

Canadian Higher Education and the GATS: AUCC Background Paper

NOTE TO READER

This paper examines the main aspects of the General Agreement on Trade in Services (GATS) as they relate to trade in educational services. It was developed with a view to helping AUCC Members prepare for discussions with government officials and non-government experts on this topic. Debate with respect to the implications of the GATS for higher education has been polarized. While the liberalization of the education and training industry is of more limited interest to the federal government than the liberalization of other service industries, federal officials nevertheless promote the export of education and training services and downplay the likelihood of any negative outcomes for Canadian higher education. On the other hand, a number of public interest groups, faculty unions, and student associations have predicted dire consequences for public higher education in Canada should the federal government decide to include educational services in the negotiations. In this paper, we have attempted to steer a middle course in what is a very complex field, outlining some of the options available to countries when making commitments under the GATS while at the same time identifying some potential concerns with respect to the Agreement's impact upon Canadian public higher education.

INTRODUCTION TO THE WTO AND THE GATS

1. The World Trade Organization (WTO) is an international trade institution, currently grouping 139 countries, which replaced the General Agreement on Tariffs and Trade (GATT) following the 1986–94 Uruguay Round. The Uruguay Round negotiations included a major revision of the GATT, and resulted in a number of new agreements, including Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the GATS.¹
2. The GATS is a multilateral, legally enforceable agreement governing international trade in services.² All service sectors are covered by the GATS, including transportation, construction, telecommunications, tourism, distribution and entertainment, as well as services which in many countries are traditionally in the realm of the public sector, such as education and health care. Global trade in services currently amounts to approximately USD\$2.2 trillion, or a third of the value of total trade.³
3. Despite the failure of trade talks in Seattle, a new round of services negotiations – GATS 2000 – started on February 25, 2000. Negotiations are underway because of Article XIX of the Agreement,⁴ commonly referred to as the “built-in” agenda of the GATS, which committed WTO Member governments to further liberalization in services starting with a new round in 2000.

¹ See www.wto.org for more information.

² All WTO Members must abide by GATS rules.

³ Guy Karsenty in *GATS 2000 New Directions in Trade Liberalization* Pierre Sauvé and Robert M. Stern Editors. Center For Business and Government, Harvard University.

⁴ Article XIX (paragraph 1) of the General Agreement on Trade in Services (GATS) states the following: “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 liberalization ...”

TRADE IN EDUCATION SERVICES

4. In Canada, most exports of education services currently take place through foreign student enrolment in Canadian institutions. In 1998-99, there were a total of 35,556 international students at the post-secondary level in Canada.⁵ According to DFAIT, international students contributed approximately \$2.7 billion to the Canadian economy in 1996.⁶
5. Canadian universities are also becoming increasingly active in the delivery of education and training programs outside of Canada. According to the most recent AUCC internationalization survey,⁷ the types of education services Canadian institutions are interested in and capable of marketing abroad include joint consulting with foreign based firms, distance education courses, degree programs and MBAs, on-line training and skills development with the private sector, ESL training, twinning programs with colleges, and customized training and technical expertise. The same survey also shows that approximately 42% of institutions are actively involved in the export of educational services. When asked about their level of interest in this area over the next five years, 43% indicated that it would be medium, 27% reported that it would be low, and 28% said it would be high. Only 2% said that it would be nil.

BARRIERS TO TRADE

6. The GATS aims to liberalize global trade in services. Potential barriers to trade in education services include immigration requirements, foreign currency controls, difficulties with respect to credit and credential recognition, the inability to obtain national licences (e.g. to be recognized as a degree/certificate granting educational institution), measures limiting direct investment by foreign education providers (e.g. equity ceilings), nationality requirements, needs tests, restrictions on recruiting foreign teachers, and the existence of government monopolies and high subsidization of local institutions.⁸
7. In September 2000, AUCC sent out a brief survey asking International Liaison Officers of Canadian universities whether they had encountered barriers to trade in education services. Approximately twelve responses were received. Only two institutions reported that they had encountered specific obstacles to their education export activities. These obstacles are the following:
 - Lack of transparency with respect to government policies and procedures
 - Difficulties with respect to recognizing credentials
 - Foreign currency controls
 - Government monopolies and high degree of institutional subsidization

Apart from the restrictions listed above, however, most responding institutions remarked that they have not encountered any barriers. Moreover, many of the institutions that did not

⁵ Statistics Canada. These numbers are up from a low of 31,435 in 1995.

⁶ DFAIT, 1996. In addition, a recent study by the Ministry of Advanced Education, Training and Technology in BC, found that international students contributed up to \$443 million to BC's economy, creating almost as much value added as some of the province's important resource industries.

⁷ AUCC, 2000. *Progress and Promise: The AUCC Report on Internationalization at Canadian Universities*

⁸ WTO Secretariat, 1998. Council for Trade in Services. *Education Services: Background note by the Secretariat*. Document S/C/W/49. Available at www.wto.org

respond to the survey probably chose not to do so because they had not encountered any barriers either. On the whole, survey responses reveal greater concern about Canadian government regulations that limit international trade in education services, in particular with respect to CIC practices regarding visa authorizations for international students, than barriers enacted by foreign countries to limit such trade. Notwithstanding, apart from international student recruitment, Canadian institutions are relatively new to the export of educational services and as activity in this area grows, restrictions can potentially emerge. In addition, countries that do not include education services in their schedules have the option of erecting barriers to the import of education services in the future.

8. Although Canadian exporters of education and training do not appear to be unduly hindered by barriers to trade in educational services, it is clear that these barriers exist for a number of education providers in countries more active in education exports such as the U.S., the United Kingdom, and Australia. The barriers seem to be especially prevalent when it comes to setting up facilities abroad, and less so in restricting the flow of international students. The Global Alliance for Transnational Education (GATE) produced a report detailing what it claims to be barriers to trade in education services.⁹ Some of the barriers this report mentions, as well as the countries where they are found, are listed below:

- Greece restricts the granting of degrees inside the country to Greek institutions only.
- Israel requires foreign institutions wishing to offer degrees in the country to obtain a special license, which is not required for Israeli institutions.
- Turkey restricts the granting of degrees by foreign institutions within the country to foreign nationals only.
- Japan does not accredit institutions wishing to operate in the country unless they offer programs of study similar to Japanese higher education programs as regulated by the Japanese Ministry of Higher Education.
- Mexico limits use of its satellites and other telecommunications infrastructure to state institutions.
- Thailand limits foreign ownership of educational institutions to a maximum of 49%.

THE STRUCTURE OF THE GATS

9. The GATS operates on 3 levels: 1. The main rules and obligations; 2. Individual schedules of specific commitments on market access and national treatment by each WTO Member country; and 3. Annexes detailing rules for specific sectors.¹⁰ The main rules and obligations, which apply automatically to all Members, include Most Favored Nation (MFN) treatment (see paragraph 11), dispute settlement (see paragraph 13), and transparency.¹¹ Individual country schedules list the extent to which market access and national treatment are granted for specific service sectors (see paragraph 14). The Agreement also contains sectoral annexes that detail specific rules for telecommunications, financial services, air transport services, and the movement of natural persons.

⁹ GATE, 1999. *Trade in Transnational Education Services. A Report by the Global Alliance for Transnational Education.*

¹⁰ WTO Secretariat, 1999. Trade in Services Division. *An Introduction to the GATS.* Available at www.wto.org

¹¹ The transparency rule simply requires Members to publish trade related information and measures, set up inquiry points for other Member countries, and notify the WTO of any changes in regulations applying to trade in services.

10. The GATS contains elements of “top-down” and “bottom-up” approaches.¹² The GATS is a “top-down” agreement with respect to the main rules and obligations, and the fact that the agreement covers all modes of supply of a service (see paragraph 18), as well as all government measures that affect services (see paragraph 33). The GATS is a “bottom-up” agreement in that market access and national treatment only apply to the extent that sectors are listed in a country’s schedule of commitments (see paragraphs 14-18).

“TOP-DOWN” ASPECTS OF THE GATS

11. The Most Favored Nation (MFN) principle states that all trading partners should be treated equally.¹³ Therefore, if Canada allows foreign competition in a certain sector, it must give equal opportunities to all other WTO Members in that sector as well. When GATS was negotiated, WTO Member countries had the right to make temporary exceptions from MFN treatment in the form of Article II-Exemptions, under which countries could list exemptions to the MFN clause in order to maintain prior preferential commitments.¹⁴ Under the Agreement, however, no new MFN exemptions can be listed, and existing exemptions are subject to re-negotiation under each round. Furthermore, exemptions “in principle” cannot last for more than ten years.
12. The MFN principle does not preclude a country from not making any specific commitments while at the same time benefiting from increased market liberalization in other WTO Member countries.¹⁵ MFN treatment simply stipulates that all trading partners should be treated equally. Keeping markets closed for all WTO Member countries would satisfy this provision.
13. Article XXIII of the Agreement provides for the settlement of disputes between Members through the WTO dispute settlement mechanism.¹⁶ Under this mechanism, a panel of government officials hears from both sides and decides if a Member has failed to uphold their commitments. The findings of the panel are subject to an appeal process. Once a ruling is issued, the Member must change the WTO inconsistent measure or provide compensation to the complainant. If compensation cannot be negotiated, the affected Member has the right to retaliate by denying market access for services or putting tariffs on goods imported from the Member that brought the complaint forward. The fact that panel and Appellate Body decisions are legally binding is an issue that has made many groups uneasy because these decisions can potentially undermine national sovereignty and government actions taken in the public interest. Indeed, some decisions related to the GATS have already affected countries in ways they had not anticipated (see paragraph 33).

¹² Ministry of Employment and Investment, British Columbia. *Note on Trade in Services*. Available at www.ei.gov.bc.ca

¹³ Article II (paragraph 1) of the GATS states the following: “With respect to any measure covered by this agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.”

¹⁴ The European Community, for example, listed 5 MFN exemptions to protect their bilateral co-production agreements in the audio-visual sector.

¹⁵ This is generally known as the “free-rider” problem.

¹⁶ The WTO dispute settlement mechanism does not have the “investor-to-state” provisions of Chapter 11 of the NAFTA, whereby foreign investors have the right to directly challenge states on their compliance with the agreement.

“BOTTOM-UP” ASPECTS OF THE GATS

14. The GATS is also a “bottom-up” agreement in the sense that market access and national treatment -- the requirement to treat foreign and domestic suppliers equally -- only apply to the sectors in which commitments are made.¹⁷ This is fundamentally different from trade agreements such as the NAFTA, which automatically cover all service sectors unless they are specifically excluded by Member governments.¹⁸ It is important to understand that because countries generally have important national policy objectives in the services sector, the GATS was designed to a certain extent so that countries can tailor their commitments to suit these objectives. It is only by reference to the individual country schedules that one can know the degree to which service sectors have actually been opened. Countries, through negotiation, choose the sectors and sub-sectors they wish to list, as well as the limitations to market access and national treatment they wish to impose. Limitations in the GATS can be sector-specific, applying only to a particular sector or sub-sector, or horizontal, applying across all sectors included in the national schedule. In Canada, provinces are consulted and have considerable input into determining the sectors and sub-sectors for which limitations and commitments are made.
15. According to Article XVI of the GATS, countries can place limitations on market access for each of the 4 modes of trade specified in the GATS. The limitations include the following:
- Limitations on the number of service suppliers.
 - Limitations on the total value of service transactions.
 - Limitations on the total number of service operations.
 - Limitations on the total number of natural persons that may be employed in a particular service sector.
 - Measures which restrict the type of legal entity through which a service supplier may supply a service.
 - Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share holding or the total value of individual or aggregate investment.
16. Limitations can also be placed on national treatment. Therefore, any WTO Member wishing to treat foreign service providers less favorably than domestic providers can do so provided this is specified in the appropriate column of the schedule. The U.S., for example, which has made commitments in Adult Education and Other Educational Services (see paragraph 18 for a description of these categories), has in place a national treatment limitation regarding access to certain grants and scholarships.¹⁹ It is important to note that limitations to both market access and national treatment can be made on a province by province basis.
17. In addition to the limitations that apply to a particular sector, there are some limitations that apply to all sectors. Horizontal limitations are made by mode of supply and applied to all service sectors.

¹⁷ WTO Secretariat, 1999. Trade in Services Division. *The GATS: Objectives, Coverage and Disciplines*. Available at www.wto.org

¹⁸ The Canadian government, for example, excluded health, education, and social services from the NAFTA.

¹⁹ The limitation is the following (see Annex 1): Scholarships and grants may be limited to US citizens and/or residents of particular states and may, in some cases, only be used at certain states institutions or within certain US jurisdictions.

18. In the national schedules, commitments and limitations are indicated for the following four modes of supply: cross-border supply (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3), and presence of natural persons (Mode 4). The four modes, as well as examples of how they apply to the educational services sector, are provided below:

- Distance education is an example of **cross-border supply**: an institution in one Member country exports its services to another Member country.
- Student mobility is an example of **consumption abroad**: citizens of one Member country consume services on the territory of another Member country.
- Educational facilities set up abroad are an example of **commercial presence**: a service supplier from a Member country supplies a service on the territory of another Member country.
- Finally, Canadian faculty lecturing abroad is an example of the **presence of natural persons**: people from one Member country supply a service in another Member country.

THE NEGOTIATING PROCESS

19. The traditional negotiating method by which Members liberalize services trade is the request-offer process, a series of bilateral negotiations of market access and national treatment commitments made on an MFN basis. Sectors for which access is sought do not have to correspond to those for which requests are made. For example, if Canada wants greater market access for service suppliers in transportation services, the country with which we are negotiating can request greater access to our market in education services. Given the dynamics of negotiation processes, some individuals have expressed concern that the Canadian government might be willing to make concessions in areas of public interest to gain access to markets abroad. Of more concern, however, is the stated desire of certain countries to supplement the request-offer approach with “horizontal negotiating modalities”, commitments that would apply across all sectors irrespective of whether Members listed them in their national schedules. This would effectively move the negotiations away from the “bottom-up” approach of the request-offer process towards a top-down approach whereby all sectors are included unless specifically excluded by Members (see paragraph 39).

AREAS EXCLUDED FROM THE GATS

20. The Canadian government has stated a number of times that public education will not be negotiated in the new GATS round. In February, Minister Pettigrew avowed that “...our public health and education systems will not be on the negotiating table”.²⁰ In a document outlining trade priorities, the federal government states that it will “...continue to uphold its clearly defined and long-established objectives to safeguard Canada’s freedom of action in key services sectors, including health, education, and culture.”²¹ And Industry Canada’s discussion paper on the education and training industry (Annex 2 of this briefing package) states that “The GATS covers only primary, secondary, tertiary/higher, adult, and other

²⁰ News release: February 8, 2000 No. 20 Minister Pettigrew Welcomes Start of Agriculture and Services Negotiations at WTO

²¹ DFAIT, 2000. *Opening Doors to the World: Canada's International Market Access Priorities – 2000*. Available at www.dfait-maeci.gc.ca. In addition, it is worth noting that in February, 2001, a report summarizing government consultations on the GATS was released. The report shows that industry associations are supportive of the agreement, while public interest groups are generally opposed to it.

educational services supplied on a *commercial basis where competition is allowed* (emphasis in original)".

21. These assurances, however, apply to the "bottom-up" aspects of the Agreement only (i.e. national treatment and market access). The "top-down" aspects of the GATS apply to all service sectors, including those for which a country has made no commitments in its schedule. The only exception is under Article 1:3 for "services supplied in the exercise of governmental authority", defined in the Agreement as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". Although no authoritative interpretation has been issued thus far, it is not likely that public post-secondary education in Canada would qualify for this exception. Because the phrase "commercial basis" has not been defined, the existence of tuition fees, private contracts, donations, and endowments could potentially be viewed as evidence that public post-secondary education is supplied "on a commercial basis". Moreover, the existence of private universities in many provinces could reasonably be interpreted as meaning that public universities are "in competition with one or more service suppliers".
22. A background note on health and social services prepared by the WTO Council on Trade in Services suggests that Article 1:3 is likely to be interpreted narrowly. The document states the following: "The hospital sector in many countries...is made up of government- and privately-owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided. Supplementary subsidies may be granted for social, regional and similar policy purposes. **It seems unrealistic in such cases to argue for continued application of Article 1:3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services** (emphasis added). In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII."²²

OBLIGATIONS ARISING FROM MFN TREATMENT

23. It would seem reasonable to assume, therefore, that public post-secondary education in Canada is subject to MFN treatment and the other general obligations of the GATS, independent of whether or not commitments are made in the sector. This means that anytime a province allows a foreign university to operate within its jurisdiction, it must extend the same treatment to all other Member countries as well. A number of foreign universities already operate in Canada, either through distance education (cross-border supply) or through an actual physical presence (commercial presence). The University of Phoenix, for example, a subsidiary of the Apollo Group, a \$500-million publicly traded firm based in the U.S., has operated a centre in Vancouver since 1998. Although Phoenix does not have a provincially-granted charter, it is registered with the Private Post Secondary Education Commission of British Columbia. Apollo also intends to apply to the Ontario government to establish centres in that province.
24. It is still unclear at this point whether the actions taken by one province to allow foreign universities to operate within its jurisdiction have implications under the GATS for an institution's ability to set up operations in other Canadian provinces. It is also unclear what

²² WTO Secretariat, 1998. Council for Trade in Services. *Health and Social Services: Background Note by the Secretariat* S/C/W/50. Available at www.wto.org

the implications of on-line institutions are under the GATS since such institutions can be accredited in one jurisdiction yet operate via the Internet in another jurisdiction.

CLASSIFICATION AND DEFINITIONAL ISSUES

25. GATS schedules are currently based on the United Nations Central Product Classification (CPC) System. This system includes twelve service sectors, which are further sub-divided into 160 sub-sectors. The educational services sector is divided into primary education services, secondary education services, higher education services, adult education, and other education services (see Annex 2 page 21 for a complete description of these categories). As part of the technical aspects of the negotiations, the WTO Committee on Specific Commitments is currently working on an improved classification scheme to capture some newer service sectors not currently listed in the UN CPC, in addition to creating more accurate descriptions of existing sectors. Work is set to conclude by March 2001.
26. Countries can also improve and supplement the UN CPC definitions on their own. For example, Norway, Switzerland, and Thailand have added additional distinctions beyond the five educational services sub-sectors listed by the UN CPC when listing educational services in their national schedules (see Annex 1). There is nothing preventing Canada from going beyond the UN CPC definitions either. If Canada were to go ahead and list educational services, defining the sub-sectors as precisely as possible in our national schedule would be advantageous, since it would ensure that commitments (and hence legal obligations) are restricted to very specific areas within the education sector.

CURRENT COMMITMENTS UNDER THE GATS

27. Governments, therefore, are not subject to all the provisions of the GATS. Once commitments are made, however, they are “bound”, meaning that they cannot be withdrawn unless compensation is paid to affected countries.²³ A compilation of national schedules containing market access and national treatment limitations for the four specified modes of supply in all countries that have made commitments in the education sector can be found in Annex 1 of this briefing note. In general, commitments in educational services are broader for industrialized countries than for developing countries, although the degree to which national treatment and market access are granted vary to a great extent even among industrialized countries. Regarding mode of supply, limitations on market access and national treatment are generally rare in the case of consumption abroad, while they are common in the case of commercial presence. Examples of limitations on commercial presence include restrictions on eligibility for financial assistance at non-certified institutions, equity ceilings, and the requirement that foreign institutions can only teach foreign students.
28. In terms of country commitments by sector, education is in the last spot, with only 44 WTO Members having made commitments in this sector. Out of these, 21 countries have made commitments in higher education. Sectors with the most commitments include tourism, financial services, communications, transport, and construction.²⁴ Interestingly, some of the

²³ WTO Secretariat, 1999. Trade in Services Division. *The GATS: Objectives, Coverage and Disciplines*. Available at www.wto.org

²⁴ This gives no indication of the actual level of commitments in terms of market access or national treatment, however.

Least Developed Countries such as Sierra Leone and Lesotho have made full unconditional commitments in the education sector, possibly driven by their effort to encourage foreign institutions to help develop their educational systems.

29. According to Article XXI, a country can modify or withdraw any commitments in its schedule 3 years after entry into force of the agreement. The country must however compensate affected countries on an MFN basis. This process is complex,²⁵ making it relatively difficult for Member countries to withdraw commitments once they are listed.

LEGAL INTERPRETATIONS OF THE GATS TEXT

30. The GATS is the first multilateral agreement governing trade in services, and relatively few countries have made broad commitments thus far. Since there is little legal precedent in the form of dispute resolution rulings to consult, it is difficult at this point in time to assess the likely impact of the Agreement. The fact that no case specific to the GATS has gone through the dispute settlement process might make it too early to fully assess the implications of the GATS with respect to Canadian higher education.
31. Although the GATS provides flexibility for countries to tailor their commitments and impose restrictions and limitations, there are no legal precedents to prove that such exemptions and limitations are effective. On the contrary, exemptions, limitations, and qualifications to international agreements such as the GATS tend to be interpreted narrowly by international tribunals. According to a legal opinion by Barry Appleton, a well-known Canadian trade lawyer, regarding the making of reservations by the Government of Canada for the Multilateral Agreement on Investment (MAI),

“International law has a special interpretive principle for the interpretation of exceptions. This rule is expressed in Latin as *exceptio est strictissimae applicationis* which means exceptions to treaty obligations are construed restrictively. Similarly, within the decisions of the GATT and the WTO, exceptions to trade obligations have been narrowly interpreted. Reservations operate as “mini-exceptions” to a treaty and their use always creates tension between the liberalizing goals of the treaty and the competing goal of maintaining effective government policy tools. These competing goals are likely to lead to disputes as the views of foreign investors may often be different than that of the host government. Despite the protestations of governments when making or when relying upon reservations that they are broad, reservations will be strictly and narrowly interpreted by international tribunals”.²⁶

²⁵ In *An Introduction to the GATS* (1999), the WTO Trade in Services Division states that “The price to be paid will be a readjustment of the balance of advantage in commitments with any WTO Member affected by the change...This will be normally settled by negotiation...In the event that negotiations do not lead to agreement, a country which believes it has the right to compensation may take the matter to arbitration. If the arbitrator finds that compensation is due, the proposed changes in commitments may not be put into effect until the compensatory adjustments are made. Should this requirement be ignored, and the changes be made without compliance with the arbitrators findings, the affected country will have the right to retaliate by withdrawing commitments “substantially equivalent” to these findings...”

²⁶ Appleton & Associates International Lawyers, 1997. *Legal Opinion on National Reservations to the MAI*.

THE “BUILT-IN” AGENDA OF THE GATS

32. In addition, despite the flexibility of the GATS in allowing WTO Members to choose the sectors, sub-sectors, modes of trade, and extent of commitment and limitations on market access and national treatment, Article XIX of the Agreement commits Members to progressive liberalization through further trade rounds. **Therefore, with each round, Members are expected to add sectors or sub-sectors to their schedules, and negotiate away limitations on market access and national treatment.** Once a specific commitment is made, even if it is initially shielded by extensive limitations on market access and national treatment, it is “on the table” for future negotiations and subject to liberalization pressures from other Member governments.

GOVERNMENT “MEASURES” AND THE GATS

33. Although no case specific to the GATS has so far been adjudicated, there has been a significant decision made in the longstanding trade dispute between the U.S. and the European Union over bananas ²⁷ -- both a goods and services dispute -- that will likely have an impact on future GATS cases.²⁸ The decision is with respect to Article 1 of the GATS, which states that “This Agreement applies to measures by Members affecting trade in services”. The panel’s interpretation of this Article widens the scope and application of the GATS to include all government measures that affect trade in services, even if they are non-discriminatory. The panel noted the following:

In the EC’s view...the term ‘affecting’ should be interpreted narrowly so as to mean ‘in respect of’, which is a much narrower concept indicating that the measure in question has to have the purpose and aim of regulating, or at least directly influencing, services as services...In accordance with Article 31 of the Vienna Convention on the Law of Treaties, we note that the ordinary meaning of the term “affecting”, in Article I:1 of GATS, does not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain. On the contrary, Article I:1 refers to measures in terms of their effect, which means they could be of any type or relate to any domain of regulation. Like GATT, the GATS is an umbrella agreement which applies to all sectors of trade in services and all types of regulations...**In sum, we believe that, consistently with their general approach, the drafters [of the GATS] consciously adopted the terms “affecting” and “supply of a service” to ensure that the disciplines of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.**” (emphasis added)²⁹

²⁷ To help former colonial economies in Africa, the Caribbean and the Pacific (the ACP countries), the EU established the Lomé Treaty, which gives favorable treatment for the banana exports of these countries. The U.S. brought forward a WTO challenge, and WTO dispute settlement panels subsequently ruled that the EC import regime violated WTO obligations.

²⁸ Sinclair, 2000. *GATS: How the World Trade Organization’s New “Services” Negotiations Threaten Democracy*. Canadian Centre for Policy Alternatives.

²⁹ WTO Secretariat, 1997. *European Communities - Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States*. Report of the Panel. Document WT/DS27/R/USA

The GATS, therefore, applies not only to those laws directly related to trade, but to any government measure, including not only federal laws and regulations, but also all provincial and municipal measures, whether they be laws, regulations, rules, procedures, decisions, administrative actions, or any other measure.³⁰

SUBSIDIES AND THE GATS

34. Subsidies are considered 'measures' under the GATS.³¹ As a result, when a specific commitment is scheduled, the two disciplines in the Agreement that affect subsidies are MFN, which specifies that if a subsidy is granted to one foreign service supplier, it must be granted to all, and national treatment. Under national treatment, if a country decides to make a full commitment, then any subsidies given to domestic suppliers must also be given to foreign suppliers (countries can, however, impose limitations on national treatment, as discussed in paragraph 16). This has serious implications for Canadian higher education institutions, since it would remove the ability of government to give preferential treatment to domestic providers. If this scenario were to be taken to its extreme, public funding for higher education could potentially be subject to action under the GATS as an unfair subsidy.
35. The GATS does not define subsidies specifically. Article XV of the GATS, however, provides a mandate to negotiate GATS disciplines on subsidies.³² As a result, the Council for Trade in Services established the Working Party on GATS Rules to conduct work on this and other subjects, which is currently underway.
36. In the absence of a definition, it might be helpful to examine the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which does define subsidies.³³ Although the SCM Agreement applies to agricultural goods and industrial products, some of its elements might be relevant in interpreting how subsidies are treated under the GATS. Article 1 of the SCM Agreement defines a subsidy as a financial contribution by a government or any public body within the territory of a Member that confers a benefit.³⁴ The SCM Agreement classifies subsidies into three categories: prohibited, actionable and non-actionable. Prohibited subsidies are those that require recipients to meet certain export targets, or to use domestic goods instead of imported goods. Actionable subsidies are prohibited if the complaining country can prove that the subsidy has an adverse effect on its interests. Non-actionable subsidies are of three types: industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain types of assistance for adapting existing facilities to new environmental laws or regulations. Non-actionable subsidies cannot be challenged in the WTO's dispute settlement procedure. In a footnote to the Article dealing with non-actionable subsidies, the SCM Agreement also notes the following: "It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of

³⁰ Sinclair, 2000. op. cit.

³¹ Sinclair, 2000. op. cit. See also Ministry of Employment and Investment, British Columbia. *Note on Trade in Services*. Available at www.ei.gov.bc.ca

³² Article XV of the GATS states that "Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects".

³³ See Gilles Gauthier in *GATS 2000 New Directions in Trade Liberalization* Pierre Sauvé and Robert M. Stern Editors. Center For Business and Government, Harvard University.

³⁴ Agreement on Subsidies and Countervailing Measures. Available at www.wto.org

Members to provide such assistance”.³⁵ Whether these categories of subsidies, and qualifications as to their “actionability”, would apply to the GATS is not known.

NEGOTIATING AGENDAS OF THE QUAD COUNTRIES

37. Countries are increasingly coming under pressure to open their education markets to foreign service providers. Moreover, much of this pressure is coming from three of the Quadrilateral governments (the fourth being Canada) – the United States, the European Union, and Japan – our most important trading partners and the countries with the most influence at the WTO. Michel Servoz, the EU official responsible for services negotiations, for example, stated that “...some sectors appear increasingly important to us, and we would like to see a higher level of commitments in them. They include environmental, construction, distribution, health, and education services.”³⁶ U.S Trade Ambassador Charlene Barshefsky stated that “Our services agenda covers a vast range of industries, from finance and telecommunications to distribution, health, education, environmental protection, and more...”³⁷ And at the World Services Congress,³⁸ delegates asserted that “It is likely that other countries, especially members of and applicants for membership in the European Union, may take the view that education and training are noncommercial activities and therefore should be off the table during GATS negotiations. This position reflects their self-interest as competitors and the weight of traditional cultural attitudes on the part of their academic and civil service communities, but is not reflective of the facts. It should be resisted.”³⁹ It is important to note, however, that to date, Canada has received no specific requests for commitments from other countries in the education sector.

38. On December 18, 2000, the United States submitted negotiating proposals for 11 sectors, including education services.⁴⁰ Education services are clearly a priority sector. According to data collected by the U.S. Department of Commerce, education services are the fifth largest traded service in the country, worth approximately US\$9.4 billion in 1998.⁴¹ This figure only includes money generated from international students in the U.S., and not the activities of U.S. institutions abroad. The proposal on education services is limited to higher education, adult education, and training, and specifically excludes primary and secondary education. For higher education, priorities are ranked as follows: 1. market access, 2. recognition of credentials, 3. equal national treatment, and 4. movement of persons. The proposal presents a list of potential barriers to trade in education services and calls on WTO members to make additional commitments, as well as to expand market access and national treatment obligations for commitments that have already been made, based on the barriers identified. Until now, the U.S. has only made commitments for adult and other education, but “is willing to consider undertaking additional commitments for higher education and training”.

³⁵ Ibid, footnote 23, p. 237

³⁶ Michel Servoz, Comment, in *GATS 2000 New Directions in Trade Liberalization* Pierre Sauvé and Robert M. Stern Editors. Center For Business and Government, Harvard University.

³⁷ Ambassador Charlene Barshefsky. *Services in the Trading System*. World Services Conference Washington, D.C. June , 1999. See www.ustr.gov

³⁸ See www.worldservicescongress.com

³⁹ U.S. Department of Commerce, 1998. Results of SERVICES 2000 A Conference and Dialogue on Global Policy Developments and U.S. Business. Available at: www.ita.doc.gov

⁴⁰ Council for Trade in Services, 2000. *Communication from The United States. Higher (Tertiary) Education, Adult Education, and Training*. S/CSS/W/23. Available at www.wto.org

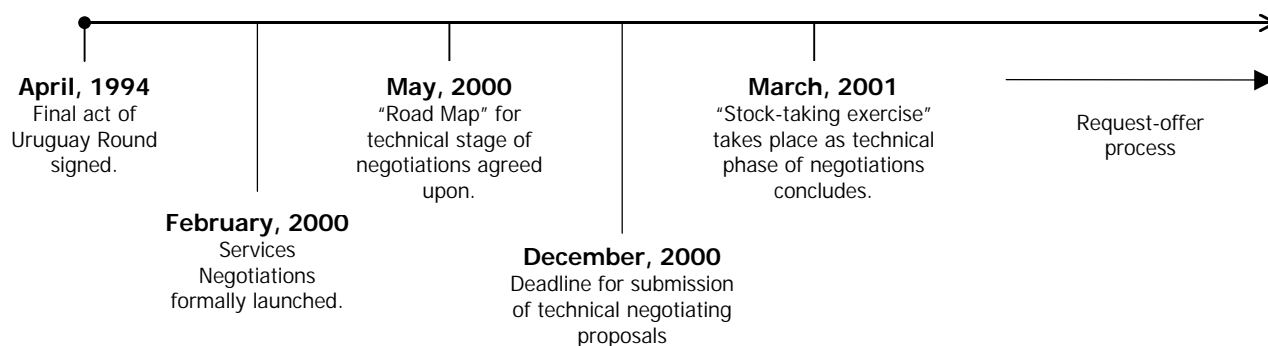
⁴¹ United States Trade Representative, 2000. *Fact Sheet on Services Proposals*. Available at www.ustr.gov

REFORMING THE ARCHITECTURE OF THE GATS

39. Another concern is that the U.S, the EU, and Japan are pushing for reforms to the negotiating process, seeking to make the GATS into more of a “top-down” agreement.⁴² In particular, they are calling for supplementing the request-offer approach (see paragraph 19) with “horizontal negotiating modalities”, commitments that would apply to all Members and sectors. These “modalities” could include more horizontal commitments that apply across sectors, and “formula approaches”, whereby countries would agree to a percentage reduction or elimination of particular market access restrictions. The Japan Federation of Economic Organizations (Keidanren⁴³), for example, has stated that “...consideration should be given to combining the traditional request-offer approach...with a formula approach...It would also be worth considering horizontal liberalization for specific modes...”⁴⁴ These proposals are worrisome; if implemented, they might limit the options available to the Canadian government for protecting services delivered in the public interest.

NEXT STEPS IN THE SERVICES NEGOTIATIONS

40. On May 26, the Services Council agreed on a “roadmap” for the first phase of service negotiations. In the next few months, WTO Members will proceed with the “rules-making” phase during which Members will negotiate new rules for services on government procurement, subsidies, and safeguards. A March 2001 deadline has been set for the conclusion of this technical phase of negotiations. After this, there will be a “stock-taking exercise”, followed, if all goes according to plan, by the start of the actual negotiations. Although there is no agreed deadline for the negotiations, the United States has proposed that they conclude by the end of 2002.⁴⁵ A time-line of the services negotiations is provided below.



⁴² Sinclair, 2000. op. cit.

⁴³ The Japan Federation of Economic Organizations (abbreviated in Japanese as "Keidanren") is a nationwide business association. Its membership includes 1,009 of Japan's leading corporations (including 64 foreign firms), as well as 118 industry-wide groups representing all major sectors.

⁴⁴ Keidanren, 2000. *Expectations on the WTO Negotiations and Requests for Liberalizing Trade in Services*. Available at www.keidanren.or.jp

⁴⁵ USTR, 2000. *Submission by the United States to the WTO Council for Trade in Services in special session*. Framework for negotiation. Available at www.usinfo.state.gov