



## **Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About?**

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References

## I. Basic facts about the GATS and trade in education services

- The GATS is a new agreement, not yet complete, not terribly user-friendly, with a complex geometry of general and *à la carte* obligations set against the backdrop of [near] universal coverage and sovereign immunity in liberalization matters.
- Novelty, complexity and variable geometry easily lead to misrepresentation and/or over-interpretation.
- Trade agreements don't come much more flexible than the GATS. The Agreement is arguably the most development-friendly of all Uruguay Round pacts, as is evidenced by the fact that no GATS-related issues appeared on the laundry list of implementation concerns raised by developing countries prior to and at the WTO's Ministerial meeting in Doha, Qatar.
- But such flexibility tends to be obscured by the Agreement's near universality in scope and coverage. Near, but not absolute: with 2 important carve-outs in GATS Article I.3 – much of air transport and, significantly in the context of the trade and education debate, “*services supplied in the exercise of governmental authority*”, by which is meant services not supplied on a commercial basis nor in competition with other service suppliers – e.g. economic activities carried out on a not for profit basis.
- GATS negotiators understood this to cover ‘public services’ broadly (if somewhat loosely) defined, including public health and education services. But public/private frontiers are inherently murky, vary significantly across countries and sectors, and are subject to change as markets, political dynamics and technology evolve. Governments have to date chosen not to clarify the scope of the GATS’ public services carve-out. But ask any negotiator in Geneva and she/he would be prone to regard primary and secondary schooling, so-called basic/compulsory education, as lying outside the scope of the GATS.
- Common understanding at the inter-governmental level is thus that public education services and education services supplied by private actors on a non-commercial basis are excluded from the GATS (as are all government measures, including in respect of public funding, relating to the supply of such services). Still, opinions differ as to whether some attempt should be made in the context of the current negotiations to provide greater clarity to what WTO Members understand to be services supplied in the exercise of governmental authority.
- Education services rank amongst the least committed of all sectors subject to GATS coverage (after audio-visual and energy services). However, there remains some degree of confusion to the extent that, despite the GATS carve-out described above, a number of WTO members have scheduled commitments in basic education services under the GATS. Such commitments are seen by GATS opponents as offering proof that no public services carve-out exists in practice, fanning speculation that the forces of unbridled competition and privatisation are about to be unleashed by the GATS on the sector.

- Being clearer on how the GATS operates and on the policy flexibility WTO members retain under it is a central challenge facing those interested in gaining a better understanding of whether, how and to what extent the current set of services negotiations could affect the burgeoning area of cross-border trade and investment in education services.
- The current negotiations take place not only against the backdrop of a weak initial harvest of liberalisation commitments in the sector. They are also proceeding with significant regulatory and political precaution, and in the midst of a growing anti-GATS campaign, of which public sector unions in the educational field are active players, especially in OECD countries, together with students sensitive to the anti-globalisation movement.
- Meanwhile, the educational world has hardly been standing still. Indeed, the last decade has witnessed explosive growth in international trade in education services, particularly at the tertiary level and in specialized training fields, covering all modes of supply and involving a mosaic of institutional arrangements among a great diversity of public and private players (on their own and in combination) in developed and developing countries alike.
- As Table 1 depicts, the “market” for trade in education services is big, diverse, innovative and growing fast. It will almost certainly continue to grow as societies place an increased premium on human capital enhancement as a source of development and as a means of better equipping individuals and societies to confront, adjust to and take advantage of the demands arising from closer economic integration. The continuous upgrading of skills is increasingly seen as a key ingredient of – and perhaps a precondition for - orderly adjustment in labor and product markets.
- The changes described in Table 1 have been occurring almost wholly independently of developments in the WTO. For reasons discussed in the paper’s concluding section, such a situation is unlikely to change in the near future. While the GATS can play a useful complementary role in accompanying and imparting greater credibility and permanency to ongoing policy changes in the education sector (but only to the extent that WTO Members choose to assign it such a role), it is not likely to be a driving force or even a major consideration behind such changes. In part, this is because the trade policy framework may not offer the most appropriate environment in which to tackle many of the measures likely to constrain the further internationalisation of education services.

**Table 1**  
**New providers of post-secondary education and training services**

<b>Type of provider</b>	<b>Explanation</b>	<b>Examples</b>	<b>Comments/Cases</b>
1. Corporate training	<ul style="list-style-type: none"> <li>Generally spin-offs of multinational companies, which mostly train their employees across the world but also train lifelong learners, suppliers and customers and sometimes deliver degrees</li> </ul>	<ul style="list-style-type: none"> <li>General Electric Crotonville</li> <li>Motorola University</li> <li>McDonalds Hamburger University</li> <li>Sun Microsystems Educational Services</li> <li>Fordstar</li> <li>Microsoft's Certified Technical Education Centers (CTECs)</li> </ul>	<ul style="list-style-type: none"> <li>over 1600 in 1998 in North America</li> <li>42% of all American "corporate universities" provide courses for which a degree could be granted at an educational institution</li> <li><u>Microsoft</u>: 1700 franchised private training companies (CTECs) internationally, using Microsoft Certified trainers and the Microsoft Official Curriculum</li> </ul>
2. For-profit institutions	<ul style="list-style-type: none"> <li>use strict business principles of operation, such as targeting specific customers (e.g. adults) or developing standardised and limited education "products"</li> </ul>	<ul style="list-style-type: none"> <li>Apollo Group</li> <li>Sylvan learning systems Inc.</li> <li>De Vry inc.</li> </ul>	<p><u>Sylvan Learning</u>:</p> <ul style="list-style-type: none"> <li>\$ US 484.8 million turnover</li> <li>International strategy of Sylvan through the acquisition of established private post-secondary institutions (Mexico, Chile, Spain, France, Switzerland)</li> <li>Number one in testing in the world</li> <li>Number two in language training in the world</li> </ul>
3. Virtual universities	<ul style="list-style-type: none"> <li>Offer conventional university services via ICTs</li> </ul>	<ul style="list-style-type: none"> <li>National Technological University (Sylvan)</li> <li>Open Learning Agency of Australia</li> <li>Western Governors University</li> <li>Open University worldwide (UK)</li> <li>Army University Access Online</li> </ul>	

4. Traditional universities (or not for-profit post-secondary institutions)		<ul style="list-style-type: none"> <li>• Monash University</li> <li>• Open University, UK</li> </ul>	<ul style="list-style-type: none"> <li>• Increasingly use ICT for their teaching operation, set up e-learning programmes as well as overseas campuses</li> </ul>
5. For-profit arms of traditional universities	<ul style="list-style-type: none"> <li>• Start to meet the competition of for-profit and virtual universities</li> <li>• Extend their activity to working adults</li> </ul>	<ul style="list-style-type: none"> <li>• NYU's School of Continuing and Professional studies</li> <li>• University of Maryland University College (UMUC)</li> <li>• Ecornell</li> </ul>	<ul style="list-style-type: none"> <li>• UMUC: degree-granting for working adults, both face to face and at distance</li> </ul>
6. Partnerships	<ul style="list-style-type: none"> <li>• Private/public</li> <li>• Private/private</li> <li>• Public/public</li> </ul>	<ul style="list-style-type: none"> <li>• Universitas 21</li> <li>• U21global (U 21 &amp; Thomson learning)</li> <li>• Trium EMBA (LSE, Stern of New York, HEC Paris)</li> </ul>	<ul style="list-style-type: none"> <li>• Increasing number of partnerships and ventures in e-learning and international programmes</li> <li>• U21 global: online university concentrating on the postgraduate business education sector in Singapore, Malaysia, and Hong Kong, with expansion plans targeting students in Africa, China, and Latin America.</li> </ul>

## II. How the GATS operates

The GATS consists of three core components. The first is a framework of rules that lays out the general obligations governing trade in services, which it does in much the same way as the GATT does for trade in goods. It provides for disciplines on transparency (of considerable importance given the regulatory density of services trade), most-favoured-nation (MFN) treatment, market access, and national treatment. The framework is still incomplete, and rule-making efforts on certain issues, such as emergency safeguards, subsidies, government procurement and, perhaps most importantly, on domestic regulation, are still underway.

Second, the GATS includes annexes on specific services sectors (air transport, financial services, maritime transport, and telecommunications) as well as the movement of natural persons. The third element consists of the schedules of commitments detailing the liberalisation commitments of each WTO member.

The preamble to the Agreement sets out the some of the key considerations that underlie its continued negotiation. These include:

- The belief that a multilateral framework of rules and principles that aim to progressively liberalise services trade will assist the growth of international trade in services and contribute to economic development world-wide;
- Recognition that the liberalisation process must respect the needs and rights of governments to regulate in order to pursue national policy objectives;
- Acknowledgement that the integration of developing countries into the multilateral trading system must be facilitated through a reinforcement of the capacity, efficiency and competitiveness of their domestic service industries.

The GATS distinguishes between **four “modes of supply”** through which services can be traded. As Table 2 shows, these four modes might be analogously compared to the means by which goods are exchanged: exports, called cross-border trade in GATS (Mode 1), movement of consumers (Mode 2), foreign direct investment, called “commercial presence” (Mode 3), and the movement of service providers (Mode 4). Table 2 indicates how each of these four modes is germane to how cross-border trade and investment in education services takes place today. For any given service in which a WTO member chooses to make a commitment, it can set limits sector-by-sector and mode-by-mode with regard to its market access and national treatment commitments. In other words, over and above so-called “horizontal” restrictions that may be maintained across the board (i.e. applicable to all sectors, as is often the case of limitations on foreign investment or the temporary entry of service suppliers), countries have eight separate opportunities to indicate how they will treat foreign service providers in any given sector (i.e., market access and national treatment restrictions can be lodged against each of the four modes of supply. This geometry is depicted in Table 3 below.

**Table 2**  
**Modes of Supply of education services**

<b>Mode of Supply according to GATS</b>	<b>GATS Definition</b>	<b>Examples in education</b>	<b>Size, potential of market and major impediments</b>
Mode 1 Cross-border supply	The supply of a service “from the territory of one Member into the territory of any other Member.” The service travels, but both the provider and the consumer stay home. Comparable to the export of a good.	<ul style="list-style-type: none"> <li>• Distance education</li> <li>• Virtual education institutions</li> <li>• Education software</li> <li>• Corporate training through ICT delivery</li> </ul>	Currently a relatively small but rapidly growing market. Seen to have great potential through the use of ICTs and especially the Internet.
Mode 2 Consumption abroad	The supply of a service “in the territory of one Member to the service	<ul style="list-style-type: none"> <li>• A student travels to another country to enrol in a school for</li> </ul>	Currently represents the largest share of the global market for

	consumer of any other Member.” Comparable to tourism or business travel by the consumer.	a course of study/degree programme.	education services, especially in post-secondary education. For prospective students, however, GATS commitments are of little significance given general lack of restrictions and relative to non-GATS issues such as student visas and funding. GATS may help in encouraging greater recognition of degrees by home-country institutions.
Mode 3 Commercial presence	The supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member.” GATS-speak for foreign direct investment.	<ul style="list-style-type: none"> <li>• Local university or satellite campuses</li> <li>• Language training companies</li> <li>• Private training companies e.g. Microsoft, CISCO, etc.</li> </ul>	Growing interest and strong potential for future growth. But significant reluctance to make binding commitments: only seven WTO members have made full commitments for higher education under this mode.
Mode 4 Movement of natural persons	The supply of a service “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” Comparable to temporary emigration or business travel by the service provider.	<ul style="list-style-type: none"> <li>• Professors, teachers, researchers working abroad on a temporary basis.</li> </ul>	Potentially a strong market given the emphasis on/increasing demand for the mobility of highly-skilled professionals Generally more politically sensitive and less commercially significant than the other three modes. Most WTO members maintain restrictions on a horizontal basis (e.g., immigration rules that apply to all services sectors). Academics tend to encounter little difficulty in this area, as their mobility is demand driven and given the uniqueness of their skills.

**Table 3. Design of GATS Schedules**

**Modes of supply:**

**(1) Cross-border supply    (2) Consumption supply    (3) Commercial presence    (4) Presence of natural persons**

<b>I. HORIZONTAL COMMITMENTS</b>			
<b>All sectors</b>	<b>Limitations on market access (Art. XVI)</b>	<b>Limitations on national treatment (Art. XVII)</b>	<b>Additional commitments</b>
	<b>Mode 1</b> <b>Mode 2</b> <b>Mode 3</b> <b>Mode 4</b>	<b>Mode 1</b> <b>Mode 2</b> <b>Mode 3</b> <b>Mode 4</b>	
<b>II. SECTOR-SPECIFIC COMMITMENTS</b>			
<b>Sector or sub-sector</b>	<b>Limitations on market access (Art. XVI)</b>	<b>Limitations on national treatment (Art. XVII)</b>	<b>Additional commitments</b>
	<b>Mode 1</b> <b>Mode 2</b> <b>Mode 3</b> <b>Mode 4</b>	<b>Mode 1</b> <b>Mode 2</b> <b>Mode 3</b> <b>Mode 4</b>	e.g. <b>procurement</b> , pre-commitment to future liberalisation

Arguably the **most important principles in GATS are its provisions on most favoured nation treatment (MFN), transparency, national treatment and market access.** The GATS does not impose any market access or national treatment commitments on WTO members unless the Member voluntarily chooses to list that service in its schedule. Unlike the Agreement's market access and national treatment principles, that apply only to scheduled activities, the **MFN** provision of the GATS is a general obligation. A country is thus obliged to extend MFN treatment to all members in respect of all sectors, unless an exemption from MFN is taken for specific measures governing particular services. The MFN obligation means that a country will treat the service supplier of another member no less favourably than it does the service suppliers of any other member. WTO members were given a one-off opportunity to draw up lists of MFN exemptions in the Uruguay Round (a possibility afforded to subsequent acceding members.) Derogations from MFN commitments are in principle subject to a ten-year sunset clause, and are also subject to periodic review or re-negotiation every five years. While MFN treatment guarantees equal treatment for all suppliers, regardless of their nationality, it bears noting that such treatment does not require any degree of market openness. It is not, as such, necessarily a liberalising discipline, merely one aimed at securing non-discriminatory negotiating outcomes.

Given the high degree of regulation of many service activities, effective access to markets can depend crucially on service suppliers gaining accurate knowledge of the laws and regulations in force in a prospective market. The need for predictability is considerable in services trade, and is reflected in the fact that **disciplines on transparency**, contained in Article III of the GATS, are one of the Agreement's core general obligations. That is, it applies to all services subject to GATS coverage, regardless of whether Members have scheduled (i.e. undertaken legally bound) liberalisation commitments. Article III requires Members to publish all relevant measures of general application that pertain to or affect the operation of the Agreement and to notify any changes in laws and regulations affecting sectors on which commitments have been made. The promotion of greater transparency has also been at the core of work done so far in developing disciplines on domestic regulation under Article VI of the GATS.

**The two key liberalising principles of the GATS, which as already noted WTO Members can subscribe to on a purely voluntary basis, are contained in Articles XVI and XVII of the Agreement, dealing respectively with market access and national treatment.** Article XVI (Market Access) consists of six different types of limitations on market access which must be scheduled if WTO Members wish to maintain them. Such limitations, the bulk of which relate to non-discriminatory measures of a quantitative nature, comprise certain measures that: (1) limit the number of service suppliers; (2) limit the total value of services transactions or assets; (3) limit the total number of service operations or the total quantity of service output; (4) limit the total number of natural persons that may be employed in a particular service sector; as well as (5) restrict or require specific types of legal entity or joint venture through which services may be supplied; and (6) limit the participation of foreign capital.

Article XVII (National Treatment) also permits Members to schedule and maintain limitations on non-discrimination. It is in this regard fundamentally different from the unqualified obligation of national treatment applicable to goods trade under the GATT. Such a distinction arises from the absence of tariff protection for services, which means that an unqualified market access and national treatment commitment would amount to full free trade in services.

Summing up, the GATS offers the following options for a country that wishes either to exclude a service sector from its GATS commitments; restrict their extent; justify a breach of those commitments; or opt out from the multilateral trading system altogether:

- **It can simply decline to make any commitments.** Nothing in GATS compels member countries to bind or liberalise any specific sector, and a country could indefinitely choose to keep a sector outside the scope of its commitments. In this respect, the sectoral coverage of services subject to specific commitments under the GATS is much less complete than that of goods under the GATT. While the majority of GATT Members have bound most or all of their goods tariffs, many have thus far left a large number of their services sectors “unbound”. None of the existing provisions of GATS or the commitments made by individual countries compel WTO member countries to liberalize any sector that they wish to protect or leave outside the trade policy framework. Many OECD countries, such as Canada or France, have systematically refused to make commitments in the education sector, a position their respective negotiators continue to hold in the current talks. There is nothing in GATS to compel them to change that position.
- **The country is free to qualify its commitments in any given sector or sub-sector.** For each of the four modes of supplying services covered by the GATS, a WTO member can either specify that it is “unbound” (i.e., the country has made no commitments in that sector for that mode of supply) or make a more specific reservation. For example, the country might retain existing discriminatory limitations on foreign investment, or set limits on the number of service suppliers, the total value of service transactions or assets, the total number of natural persons employed in a particular sector, etc. A WTO Member can also bind less than the statutory and regulatory *status quo* or commit to future liberalisation, allowing incumbent suppliers to prepare for new market conditions and for necessary regulatory regimes to be established.<sup>2</sup>
- **The country might apply horizontal limitations to all services.** For example, many countries have listed horizontal limitations applicable to all sectors on the commitments for movement of persons or on those governing investment (commercial presence) in service activities. For instance, some WTO Members maintain the right to review all inward FDI flows above a certain value threshold or to restrict temporary entry to certain types of service providers (i.e. highly skilled).
- **A country can invoke GATS Article XII (Restrictions to Safeguard the Balance of Payments) provisions** to suspend a commitment in the event that it is found to cause adverse effects on its balance of payments.

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<sup>2</sup> One means of limiting commitments on services is through the definition of the sectors themselves. For the sake of simplicity, one can treat post-secondary education as a single sub-sector, but in actual negotiations it could be broken down into much smaller units. For example, a country could draw distinctions between sports education and all other forms, and draw a further distinction between gymnastics instruction and all other forms of physical education. A commitment to permit individual gymnastics trainers to enter the country for purposes of giving lessons would not then apply to ice hockey or downhill skiing instructors or any other sports or non-sports educational services.

- **A country can invoke the various general exceptions in GATS Article XIV (General Exceptions)** to justify existing regulations, or to enact new ones, in pursuit of legitimate public policy concerns. Such exceptions can be invoked where necessary to protect major public interests, including safety, human, plant or animal life or health, national security or public morals. The exceptions foreseen under GATS Article XIV (General Exceptions) override all other provisions of the Agreement, allowing a WTO Member to violate or withdraw its own commitments if necessary.
- **A country could ultimately withdraw from GATS and the WTO altogether**, though it bears recalling in this regard that no WTO Members have to date done so and that countries have been queuing to join – rather than leave - the Organisation.

### III. Fault lines in the public policy debate over education and the GATS

Critical assessments of the GATS typically find their origin in the broader context of backlash against globalisation and the commercialisation that it brings to some activities previously insulated from the market. Claims of threats to the provision of public services, such as education or health services, or to services with strong public goods connotations, such as water or electricity distribution, are among the most commonly voiced concerns associated with the GATS and with the very idea of services trade and investment liberalisation (including that pursued at the regional level).

The citations in Box 1 below depict some of the most fanciful claims levelled against the GATS in the area of education services. The Agreement’s critics allege that the GATS is nothing less than a tool of privatization, globalization, “commodification,” and other assorted ills. Such statements belie significant misunderstandings about the GATS and its *modus operandi*. Whether by deliberate commission or innocent omission, GATS detractors often present false, inflammatory and misleading characterisations of the purpose, rules and policy consequences of the GATS. A more reasoned assessment of the Agreement shows that it is nowhere nearly as powerful as its critics suggest.<sup>3</sup>

#### Box 1

##### *The GATS and Education: The Critics’ Corner<sup>4</sup>*

- “[U]nder GATS, foreign education service providers would be guaranteed access to ... [Canada’s] ‘education market’ (including degree-granting status), governments would have to give these providers the same grants and financial assistance as they provide to the country’s publicly funded universities and colleges, provide student loans, bursaries and other

<sup>3</sup> See OECD (2002), *GATS: The Case for Open Services Markets*, Paris: OECD Publications, available at [www.sourceoecd.org](http://www.sourceoecd.org). See also vanGrasstek (2002) for a useful depiction of the GATS debate as it concerns the education sector.

<sup>4</sup> The author is grateful to Craig vanGrasstek for drawing his attention to the various strands of anti-GATS critiques in the education services field.

*financial aid to students attending foreign schools, and eliminate preferential tax treatment for Canadian schools and research and development carried out therein.”<sup>5</sup>*

- *“The new area of GATS rules and restrictions on state subsidies could identify government payment of student tuition fees as discriminatory. This could force the government to either subsidise students at private universities equally, or end state financial support to students altogether.”<sup>6</sup>*
- *“[T]he private sector will receive enormous power to undermine the public delivery of educational services. One specific ‘barrier’ ... that is particularly alarming is the identification of ‘the existence of government monopolies’. The underlying philosophy of trade liberalisation in international trade agreements is that, whenever something can be provided by the private sector, conditions should exist to ensure that this can occur ... clearly whenever governments operate in what is, or potentially could be, a ‘market’, their actions are ‘barriers’ to the creation of private markets and, therefore, need to be controlled.”<sup>7</sup>*
- *“[T]here is every reason to be seriously concerned about the democratic deficit which is progressively deepening as what effectively amounts to a covert world government is built step by step on the basis of the economic, financial and business interests of a handful of corporations. On the one hand, the secrecy which surrounds the negotiations of these major trade agreements very often results in the main players concerned, including entire populations, being faced with a ‘fait accompli’, in which they have had no say. On the other hand, the colossal power that these agreements usually confer on a few economic operators dramatically restricts the scope for political and socially-oriented action in determining major choices which concern society as a whole.”<sup>8</sup>*
- *[T]rade pacts are designed to prohibit a country from changing its policies. Once a government has agreed to include an area like education into one of these agreements, it cannot withdraw that area from being covered by the agreement — even if the people of a country vote overwhelmingly that they do not approve of what is happening.”<sup>9</sup>*

Much of the public policy debate over the alleged downsides of the GATS, including (but not only) for education services, is rooted in a number of fallacies about the Agreement’s design and operation. These include:

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<sup>5</sup> Canadian Federation of Students, “Brief on General Agreement on Trade in Services” (October 15, 2001), page 3.

<sup>6</sup> Jess Worth, *The Threat to Higher Education: A Briefing on Current World Trade Organisation Negotiations* (Oxford, United Kingdom: People & Planet, 2000), page 3.

<sup>7</sup> Marjorie Griffen Cohen, “The World Trade Organisation and Post-Secondary Education: Implications for the Public System” (Address delivered to the University of South Australia, 2000), page 6.

<sup>8</sup> Education International and Public Services International, *The WTO and the Millennium Round: What is at stake for Public Education?* (Ferney-Voltaire, France: Education International and Public Services International, 2000), page 23.

<sup>9</sup> Larry Kuehn, “Keep Public Education Out of Trade Agreements” (N.P.: British Columbia Teachers’ Federation, 2000), page 1.

- **The fallacy of universal coverage:** which leads to the erroneous assertion that simply because a service activity is subject to GATS rules (a matter that cannot be said to apply fully to education services in view of GATS Article 1.3), it must *per force* be subject to liberalisation commitments.
- **The fallacy of full market opening:** by which GATS critics wrongly assert that the elimination of all trade- and investment-restrictive measures (including non-discriminatory regulatory measures) is the aim of the GATS, when in fact WTO Members retain the right not to liberalise a given sector and can indefinitely maintain, in sectors where they make liberalisation commitments, measures that openly discriminate against foreign suppliers or quantitatively restrict their ability to compete in service markets.
- **The fallacy of immediacy:** by which GATS critics allege, once again erroneously, that liberalisation under the GATS must by definition not only be complete in nature but immediate in effect. In reality, the entire Agreement is predicated on the progressive, orderly, nature of liberalisation where and when WTO Members are so willing to pursue it under the GATS.
- **The fallacy of confusing trade and investment liberalisation with deregulation:** words that GATS critics use synonymously when in fact liberalisation typically must be underpinned by a proper regulatory framework to be successfully pursued
- **The fallacy of equating negotiating requests with negotiating offers:** as if the process of opening services markets resulted from the mere act of formulating a request of one's trading partners. How then can one explain the low level of bound liberalisation under the GATS?
- **The fallacy of policy irreversibility:** according to which bound measures under the WTO cannot be rescinded or modified, locking-in governments in perpetuity, when in fact the GATS (like the GATT) establishes a series of means by which countries can limit, condition, or even suspend the commitments that they make, subject to compensating trading partners.
- **The fallacy of secrecy:** by which GATS critics allege that the opening of services markets is happening in secret, behind the backs of citizens, when in fact the current GATS negotiations are being conducted in a highly transparent manner, with all negotiating proposals and information on the state of play of services negotiations available in real time on the WTO website.

A paradox of the anti-GATS campaign is that much of it is rooted in the OECD area, where the share of services in employment and standards of living are highest, and where the benefits of regulatory reform and of trade and investment liberalisation in services have arguably generated the greatest gains in consumer welfare and allocative efficiencies. Not surprisingly, the public policy debate on services in OECD countries has tended to centre not so much on disputing the economic case for open markets. Rather, the debate over GATS has generally focused on the respective roles that the market and the state (as both regulator and direct purveyor of services such as education and health) should be assuming, as well on the threat to national regulatory sovereignty allegedly posed by trade and investment rule-making. All are issues that elicit strong feelings in the educational field. The following describes some of the most contentious issues in the GATS debate, highlighting where relevant its education dimension.

### *The GATS and public services*

A variety of claims are made describing the GATS as a threat to the provision of public services: that it forces governments to privatise and allow competition in public services, that it obliges them to open them up to foreign trade and investment, and that it puts in danger the assurance of basic public services such as education, water distribution or health services. However, GATS rules do not dictate any specific role for the public and private sectors; countries are free to decide for themselves what sectors will be reserved for the state or state-owned enterprises. And they remain entirely free to decide whether or not to open such sectors to outside competition and to make (or not) binding commitments in such sectors in their GATS schedules. It is simply incorrect to suggest that the GATS forces governments to privatise or open up public services to competition, as the Agreement features no such obligations.

An important element in the debate over GATS and public services is the fact, noted earlier, that services supplied in the exercise of governmental authority are specifically excluded from the scope of the GATS. GATS Article I.3(b) defines “services” to include “any service in any sector except services supplied in the exercise of governmental authority.” This exception is further refined in Article I.3(c), which specifies that “a service supplied in the exercise of governmental authority” means “any service, which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

The degree of government funding for public services varies widely across countries, depending on social and political preferences over the role of the state in the provision of those services. The regulatory landscape in the education and health fields in most countries, developed and developing, is one in which public and private suppliers co-exist. The advantage of the GATS in this regard lies once more in its flexibility. It can accommodate a wide spectrum of positions with regard to services provided by the government and those supplied under competitive market conditions or by private entities on a not-for-profit basis. Over and above the specific GATS carve-out for services supplied in the exercise of governmental authority, it is important to recall that the Agreement allows WTO members to:

- regulate their service sectors in accordance with national policy objectives (subject to the limitations noted earlier in respect of areas where liberalisation commitments are undertaken);
- refrain from taking liberalisation commitments in any particular sector, sub-sector or mode of supply;
- maintain or designate monopolies; and
- retain the ability to subsidise service activities in their territories (see below).

It bears noting for instance that not a single country proposal to liberalise the provision of health services under the GATS has been formulated to date. Moreover, the four WTO members that have tabled negotiating proposals on trade in education services have all sought to clarify their circumscribed nature (see section IV below). These proposals generally seek non-discriminatory treatment for those who provide education and training services on a *commercial* basis and meet the regulatory requirements of the host country. The United States, which submitted one of the proposals, has noted that it explicitly *does not* cover primary and secondary education and that a country’s subsidies for higher education should not be made equally available to foreign providers. All proposals emphasise the central importance of preserving the ability of countries to

apply regulatory measures necessary to achieve education policy objectives, including in respect of public funding, consumer protection and quality assurance.

### ***GATS and the right to regulate***

Threats to a country's sovereign right to regulate, or the alleged transfer of regulatory authority from national governments to a supranational body such as the WTO, is a central plank of the anti-GATS critique. Agreements to accept a framework of rules, whether bilateral, plurilateral or multilateral, by definition entail some curtailment of sovereignty, although the decision to enter into such an agreement is itself an exercise of sovereignty. Over 140 governments have chosen through membership of the WTO to participate in a package of multilateral agreements because they recognise the overall net economic and social benefits that accrue from a rules-based trading system.

The progressive liberalisation, not deregulation, of services trade is the goal of the GATS, and of periodic negotiating rounds. A common misconception in debate over GATS is to use the terms "liberalisation" and "deregulation" interchangeably, as if they were literal synonyms. They are not, and it is simply wrong to assimilate regulations to trade restrictions. Services liberalisation, indeed, often necessitates regulation or re-regulation. But that is not to say that regulation, whether for economic or social purposes, cannot be designed, implemented or enforced in more transparent and efficient ways, with positive overall effects in terms of democratic governance.

The principal concern linked to loss of sovereignty is the consequent loss of a nation's freedom to regulate its service sectors in the manner it deems appropriate. Many service sectors are highly regulated in order to protect consumers, the environment and, in the educational field, to achieve universal service objectives in basic education whilst ensuring the quality of those services. Governments are understandably cautious when agreeing to subject themselves to common rules. Such regulatory precaution is reflected in the provisions of the GATS, which uphold the fundamental right of a government to regulate in order to pursue national policy objectives. The Agreement's preamble recognises, *inter alia*, "*the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives*".

It is certainly true that, as with any other legally bound undertaking in the WTO (or any other international treaty), the GATS can affect the regulatory conduct of member countries. Yet countries accept such disciplines because they deem them necessary to reaping the full benefits from international co-operation in a rules-based system. The GATS affords WTO members considerable flexibility in this regard. For only those sectors, sub-sectors and modes of supply where a WTO member agrees to schedule liberalisation commitments and where exceptions from the most-favoured-nation treatment obligation have not been taken, what that country ultimately accepts to do under GATS is to not make its regulatory regime more restrictive in future (subject to trade concessions or retaliatory measures of commercially equivalent effect if a country decides, as it always can, to renege on its commitment).

In scheduling commitments, WTO members may also opt, at their discretion, to treat foreign services and service providers in a non-discriminatory manner. That is, extend national treatment to the latter, now or in the future. And they can decide, if they so desire, to eliminate, immediately or progressively, quantitative restrictions that impede access to their services markets. Each one of

those decisions – like that of not scheduling commitments - remains the sovereign prerogative of WTO members to make.

Commitments under the GATS to grant market access do not entail any changes – and certainly not compromises - to regulatory standards or preferences. Those in force for the protection of the public, or to achieve universal access, continue to apply regardless of the nationality of the supplier. Governments may also choose to impose additional requirements on foreign suppliers, something they typically do for instance in the case of professional licensing in medical services.

The specific obligations concerning domestic regulation in the GATS framework aim at requiring Members to regulate those service sectors in which they have made commitments in a reasonable, objective and impartial manner. Article VI of GATS on Domestic Regulation aims to create more transparent domestic regulatory decision-making, implementation and administration. There is explicit recognition of the right of service suppliers to information on regulatory and administrative decisions and to judicial and administrative review and appeals processes. In both respects, the GATS champions principles of good governance.

The work programme under GATS Article VI(4), on which discussions have continued since the end of the Uruguay Round, has provoked some of the strongest anti-GATS sentiments. Work in this area is designed to address the fact that non-transparent, unfair or unduly burdensome regulations at the national level can potentially undermine the value of market access commitments freely entered into by a WTO member. Article VI(4) calls for the development of any necessary new disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary trade barriers. No so-called “necessity” test has yet been developed under the Article VI(4) work programme. Discussions have proceeded slowly, reflecting the cautious attitude of governments in this area.

Disciplines relating to domestic regulation have however been developed specifically for the accountancy sector. These draft disciplines, which were adopted in December 1998 and are due to be integrated into the GATS at the conclusion of the current negotiations, would only apply to those countries that made commitments on accountancy services. Critics have argued that the incorporation of such disciplines in the GATS could infringe upon governments’ sovereign right to regulate by imposing a set of global standards on WTO members. However, the draft disciplines do not focus on the substantive content of qualifications in accountancy but seek to ensure procedural transparency in matters of licensing and qualification. The WTO is not a standards-making body, nor is it mandated to assess the content of national standards, be they technical or professional. The Article VI(4) work programme concerns itself with the *means* that countries choose to pursue public policy objectives, and not the objectives *per se*.

### ***The GATS and foreign investment***

The educational field highlights well why services trade conducted through foreign direct investment (or commercial presence, as it is called in GATS) is particularly important given the need for proximity between suppliers and consumers of services and the need to tailor service offerings to host market conditions. Commercial presence is the area where the largest amount of liberalisation commitments were undertaken by WTO members in the Uruguay Round (although education is an outlier in this respect, reflecting once again the defensive attitudes of many countries towards the very idea of taking on legally binding commitments in the sector). This

suggests the importance countries attach to reaping the positive benefits – high paying jobs, human resource training, technology transfers, quality upgrading – typically associated with greater doses of foreign direct investment whilst also retaining the freedom to regulate such activity.

The argument is often heard that the GATS is principally an investment agreement, designed to promote the interests of large multinational corporations over those of smaller, national, enterprises. While the GATS can be described as a multilateral agreement that covers investment in the services trade context, it is not an agreement on investment *per se* and cannot be portrayed, as many GATS opponents often allege, as a means of resurrecting the failed Multilateral Agreement on Investment (MAI).

While WTO members may, *via* their GATS commitments, accord market access to foreign investors, they are not obliged to do so. In addition, governments are free, if they choose to make commitments on commercial presence, to maintain existing discriminatory or quantitative restrictions. The Agreement affords no automatic right of establishment to foreign investors. The only obligations of WTO members are to schedule any existing restrictive measure they wish to maintain in sectors where liberalisation commitments are voluntarily undertaken, and to ensure freedom of payments and transfers relating to investments in such sectors.

Governments can use the GATS selectively to encourage investment in sectors of their choice, subject to the conditions they wish to impose or retain, including with respect to technology transfers and the employment or training of local workers. The Agreement also permits governments to maintain foreign ownership restrictions in sectors where they have made commitments. The GATS promotes greater predictability through the permanency (but not irreversibility) of commitments, a potentially important element in attracting investment in developing countries. The “investment signalling” properties of the GATS may well explain the decision of a number of developing countries to undertake mode 3 commitments in education services. The logic behind such commitments is easily understood, as the demand for higher education and specialised training far outstrips the supply capacity of many developing countries educational systems.

### ***The GATS and subsidies***

One of the allegations most often raised by critics of the GATS concerns the presumption that the GATS forces WTO Members to grant governmental subsidies, notably in the fields of public health and education or cultural industries, to all comers on a non-discriminatory basis.

The issue of subsidy practices in the services field (like that of emergency safeguards and government procurement) is one where WTO Members agreed at the end of the Uruguay Round to pursue negotiations with a view to developing multilateral disciplines. No such disciplines currently exist under the GATS, nor has any firm deadline been set to complete ongoing discussions in both areas.

At present, for those services where a WTO Member has made market access commitments, it can maintain the ability to subsidise national service suppliers on a discriminatory basis by listing such limitations on national treatment in its schedule of commitments. The issue of public subsidies in education, which tends to receive significant attention in the public policy debate over the GATS, is largely moot in the light of the carve-out of governmental services.

#### **IV. What exactly are we talking about? A stylized depiction of negotiating proposals by Australia, Japan, New Zealand and the United States**

As noted earlier, four WTO Members – Australia, Japan, New Zealand and the United States have to date tabled negotiating proposals on education services under the GATS, the core elements of which are summarised in Table 4 below. These proposals bear little resemblance to the assault on public education services that GATS critics decry as an inevitable outcome of the current negotiations.

Rather, a closer reading of the proposals suggests two broad comments. First, their proposed scope tends to be narrowly drawn. Indeed, some of the proposals, notably that of the United States, focus attention on a very circumscribed universe of new service offerings where private suppliers have tended to be in the vanguard of what is already a highly competitive market environment (*private* higher (i.e. tertiary or post-secondary) education, adult education and training services). Meanwhile, the government of New Zealand calls on WTO Members to consider making commitments in education sub-sectors that are less affected by sensitivities relating to the divide between public policy and commercial activity in education.

Second, “*demandeur*” governments, far from being captured by rapacious private suppliers of education services, appear acutely cognisant of the range of sensitivities that calls for greater competition in the delivery of education services can elicit in concerned constituencies. Accordingly, all four proposals acknowledge the central role governments will continue to play (as both suppliers and regulators) in education services, a role liberalisation proponents expressly acknowledge the GATS must not undermine.

There can be little doubt that the controversy that has arisen over the scope and negotiating implications of the public service carve-out under GATS may explain the care that proposing countries have taken in making explicit the role they see governments playing in the education field (Knight, 2001). Thus the Australian proposal notes that governments have a role to play in the financing, delivery and regulation of higher education – either alone or in partnership with individuals, NGOs and private suppliers; and they must retain their sovereign right to determine their own domestic funding and regulatory measures and policies.

In the New Zealand submission, a central focus of which concerns the need for the classification of services activities under the GATS to better reflect the rapidly changing landscape of international education, the government recalls how the reduction of barriers to trade and investment in education services does not equate to an erosion of core public education systems and standards.

The US submission, for its part, reaffirms the principle that governments must retain the right to regulate to meet domestic policy objectives; that education is to a large extent is a government function and that calls for enhanced access by private suppliers in higher education, adult education and training services seek to supplement – and not displace – public education systems.

In taking its negotiating proposal “on the road”, US officials have gone to great lengths to point out what was “off the GATS table”: opening up the provision of primary and secondary education

services (including the private supply of such services); privatising public education services; affecting the tax status of educational establishments; extending funding/public subsidies for education to foreign service providers on a non-discriminatory way; addressing policies regarding admissions, scholarships, grants or curriculum.<sup>10</sup>

While calling for a greater overall level of bound liberalisation commitments in the sector, the Government of Japan draws attention at the same time on the central role that governments must continue to play in protecting consumers (students) and ensuring the quality of education services through proper accreditation and quality assurance systems. The latter are issues that the New Zealand proposal also highlights.

Finally, two submissions – those by Australia and the United States – identify and draw attention to a range of potential impediments to the internationalisation of education services (see tables 5 and 6 in the following section) which both governments believe the GATS could address with a view to their progressive elimination or liberalisation. This paper concludes with a discussion of the scope that may exist for tackling such impediments in a trade policy setting.

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<sup>10</sup> See Bernard Ascher (2001), pp. 5-6.

**Table 4**

**GATS and education services -A synthetic look at negotiating proposals**

	<b>AUSTRALIA</b>	<b>JAPAN</b>	<b>NEW ZEALAND</b>	<b>USA</b>
<b>Scope of Proposal</b>	Not addressed directly	Not addressed directly	Commitments should be contemplated in sectors that are less affected by sensitivities relating to the divide between public policy and commercial activity than others.	<p>Clear intent to narrow the scope of possible GATS negotiations in education services:</p> <p>Proposal refers only to private higher (tertiary) education, adult education, and training services; it does not apply to primary and secondary education</p> <p>Clarification of coverage: Higher education includes all tertiary education, adult education and training services Proposal to include two other types of services as part of the concept of education: training services and educational testing</p>
<b>Objective</b>	<p>Focus attention on the identification of impediments to trade in education services</p> <p>Barriers identified by GATS mode of supply</p>	Promote liberalisation through better market access, further assurance of national treatment and deregulation of related domestic regulations.	<p>Identification of relevant sectors through improvement of the current education services classification:</p> <p>Proposal to clarify the delineation of services between the “higher”, “adult” and “other” categories by adding non-exhaustive, illustrative lists which should reflect more accurately the realities of education delivery (e.g. acknowledgement that many education services are increasingly being offered by</p>	<p>Create conditions favourable to suppliers of higher education, adult education, and training services by removing and reducing obstacles to such services across national borders through electronic or physical means, or to the establishment and operation of facilities (schools, classrooms or offices) to provide services to students in their home country or abroad</p> <p>WTO Members should make commitments on higher education, adult education, and training services based on a list of obstacles identified in the proposal</p>

			<p>organisations or institutions from outside traditional education systems); of particular interest is the category “Other education services”</p> <p>Proposal to add “community education” to the current definition of “Adult education services not elsewhere classified” and student recruitment and placement services to the educational services classification</p> <p>Proposal to classify “education services primarily concerned with recreational matters”, (currently treated under sporting services), as part of education services</p>	
<b>Related concerns</b>	<p>Reaffirm the need of any negotiated outcome to respect a set of principles with a special focus on domestic policy issues:</p> <p>Giving consumers (students) in all countries access to the best education services</p> <p>Not preventing Member countries from establishing their own education policy objectives;</p> <p>Not preventing Member countries from providing</p>	<p>Liberalisation measures should be considered with primary interest in maintaining and improving the quality of services, taking into account aspects of government policy objectives (quality of education, consumer protection, international equivalence of degrees)</p> <p>Taking into account differences in administrative structures (authorisation of establishment, third-party evaluations and degree-granting system)</p>	<p>Strike a balance between pursuing domestic education priorities and exploring ways in which trade in education services can be further liberalised</p>	<p>Proposal to apply existing GATS market access and national treatment disciplines, as well as additional commitments to education services while respecting following issues:</p> <p>Governments would retain the right to regulate to meet domestic policy objectives.</p> <p>Education is to a large extent a government function; the proposal does not seek to displace public education systems</p> <p>Public education systems could be supplemented by affording opportunities to service providers to make their services available to students in other countries, while respecting each country’s role of prescribing and administering appropriate</p>

	<p>public funds for education to meet domestic policy and regulatory objectives;</p> <p>Considering the significant linkages between education services and other services sectors</p> <p>Recognising the sovereign right of Member countries to screen for temporary entry immigration purposes.</p>			<p>public education for its citizens</p> <p>No intention to interfere with the tax exempt or state-funded status of educational institutions, or policies regarding admissions, scholarships, grants or curriculum</p> <p>No intention that a country's subsidies for higher education be made equally available to foreign providers</p> <p>Right of countries to make reservations for measures to avoid undue disruption of their public education systems.</p>
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## V. Irrational exuberance? What role should the GATS be expected to play in the internationalization of trade in education services?

The GATS negotiations are likely for the foreseeable future to be a useful complementary adjunct to WTO members' international education strategy. Such negotiations are unlikely however to be the driving force behind the continued internationalisation of trade and investment in education services. The GATS process should neither be demonised nor expected to provide a magic bullet for education service providers interested in serving foreign markets or attracting greater numbers of foreign students.

To the extent that the promotion of internationalisation of education involves collective actions on the part of governments, these may well be more properly pursued through agreements on educational qualifications, academic and cultural exchanges, and so forth, rather than brokered inside the trading system.

This conclusion is not altogether very different from that articulated by four leading educational trade associations in a September 2001 "*Joint Declaration on Higher Education and the General Agreement on Trade in Services*."<sup>11</sup> Signed by the Association of Universities and Colleges of Canada, the American Council on Education, the European University Association, and the Council for Higher Education Accreditation, the declaration noted that "while some barriers exist to trade in educational services, "there does not appear to be a major problem overall."<sup>12</sup>

Part of the reason for coming to such a conclusion lies in the remarkable pace of change witnessed in the educational services field in recent years, much of which occurred completely outside a trade policy framework. This is not to suggest that barriers to trade or investment in education services do not exist or could not be amenable to gradual reduction or elimination through trade negotiations. Nor does it suggest that the greater transparency and policy predictability that would derive from a higher level of bound liberalization commitments under the GATS would not be beneficial to suppliers and consumers alike. Yet, as already alluded to Table 2, apart from restrictions on commercial presence – that is on the ability of education service providers to establish a physical presence in foreign markets under mode 3 of GATS – it is not clear that trading conditions in the other modes of supply are seriously impaired or restrained by governmental measures, nor that potential impediments – such as those pertaining to cross-border delivery through electronic means of delivery- are unique to education services.

Indeed, were obstacles to internationalisation so significant, educational institutions around the world would not have been able in recent years to actively develop a dizzying range of exchange agreements, distance education programs, research collaborations and offshore partnerships to meet their internationalization objectives and contribute to international development.

Moreover, in those areas where significant impediments to internationalisation of education do exist, such as the lack of recognition of academic qualifications or concerns over the quality of educational providers and the risk of seeing "degree mills "sprouting in a liberalized environment, it is not clear that GATS offers the most appropriate setting in which to directly tackle and resolve

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<sup>11</sup> The text of the declaration is available on-line at <http://www.aucc.ca/en/international/bulletins/declaration.pdf>.

<sup>12</sup> For further elaboration on this point, see Association of Universities and Colleges of Canada, "*Canadian Higher Education and the GATS: AUCC Background Paper*" (2001).

such problems relative to those available in non-trade mechanisms (such as the Convention on the Recognition of Qualifications Concerning Higher Education in the European Union (Lisbon Convention), open to all states, which addresses these issues). Most of the barriers to trade in education services identified in Tables 5 and 6 below, are arguably best addressed in other types of international agreements (e.g. educational or cultural exchange agreements), including at the bilateral and regional levels as well as through domestic legislative changes.<sup>13</sup>

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**Table 5: Barriers to trade in education services identified in the US submission**

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- Prohibition of higher education, adult education, and training services offered by foreign entities.
  - Lack of an opportunity for foreign suppliers of higher education, adult education, and training services to obtain authorization to establish facilities within the territory of the Member country.
  - Lack of an opportunity for foreign suppliers of higher education, adult education, and training services to qualify as degree granting institutions.
  - Inappropriate restrictions on electronic transmission of course materials.
  - Economic needs test on suppliers of these services.
  - Measures requiring the use of a local partner.
  - Denial of permission for private sector suppliers of higher education, adult education, and training to enter into and exit from joint ventures with local or non-local partners on a voluntary basis.
  - Where government approval is required, exceptionally long delays are encountered and, when approval is denied, no reasons are given for the denial and no information is given on what must be done to obtain approval in the future.
  - Tax treatment that discriminates against foreign suppliers.
  - Foreign partners in a joint venture are treated less favorably than the local partners.
  - Franchises are treated less favorably than other forms of business organization.
  - Domestic laws and regulations are unclear and administered in an unfair manner.
  - Subsidies for higher education, adult education, and training are not made known in a clear and transparent manner.
  - Minimum requirements for local hiring are disproportionately high, causing uneconomic operations.
  - Specialized, skilled personnel (including managers, computer specialists, expert speakers), needed for a temporary period of time, have difficulty obtaining authorization to enter and leave the country.
  - Repatriation of earnings is subject to excessively costly fees and/or taxes for currency conversion.
  - Excessive fees/taxes are imposed on licensing or royalty payments.
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<sup>13</sup> See vanGrasstek (2002).

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**Table 6: Barriers identified by mode of supply in the Australian submission**

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Mode 1: Cross-Border Supply:

- Erection of new barriers as governments respond to growing use of the internet for delivering education services;
- Restrictions on the use/import of educational materials (academic tools of trade).

Mode 2: Consumption Abroad:

- Visa requirements regulating the free flow of international students;
- Foreign exchange requirements regulating the free flow of international students;
- Qualification recognition issues which act as a deterrent to gaining qualifications at overseas institutions.

Mode 3: Commercial Presence:

- Limits on ownership/foreign equity;
- Rules on twinning arrangements which restrict the development of these institution-to-institution arrangements;
- Lack of transparency of government regulatory, policy and funding frameworks.

Mode 4: Presence of Natural Persons:

- Visa issues regulating the free flow of academics;
- Employment rules regulating the free flow of academics;
- Restrictions on the use/import of educational materials (academic tools of trade).

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The barriers that are most typically mentioned in the education field tend to take two main forms. A first category consists of restrictions on Mode 3 trade (i.e. commercial presence or investment). These include measures that either prevent foreign schools from establishing a presence (e.g., a satellite campus) or deny privileges to these schools or their students. While these are important concerns for certain schools in the United States and a few other countries, the range of countries whose post-secondary institutions have a strong interest in establishing abroad remains somewhat limited. Still, as noted above, the GATS does lend itself to deepened investment regime liberalisation in services, although the attitudes of many potential host countries continues to be characterised by significant regulatory precaution in respect of mode 3 commitments.

While some of the issues listed in Tables 5 and 6 could indeed be dealt with in the WTO, they may be best tackled in other aspects of the new round. For example, restrictions on trade in educational materials fall within the scope of the market-access negotiations for goods rather than

services. Issues relating to transparency and the electronic delivery of services can also be addressed in negotiations that are not specifically focused on educational services.

With the exception of a still relatively small number of (mainly Anglo-Saxon) countries (though the numbers are clearly on the rise), the pace of whose internationalisation far exceeds that observable elsewhere, many WTO members' principal interests regarding trade in educational services are likely to remain in Mode 2 (consumption abroad), which involves students travelling to foreign countries.

Few, if any, "trade" barriers impede such flows. Rather, what holds back Mode 2 trade is a host of measures that are not addressed by the GATS. Chief among these are difficulties in obtaining student visas, funding prospective students/studies abroad and dealing with various student-related work permit matters. For reasons of sovereignty and national security, immigration and labour market issues are typically left to national and sub-national legislation rather than to international trade agreements, the GATS being essentially concerned with conditions governing the temporary entry of service suppliers. So-called Mode 4 trade is not on the whole problem-prone in the educational field, given the demand for expertise and the uniqueness of the skills that researchers and academics bring to the host country and its educational institutions.

As regards funding-related problems (including in respect of tuition fees), traditionally one of the biggest problems facing students contemplating studies abroad, apart from ensuring that countries can continue to discriminate in favour of certain categories of students (typically nationals of the home country) in charging tuition, granting scholarships and administering student aid packages (which the GATS allows in sectors where WTO Members undertake liberalisation commitments), it is not clear what WTO members could achieve by tackling these kinds of issues in a trade policy setting. Indeed these are areas where even proponents of using the GATS to achieve greater liberalisation of trade in education services urge caution. Indeed, these are areas which even GATS' proponents tend to consider as lying squarely outside the Agreement's remit.

The most significant remaining barrier concerns the non-recognition of degrees and qualifications. Students will hesitate to study abroad if the degrees they obtain run the risk of not being recognised by prospective employers or by educational institutions at home or abroad. Here the GATS can play a useful role, but once again in a secondary, trade facilitating, capacity.

It is an increasingly common practice for government agencies and professional associations to negotiate agreements that provide for transnational recognition of educational and other qualifications in specific professions. Agreements of this sort are not negotiated under the auspices of GATS. They can however be recognised under the Agreement. GATS Article VII provides both for the negotiation of such agreements and rules governing their possible extension to additional parties, as well as the formal notification of such agreements to the WTO.

Article VII of the GATS (Recognition) provides an opportunity for other countries to indicate their interest in joining negotiations on recognition. The Agreement also encourages the use of international standards, as noted in Article VII:5, which states:

*"Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in co-operation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international*

*standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.”<sup>14</sup>*

Two final areas where the GATS could play a useful role in helping achieve greater market openness concerns activities ancillary to education, such as quality assessment and testing, and in ensuring that regulatory measures in this area (as with recognition-related matters), even while non-discriminatory in character, are not unduly burdensome or indeed disguised restrictions to trade and investment in the sector. The adoption of possible disciplines on domestic regulation foreseen under the Article VI:4 work programme of GATS, and in particular the adoption of a necessity test (which currently does not exist but is under consideration), could be important in this regard, though one cannot underestimate the political sensitivities that lie ahead in this area.

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<sup>14</sup> Although the GATS does not specifically address certification or accreditation issues by non-governmental organisations, implicitly these processes would be expected to be consistent with the principles of non-discriminatory treatment and use of objective and transparent criteria. Where government statutes or regulations require certification or accreditation by non-governmental organisations for the purpose of licensing, or where such authority is delegated, it is clear that these are considered “measures” of Members and, therefore, subject to provisions of the Agreement.

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