the following link: <http://users.uoa.gr/~ahatzis/Surrogacy.pdf>

²⁰ http://hosted.law.wisc.edu/wjlg/issues/fall_2011/luckey.pdf

participants would use surrogate mother if they could not become pregnant. 14.9% of the infertile women indicated that they did not have enough knowledge about gestational surrogacy. The researchers in the study also asked the participants whether they would become a surrogate mother themselves. The results of this question showed that only 5,3% of the participants would become a surrogate mother and 12% of the participants would consider becoming a surrogate mother for a relative. This study showed that 15.1% of the infertile women in Turkey accepts surrogacy. Although Turkey prohibits all forms of third party reproduction, including surrogacy.

Critique on this study is that the research only asked for the opinions of infertile women. Therefore the results of this study cannot be generalized to the Turkish population. However, the authors of the study argued that people who are in the position of being infertile can make decisions about infertility treatments. In addition, the majority of the participants did not have enough knowledge about surrogacy (Baykal et al. 2008).

8.2.2 Opinion: Germany

Surrogacy mothers are not allowed by law in Germany (Stöbel-Richter et al. 2009). Stöbel-Richter et al. (2009) conducted a study to determine the attitude of the German population towards reproduction methods. In total 2109 people answered the surrogacy related questions in the study. It was found that 43,6% of the participants disapproved surrogacy and 43,7% approved surrogacy. However, of the 43,7% who approved surrogacy, 28,5% stated that surrogacy should only be approved for medical reasons. In addition, 10,4% stated that surrogacy should be allowed in general and 4,8% stated that it should be allowed if age was the reason. The results are graphically shown in Figure 8.

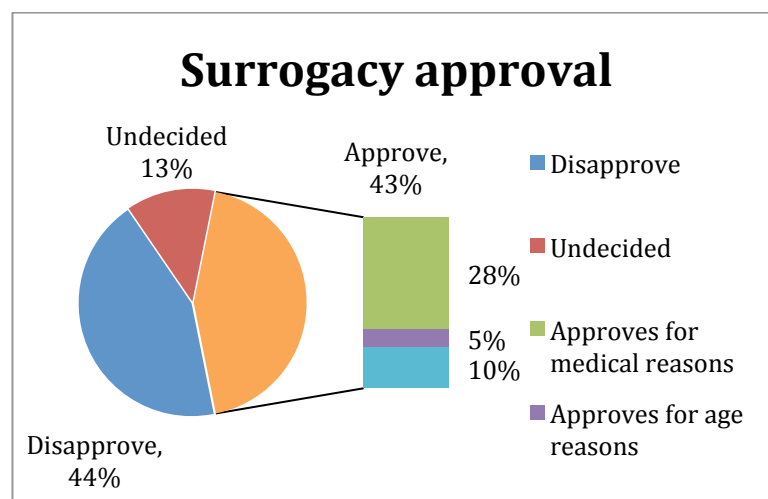


Figure 8 Surrogacy approval (authors' own compilation based on Stöbel-Richter et al.2009)

In the study (Stöbel-Richter et al 2009) was also found that participants who were younger than 35 years gave more approval for surrogacy than participants older than 35 years. It was found that an increase in age was related with an increase in percentage of disapproving surrogacy. In the group of 46 years and older was found that the percentage that favours prohibition was 52%. This study provides evidence for a change in opinion with regard to surrogacy. Critique on this study is that the participants were not familiar with different kinds of reproduction methods. Therefore, they might not give thoughtful answers to the interviewers.

8.3 Non-commercial surrogacy allowed

8.3.1 Opinion: Australia

In 2010 Australia has changed her law regarding surrogacy. Before 2010, the law stated that the birthmother was the legal mother of the child who was conceived through surrogacy. This led to an adoption procedure between the surrogate mother and the commissioning parents. After 2010, the new law permits the intended parents to become the legal parents of the child without adopting their child. The commissioning parents can simply apply for a parentage order so that they will receive the parental right over their child (Constantinidis & Cook 2012).

Constantinidis & Cook (2012) conducted a study about the acceptability of surrogacy in Australia. In this study 195 participants answered questions regarding traditional and gestational surrogacy. The results of the support for gestational surrogacy and support for traditional surrogacy are shown in Figure 9 below. In Figure 9 can be seen that the support for traditional surrogacy is 51.3%. The support for gestational surrogacy is high as 82.1%. This study showed that the new legislation reflected the opinion of the participants in this study. Critique on this study is that the participants were mainly undergraduate psychology students and friends and associates of the authors of the study and are therefore not representative for the population.

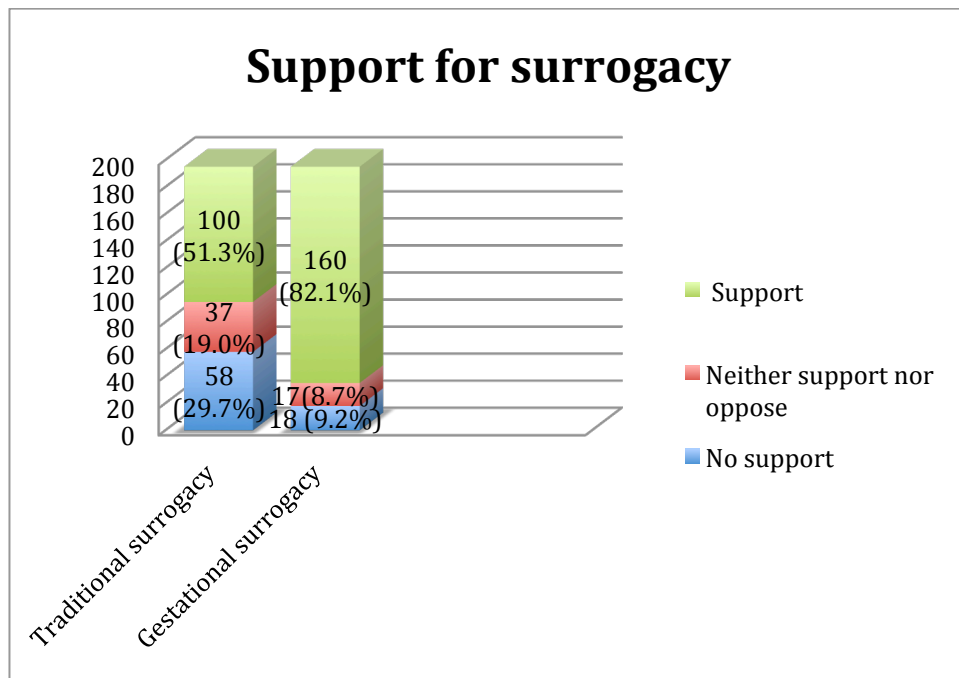


Figure 9 Support for surrogacy types: Traditional and Gestational (authors' own compilation based on Constantinidis & Cook 2011)

8.3.2 Opinion: United Kingdom

Research of Poote and Van den Akker (2009) has shown that only 8% of the British women in their study were willing to become a surrogate mother. Their research was based on 187 women in the United Kingdom who were invited to participate the study through their workplace via email. The results of the survey divided the participants in three groups: willing to become a surrogate mother group, unsure group and unwilling to become a surrogate mother group.

An interesting result from this study (Poote & Van den Akker 2009) was, although the group who were willing to become a surrogate mother was small (15 women), the 'unsure' group (61 women) had similar opinions in becoming a surrogate mother when compared with the willing group. For instance, although the unsure group stated that they are not sure whether they wanted to become a surrogate mother. The results of this group showed that 41 women of this group would become a surrogate mother for a friend or relative, 9 women would become a surrogate for a stranger, 7 women indicated that they would become a surrogate for anyone. Only 3 women in this group would not become a surrogate mother. Therefore, the researchers conducted a 'possibly willing to become a surrogate mother' group by merging the willing and the unsure group together in order to do further analysis.

The results from further analysis of the two groups: possibly willing to become a surrogate mother and unwilling to become a surrogate mother, showed that age was a significant factor in choosing to become a surrogate mother or not. This means that the younger the age, the higher the possibility to be willing to become a surrogate mother. Thus, the group that has the possibility to be willing to become a surrogate mother is approximately 40% (Poote & Van den Akker 2009). Critique on this study is the small sample of 187 participants, which can contribute to biased results.

8.4 No legal prohibition

8.4.1 Opinion: Japan

Japan does not have any regulations concerning ART. However, the Japan Society of Obstetrics and Gynecology does have guidelines, which disapproves surrogacy. Suzuki et al. (2006) did research about factors that contribute to the (dis) approval of gestational surrogacy. They distinguished four factors: gender & age class, socioeconomic status, individual belief and information about ART.

Furthermore, the researchers (Suzuki et al. 2006) used the results of two independent surveys that was done earlier in Japan, the first survey was the *National Survey of People's and Medical Doctors' Attitude Toward ART Involving Donors and Surrogate Mothers* which was done by the ministry of Health and Welfare in 1999. The second survey the *National Survey of People's attitudes Toward ART Involving Donors and Surrogate Mothers*, which was done in 2003 by the ministry of Health, Labor and Welfare.

The results of this study (Suzuki et al. 2006) showed that in 1999 52% of the participants approved surrogacy and in 2003 46% of the participants approved surrogacy. The factors that were related to the disapproval of gestational surrogacy in the 1999 survey were female gender and age above forty. In the survey that was conducted in 2003 the factors that contributed to the disapproval of gestational surrogacy was age above thirty and high education level (university or graduate school).

The age factor in this study was similar to the study that was conducted by Stöbel-Richter et al (2009) mentioned earlier in this chapter. In both studies, age was negatively related to disapproval of surrogacy. For the study of Suzuki et al. (2006) it concerned the group of people who were >45 years and for the study of Stöbel-Richter et al (2009) it concerned the group of people of >35 years old.

In the study (Suzuki et al. 2006) was also found that having a liberal attitude towards gender role or having a positive view on the medical technology development contributes to the approval of gestational surrogacy. However, having a liberal attitude

towards the view of the family contributes to the disapproval of gestational surrogacy. This could be explained by the acceptance of childless families. Further, it was found that the percentage of participants disapproving gestational surrogacy increased after reading a brochure about the topic. Hereby it did not matter whether the participant understood the brochure completely or not. Reading a brochure could therefore stimulate a more cautious behaviour regarding gestational surrogacy.

Limitations of this study was that it could not be established why participants selected the answer option 'I cannot decide'. Furthermore, it is questionable whether the participants answered the question on their own or whether they have discussed it with their partner or other people. Also, it can not be checked whether all respondents have read the brochure. Nevertheless, the strong point of this study is that it concerns a national opinion surveys (Suzuki et al. 2006)

8.4.2 Opinion: Pennsylvania, USA

Lasker and Murray (2001) have conducted a study in 1999 for assessing the attitudes towards technologies for conception, including surrogacy. This research had a total of 266 participants. The participants were students and their age ranged between 18 and 22 years. The results of the study were that 11.7% (strongly) agreed being a surrogate mother and 39.1% would approve others for being a surrogate mother. In addition, the results also revealed that 24.2% would agree to be a gestational surrogate and 47% of the participants would give others an approval for being a gestational surrogate.

Although Pennsylvania does not have any legislation concerning third party reproduction, it seems that almost half of the students would approve if someone else wants to become a gestational surrogate. Critique on this study is that the participants concerned students and therefore the results were not generalizable to the population.

8.5 Chapter Summary: Possibility of acceptance of ICS?

In the previous sections several countries with their own legality status concerning surrogacy were discussed. It is notable that the number of research related to the public opinion about surrogacy is limited. However, few conclusions can be made based on previous discussed studies. Firstly, in countries where surrogacy is prohibited, research from Turkey and Germany showed an acceptability of surrogacy of 15% and 43%. Secondly, countries that allow non-commercial surrogacy showed an acceptability of surrogacy of 40% in the UK and an acceptability of 82% in Australia. Thirdly, in countries where surrogacy is not regulated by law such as Japan provides an

acceptability of surrogacy with 43% in 2005. In the United States, in particular the state Pennsylvania showed an acceptance of 47% for gestational surrogacy. It can be seen that based on the available research, the highest approval of surrogacy is in Australia where non-commercial surrogacy is allowed. For countries that have prohibited surrogacy such as Turkey, the approval rate is low. As for other countries who do not have regulation on surrogacy the approval rate varies from 43% to 47%. It is essential to be aware of the fact that the studies in this section have it generalizability limitations due to small samples and samples that consist of only students or infertile participants. Furthermore, there is little reliable data with regard to the public opinion related to surrogacy specifically.

Chapter 9 Discussion & Conclusion

The ICS market faces many tensions with widespread public values. For instance, international commercial surrogacy can be seen as turning woman, children or reproduction into commodities, which would be considered as inhumane and degrading (Humbyrd 2009; Scott 2009). Thus, several conflicts exist between ICS and human rights. For example, being a surrogate mother is to be considered as a violation of the human dignity as the body is being used for financial gain. This goes against the public morals (Ergas 2012:35). Another tension that exists between ICS and human rights is that the conceived child has the right to receive a nationality. In the case of ICS, receiving a nationality depends on the definition of who the father and the mother of the conceived child are. As discussed earlier in this thesis, due to different definitions of a parent, the conceived child faces problems in receiving a nationality.

However, given the fact that the ICS market exists and is growing, regulation is strongly needed in order to protect the weakest actors in this market: surrogate mothers and conceived children. This section shall discuss the gaps of GATS when this agreement would be applied on trade for ICS. The questions that are addressed in this section are the following: what solution can GATS offer for the ICS market? And what loopholes have to be closed when GATS would act as a regulatory instrument for trade in ICS?

9.1 Governing Trade According to GATS

GATS main goal is liberalization. As aforementioned, trade in general can have several economic advantages in the health care sector that are related to effectivity, efficiency and therefore quality benefits. An important question that should be addressed is why trade under GATS would be more beneficial than trade without the GATS. Firstly, as has been discussed earlier in this thesis, many countries have different legislations concerning commercial surrogacy. As a consequence, several problems arise such as filiation issue, parental rights and nationality of the child. It would be more effective to have a trade in commercial surrogacy under GATS whereby one organisation, the WTO, governs the commercial surrogacy market. This would lead to more clarity for countries that faces problems with regard to infertile couples who want to bring their child back to their home country. However, it would still be difficult to have countries agree on an international agreement regarding surrogacy as many countries have different views.

Furthermore, it could be that some countries want to export their surrogacy services abroad. Hereby, one can imagine that a surrogacy company could send their

employees, surrogate mothers, abroad in order to provide gestational services. GATS could stimulate the entry of surrogate mothers from other countries by lowering the entrance barriers. For instance, the importing country could provide temporary visas.

However, a disadvantage of the GATS is that when a commitment is established, it cannot be reversed. In other words, when a commitment damages a country in any way, the commitment cannot be changed. This is one of the main reasons why countries do not want to make commitments under the GATS, as they do not want to take the risks of being locked into a trade commitment. In addition, countries might fear the massive increase of infertile couples travelling to other countries for a surrogate mother. This can go against the public policy of that particular country. One way to enhance trade under GATS is to provide an opportunity for countries to try out the commitment under GATS first. The so-called 'try before buying' (Smith, Chanda & Tangcharoensathien 2009).

Another advantage by introducing the GATS as an instrument concerns the enforceability of contracts. However, surrogacy contracts must be designed in the best interest of the child. For instance, a safety net for the child should be implemented in case of a contract breach. A possible solution that would limit the damage of ending a contract is that there is a second person that can be held responsible for the surrogate mother and the child. For example, when the intended parents change their minds, other relatives such as the grandparents can be held responsible for the situation. This idea would resemble the situation of a bank who wants to lend a specific person a loan, but is only willing to do that when someone else will be held responsible when that specific person can not pay back the loan. There should be a set of standards for contracts in order to prevent the negative consequences of contract breach.

Nevertheless, when discussing governing trade through GATS, one has to bear in mind that at the moment only a few countries allow commercial surrogacy (see appendix). This means that the number of surrogate mothers or physicians who would like to cross borders in order to supply surrogacy services would still be limited.

9.2 The gaps between GATS and ICS

This research has shown that there are multiple gaps when ICS would be seen as a trade under the GATS. These gaps shall be addressed hereafter. The first issue is that the GATS cannot address minimum labour standards. For this domain, the International Labour Organisation on the contrary can investigate and set minimum labour standards for the

protection of the surrogate mothers. This is also to assure the surrogate mothers from being exploited.

A second issue is the quality of the health care service. Both the medical institution and the surrogate mother should supply gestational services that meet minimum requirements. However, GATS does not control the quality of health care services. Nevertheless, an accreditation institution is needed in order to set the minimum quality and prevent medical malpractices. The Joint Commission International could take part into this.

A third issue is that GATS cannot regulate the problem of privacy regarding the identity of the surrogate mother or other third party reproducers. Privacy issues are taken into account in the GATS under art XIV whereby governments can take measures for '*the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts*' (GATS, article XIV).

9.3 Further research

More research is needed on the topic ICS. For instance, more research on an international level is needed on the public opinions concerning commercial surrogacy. It would provide a basic framework for the acceptability of commercial surrogacy worldwide. Constructing an international survey for public opinion about surrogacy should stimulate further research on this domain. As it has been mentioned before, legislation is affected by the values of the society (Broham 1995). Therefore it is important to analyse the societies' opinions and development of that opinion concerning surrogacy in order to make predictions about the acceptability of commercial surrogacy and ICS. Thereby, analysis should also be done relating the possible shift of opinions through different generations.

Further, more research is also needed on the area of the surrogacy market itself. For instance, little field research has been done among surrogate mothers. To my knowledge, the only field researcher that has done research in India is Pande. In order to understand the market and the working environment, more of these researches are needed.

9.4 Limitations of the study

One of the limitations of this thesis is that it approached the ICS market from an economic perspective. By analysing the application of the GATS and its economic advantages and disadvantages, other perspectives such as human rights and social

cultural aspects have been left behind. However, it must be acknowledged that ethical social cultural desires and acceptability of the ICS market have to be taken into account when making policy decisions in order to limit obstacles when implementing interventions.

Another limitation of this thesis is that the applicability of the GATS on the ICS market is mainly a view of how the market can be regulated from an economic perspective. In order to apply this vision, many obstacles have to be overcome, which mainly are the controversial views of surrogacy of countries. A more likely scenario described by Ergas (2012) would be a so-called 'permissive treaty zone' whereby countries who does allow surrogacy can have an agreement that contains issues that surrounds surrogacy such as defining the parents of the conceived child, compensation, conditions for terminating pregnancies and medical services.

A third constraint is that there is limited empirical literature available on this topic. Therefore, this thesis is mainly based on theories and descriptions of the surrogate market. There are for instance no clear numbers concerning surrogate mothers.

9.5 Concluding remarks

Although this thesis has discussed several economic advantages and disadvantages for the ICS market by regulating it through GATS, it must not be forgotten what the main goal is for regulating this market in the first place. The purpose of regulating this market is to protect the weakest actors in the ICS market, which are children and surrogate mothers. Despite the fact that ICS is not a desired phenomenon due to its interference with human rights, regulations are needed in order to make this phenomenon more acceptable. In other words, if something is being perceived as undesirable but cannot be prohibited due to its persistent existence, it should be tolerable within a well-designed frame.

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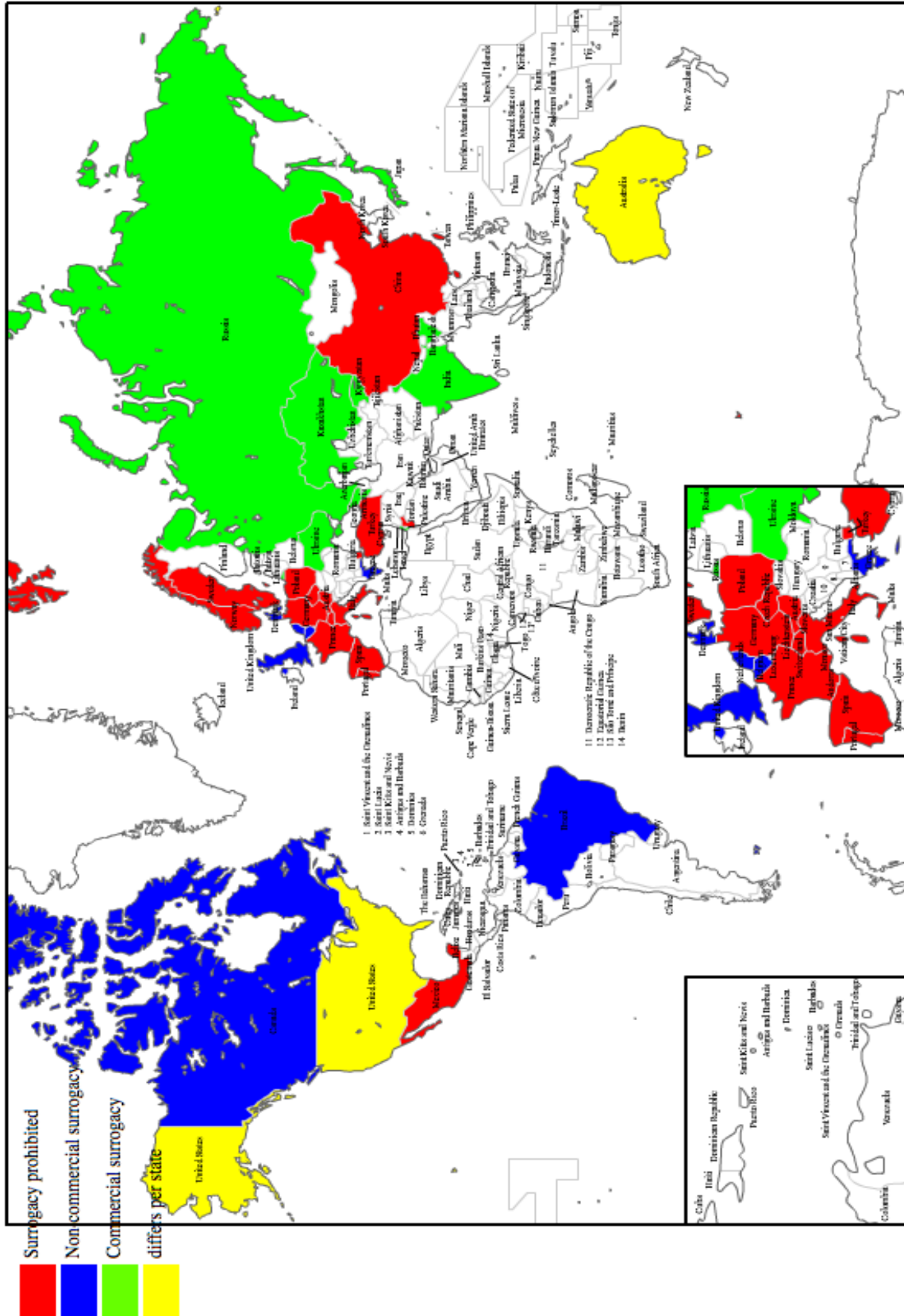
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Appendix



7. Montserrat 8. Martinique 9. Guadeloupe 10. French Guiana and Overseas Territories

