

# The General Agreement on Trade in Services: Implications for public post-secondary education in Australia

MARJORIE GRIFFIN COHEN

*Simon Fraser University, British Columbia, Canada*

Professor Steven Schwartz (2000), the Vice-Chancellor of Murdoch University, has accused public universities of being inefficient institutions that need the discipline of the market to get them into shape. In an article in the higher education section of *The Australian*, he castigates these institutions for being 'large public works projects with guaranteed lifetime employment.'

Specifically, Professor Schwartz wants higher education to be competitive and, when possible, provided by the private sector. What is more, he believes this to be inevitable because 'higher education is increasingly an international enterprise' and, therefore, will be more and more subject to the pressures of deregulation and privatisation. He is calling for, at the very least, a system in which public institutions compete 'on a level playing field' with private ones. The 'level playing field' he has in mind is equal access to public funds.

In subsequent issues of *The Australian* Professor Schwartz's prescriptions for universities in Australia did not go unchallenged. Clearly, despite official competition policy, and massive privatisation and deregulation exercises in Australia (as elsewhere in wealthy countries), considerable support still exists for higher education remaining in the public domain.

The important fact in any democratic society is that points of view like those of Professor Schwartz are debated and discussed before acted upon. But discussions of this sort could become irrelevant in the future as a result of changes in international trade laws. Professor Schwartz's dream could come true *without* specific national policy changes — and changes that would be subject to public debate and scrutiny.

The immediate threat to democratic decision-making and the public provision of services is through the General Agreements on Trade in Services (GATS). Negotiations at the World Trade Organisation (WTO) to extend the GATS began in February 2000 with specific objectives to increase market access of private service providers to industries that are now in the public sector. While all government

services are implicated, this article will focus on the effects for public higher education. This article will not debate the merits of public higher education, but will take these merits as its starting position for analysing the implications of the emerging global trade regime. The importance of these agreements to public education is their alarming potential to limit the role of government in the delivery of public services.

## The General Agreement on Trade in Services

Until the WTO was created out of the last round of the General Agreement on Tariffs and Trade (GATT) in 1994, there was no multilateral agreement on services. Trade agreements historically have been mainly about reducing tariffs and eliminating other barriers to trade (such as quotas on imports) on things that were produced in one place and sold in another. Some services, like transportation, communication and financial services, have always been traded, but social services, like education and health care, have generally been too place-specific to be tradeable.

As the services sectors of economies have grown, and as trade in various types of services has increased, in part because of technological changes, the rules that focused only on trade in objects were deemed inadequate to meet the needs of the private sector. The normal identification of barriers to trade (eg tariffs and quotas) did not cover obstacles service companies encountered when they tried to expand their businesses into areas where the public sector dominates. The international corporations that exported services demanded and worked for new trading rules that would foster new international markets in services.<sup>1</sup>

In the last round of international trade negotiations that established the WTO, an enormous first step was made toward a comprehensive agreement on international trade in services. This occurred through a document called the General Agreement on Trade in Services.<sup>2</sup> This agreement

in principle covers *all* services, including health and education services. The WTO literature explaining the GATS indicates the enormous scope of this agreement. It is not only the first multilateral agreement to 'provide legally enforceable rights to trade in all services', but, even more significantly, it is also the world's first multilateral agreement on investment. As the WTO ( 2000) literature explains, 'it covers not just cross-border trade but every possible means of supplying a service, including the right to set up a commercial presence in the export market'. The kinds of rights that corporations in general would have received through the Multilateral Agreement on Investment (MAI), had it not failed as a result of international public action, can be granted to investors in services through the existing GATS.

Only when a service is provided entirely by a government does it fall outside the GATS rules. Since almost all education systems have some private providers involved or some level of commercialisation, virtually all systems can be affected by the GATS in some way. Any institution that requires the payment of fees (even a public one) would fall within the category of 'commercial activity' and would be covered by the GATS as it currently exists (Langlois, 1999).

The GATS currently applies to services like education in two distinct ways. First, it provides a general framework of obligations that applies to all countries in the WTO. This framework stipulates that there should be no discrimination in favour of national providers (the national treatment principle) and that there should be no discrimination between other members of the agreement (the most-favoured-nation, or MFN, principle).

Secondly, the GATS identifies the specific commitments of member nations, indicating on a sector-by-sector basis the extent to which foreigners may supply services in the country. There are certain basic principles that all countries must follow, although the extent to which some services, such as education, are fully covered has been a matter of individual choice of nations. In this sense, the GATS is, in part, a voluntary agreement in which countries can decide, through 'request-offer' negotiations, which service sectors they will agree to cover under GATS rules.

So far, Australia has committed itself to some aspects of opening education markets in higher education as well as secondary and 'other' education categories. [See Table I] Neither the US nor Canada took this step in the initial round, although these countries, along with Australia, the

European Union and Japan are among the most vigorous proponents of expanding the coverage of GATS.

This voluntary nature of education coverage in the GATS is a very important feature which business service organisations and the US government have placed high on their priority list of things to change. The 'request-offer' approach, in which each country places on the table those activities it offers to be covered by the agreement, is considered too slow and cumbersome to allow private providers full access to world markets.

**Table 1. Summary of specific GATS commitments to liberalised education services**

Countries	Primary	Secondary	Higher	Adult	Other
Australia		X	X		X
Austria	X	X		X	
Bulgaria	X	X		X	
Congo RP			X		
Costa Rica	X	X	X		
Czech Republic	X	X	X	X	X
European Community	X	X	X	X	
Gambia	X			X	X
Ghana		X			X
Haiti				X	
Hungary	X	X	X	X	
Jamaica	X	X	X		
Japan	X	X	X	X	
Lesotho	X	X	X	X	X
Liechtenstein	X	X	X	X	
Mali				X	
Mexico	X	X	X		X
New Zealand	X	X	X		
Norway	X	X	X	X	X
Panama	X	X	X		
Poland	X	X	X	X	
Rwanda				X	
Sierra Leone	X	X	X	X	X
Slovak Republic	X	X	X	X	X
Slovenia		X	X	X	
Switzerland	X	X	X	X	
Thailand	X	X		X	
Trinidad and Tobago			X		X
Turkey	X	X	X		X
USA				X	X
Total Number of Schedules	21	23	21	20	12

Source: WTO Secretariat, 'Education services: background note', Table 5. This table indicates areas in which a country has committed itself to free trade in education.

When the Seattle meeting of the WTO ended without any agreement over the negotiating agenda for the next few years, a collective sigh of relief was heard from many sources. At the very least, there was a sense that whatever changes happened at the WTO would be slow in coming and there would be time to analyse issues and organise resistance to the most odious plans. This time to analyse and organise was critical for eliminating the MAI.

However, negotiations on free trade in educational services have already begun. This is because the GATS initial agreement provided for continuing negotiations in services, or what is often referred to as a 'built-in agenda' to liberalise services.<sup>3</sup> Sectoral agreements have already been reached on information technology (December 1996), telecommunications (February 1997) and financial services (December 1997). The deliberations over GATS coverage in these areas received very little public scrutiny and have proceeded without controversy.

The new negotiations for services, through the Council for Trade in Services, began at the end of February 2000. These negotiations have been specifically charged to 'achieve a progressively higher level of liberalisation [which shall] be directed to the reduction or elimination of the adverse effects on trade in services ... as a means of providing effective market access' (GATS Article XIX).

## Trade in education

In preparation for the ongoing negotiations in services, the WTO produced a background paper that explains trade in education services and begins to identify some of the so-called 'barriers' to increased access to markets by private education companies.<sup>4</sup> Education services are identified in five main categories based on the traditional structure of the sector. These are, primary education, secondary education, higher education, adult education, and a category labelled 'other,' that includes anything not mentioned elsewhere.<sup>5</sup>

The WTO has identified four main categories of trade in education that receive legal protection through GATS. These categories are extremely broad and take in virtually all ways of providing education services:

- *Cross-border supply* of a service includes any type of course that is provided through distance education or the internet, any type of testing service, and educational materials which can cross national boundaries.
- *Consumption abroad* mainly involves the education of foreign students and is the most common form of trade in educational services.
- *Commercial presence* refers to the actual presence of foreign investors in a host country. This would include foreign universities setting up courses or entire institutions in another country.

- *Presence of natural persons* refers to the ability of people to move between countries to provide educational services.<sup>6</sup>

In each of these categories, so-called 'barriers to trade' have been identified. This has been part of the built-in, ongoing agenda of the GATS. The WTO was helped in this exercise of identifying barriers by private service providers, such as the Global Alliance for Transnational Education (GATE). GATE is primarily an organisation of private, for-profit education providers dedicated to the private provision of education. Its vision statement identifies its purpose: 'GATE is dedicated to fostering access to quality higher education resources on a global basis, focusing on transnational education.'<sup>7</sup>

The kinds of education practices already identified by the WTO as restrictive are instructive of the actions that are the target for change. The main point to be taken from the following list is that many of the practices that are identified as barriers to trade are generally normal and necessary activities of public systems of education.

## "Barriers to trade in education"

- The existence of government monopolies. [This is the most intrusive of all of the 'barriers' identified by the WTO. Most forms of education are supplied through government monopolies that are identified as barriers to the establishment of a commercial presence for foreign education providers. This issue will be discussed at length in the next section.]
- High government subsidisation of local institutions. [This 'barrier' appears to address the issue of government subsidies to domestic private education providers that are not available to foreign education providers. As will be discussed below, this 'barrier' could also apply to subsidies to public institutions in certain circumstances.]
- The inability to be recognised as a degree or certificate-granting educational institution.
- The differential treatment of students enrolled in foreign institutions. [They often do not qualify for the kinds of subsidies that students in nationally based institutions receive, ie, 'student transportation passes and financial assistance']
- Measures that limit direct investment by foreign education providers. This includes equity ceilings that limit the size of foreign establishments.
- National requirements. [This could include any national requirements for setting up an institution or courses, receiving government grants, or any other advantages that are granted to nationally based education service providers.]

- Needs tests. [This refers to restrictions on the type or quantity or quality of services, or eligibility for services provided, according to a government's assessment of what is needed. If a government decided that more resources were needed for educating one specific occupation and reduced funding for another, this could be challenged through trade law. In some countries the issue of needs tests and restrictions on certain types of educational material are closely related. Smaller countries frequently attempt to consciously foster their own country's research and education materials as a way of having students taught information germane to the country.]
- Restrictions on recruiting foreign teachers. [The WTO specifically identifies as problematic national requirements for teachers and board members in Greece and the way in which France limits the inflow of foreign professors through regulations about length of stay, payments of taxes and needs tests.]
- Direct restrictions that limit the ability of students to study in other countries through immigration and visa requirements or currency controls.
- Indirect barriers, including the difficulties encountered in translating degrees into national equivalents. [The issue of degree equivalencies is one that needs to be resolved in an international arena, as are issues related to visa requirements and immigration controls.]
- Unequal access to resources for students
- Restrictive use of national satellites or receiving dishes.

Some of the issues raised in this identification of barriers to the movement of natural persons are issues that deserve to be considered more thoroughly. For example, the difficulties foreign educators, particularly from third world countries, encounter in having their education credentials recognised needs to be addressed in wealthy countries. These, however, do not require the heavy-handed apparatus of the GATS to rectify.

### Implications for the public system

Public higher education can be affected by GATS in distinct ways, depending on the results of the trade negotiations and what the position of various governments is in these negotiations.

If the new round of negotiations succeeds in eliminating the 'barriers' identified by the WTO, the private sector will receive enormous powers to undermine the public delivery of educational services. One specific 'barrier' in the WTO background paper 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 so that this can occur. These agreements are about creating and expanding private markets and, whenever possible, identifying and eliminating government actions which hinder the growth of the private sector. Clearly whenever governments operate in what is, or potentially could be, a 'market', their actions are considered to be 'barriers' to the creation of private markets and, therefore, need to be controlled.

How would the elimination of government monopolies in higher education be carried out? This is an important question because it is highly unlikely that all countries would agree to direct attacks on their public education systems, if only because of the political risks involved. Something more subtle will need to occur at the bargaining table to get governments to agree to the control of government monopolies. There are two main ways in which this can occur with the help of the GATS. One is through language in GATS that specifically prohibits certain types of government action, and the other is through language that strengthens private service provider's claims on public funding.

### Domestic Regulation

A feature of the GATS 2000 negotiations that deserves special attention relates to new ways in which the WTO will be able to monitor "*domestic regulation*." As part of the on-going negotiations of GATS, its Council for Trade in Services has been instructed to develop new 'disciplines' to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade" (GATS Article VI:4).

The unusual feature of these restrictions on domestic regulations is that unequal treatment of foreign and domestic service providers will no longer be the test of whether a practice is illegal under the GATS. Even if some government action treats foreign and domestic education providers the same it could be a violation of GATS. None of the terms – "qualification requirements, licensing requirements and technical standards" – have been defined, but the general sense is that the coverage will be broad. Australia, for example, has formally suggested that "the Working Party treat the three items as indicative only (WTO, 1999)." As one analyst noted, if this proposal is accepted it would mean that the restrictions would apply to all types of regulation (Sinclair, 2000). This is an extraordinary intrusion into the power of national governments within their own jurisdiction, something that no other trade agreement has attempted.

The main point of the domestic regulation provisions is to limit the ability of governments to provide public services. Coalitions of private service providers, such as the Coalition of Service Industries in the U.S. and the European Services Forum are the driving force behind the

wide application of this measure. Governments, like the Australian government, that have aggressive privatisation policies, tend to support the domestic regulation provisions as a means of avoiding the messy political business of deciding on a sector-by-sector basis which industries will be privatised.

### Private Claims on Public Funding

The international corporate world has had considerable experience in honing effective, gradual steps to secure a firm base in undermining services in the public sector. The most striking examples in the US and Australia are in the privatisation of electricity, and, even more spectacularly, the private control of prisons and social welfare programs.

The first step is usually an overall attack on the funding of public institutions, by claiming that taxpayers can no longer afford to support overblown public institutions. As public institutions become weaker because of underfunding they either no longer perform well, and therefore lose public support, or they pursue other funding sources. Universities are doing this through, for example, high user fees in certain programs, appeals for private corporate financing for research and even whole programs, and by becoming more entrepreneurial in foreign markets. These public-private initiatives steer universities toward corporate approaches to education, and, as a result, bring the universities more firmly under the rules of international trading structures.

The other method that the private sector uses effectively is to make sure it can tap into the money the government spends on education. As with the health care industry, private educators are acutely conscious of the *vast sums of public money* spent by governments on the public service. Private educators certainly are not objecting to governments paying for education services. What they want, rather, is to have this government spending directed toward the private sectors, much in the way that private prison and welfare service providers rely on government funding to buy their services. The trade agreements are a crucial step in this direction because they can enable the private sector to insist on a 'level playing field' in the education market.

Obviously in any country where publicly funded university education is of a high quality and relatively inexpensive, students will not rush to enrol in expensive private universities. As the WTO's background paper notes, there are questions about 'whether higher education can be profitable for private investors without public subsidies' (WTO, 1998, p. 9). The task for the private education industry is to organise things in such a way that governments are forced to provide subsidies for private education. Generally, when the private sector begins identifying a specific area for privatisation that has long been in the public sector, it gets a toehold in the area through some marginal activity in the industry. The strategy subsequently is to complain about the existence of government

monopolies and the difficulties of trying to maintain a business. The usual charge is that the public sector can provide the service cheaper than private providers can under normal commercial conditions because the public sector is subsidised by tax dollars.

When this reasoning is established, the trade agreements can support the private sector's claim to access to money in distinct ways. The most obvious is to ensure that the private sector be eligible for 'like' treatment when it comes to government subsidies.

Understanding the way in which the public sector is treated in trade agreements gives some insight into the potential impact of removing 'government monopolies' in education. The international trade agreement that has gone furthest in granting power to control public monopolies is the North American Free Trade Agreement (NAFTA). This document is important not just because it spells out in detail behaviour for government monopolies in goods and services, but also *because it is a framework document for negotiating services agreements* in the wider international arena. The following are the requirements for governments for the regulation and supervision of both private and public monopolies. They must ensure that the monopoly provides

- non-discriminatory treatment to investment of investors, to goods and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
- Does not use its monopoly position to engage, either directly or indirectly ... in anti-competitive practices in a non-monopolised market in its territory that adversely affect an investment of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct. (NAFTA, Chapter 15, Article 1502)

These are strong clauses that greatly inhibit the ability of public institutions to provide educational services in educational markets that are now in the private sphere, as many universities and colleges are now attempting to do. The clause about cross-subsidisation is particularly significant because virtually any commercial activity a university undertakes independently of its main function of public education could be identified as an unfair trade practice if it is in any way supported by the university. Even a common administrative structure could be identified as a cross-subsidy.

The most important requirement in the behaviour of monopolies, however, is that any monopoly, even if it is a government monopoly, must behave according to commercial objectives. NAFTA states that any monopoly must act 'solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other

terms and conditions of purchase or sale' (NAFTA, Chapter 15, Article 1502). The text defines 'in accordance with commercial considerations' to mean any action which is 'consistent with normal business practices of privately held enterprises in the relevant business or industry'.

The main point to make from this is that post-secondary public education is not run mainly 'in accordance with commercial considerations'. The objectives of the post-secondary system are varied, but its very existence in the public sector means that it is not primarily a profit-generating system. The wording in the NAFTA text is present precisely because, in the absence of similar objectives, the cross-comparison between public and private education is difficult to make. However, with the requirement that the objectives of all monopolies be commercial, the justification for equal treatment seems more rational.

### What is next?

US Trade Representative Charlene Barshefsky has identified what she called 'the single greatest threat to the multilateral trading system', as being 'the absence of public support for that system and for those policies which have created that system' (MacCarthy, 1999). She and other government officials around the world are determined that the public must change its collective mind. Public actions over the MAI and the WTO Seattle meeting indicate that public pressure can be effective in allowing people's interests to be heard in the international arena. At the very least these actions slow down the pace of international deep integration and give supporters of the public domain time to analyse events and understand their own interests in what is a complex array of negotiations.

For supporters of public education the continued monitoring of negotiations and informing the public about their potential impact is extremely important. As a first step, all educators should place considerable pressure on their governments to resist expanding the coverage of GATS. But, more importantly, demands need to be made to ensure that no public services undertaken by government can be affected by the GATS. The GATS is an extremely complicated agreement and often governments do not understand the full ramifications of their commitments, so getting the language right is critical.<sup>8</sup> But it is possible to carve out whole sectors from the agreement, as governments have managed to do in areas affecting national security and industries related to national security.

A wide-spread call for an exclusion of services provided by governments in the public interest could be effective in protecting not only education but all other public services provided by government.

Educators need to be wary of claims that we are worse off with the absence of specific agreements on issues. It is true that the WTO can affect education in a variety of

different ways, even in the absence of a specific agreement, but it will be worse if education services, or some aspects of them, are specifically included.

Educators also need to guard against the strategies of 'gradualism' that might be used to secure a minimal type of agreement that can be accepted by all countries. The US Coalition of Service Industries (the organisation that was influential in getting the US to initiate a services agreement in the Uruguay round) anticipated difficulties in securing open trade in all services in the new round of negotiations. It specifically advocates the 'horizontal' approach to rule across all sectors. Its president gave an example of how something simple, like 'national treatment', if applied across all sectors, works to the benefit of private service providers.

The usual practice now in trade agreements that cover some aspect of public services, such as NAFTA, is for governments to specifically list the programs and practices they want exempted from the agreement. This is distinct from a 'carve-out' for all services provided in the public interest because these exceptions for specific programs offer, at best, temporary protection for the public sector because they only protect existing measures and prevent new government programs from being initiated. That is, current policy is frozen and all new measures must conform to the trade agreements. But most problematic is that these lists of exceptions to the trade agreements identify targets for subsequent rounds of negotiations. As the president of the US Coalition of Service Industries noted, any minimal agreement in GATS would at least get countries to list the areas they wanted protected under each service. He stated that this would be 'useful as a transparency exercise, forcing countries to demonstrate explicitly their laws and practices that are trade restrictive' (Vastine, 1998).

### Summary and conclusion

The failure of the Seattle meeting of the WTO to agree on an agenda for negotiating issues over the next few years was a victory for those who want to slow the process of globalisation. This does not mean, however, that all negotiations for trade liberalisation have ceased. Because of the negotiating process on services that was built into the GATS, negotiations on trade in services have already begun and are, for the most part, occurring without public scrutiny. In education services, negotiations will proceed for all levels of education, although the prime target for opening private access appears to be higher education services. In education, the so-called 'barriers' to trade that have been identified by the WTO are all 'subsidies' to the public system that restrict the ability of private providers to compete for students. These barriers include the existence of government monopolies, the inability to be recognised as a degree-granting institution, restrictions on

recruiting foreign teachers, and high government subsidies to local institutions.

The GATS treats a government service, like education, primarily as though its main function is its tradability. As a result, the focus for discussion in the negotiation of further liberalisation of services is how to remove government restrictions on the foreign presence of service providers in a national market. The implications, however, go far beyond market access for foreign providers: these changes will provide an important leverage for all private providers of education to undermine the public provision of education.

This article has explained why it would not be possible for a GATS agreement on liberalised services to leave the public education system intact. Rather, the kinds of measures that will provide market access for private educators will require substantial changes in the ways in which the public system operates.

Opportunities exist for those interested in the public delivery of education to affect the outcomes of the current negotiations. Many countries did not sign onto the 1994 GATS agreement on education and, while the mood of governments now appears to have changed, there is still room for the public to influence the ultimate position of the government. The rush to open all markets to the private provision of services presents serious and substantial threats to the very existence of a vigorous public education system.

## Endnotes

<sup>1</sup> The Canada-US Free Trade Agreement (FTA) was the first major international bilateral agreement to include services. The subsequent North American Free Trade Agreement (NAFTA) between Mexico, Canada, and the US replicated the FTA provisions on services and serves as a model for WTO negotiations.

<sup>2</sup> When the GATS was negotiated and then added to the GATT, the WTO was created.

<sup>3</sup> Article XIX of the GATS provides for the ongoing negotiations:

*In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalisation.*

<sup>4</sup> The information which follows is from WTO, Council for Trade in Services, 'Education services: background notes by the Secretariat', 23 September 1998, <http://www.wto.org/wto/services/w65.htm>.

<sup>5</sup> Only services related to recreation are excluded.

<sup>6</sup> 'Natural persons' are human beings. The term is used to differentiate people from 'legal' or 'juridical' persons, terms that can apply to corporations as well as human beings.

<sup>7</sup> Its website further explains its mission (see <http://www.edugate.org.htm>):  
*Committed to developing and promoting transnational education as a viable means of delivering education to the world population, GATE plans to involve country accreditation parties, college and university bodies, commercial institutions, multinational corporations, and government agencies to face the challenge of evaluating degree programs and other academic standards from countries around the world.*

<sup>8</sup> This sounds bizarre, but Canada, for example, has been affected by WTO rulings on the Auto Pact because it did not fully understand the limitations on the exemptions it thought it had on this issue.

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