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The GATS: What does it mean for post-secondary education in Canada?

One of the most dramatic developments in post-secondary education in recent years has been the rapid expansion of the “international trade” in education services. Post-secondary education has of course always been international in scope. Students and teachers have for centuries crossed international borders as part of their academic pursuits. What characterizes the current environment, however, is not so much this mobility of students and teachers, though the sheer volume of this has increased. Rather, it is the increasingly market-oriented delivery of education and the prominent role played by for-profit providers. The aggressive recruitment of full fee-paying international students, the growth in cross-border e-learning, the franchising of offshore campuses, and the sale of curricula and course materials overseas are all features of an emerging multi-billion dollar trade in education.

To date, this international trade in education has been much more difficult to regulate and codify than the trade in widgets or wheat. Nevertheless, efforts are now being made to do precisely this to develop rules governing the international trade in higher education services. This has been principally occurring through negotiations taking place within the World Trade Organization (WTO) to expand the scope and reach of the General Agreement on Trade in Services (GATS). As negotiations now enter a critical stage, it is important to highlight how the outcome could have far-reaching consequences for universities and colleges in Canada.

The inclusion of post-secondary education within the GATS or similar trade agreements will have far-reaching and negative consequences. Trade agreements are designed to promote commercial interests, and are therefore hostile toward public services which are often viewed simply as barriers to trade. In this way, the legal obligations of the GATS can lock in and intensify the pressures of commercialization and privatization, fundamentally weakening the public mission of universities and colleges.

What is the GATS?

The GATS is one of several agreements adopted in 1994 when the WTO was first established. It is a complex, legally binding, multilateral treaty that places restrictions on a broad range of government measures that may affect the trade in services, including education services. It applies to actions taken by all levels of government, including the provinces and municipalities. Notably, the restrictions of the GATS also extend to “other bodies” exercising powers delegated by governments. These include, for example, professional associations and boards of hospitals, universities and colleges when conferred with powers by any level of government.

The scope of the GATS is very broad. In fact, it is much more than a traditional free trade agreement. Because it covers every possible way of providing a service internationally, the GATS is best seen simultaneously as a trade agreement, an investment agree-



ment, and a labour mobility agreement. This is reflected in the following four “modes of supply” or ways of trading services internationally that are identified in the GATS:

1) Cross-border supply: This describes services supplied from the territory of one member country to another member country. It covers all services provided through international mail, phone, fax, teleconference, and the Internet. In the case of education, an example of this would be on-line courses offered by distance education providers.

2) Consumption abroad: This mode describes services supplied in the territory of one member to a consumer of another member. This would include Canadian university and college students traveling overseas to attend a school.

3) Commercial presence: This refers to services directly provided by a supplier of one member in the territory of another. This covers all foreign direct investment related to services, such as the establishment of a branch campus in Canada by an overseas institution.

4) Presence of natural persons: This mode of supply refers to the temporary entry of people from one member providing a service in the territory of another member. This describes, for example, Canadian professors who travel abroad temporarily to teach courses.

General restrictions of the GATS

At its heart, the GATS is a legally binding treaty that commits members to a liberalization agenda, not just by eliminating barriers to trade and investment, but also by encouraging domestic liberalization in the form of privatization, commercialization, and deregulation of public services like education. While it is true that the GATS itself does not force governments to privatize and commercialize public services, it does have the effect, through the legal obligations it places on members, of intensifying and locking in these pressures.

The GATS contains two distinct sets of restrictions on government measures. The first set applies generally to all services and includes rules on transparency and Most Favoured Nation (MFN) treatment. Transparency rules require WTO members to publicize measures they have adopted or plan to adopt that may affect the trade in services.

While seemingly benign, these requirements might have unexpected consequences for delegated authorities such as university and college boards. For instance, consider that a college adopts a “no sweat” policy that prohibits the college and all retailers on campus from purchasing and selling clothing and uniforms made in sweat shops. This has the practical effect of preventing one particular overseas clothing distributor from having its products sold on the college campus. The college administration understandably did not widely publicize this policy nor did it notify trade officials in Canada or at the WTO. The overseas distributor, however, subsequently presses its government to launch a complaint that Canada violated the transparency rules of the GATS that would apply in this case to retail and distribution services.

It is not clear that such a complaint would be successful, but the example does underline the point that transparency rules apply quite broadly and could potentially lead to pressure to abandon university and college policies and rules that are inconsistent with the GATS. At the very least, transparency rules place an additional administrative burden and cost on delegated authorities in ensuring measures they adopt comply with the obligations of the GATS.¹

Similar concerns are raised by MFN rules. These restrictions require that the best treatment that governments and delegated authorities grant to any foreign service provider be extended to all foreign service providers. It is a principle summarized as “favour one, favour all.” The intention is to ensure that countries do not give special treatment or advantages to companies from one country and not others.

At first blush, this seems relatively uncontroversial if applied to post-secondary education. However, when considered more carefully, potential problems could arise. For instance, suppose a provincial government grants authority to an American institution to offer a university degree in the province. A Chinese institution subsequently applies for degree granting status but is rejected. The institution met all of the same criteria for accreditation as the American university, but provincial officials said they had concerns about awarding degree granting status to the Chinese university, citing concerns about that country’s human rights record and poor respect for student rights and academic freedom. Would this decision violate MFN rules? Again, it is an open question. However, such threats have been made in similar cases², highlighting some of the potential problems that can arise given the extremely broad application of MFN rules. In

any event, if a claim proceeded to a WTO dispute panel, the question would be decided by a tribunal of trade experts who will interpret the matter narrowly.

Is post-secondary education excluded from the general restrictions of the GATS?

Transparency and MFN restrictions apply to all service sectors and all government measures, with the exception of “services supplied in the exercise of governmental authority.”³ WTO officials and many governments — including Canada — maintain this language means that public services like education are explicitly excluded from the transparency and MFN requirements of GATS. In truth, however, the matter is far from clear. The GATS defines government services very narrowly as “any service which is supplied neither on a commercial basis nor in competition with one or more service supplier.” In other words, if a government service is provided on a commercial or for-fee basis, or if there are other suppliers that compete for clients and revenues, the service may not benefit from this general exclusion.⁴

The requirement that a service must be provided on a non-commercial basis to be excluded from the GATS is important in the case of post-secondary education in Canada. Private funding in the form of tuition fees comprises a significant and growing share of university revenues. This raises the question about whether Canadian universities and colleges would be considered non-commercial services under the GATS. While the WTO Secretariat has argued that charging small fees would not automatically lead to the conclusion that a public service is being supplied on a commercial basis, it remains an open question as to what point the fees

charged put the service on a commercial footing. This is particularly pertinent as tuition fees in Ontario and Nova Scotia now constitute more than 50 per cent of university operating revenues.⁵

Similarly, there are clear examples of public post-secondary institutions in Canada directly competing with commercial providers for students and revenues. For instance, most public universities and colleges offer non-credit course instruction in computer training. These courses clearly operate in competition with the many private and for-profit training institutes offering similar courses. Universities and colleges also engage in other commercial activities, such as executive training, contract research, and “ancillary services” such as the operation of parking lots and campus bookstores. These activities outside of the core teaching and research missions of institutions have grown rapidly in recent years. They would likely be seen as separate services delivered on a commercial basis and subject to the general obligations of the GATS and, where Canada has made commitments, to the specific restrictions of the agreement. Consequently, a strict reading of the GATS exclusion for services supplied in the exercise of governmental authority suggests that the general obligations of the GATS likely apply to post-secondary education in Canada.⁶

Specific restrictions of the GATS

In addition to the two general restrictions of transparency and MFN, a second more onerous set of rules applies to service sectors where a WTO member has taken a “commitment” — that is, it has explicitly agreed to liberalize trade. National treatment restrictions require that countries extend the same benefits and privileges that domestic providers enjoy to foreign providers. The second rule - market access - prohibits WTO

members from adopting measures, such as quotas or limitations on for-profit providers that restrict the ability of foreign providers from entering the marketplace.

These latter two obligations could threaten a number of legitimate policies affecting post-secondary education. National treatment requirements, for instance, prohibit any conditions put on foreign suppliers relating to nationality. This would prohibit current rules requiring that hiring preferences be given to teachers who are Canadian citizens.

More controversially, if Canada were to fully include post-secondary education services in the GATS, national treatment rules would require governments to provide the same public subsidies to overseas institutions operating here as they provide to Canadian public colleges and universities. Alternatively, governments could be forced to eliminate those subsidies altogether to comply with national treatment provisions.

Moreover, market access rules would prevent governments from placing any quantitative limits on the number of overseas providers entering Canada, thereby enabling providers from other countries to engage freely in post-secondary education activities. Market access rules would also restrict the ability of Canadian governments to adopt measures and rules that favour public over private institutions. For instance, provinces would not be able to refuse accreditation of for-profit foreign institutions or to require that training benefits and programs be available only at public institutions. Both these measures would be interpreted as restricting the ability of foreign for-profit providers from entering the market.

Consequently, troubling questions have been raised about the potential impact of GATS on the quality of education. GATS

rules are designed to promote free trade in education services by guaranteeing open markets for all providers, public or private, non-profit or for-profit. However, by granting unfettered market access to all foreign education enterprises, governments could very well usher in a flood of providers of questionable quality.

Domestic regulation: undermining regulatory authority?

Beyond the existing restrictions in the GATS, negotiations are also underway to develop new rules on domestic regulation. Domestic regulation refers to measures taken by governments and delegated authorities with respect to qualification requirements and procedures, technical standards and licensing procedures and requirements. One version of the proposed rules would require that these measures are not “unnecessary barriers to trade in services” and are not “more burdensome than necessary to ensure the quality of the service.”

Depending upon the outcome of the negotiations, domestic regulation rules could have a direct impact on post-secondary education in Canada. Disciplines developed on qualifications could potentially allow other countries to challenge our educational requirements, professional accreditation standards, and certification and testing procedures as “more burdensome than necessary”. Rules on licensing procedures and requirements are very broad and could call into question regulations related not just to professional licensing, but also to university and college accreditation. Technical standards refer to the rules according to which a service must be delivered, thereby potentially exposing quality assurance standards governing post-secondary education.

Monopolies and exclusive service providers

There are other rules in the GATS that could potentially affect post-secondary education in Canada. Article VIII prevents government regulated monopolies and “exclusive service suppliers” from subsidizing other commercial activities and thereby “abuse” its monopoly position. If Canada were to make commitments to liberalize education services, this rule could apply to post-secondary institutions. Universities, for example, have the status of exclusive service providers insofar as there are a relatively small number of service suppliers that, through authority granted by governments, have effective monopoly power in granting degrees.⁷ In this sense, complaints could arise that a university is abusing its monopoly position, for instance, by cross-subsidizing the delivery of non-credit courses. That is, it could be argued that the university has an unfair competitive advantage because it is able to offer non-credit courses at lower costs than commercial competitors because it is using its effective monopoly position over degree programs to partially subsidize activities that compete with private training institutes.⁸

Canada's position on education services and the GATS

Because of the far-reaching impact of the GATS, education to date remains one of the least covered service sectors in the agreement. Like most countries, Canada made no commitments on education services in the first round of the GATS. Both the previous Liberal and current Conservative governments have indicated that they will not make any commitments on “private education services” in the current round of talks. What is meant by “public” education, however, has

never been adequately explained. Does it refer only to primary and secondary education? Does it extend to post-secondary education? Is Canada considering making GATS commitments on private education services?

This is more than simply a question of semantics as there is pressure mounting on Canada and other countries to liberalize the trade in private education services. The United States, for instance, has identified this sector as one of its top four priorities in the current round. Along with Australia and New Zealand, the American government is pushing hard for the removal of various “obstacles” that they say prevent their private education providers from operating in other countries — such as policies that require foreign institutions to hire local citizens or that prohibit for-profit or on-line institutions from receiving accreditation.

The inclusion of private higher education services in the GATS could very well pose a serious risk to public universities and colleges in Canada. This is because the distinction between public and private education services is exceedingly difficult to draw. Canada’s “public” universities and colleges are increasingly reliant upon private revenues, primarily in the form of tuition fees. Many private universities and colleges are partially and indirectly subsidized by government student financial assistance programs. Many public universities and colleges offer fully “private” programs such as the executive MBA. Other public institutions have spin-off companies and partnerships with private industry to commercialize research discoveries. McGill University, for example, underwrites the cost and shares the revenues of spin-off companies established to sell the inventions of university researchers, and the University of Calgary has established University Technologies International, a for-profit company to commercialize the univer-

sity’s intellectual property.⁹ In short, the division between “private” and “public” post-secondary education services is blurring. If specific commitments are made on commercial education services, Canada could very well unwittingly expose the entire public post-secondary education system to the more onerous market access and national treatment provisions of the GATS.

Other service sectors with implications for post-secondary education

Although Canada has made no commitments to date on education services in the GATS, commitments taken in other sectors can potentially affect universities and colleges. Research and development services, for instance, appear as a sub-sector of business services in the GATS and involve activities related to natural sciences and engineering, social sciences and humanities, and interdisciplinary research services.¹⁰ Although it is not widely known, it is significant that Canada has taken commitments in social sciences and humanities research and development services in the GATS.

Exposing research and development services to the GATS poses potential risks for post-secondary institutions. Given the mixed nature of research funding for universities and colleges, private R&D service providers could argue that universities and colleges have an unfair advantage because of the public grants they receive through the federal and provincial governments. Similarly, foreign institutions could argue that restricting those grants to domestic institutions only is a violation of national treatment. For this reason, the government of Canada has included a horizontal limitation or reservation for public subsidies for R&D activities. This restricts the application of market access and national treatment rules in this sec-

tor. However, Canada will likely face pressure in the ongoing GATS negotiations to progressively withdraw this limitation.

Commitments that Canada negotiates in professional services may also potentially expose parts of post-secondary education to the GATS. This sector includes such professional activities as accounting, legal services, and architectural services. In many cases, university and college faculty in these fields, in addition to their normal teaching and research duties, provide consulting services. These consulting activities are routinely in competition with private sector providers. Consequently, trade disputes could arise if foreign providers of similar professional services felt that university and college faculty were able to use the resources of their institution to lower their competitive costs. In fact, this concern has already been raised domestically by some private firms who complain that Canadian university professors have an unfair advantage when conducting consulting activities for the private sector.¹¹

Finally, concerns have been raised about the potential impact of the GATS on public sector libraries, including those operated by universities and colleges. Canada has to date taken no commitment in the GATS on library services. Are library services exempt from the general restrictions of the GATS as “services supplied in the exercise of governmental authority”? There is a reasonably strong argument to be made that public sector libraries would be seen as supplying services on a non-commercial basis. However, this becomes less certain where library fees charged to students are substantial, where certain services are provided on a cost-recovery basis, or where a public-private partnership is involved. It is more difficult to establish definitively whether university and college libraries do not supply serv-

ices in competition with the private sector. The issue is particularly murky given the growth of on-line and digital library services and the growth in the number of private information service providers.¹²

The state of the GATS talks

The GATS negotiations, along with the whole WTO Doha Round of talks, are now at a critical stage. After a series of delays and following a formal suspension announced last year, negotiations are now quickly intensifying as officials aim to secure an agreement before the expiration of the Trade Promotion Authority in the United States this year. There remain serious differences between countries, particularly with respect to subsidies and tariffs in agriculture and industrial products. However, if a deal can be brokered on these issues, many countries, including Canada, will be under intense pressure to make more significant commitments in the GATS. The danger is that countries will have little time to fully assess the impact of commitments on vital public services like education.

Clearly, there are significant risks in the GATS for universities and colleges. As such, the Canadian government must not make or seek any commitments in all education or education-related sectors. Keeping education services out of the GATS must not be interpreted as simply being opposed to the internationalization of education. On the contrary, cross-border collaboration and cooperation should be encouraged. It is simply that the GATS is not the appropriate vehicle for achieving this. The GATS is an agreement that would subject post-secondary education to commercial values, treating it simply as a private commodity to be bought and sold in the international marketplace. GATS critics are legitimately concerned that the inclusion of education services will have

a powerful narrowing effect on public policies and intensify the privatization and commercialization of education.

Traditionally, education in Canada has been seen as more than a tradable commodity. It is part of the cultural and social fabric of our society. Ultimately, what some countries see as barriers to trade in education may in fact be legitimate policies enacted to promote Canada's social, cultural, and economic development. ■

Notes

¹ Transparency rules also expose and cast the spotlight on measures taken by governments affecting trade. In effect, this can draw attention to these measures and make them targets for elimination in future negotiations. See Jim Grieshaber-Otto and Matthew Sanger, *Perilous Lessons: The Impact of the WTO Service Agreement (GATS) on Canada's Public Education System*, (Ottawa: Canadian Centre for Policy Alternatives, 2002), pp. 98-100.

² In 1996, the state of Massachusetts passed a law that restricted the ability of companies doing business in Burma from obtaining purchasing contracts with the state government. In effect, Massachusetts was attempting to use its purchasing power to protest human rights abuses of the military dictatorship in Burma. In response, the European Union and Japan, both of which had companies doing business in Burma, began the process of launching a formal complaint at the WTO, claiming the law violated, among other things, MFN commitments taken by the U.S. government under the WTO's Government Procurement Agreement (GPA). The case was subsequently dropped at the WTO because the Massachusetts' law was challenged on domestic constitutional grounds by the National Foreign Trade Council, a pro-free trade business lobby group. The law was eventually struck down in U.S. courts. Nevertheless, the case does raise important and as yet unresolved questions about the potential impact of WTO rules on the ability of governments and delegated authorities to take economic actions against countries and companies in an effort to protest violations of political and human rights.

³ General Agreement on Trade in Services (GATS), Article I:3 c). Available on-line at <http://www.wto.org>.

⁴ A WTO Secretariat's background paper on education services does not directly discuss the application of the "government authority" exclusion to the education sector. However, it concludes that: "Basic education provided by the government may be considered to fall within the domain of, in the terminology of the GATS, services supplied in the exercise of governmental authority (supplied neither on a commercial basis nor in competition)." The statement is noteworthy because it does not deny that basic education may not, in fact, fall within the "governmental authority" exclusion depending upon the degree of private sector involvement and competition in a country's education system. See World Trade Organization, *Education Services, Background Note by the Secretariat, Council for Trade in Services*, 29 September 1998, S/C/W/49, p. 4.

⁵ Canadian Association of University Teachers, *Almanac of Post-Secondary Education, 2006*, Figure 1.4, p.3.

⁶ See J. Anthony VanDuzer, "Health Education and Social Services: The Impact of GATS," in Trade Policy Research, eds. J. M. Curtis, and D. Ciuriak, Ottawa: International Trade Canada, pp. 443-337. Available on-line at: <http://ssrn.com/abstract=747545>. For a legal analysis of the limitations of the GATS exception for government services in the case of education, see Gottlieb and Pearson, *Legal Opinion: GATS Impact on Education in Canada*, October 2000. Available on-line at <http://www.caut.ca/en/issues/trade/GAT-SImpact.pdf>

⁷ Scott Sinclair and Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate* (Ottawa: Canadian Centre for Policy Alternatives, 2002), pp. 61-62.

⁸ This is essentially the argument raised in the NAFTA case involving UPS and Canada Post. UPS is alleging that Canada Post uses its monopoly of letter-mail services to subsidize its competitive services, including courier services. NAFTA contains anti-monopoly provisions that are very similar to those in the GATS.

⁹ Neil Tudiver, *Universities for Sale: Resisting Corporate Control over Canadian Higher Education* (Toronto: James Lorimer & Company, 1999), pp. 157-158.

¹⁰ Department of Foreign Affairs and International Trade, *Research and Development Services Industry: A Discussion Paper in Preparation for the World Trade Organization General Agreement on Trade in Services (GATS) Negotiations*. Undated. Available on-line at: http://www.dfait-maeci.gc.ca/tna-nac/documents/RDPaper_e.pdf

¹¹ Association of Universities and Colleges of Canada, *The GATS and Higher Education: An Update on Canada's Position and Implications for Canadian Universities*, May 23.

¹² Steven Shrybman, *An Assessment of the Impact of the General Agreement on Trade in Services on Policy, Programs and Law Concerning Public Sector Libraries* (Ottawa: Sack Goldblatt Mitchell). Available on-line at <http://www.cla.ca/resources/gats.pdf>

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