

# **THE LIBERALIZATION OF EDUCATION UNDER THE WTO SERVICES AGREEMENT (GATS): A THREAT TO PUBLIC EDUCATIONAL POLICY?\***

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## **Abstract**

The liberalization of education under GATS has been in the middle of an academic battle. While the WTO's opponents argue that it is a threat to public and good education, its supporters defend that it as a useful instrument to promote education in an organized and safe way. The main problem is to understand to what extent GATS is, in fact, a real menace to governmental power to adopt internal measures necessary to achieve policies which aim to provide education responsive to national values, culture and needs.

## **I. INTRODUCTION**

The General Agreement on Trade in Services (GATS), one of the agreements administered by the WTO, is very controversial and inspires critics of all sorts, mainly because of its impact on service sectors traditionally provided by governments or under governmental control. Services are, according to Sinclair<sup>1</sup>, 'products of human activity aimed to satisfy a human need, which do not constitute tangible commodities'. According to Grieshaber-Otto and Scott<sup>2</sup>, 'services affect nearly all aspects of our lives: from birth (e.g. midwifery) to death (e.g. burial); the trivial (e.g. shoe-shining) to the critical (e.g. heart surgery); the personal (e.g. hair-cutting) to the social (e.g. primary education); low-tech (e.g. household help) to high-tech (e.g. satellite communications); and from our wants (e.g. retail sales of toys) to our needs (e.g. water distribution)'.

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\* Acknowledgements: Many institutions and people contributed to the preparation of this article. First, the Brazilian Fundação Coordenação de Pessoal de Nivel Superior (CAPES) provided financial support; second, Universidade do Estado do Rio de Janeiro, released me from my regular academic work; third, Middlesex University, in London, and especially Prof. Surya P. Subedi, accepted me as a visiting scholar. Also, many thanks to people who gave me some of their time: Pierre Latrille and Maria Pilinini (WTO staff); Alvaro Vereda (Brazilian Mission at UNESCO); Audo Faleiro (Brazilian Mission at WTO); Dulce Almeida Borges, Komlavi Seddoh, Liliana Simionescu and Kacen Bensalah (UNESCO); Stephan-Vincent Lancrin (OECD); and Dr. James J. Busuttil, of the University of London.

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<sup>1</sup> Quoted in Jim Grieshaber-Otto and Matt Sanger, *Perilous Lesson: The impact of the WTO Services Agreement (GATS) on Canada's public education system* (Canadian Centre for Policy Alternatives, Ottawa, 2002), at 29.

<sup>2</sup> Quoted in Grieshaber-Otto and Sanger, *ibid*, at 6.

The debate on the liberalization of trade in educational services, mainly the higher education segment, is a very complex one. Many scholars argue that education deserves special treatment and cannot be subject to market forces. According to Fasel and Saner<sup>3</sup>, education is a human right which must be accessible to everyone, in optimal conditions. Those authors believe that high quality education can positively influence labour factor conditions of a country's economic development, being of strategic importance to the enhancement of national competitiveness and to the increase of foreign direct investment opportunities. The authors add that education 'is more than acquisition of knowledge and skills: it is also a critical public instrument to ensure students' integration into the civil society, ensuring social and national cohesion and equitable access to knowledge by all strata of society independent of wealth and social class'.

According to Jane Knight<sup>4</sup>, the term 'liberalization' means 'the promotion of increased trade through the removal of barriers which impede free trade'. Liberalization and deregulation are different terms with different implications. In general, while the first implies the access to a certain market under 'fair' conditions, the second implies the lack of State regulatory supervision. Hence, when a government decides to liberalize a particular market, it does not mean that it loses his right to regulate it. In practice, however, liberalization does have an impact on regulatory procedures as governments are prevented from adopting certain measures which might nullify or reduce the benefits from such liberalization

Higher education and, on a smaller scale, adult education, are the main educational sub-sectors affected by liberalization. Besides the fact that higher and adult education is much more critical and imminent to the labor market, primary and secondary education is usually controlled by the State. Basic schooling, as it is considered in many countries, is a government responsibility. Moreover, it seems that the public sector is not able to keep up with the growing demand for higher education, leaving a very lucrative market to private suppliers.

It must be noted that the liberalization of education does not necessarily depend on GATS: it can also be attained by countries unilaterally under their domestic law and thus remain an exclusively internal matter. As a matter of fact, with or without GATS, trade in education is already a reality and is likely to grow in coming years.

Nevertheless, some of GATS' advantages in such process could be:

- Extending the liberalization to all WTO Members in accordance with the most favored nation clause, except in a few cases.

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<sup>3</sup> Sylvia Fasel and Raymond Saner, 'Negotiating Trade in Educational Services within the WTO/GATS context', *Aussenwirtschaft, Jahrgang, Zurich*, n. 59, Vol. II, June 2003, at 276.

<sup>4</sup> Jane Knight, 'GATS – Higher Education Implications, Opinions and Questions', *First Global Forum on International Quality Assurance, Accreditation and the Recognition of Qualification in Higher Education*, UNESCO, Paris, 17-18 October 2002, at 140.

- Providing common rules and principles to all Members and therefore providing economic operators parameters within which to plan and anticipate their investments.
- Guaranteeing foreign economic operators that conditions of entry and operation in the market of the committed country will not change to their disadvantage, except in a few circumstances and in accordance with strict conditions.
- Providing an effective dispute settlement system which can lead to commercial sanctions in case of non-implementation of the decision.

Consequently, GATS may be a useful instrument to achieve the liberalization of education, by providing a common framework for all WTO's Members to open their markets and/or conquer new ones in an organized way. Therefore, it is crucial to understand how education is treated in GATS and to what extent it could be a menace to governments with regard to the promotion of education in their territories according to national values and needs.

## II. How Education Is Featured in GATS

The education sector was included in GATS among the twelve services sectors<sup>5</sup>. Therefore, education service is subject to GATS' general rules and principles, which operate independently of a specific commitment. Moreover, education became susceptible to being a target during GATS' negotiations in order to be liberalized by WTO Members.

### A. Should Education Be Excluded from GATS?

According to Article I, Paragraph 3 (b) of GATS, 'services supplied in the exercise of governmental authority', i.e. 'service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers', as defined in Paragraph 3 (c) of the same Article, are excluded from GATS' provisions<sup>6</sup>. Due to the specific nature of education, the question is whether or not the service sector is included in the meaning of GATS, Article I.3 (b) and (c); and therefore released from general rules and negotiations under GATS.

In principle, the public nature of a given activity is an internal matter, and as such should be defined exclusively by the domestic law of the country where such activity takes place: its juridical regime, decided upon national criteria is crucial to determine whether or not an activity is exercised under public authority. However, WTO Members accepted the transfer of such competence to GATS, overriding the principle of no interference in domestic matters, which otherwise is one of the basic principles in international public law.

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<sup>5</sup> The other sectors are: business services; communication services; construction and related engineering services; distribution services, environmental services, financial (insurance and banking) services; health-related and social services; tourism and travel-related services; recreation, cultural and sporting services; transport services; and other services not included elsewhere.

<sup>6</sup> Note that other GATS' provisions, less relevant and controversial for education services, also exclude some kind of services/measures from GATS scope, like Articles XXVII, XIII.1 and Paragraph O of the Annex on Air Transport Services.

Despite a common belief that GATS would not apply to public services, there is no general exclusion for public services in the Agreement, except some activities expressly named in financial services<sup>7</sup>. According to Sauvé<sup>8</sup>, the fact that some Members have scheduled commitments in basic education services under GATS is a proof that no public services carve-out exists in practice. Nevertheless, whilst this assumption could be accepted concerning private education, it is doubtful concerning public education directly provided by public institutions.

The problem, according to Krajewski<sup>9</sup>, is that the definition of ‘a service supplied in the exercise of governmental authority’ given in Article I.3 (c), completely ignores the nature of the service, i.e, if it has a public interest. Therefore, services that are governmental functions, like health and education, or even those which imply power, like police services, could be in the scope of GATS. In summary, no service can be excluded *per se*.

The question of whether or not public education falls under the definition provided by GATS is even more relevant because some GATS rules and principles, like the most favored nation treatment (MFNT) clause, apply to all services independent of a commitment. Hence, if for some reason, like the demand for supplemental fees for study material or the existence of a hidden cross-subsidization (foreign students paying for national students), public education is considered to be providing a service on a commercial basis, the consequences may be as follows:

- Concerning the MFNT, profit education suppliers from any other WTO Member must have the same treatment as any non-profit education supplier from any WTO Member: the same conditions and limitations must apply, unless an exception to the MFNT is made.
- Where a commitment was undertaken, the market access and national treatment obligations apply to both private and public categories of education suppliers, unless a limitation is entered in both obligations.

According to a note issued in 2002 by the former Director-General of the WTO, Mike Moore, and the Chairman of the WTO Council for Trade in Service, Alejandro Jara, the education services are included under the heading of public services. Therefore, governments are within their rights to regulate and meet domestic policy, and are only linked to specific commitments made. Nevertheless, this note has no juridical force and may be easily nullified in the future by an opposing interpretation, according to Larsen and Vincent-Lancrin<sup>10</sup>.

There is a common understanding that the definition of ‘governmental authority’ provided by GATS is not very clear and may result in some ambiguity. Some authors go even further and assume that the definition is too narrow to include many public services

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<sup>7</sup> See Article 1.b of the Annex on Financial Service.

<sup>8</sup> Pierre Sauvé, ‘Trade, Education and the GATS: What’s In, What’s Out, What’s All the Fuss About’, Forum on Trade in Educational Services, OECD, Washington, DC, 23-24 May 2002, at 3.

<sup>9</sup> Markus Krajewski, ‘Public Services and Trade Liberalization: Mapping the Legal Framework’, Journal of International Economic Law (JIEL), Oxford University Press, Oxford, 6 (2003), at 353.

<sup>10</sup> Kurt Larsen and Stéphan Vincent-Lancrin, ‘International Trade in Educational Services: Good or Bad?’ Higher Education Management and Policy, Vol. 14, N. 3, Paris, OECD, 2002, at 27.

as we understand them today, since both criteria - the non-commercial basis and absence of competition - must apply to a service to be excluded from GATS' scope, according to Krajewski<sup>11</sup>.

In an attempt to guarantee that public education would be out of GATS' scope, many Members limited their obligations on education, as follows:

- a) By naming privately funded education services in their schedules (Australia, Bulgaria<sup>12</sup>, Czech Republic, European Community<sup>13</sup>, Estonia, Georgia<sup>14</sup>, Liechtenstein, Macedonia, New Zealand, Poland, Slovenia and Switzerland).
- b) By expressly excluding education funded from State resources from their schedules (Kyrgyz Republic and Nepal).
- c) By specifying that primary and secondary education are public service functions (Norway).
- d) By recognizing expressly that education is a public service and therefore the State may intervene to ensure the fulfillment of national and social objectives (Panama and Costa Rica).

Even accepting the common understanding at the inter-governmental level that education services supplied by both public and private actors on a non-commercial basis are excluded from GATS, as they are governmental measures, the real problem lies in determining what characterizes 'public education'. In some countries the boundary between public education and private education is not very clear and no legal definition for 'public services' exists, according to Krajewski.<sup>15</sup>

As a matter of fact, Jane Knight<sup>16</sup> identifies some situations where the public nature of education seems doubtful, as follow:

- Countries where a significant amount of funding for public institutions is, in fact, coming from the private sector.
- Public institutions when they charge international students unsubsidized tuition fees whether at home or abroad.
- Public education institutions when exporting their services are often defined as private/commercial.
- Some institutions operate 'for-profit units'.

According to John Daniel, UNESCO Assistant Director-General for Education, UNESCO's Charter of 1945 clearly recognizes education as a public good, quoting the passage that states that UNESCO believes in the unrestricted pursuit of objective truth and in the free exchange of ideas and knowledge. On the other hand, the author argues

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<sup>11</sup> See Krajewski, 'Public Services...' above n 9, at 350.

<sup>12</sup> Besides limits to the commitments undertaken to privately funded education services, this country also stated that such commitments do not refer to State, municipal and private non-secular educational institutions.

<sup>13</sup> Moreover, the EC's schedule states that in all EC Member States services considered as public utilities at a national or local level may be subject to public monopolies.

<sup>14</sup> Concerning specifically secondary and higher education.

<sup>15</sup> Above n 9, at 343.

<sup>16</sup> Above n 4, at 144.

that there is no link between the idea of knowledge as a public good and the State financing of universities. He remarks that the notion of knowledge as the common property of humankind was around long before universities received funds from States. He adds that access to higher education can be equally achieved on an economic basis, i.e. it does not necessarily need to be free: countries with a regime of tuition fees accompanied by bursary schemes enroll more students in higher education – and from a broader socio-economic base. He stresses that it is an error to treat ‘public’ and ‘State’ as synonymous<sup>17</sup>.

Although Krajewski suggests that the main element to identify a public service is rather its common or general interest, i.e. its *raison d’être*, he recognizes that the concept of public service is dynamic and varies over time and space, as the ‘public interest is determined by a particular society in a distinct historical, social, and economic context based on the values of that society’.<sup>18</sup> Due to the ambiguity of the definition provided by GATS, Krajewski proposes different rules and principles which could be helpful in the interpretation of Article I.3 (b) and (c) of GATS. According to the author, moreover ‘good faith’, text and context, intention of the parties and the object and purpose of the treaty (teleological approach), as provided by Article 31 of the Vienna Convention on the Law of Treaties, 1969; and other principles, such as the principles of logic and good sense, can apply. In this particular case, one principle of most importance is the principle of *in dubio mitius* applied to the sovereignty of States. According to the author, that principle suggests that in case of an ambiguous term, the meaning preferred must be the one which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon parties<sup>19</sup>.

After a deep analysis of the terms of every article, Krajewski draws some conclusions. In his opinion, services supplied on a non-profit basis are not supplied on a commercial basis, even if the supplier provides the service for a certain price. According to the author, the problem is that sometimes the same institution or agency provides services on both a commercial and non-commercial basis, when, for instance, higher education institutions charge higher fees to foreign students in an attempt to make a profit and cross-subsidize the education of domestic students<sup>20</sup>.

Concerning competitiveness, Krajewski<sup>21</sup> assumes that a situation of competition exists if two suppliers provide the same service for the same group of consumers. Nevertheless, according to the author, the notion of competitiveness can be wider than the notion of likeness<sup>22</sup>. According to the Panel and Appellate Reports in Japan – Alcoholic Taxes, the decisive criterion to determine whether two products are directly competitive or

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<sup>17</sup> John Daniel, ‘Automobiles, Bananas, Courses, Degrees...: An ABC of Higher Education and Globalisation’, First Global Forum on International Quality Assurance, Accreditation and the Recognition of Qualifications in Higher Education, UNESCO, Paris, 17 – 18 October, 2002, at 21-22.

<sup>18</sup> Above n 9, at 344.

<sup>19</sup> Ibid, at 349 – 350.

<sup>20</sup> Ibid, at 351.

<sup>21</sup> Ibid, at 352.

<sup>22</sup> The question of whether public education service is ‘like’ private education service will be far more crucial in the application of the most **favoured** nation and national treatment clauses, as we will see later.

substitutable is whether they have common end-uses<sup>23</sup>. In that sense, Krajewsky provides the example of rail service and bus transportation that can be used alternatively for similar purposes, but are not like services given the obvious differences between the two modes of transportation. In his opinion, a service is supplied in competition if there is a certain degree of elasticity of substitution, which may vary from country to country and therefore must be determined on a case-by-case basis<sup>24</sup>.

## **B. SERVICES CLASSIFIED AS EDUCATIONAL**

In general, education service can cover different activities: classroom teaching, counselling, tutoring, testing, financial management, grounds-keeping, certification, speech therapy, records keeping, administration services, extracurricular activities, cleaning, school bus transportation, etc.

In order to provide a common classification to WTO Members, a document, based upon the UN Provisional Central Product Classification (CPC) was adopted during the Uruguay Round: the Services Sectoral Classification List<sup>25</sup>. This document works as a facultative guideline, as Members remain free to continue adopting their own denominations; and draw distinctions among different forms of education at the same level, breaking down sub-sectors into smaller units.

Under the UN's hierarchical classification system, education services comprise Division 92 and are classified as one of the nine categories contained in 'Community, Social and Personal Services' (Section 9). Education services are then sub-divided into the categories below, each one, in turn, divided into sub-categories<sup>26</sup>:

921 - **Primary education services:** Pre-school and other primary education services.

922 - **Secondary education services:** General secondary education services, higher secondary education services, sub-degree technical and vocational secondary education services and technical and vocational secondary education services for handicapped students.

923 - **Higher education services:** Post-secondary technical and vocational education as well other higher education leading to a university degree or equivalent<sup>27</sup>.

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<sup>23</sup> WTO, Japan – Taxes on Alcoholics Beverages, Panel Report (WT/DS8/R, paras. 6.22 and 6.28) and Appellate Body Report (WT/DS8-11/AB/R, Section H.1. (a)).

<sup>24</sup> Above n 9, at 353.

<sup>25</sup> MTN.GNS/W/120.

<sup>26</sup> For more details see WTO, S/C/W/49, restricted document, 23 September 1998.

<sup>27</sup> According to Cemell, it is very difficult to objectively define higher education, but there is a common acceptance that higher education has to fulfil four majors functions: 1) the development of new knowledge (the research function); 2) the training of highly qualified personnel (the teaching function); 3) the provision of services to society; 4) the ethical function, which implies social criticism. Nevertheless, new forms of provision by non-university institutions are operating in higher education, like vocational training institutions (e.g. McDonald, Motorola), for-profit corporations (e.g. Microsoft's centers) and distance-learning institutions, which do not always meet such criteria (James Cemell, 'Public vs. Private Higher Education: Public Good, Equity, Access. Is Higher Education a Public Good?', First Global Forum on

924 - **Adult education:** Covers education for adults outside the regular educational system.

925 - **Other education services:** Remains wide open, as it includes education services at the first and second levels in specific subject matters not elsewhere classified, and all other education services that are not definable by level, i.e. language testing, student recruitment, and quality assessment of programs.

As noted by Grieshaber-Otto and Sanger<sup>28</sup>, the CPC classification system presents some failures concerning education services. Besides the fact that there are no distinctions made within the categories for public as opposed to private service delivery; other regular education services are classified in other categories: child care services, for example, are classified in 'Social services without accommodation' instead of primary education; even the catch-all category 'Other education' does not include recreational matters, which are classified as Sporting Services, and the library services are classified as 'Cultural Services'. Another WTO classification anomaly is that research activities of higher education institutions are separated from the Education Services category and are known as Research and Development Services.

On the other hand, many services supplied in an educational environment are not included in Educational Services, as by nature they are not proper education. Therefore, commitments in those service sectors can be used as a way to have access to the educational market, even if no specific commitment was undertaken in it. For example, services involved in management and operation of schools are classified as Business Services (CPC Section 8), and as a result can be supplied in an educational environment.

The problem is that those lapses in Educational Services classification make it more difficult to really understand exactly what commitments were undertaken in education as a whole. It is necessary to look at other related sectors, like Research and Development, Cultural Services, Recreation and Sporting Services, and so on, to be certain of not missing anything.

### **C. EDUCATION MODES OF SUPPLY**

Instead of providing a definition of 'services', GATS refers to the various ways in which services are supplied to delimit its coverage. Hence, the educational service sector covers any international trade in an educational sector provided through one of the four modes of supply: cross-border, consumption abroad, commercial presence and presence of natural person.

By referring to modes of supply to define trade in service, GATS 'extends far beyond the common understanding of trade as an exchange across national borders', according to Grieshaber-Otto and Sanger<sup>29</sup>. Moreover, as noted by the authors, GATS applies to all

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International Quality Assurance, Accreditation and the Recognition of Qualifications in Higher Education, UNESCO, Paris, 17 – 18 October, 2002, at 132)

<sup>28</sup> Above n 1, at 31-37.

<sup>29</sup> Ibid, at 7.

services regardless of the means of technology by which they are delivered<sup>30</sup>. For instance, electronic delivery of services falls under the scope of GATS as it can take place under any of the four modes of supply<sup>31</sup>.

Provision of a service through the **cross-border** mode of supply occurs when the service crosses the border without physical movement of either consumers or service suppliers. Only the service itself crosses the border, which is why this mode of supply is also known as 'internationalization at home'<sup>32</sup>.

Despite the advantage of avoiding the high cost of student mobility, distance education is the more problematic mode of education supply as it can be difficult to control, mainly when it involves institutions that operate solely on a virtual basis<sup>33</sup>.

The **consumption abroad** mode of supply implies the movement of the consumer to where the service is provided; it is also known as international student mobility. This covers only whether a country allows or imposes barriers to its own nationals to consume services abroad, not whether it allows foreigners to consume services in its territory. Generally, countries have few possibilities to prevent such mobility, but can restrain it by, for instance, not translating degrees obtained abroad into national equivalents.

The **commercial presence** mode of supply occurs when a service provider establishes itself in the territory of a foreign country in order to render its service<sup>34</sup>. In fact, the inclusion of such mode of supply in GATS makes it the world's first multilateral agreement on investment.

Most of the time, suppliers choose their host country based upon economic criteria, usually poor or developing countries, in order to reduce their cost and become more competitive, but accreditation facilities and regulation as a whole are also considered.

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<sup>30</sup> Ibid, at 95.

<sup>31</sup> To exclude a means of providing a service from a commitment in a given service sector, Members must enter a limitation to the corresponding service sector (Austria, for instance, excluded from its commitments adult education provided by means of radio or television broadcasting).

<sup>32</sup> In Mexico- Telecommunications case, the Panel was asked to clarify the definition of cross-border trade in services. In its Report, the Panel found that GATS, Article I.2 (a), does not address the service supplier or specify where the service supplier must operate or be present in some way, much less imply any degree of presence of the territory into which the service is supplied. Therefore, the place where the supplier itself operates, or is present, is not directly relevant to the definition of cross-border supply (para 7.30). Complementarily, the Panel relied to GATS Annex on Telecommunications to conclude that the cross-border supply of a service does not require a supplier operate, or to be present in some way, on both sides of the border, nor an 'end-to-end' service by one and the same operator (paragraphs 7.32 and 7.36). Hence, the linking of networks of different operators at the border is understood as a cross-border supply of a telecommunication services (WTO Panel Report, Mexico – Measures Affecting Telecommunication Services, WT/DS204/R, adopted 1<sup>st</sup> June 2004).

<sup>33</sup> See Larsen and Vincent-Lancrin, 'International Trade...' above n 10, at 31.

<sup>34</sup> According to the Panel in Mexico-Telecommunications (above n 32, para 7.375), the supplying of a service through commercial presence does not exclude a service that originates in the territory in which a commercial presence is established, but is delivered into the territory of any other Member.

As remarked by Zdouc<sup>35</sup>, besides the fact that in their schedule of commitments Members can specify the type of juridical person entitled to operate in their territory, GATS does not limit the discretion of Members to define different types of juridical persons (e.g. corporations, trusts, partnerships, joint ventures, sole proprietorships or associations) in accordance with their own national standards and legal traditions. Nevertheless, branches or representative offices must be treated as entities equivalent to juridical persons, although the 'real' juridical person behind the branch or representative office is not located within the Member's territory.

The **presence of natural persons** implies the movement of persons on a temporary basis to provide a service in a foreign country. This mode covers only the acceptance of foreign service suppliers into a Member's territory, not the sending of its own nationals abroad as service suppliers. Most of the time, this mode of supply is linked to the commercial presence mode, so the person is an employee of a service supplier which benefits from market access in a commercial presence mode. Nevertheless, the person can be a supplier itself, working on his/her own.

Recognizing that the movement of natural persons plays an important role in process of liberalizing services, and it is a sensitive area as well, GATS provides an annex to clarify some questions on this matter.

First of all, GATS does not provide any automatic right for natural persons to settle down in another country, nor does it apply to persons seeking access to the employment market, citizenship, residence or employment on a permanent basis. These rights only exist in so far as they are subject to a specific commitment. Even so, Members maintain their competence to regulate the entry and the stay of natural persons in their territory, and are able to adopt measures which are necessary to protect the integrity of its territory, and to ensure the orderly movement of natural persons across their borders.

Nevertheless, immigration policy cannot be applied in such manner as to nullify or impair benefits accruing under the terms of a commitment on personal presence, as requested in GATS' Annex, n. 4. According to McGovern<sup>36</sup>, this provision appears to be an explicit application of the notion of non-violation nullification or impairment.

Despite the general obligation of non-discrimination between Members, the fact of requiring a visa on a selective basis, i.e. for only certain Members, is not considered a default of commitment, according to the Annex on Movement of Natural Persons, footnote 13.

### **III. SUBMITTING EDUCATION TO GATS' OBLIGATIONS AND PRINCIPLES**

Once covered by GATS, Members shall respect principles, rules and guidance in education sector regulation provided not only in that Agreement but also in the WTO system as a whole.

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<sup>35</sup> Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS', *Journal of International Economic Law (JIEL)*, Oxford University Press, Oxford, 2 (1999), at 324.

<sup>36</sup> Edmond McGovern, *International Trade Regulation*, Chapter 31 'Services', Globefield Press, UK, 2000, at 31 15-6.

## A. GATS' STRUCTURE AND NATURE

GATS is a complex agreement, which includes a main text (the 'GATS'), eight annexes and national schedules of commitments. GATS provides a framework for trade liberalization in services, stating general rules and principles, as well as rules which only apply in relationship to specific commitments. Its main concern is to provide a minimum 'conduct code' on local measures related to services and to avoid discrimination between WTO Members. In its annexes, GATS provides complementary rules and orientations concerning the exceptions to most favored nation treatment, the movement of natural person's mode of supply, and some services sectors<sup>37</sup>; however, education is not specified. The national schedules of commitments are the lists in which Members undertake obligations related to market access, national treatment and other optional obligations related to a given service sector. The list also contains exceptions entered by Members to the most favored treatment obligation. It is through the national schedule of commitments that liberalization in education can really be achieved.

Since GATS entered into force, education has drawn very little attention compared to telecommunication and financial services. The lack of commitments in education is probably due to the fact that education is politically sensitive and is not one of the sectors specifically targeted in the current round of GATS re-negotiations<sup>38</sup>.

Currently, 57 Members have undertaken specific commitments in education under GATS, as follows: **Moldavia, Slovak Republic, Jordan, Lesotho, Sierra Leone, and Norway** for all education sub-sectors; **Kyrgyz-Republic, Albania, Estonia, Georgia, Hungary, Latvia, Lithuania, Poland, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Ireland, Luxembourg, United Kingdom, Portugal, Spain, Japan, Liechtenstein, and Switzerland** for all education sub-sectors, excepted other education; **Chinese Taipei, Croatia, and Oman** for all education sub-sectors, excepted primary education; **China and Turkey** for all education sub-sectors, excepted adult education; **Jamaica, Mexico, Panama, and Costa Rica** for primary, secondary and higher education; **Cambodia and Kingdom of Nepal** for higher, adult and other education; **Austria, Bulgaria and Czech Republic** for primary, secondary and adult education; **Gambia** for primary, adult and other education; **Armenia** for higher and adult education; **Australia** for secondary, higher and other education; **Macedonian** for secondary, higher and adult education; **Slovenia** for secondary and higher education; **United States** for adult and other education; **Thailand** for primary, secondary, higher and vocational, professional and/or short courses education; **New Zealand** for primary, secondary and tertiary education; **Congo Republic** for higher education only; **Ghana** for secondary and specialist education; **Mali** for adult and craft education; **Rwanda** for adult education only; **Haiti** for rural training center for adult only; **Trinidad and Tobago** for specialist teachers and lecturers in the tertiary level.

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<sup>37</sup> Maritime, air transports services (2 annexes), financial services, telecommunication and basic telecommunication services.

<sup>38</sup> The new round of negotiations in services is still in progress, notwithstanding the Ministerial Declaration adopted by WTO Ministers at the fourth Ministerial Conference in Doha, in November 2001, which stated that such negotiations should be completed by 1<sup>st</sup> January 2005.

Specific commitments are voluntary, as GATS does not require Members to open their service market to foreign services suppliers. Every Member has sovereignty to decide what service sector or sub-sector will be included in its list (positive list) as well the extension of liberalization accorded to each one. Consequently, only the sectors and sub-sectors listed are subject to three kinds of commitments: market access (second column), national treatment (third column), and additional commitments<sup>39</sup>, as well to complementary rules concerning domestic regulation. Despite the fact that the liberalization of services depends exclusively on the free will of each WTO Member, some GATS opponents wonder about the 'voluntary' nature of those commitments, as the negotiations, specially at the stage of 'behind closed doors', operate on a 'request-offer' basis.

National commitments are made under the MFNT clause, as such obligation have a general impact, unless an exception applies. That is why specific commitments have to be analyzed conjointly with the most favored nation treatment clause exceptions list of each Member. Although no exception to the MFNT was entered directly concerning the education sector, exceptions related to modes of supply in general can apply to any service sector, including education<sup>40</sup>.

Commitments in education are entered into force on the date agreed by Members (for instance, the 1st January 1995 for commitments undertaken during the Uruguay Round in 1993). In principle, dates of entry into force and implementation of a commitment are coincident, as was the case of commitments in education, even though GATS, Article XX.1.d, permits commitments to be phased over time, i.e. implementation within a time frame (where the date of implementation differs from the date of entry into force)<sup>41</sup>.

Once ratified by a Member, its commitments become binding. Nevertheless, some Members wishing to be free, in a given sub sector and/or a mode of supply, to introduce or maintain measures inconsistent with market access or national treatment, entered the term 'unbound'. This was the case of the majority of commitments undertaken in the presence of natural person. These are generally bound only for persons employed by foreign institutions, to which were accorded permission to provide education service through the commercial presence mode of supply; but not for persons who are independent or are seeking a job<sup>42</sup>. Other common unbound entries refer to educational services funded from State sources.

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<sup>39</sup> This is for residual commitments and generally concerns qualifications, standards and licensing matters.

<sup>40</sup> For instance, the EC exceptions list to the MFNT indicates that any arrangement, current or future, concluded between the EC and some countries concerning juridical or physical person settlement rights and exemption of work permission for physical persons are not subject to the MFNT for a non-determinate period.

<sup>41</sup> That possibility does not mean it is open-ended nor does it leave the time of the occurrence in doubt, according to the Panel in the case Mexico - Telecommunications (above n 32, para 7.366). The Panel determined that Article XX.1 could not be interpreted to allow a window of discretion with regard to temporal aspects of these commitments that could erode the practical value of a commitment (para 7.368). According to the Panel, where a Member does not specify a time frame, implementation must be deemed to be concurrent with the entry into force of the commitment.

<sup>42</sup> The EC's schedule entered 'unbound' in the presence of natural persons, even when related to a market access mode of a supply, excepted France and Luxembourg which are bindingly committed to the temporary entry of professors, since some conditions are fulfilled.

Members desiring to withdraw or modify a consolidated commitment have to apply the procedure provided in GATS, Article XXI. This includes some conditions, such as: waiting three years from the entry into force of the commitment, and providing an agreement or a compensatory adjustment on a MFN basis to 'affected Members'. The three years period can be reduced to one year, provided that the Member demonstrates that it cannot wait the three years, according to GATS, Article X, para 2<sup>43</sup>.

Any controversy concerning the compensatory adjustment can be subjected to arbitration<sup>44</sup>. The modifying Member shall not implement its proposals until compensation is provided according to the arbitration's finding. If it does so, any affected Member that participated in the arbitration may, with respect to the modifying Member, modify or withdraw substantially equivalent benefits in conformity with those findings, according to GATS, Article XXI.4.b. As the provision does not determine the appropriate counter-measure, Members affected must, themselves, determine the 'substantially equivalent benefits', which can also be brought to a new arbitration process in case of a disagreement between involved Members.

Note that, unlike GATT, GATS does not provide the possibility of adopting automatic safeguard measures in services. Consequently, governments are prevented from reversing, even temporarily, commitments that have produced catastrophic consequences. Until an agreement is attained to regulate the adoption of safeguard measures in services, as requested in GATS, Article X, the procedure of Article XXI remains the only way to withdraw or modify a commitment, which can be a significant problem to countries that have made errors in their schedules, or to others which face emergency situations, according to Ellen Gould and Clare Joy<sup>45</sup>. To turn Article XXI into an efficient option, the Report of the United Nations High Commissioner of the Economic and Social Council (Doc. E/CN.4/Sub.2/2002/9, para. 64) suggests that some flexibility should be given to developing countries for human rights purposes, given these countries are in a dynamic process of building social structures. In that sense, the compensatory adjustment could be inappropriate and therefore set aside.

GATS as a whole is binding on Members. Therefore, any disrespect of its rules and principles can be brought before the WTO's Dispute Settlement Body and eventually cause the suspension of concessions to the failed Member. Only through a waiver may Members be released from their obligations under GATS, and then only for a short period. As a matter of fact, under the WTO's Charter, paragraph 3 of Article IX, when the circumstances justify, Members can be permitted to escape from any of their duties

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<sup>43</sup> In principle, such possibility should have ceased to apply after three years of the date of entry into force of the WTO Agreement, i.e. 31<sup>st</sup> December 1997. However, as the negotiations on emergency safeguards are still in progress and the Council for Trade in Services extended its deadline (S/L/159), the one year period remains a legal option.

<sup>44</sup> As the provision does not state how the arbitration is to be established, it is supposed that the WTO's Dispute Settlement Understanding, specifically the arbitration part, applies, where appropriate.

<sup>45</sup> See Ellen Gould and Clare Joy, 'In Whose Service? The Threat Posed by the General Agreement on Trade in Services to Economic Development in the South', December 2000, available at <http://www.wdm.org.uk/campaign/gats.htm#gatsreport>.

under the WTO legal system for a certain period without a compensatory obligation<sup>46</sup>. The decision to waive a Member's obligation is adopted, in principle, by consensus of the Ministerial Conference. Failing consensus, a waiver must be adopted by three fourths (3/4) of the Members.

The mandatory and continuing nature of GATS is probably one of its main problems for those who fear its negative effects on education, as Members have almost no possibility of changing their minds in the future unless they withdraw from the WTO, in accordance with Article XV of the WTO's Charter.

## **B. INTERNAL GENERAL PROVISION STANDARDS**

In order to guarantee a minimum secure environment for foreign operators, and maximize the benefits of GATS, Members are expected to adopt some conduct, and to follow some orientations, according to GATS' provisions. These provisions apply to all services, whether or not included in a national schedule of commitment, except for services outside the scope of GATS.

Concerning the **transparency** provision, Members shall provide, publish, and promptly reply, to all requests made by any other Member, concerning measures of general application, which pertain to or affect the operation of the Agreement. Moreover, Members shall create inquiry points to provide specific information on such measures.

According to GATS, Article III.bis, Members are released from providing any confidential information, 'the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private'. This attenuation of the transparency rule is applied in every situation, even where a specific commitment has been undertaken.

According to Grieshaber-Otto and Sanger, the transparency rule is apparently benign, but in reality it 'entails new administrative demands that may be particularly onerous for local school boards and provincial governments that administer education systems'. The authors argue that some small institutions generally have neither the financial resources nor the expertise to vet their practices to determine if they conform to the complex maze of GATS rules. Moreover, according to them, 'these reporting requirements are also a means to target education measures for further liberalization in subsequent negotiating rounds'<sup>47</sup>.

There is also the fear that under the banner of transparency some other obligations could be introduced in the future, such as prior consultation with foreign interests whenever a Member intends to introduce a new measure affecting services. Moreover, there is a risk that only measures in accordance with international standards be accepted.

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<sup>46</sup> The fact is that besides its limited duration in time, the waiver's procedure has a high political cost, as it is usually alleged.

<sup>47</sup> Above n 1, at 39 and 92.

Another GATS' general obligation is related to **internal procedures** (Article VI.2.a), as Members are required to ensure due access to administrative, judicial or arbitral tribunals. This includes the possibility of review, to deal with administrative decisions affecting trade in services, as far as this obligation is not in contradiction with their constitutional structure or the nature of their legal system, as provided in GATS, Article VI.2.b.

Concerning **competition**, Members shall ensure competitiveness in their territory, in accordance with GATS guidance provided in Article VIII. Nevertheless, since GATS does not provide common rules on competition, any problem in this area remains an internal one, governed exclusively by domestic law, unless Members have voluntarily undertaken obligations under GATS, concerning competition related to a specific service sector<sup>48</sup>.

With regard to **governmental subsidies**, Members are called to enter into negotiation with a view to develop subsidy disciplines in order to avoid distorted effects on trade in services. A working program has yet to be decided upon to conduct such negotiations, which must take into account the important role of subsidies in developing countries, allowing them some flexibility in this matter (GATS, Article XV). In that sense, Jane Knight<sup>49</sup> opposes the interpretation that government subsidies in education are unfair measures or barriers which must be removed as, according to the author

*public subsidies and cross-subsidization of educational programmes are a common and often necessary practice in public higher education. Cross-subsidization can be a means of reducing poverty, assisting the development of local infant service suppliers, increasing universal access to essential services and thus promoting human rights.*

The fact is that GATS does not provide any guidance or remedy to combat 'illegal' subsidies, not even the possibility of adopting countervailing measures. Therefore, Members affected by such practices can only request consultations, which shall be accorded 'sympathetic consideration' by the claimed Member (GATS, Article XV).

### **C. THE NON-DISCRIMINATION PRINCIPLE**

One of the main principles upon which GATS is based is non-discrimination, which applies irrespective of the aims and effects of national regulations. This principle operates basically through two GATS obligations: the most favored nation treatment (general obligation) and the national treatment (applicable only in relation to a specific commitment). Therefore, unless Members have listed exceptions to these obligations, they cannot deny a privilege allowed to one provider of a service, foreign or domestic, to other providers. In that sense, standards and quality, for instance, must be the same for all possible competitors. On the basis of the Panel Report on EC – Bananas case<sup>50</sup>, Zdouc

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<sup>48</sup> This was particularly the case in basic telecommunication services, as many cases in this sector are characterized by monopolies or market dominance.

<sup>49</sup> Above n 4, at 146.

<sup>50</sup> WTO Panel Report, EC – Regime for the Importation, Sale and Distribution of Bananas, WTO/DS27/R, adopted 25 September 1997.

points out that a *de facto* differentiation, in absence of a *de jure* differentiation, is also contrary to the principle of non-discrimination<sup>51</sup>.

Even though there is nothing in the Agreement that forbids Members from discriminating among users of a service, some countries entered limitations in their schedule with regard to consumer's personal conditions, stating that scholarships or educational fees are accorded upon a selective criteria related to the person's nationality, citizenship, and/or residence in a certain region<sup>52</sup>.

As noted by Carreau and Juillard<sup>53</sup>, unlike GATT in its Part IV, GATS did not officially adopt the principles of non-reciprocity and most favorable treatment to regulate the North-South trade in services. Such absence could be regarded as in contradiction to some GATS provisions which make reference expressly to developing countries, mainly by requesting Members to take into account their development situation (cf. GATS preamble, fourth paragraph, and articles IV, V.3. a and b, XI, XV, XIX.2), even though the positive effects of those vague provisions should be regarded with scepticism.

### ***1. The National Treatment Obligation***

The national treatment obligation only applies when a Member undertakes a commitment in its schedule according market access to a specific service sector. Basically, national treatment aims at equal treatment for foreign and domestic providers. Nevertheless, discriminatory measures which aim to ensure the equitable or effective imposition or collection of direct taxes in respect to services or services suppliers of other Members, are outside the national treatment scope, according to GATS Article XIV.d (general exception). The national treatment under GATS, Article XVII, implies the obligation to accord to services and service suppliers of any WTO Member treatment not less favorable than is accorded to like domestic services and service suppliers<sup>54</sup>.

Moreover, GATS, paragraph 3 of Article XVII, states that even identical treatment can be considered less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or like service suppliers of any other Member (e.g. prior residence or experience in the Member's territory). Hence, if the treatment of the two is formally identical, a national treatment commitment could still be breached if it is impractical or more difficult for the foreigner to comply with the government's requirements. Nevertheless, according to Julia Nielson, Senior Trade Policy Analyst at OECD<sup>55</sup>, a measure may not be considered discriminatory if it is

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<sup>51</sup> See Zdouc, 'WTO Dispute Settlement...', above 85, at 295.

<sup>52</sup> See commitment schedules of Bulgaria, Croatia, European Community, Estonia, Lithuania, Mexico, Norway, Switzerland, and United States.

<sup>53</sup> Dominique Carreau and Patrick Juillard, *Droit International Economique*, Part I, 'L'échange international de services', Dalloz, Paris, 2003, at 285.

<sup>54</sup> As the 'likeness' is a issue common to national treatment and most favored nation treatment, it will be analyzed jointly in a specific topic.

<sup>55</sup> Julia Nielson, 'Trade Agreements and Recognition', in *Quality and Recognition in Higher Education – The Cross-Border Challenge*, OECD, Paris, 2004, Chapter 10, at 184.

genuinely open to both nationals and foreigners to fulfil – e.g. a requirement for a degree of proficiency in a certain language need not be discriminatory; as it is really possible for foreigners to be able to learn the language and achieve the required level of proficiency.

GATS provides in a footnote of Article XVII that a Member is not responsible for the inherent disadvantage that a foreign supplier faces in the Member's market due to consumer preferences for domestic supply. On the other hand, according to the Panel Report on Canada – Certain Measures Affecting the Automotive Industry<sup>56</sup>, even a requirement that imposes no present disadvantage may be forbidden because of its potential to do so in the future.

In order to avoid any misunderstanding about the extension of the national treatment obligation, an Explanatory Note, issued in September 1993 by the WTO Secretariat for countries considering making their initial set of GATS commitments, stated that:

*There is no obligation in GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another country.*

Therefore, Members are not obliged to extend any advantage or benefit granted to a service supplier settled in its territory to those which provide the 'like' service from abroad, including distance education or internet delivery providers, even though a commitment has been undertaken in 'cross-border' or 'consumption abroad' mode of supplies. Nevertheless, one must have in mind that this moderation only applies positively, i.e. no restriction can be imposed on these foreign providers, unless the same restriction is imposed on providers under the Member's jurisdiction.

According to Raj Bhala<sup>57</sup>, national treatment can be a problem for countries in which the government is a market participant in addition to the market regulator. In principle, the government should apply all internal laws, regulations, taxes and standards neutrally among all market participants. Nevertheless, the author hardly sees a government taxing itself. This kind of problem is the reason for the huge exceptions entered by certain Members to the national treatment obligation concerning taxes.

## 2. *Most Favored Nation Treatment (MFNT)*

The most favored nation treatment under GATS, Article II, is a general rule and therefore applies irrespective of the existence of a specific commitment in a given service. It has the same meaning as in GATT, i.e. non-discrimination among WTO Members concerning services or services suppliers of a like service. Therefore, any privilege or benefit allowed to a service or service supplier from a country (WTO Member or not) must be extended to service suppliers from all WTO Members, i.e. if you favor one, you must **favor** all. According to Grieshaber-Otto and Sanger<sup>58</sup>, the risk of that obligation is

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<sup>56</sup> Quoted in McGovern, above n 36, at 31 16-7.

<sup>57</sup> Raj Bhala, *International Trade Law: Theory and Practice*, Part II, Chapter 12, 'Basic obligations of the GATS and NAFTA', second edition, Lexis Publishing, Washington, D.C., 2001, at 737.

<sup>58</sup> Above n 1, at 93.

its ‘potential to turn a modest market opening policy experiment from a rivulet into a torrent’.

As noted by Carreau and Juillard<sup>59</sup>, the most favored nation treatment under GATS differs from the one under GATT in the sense that GATS refers also to service suppliers in addition to services, while GATT only refers to goods, not to producers or exporters. Hence, the rule under GATS has a direct effect over physical and juridical persons, which are direct beneficiaries of the obligation, according to the authors.

Unlike the national treatment clause, Article II of GATS does not provide any complementary elements to determine whether or not a measure is contrary to most favored nation treatment.

The Panel on the EC – Bananas case<sup>60</sup>, on the basis of Article 31.1 of the Vienna Convention on Treaty, understood that the obligation in Article II.1 of GATS to extend treatment no less favorable should be interpreted in *casu* to require providing no less favorable conditions of competition (like in the national treatment clause), as there was no reason to give a different ordinary meaning to the words ‘treatment less favorable’ which are identical in Articles II and XVII. In doing so, the Panel did not follow the EC argument that the GATS MFNT clause was in essence limited to *de jure* discrimination.

Zdouc<sup>61</sup> criticizes the Panel’s findings as, according to him, there was no reason to accord both articles the exact meaning since they do not have the same language, or the same juridical nature. In that sense, the author suggests that:

*The Panel could have concluded that it was the object and purpose of Article II to create a higher degree of obligation in an area where Members were left with the discretion to choose the scope and reach with respect to service sectors and supply modes of the national treatment obligations they entered into. By the same token, the Panel could have presumed that the GATS drafters intended a lesser degree of obligations under the GATS MFNT clause, because it was an obligation of general application whose scope and reach did not depend on the specific commitments entered into by specific WTO Members.*

In fact, the Panel was found at fault by the Appellate Body, in particular for having interpreted the MFNT clause in light of the national treatment clause; and referred to panel reports interpreting national treatment obligation under GATT. According to the Appellate Body, the Panel should have rather compared the MFNT obligation between GATS and GATT, as GATT Article I has been applied, in past practice, to measures involving *de facto* discrimination<sup>62</sup>. Even though the Appellate Body did not follow in *totum* the Panel’s findings, in its conclusion it says that ‘treatment less favorable in

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<sup>59</sup> See Carreau and Juillard, ‘Droit International...’ above n 53, at 291.

<sup>60</sup> See above n. 50, at para 233.

<sup>61</sup> Above n 35, at 348.

<sup>62</sup> Quoted in Zdouc, *ibid*, at 320.

Article II.1 of the GATS should be interpreted to include *de facto*, as well as *de jure*, discrimination'. But differently from the Panel, the Appellate Body did not state clearly that Article II should be interpreted to require providing less favorable conditions of competition.

In principle, MFNT applies to all service sectors, and all modes of service supply, irrespective of its inclusion in a commitment schedule, unless an exception applies accordingly to GATS provisions. Where no specific commitment was undertaken on a given service sector, the exception to MFNT can permit either more or less favorable treatment to the country to which the exception applies. However, if there is a specific commitment, the MFNT exception can only be to permit more favorable treatment to be given to the country to which the exception applies than is given to all other Members.

The general exceptions to the MFNT, which apply to all service sectors, are related to: advantages given to adjacent countries (GATS, Article II.2-3); discriminatory treatment based on an agreement on the avoidance of double taxation, or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound (GATS, Article XIV.e); advantages from integrating economic or labor market agreements (GATS, Articles V and V bis, respectively). Note that those discrimination situations do not need to be listed, although Members remain under the control of the Council for Trade in Service, as some conditions must be fulfilled.

Besides general exceptions, Members, when joining the WTO and undertaking commitments on services, have the possibility to list, according to the Annex on the MFNT, 'provisional' exceptions to MFNT related to specific service sectors<sup>63</sup>. Concerning education, no exception was entered. Consequently, in fact WTO Members do not have the possibility to do so, and must apply the same measures and regulation in such sector to every other Member, except if discrimination is related to one of the situations referred to above.

### **3. *The Likeness of Services in Education***

Determining if services or service suppliers are 'like' is critical for the application of the non-discrimination principle, since a violation of most favored nation treatment or national treatment only exists if services or service suppliers are 'like', as both obligations work on a comparative basis.

The problem is that GATS provides little guidance on how to determine such 'likeness'. Moreover, there is no indication that services must be delivered through the same mode

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<sup>63</sup> The second review of MFNT's exceptions finished 23<sup>rd</sup> February 2005, instead of the 1<sup>st</sup> January 2005 as expected. Exceptions listed at the entry into force of GATS were unofficially renewed despite Article 6 of the Annex on Article II Exceptions which states that, in principle, no exception could last for more than 10 years. According to McGovern (above n 36, at 31.12-2), the Council has no power to order the termination of a measure and there is no guideline to identify which situations could be considered for an exception extension. Therefore, those exceptions will remain until Members decide otherwise, unless a panel eventually rules they are illegal under GATS.

of supply to be considered 'like' services. Hence, a service provider delivering a course through the internet could be 'like' a provider delivering the same course through a regular classroom.

According to Krajewski<sup>64</sup>, unlike the understanding reflected in the Japan – Alcoholic Beverages case, where the Panel referred to the 'common end-use of the product' to determine the likeness between goods, in the EC – Bananas case, the Panel, in order to determine whether or not national treatment was violated, held that 'to the extent that entities provide like services they are like services suppliers'.

As remarked by Zdouc<sup>65</sup>, the Panel in the EC – Banana case found that not only actual, natural or legal persons may be entitled to claim the benefit from the non-discrimination clauses, but also natural or legal persons who potentially engage in the like activity in the future. According to the author, 'this would mean that it would be irrelevant for the determination of likeness of service suppliers whether these persons have the ability or capacity to supply the services in question'. Under such interpretation the author concludes that not only well-established firms engaged in the production or distribution of bananas, but also any imaginable new market entrant of foreign origin without any conceptual limitations, could qualify a 'like service supplier'. To the author, this approach seems to preserve the scope of the creation of market access opportunities for foreign services suppliers.

If suppliers' characteristics are eliminated as an element to determine the likeness of the service supplied, private education services must be granted the same treatment as public education, unless the latter is covered by the governmental authority exclusion, and therefore outside of GATS' scope, which is doubtful. On the other hand, if private education providers are also considered to fulfil the education public function, providing a 'like' service, under the national treatment obligation they would be eligible for the same grants, subsidies and tax incentives as public providers, which would decrease the amount of financial support available to public universities.

According to Larsen, Martin and Morris<sup>66</sup>, the fact that in mixed education systems the private sector seems to compete with the public sector does not necessarily mean that they are like products; nor automatically bring the government-supplied services into the GATS arena. The authors believe that the idea of 'not-for-profit' could be used to clarify the non-commercial aspect of education service. In that sense, profit education suppliers would not be eligible to be accorded the same treatment as non-profit education suppliers.

During a meeting of the Council for Trade in Service, held on 3 December 2001<sup>67</sup>, Brazil expressed that there are two different interpretations concerning the extent to which

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<sup>64</sup> Above n 9, at 360.

<sup>65</sup> Above n 35, at 333.

<sup>66</sup> Kurt Larsen, John Martin and Rosemary Morris, 'Trade in Educational Services: Trends and Emerging Issues', *World Economy*, Blackwell Publishers Ltd, Oxford, Vol. 25/6, June 2002, at 862.

<sup>67</sup> Report on the Meeting. Doc. S/C/M/56, 25 January 2002, p. 5, para. 28.

services and service suppliers operating in different modes could be considered 'like', as reproduced by Grieshaber-Otto and Sanger<sup>68</sup>:

*First, likeness could be interpreted without regard to the mode of supply, i.e., on the basis of the nature of the economic activity performed regardless of the territorial presence of the supplier and the consumer. Such an interpretation drew on the jurisprudence established in the area of trade in goods, which defined likeness in terms of the essential characteristics of products.*

*The second possible interpretation would hold that MFNT and national treatment applied within each mode of supply individually, based on a comparison of service suppliers that operate in 'like circumstances'. This second interpretation drew on another approach to likeness identified in jurisprudence in trade in goods, which was to define it on the basis of the 'aims and effects' or of the regulatory objective being pursued by a certain measure affecting the product or its producers. In this connection, services and/or service suppliers would be considered 'like' only if they were subject to the same regulatory framework, which did not mean that they necessarily had to be in compliance with the same regulatory framework. In practice, likeness would become a function of the mode of supply, being defined only within each mode individually.*

In order to escape from the full application of national treatment, many Members reserved 'commitment' to privately funded education, as seen before, and the large majority of them entered 'unbound' in relation to subsidies and/or tax advantages<sup>69</sup>. In doing so, the problem is only partially solved, since it still remains connected to the general application of the MFNT.

The lack of information about which elements and factors should be relevant for the definition of 'likeness' concerning the services sector with public interest leaves it to the WTO's dispute settlement system, working through a case-by-case approach; although such approach creates legal uncertainty.

#### **D. MARKET ACCESS COMMITMENTS IN EDUCATION**

The market access obligation means that no barriers will be imposed in the supplying of a given service/sub-sector/mode of supply, unless limits are entered into national schedules of commitments. As a matter of fact, GATS, in Article XVI.2, lists the restrictive measures to trade in service that are not allowed, which are basically measures of

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<sup>68</sup> Above n 1, at 97.

<sup>69</sup> Additionally, the European Community, Bulgaria, and Slovenia entered that the subsidization of the supplying of a service within the public sector is not in breach of national treatment.

quantitative nature: an explanatory note, adopted by the Council for Trade in Service, provides examples for every measure listed<sup>70</sup>.

In short, these are considered to be restrictions to the market access obligation measures which limit the number of suppliers entitled to provide a service, the value of service transactions or assets, the participation of foreign capital, the number of services operations, the number of natural persons that may be employed as well as measures which restrict or require specific types of legal entity or joint venture with local enterprises.

The market access obligation is alleged to directly affect the governance structures and the ability of national governments to regulate the provision of services through foreign providers in its domestic market. In principle, such obligation prevents Members from adopting measures that undermine or reduce the benefits according to its national schedule. In that sense, there is a general fear that the market access obligation, mainly through modes 1 (cross-border) and 3 (commercial presence), might prevent developing countries from building up their own higher education sector.

One issue is that, unless foreseen in its schedule, a Member will not be able to apply any condition that leads to a limitation on market access, including critical measures for pursuing its economic and social development such as involvement of local people in management, the hiring or training of local staff, a minimum percentage employment of nationals, license applications based upon an economic needs test, transfer of technology, adoption of research and development programs, technical marketing assistance, and linking with domestic suppliers to promote knowledge transfer, among other measures.

It is too early to estimate the real impact of market access commitments on education national policy, and many questions still remain. For instance, would it be considered a quantitative restriction if a governmental order required universities to establish themselves in places outside the capital where there was a lack of access to education, since this would limit the number of service suppliers on the basis of an economic needs test?

Another uncertain point is whether or not the two specific obligations, market access and national treatment, work together, i.e. if market access limitation would be permitted when applied on a non-discriminatory basis. For instance, would GATS permit a condition to be imposed on all universities, national and foreign, operating in the Member's territory, which required private universities to grant a minimum scholarship for disadvantaged people, as it can reduce the assets of the university?

While some delegations believe that a clear and consistent interpretation of the overlap was possible, others wonder. According to the WTO Secretariat's interpretation, which

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<sup>70</sup> Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Service (S/L/92, 28 March 2001).

was rejected by Canada and Brazil, the market access provision of GATS applies even to non-discriminatory measures<sup>71</sup>.

## **E. COMPLEMENTARY OBLIGATIONS TO COMMITMENTS IN EDUCATION**

Despite GATS preamble, fourth paragraph, which recognizes ‘the right of Members to regulate and to introduce new regulations regarding the supply of services within their territories in order to meet national policy objectives’, some GATS provisions require Members to respect different obligations in order to prevent them from adopting certain measures capable of nullifying or impairing a specific commitment. Those obligations, directly or indirectly, have an impact on national policies and are alleged to compromise national objectives.

### **1. Basic Obligations**

The simplest of complementary obligations to commitments undertaken requires Members to inform the Council for Trade in Service of the introduction of new or changed laws, regulations or administrative guidelines which significantly affect trade in service covered by its specific commitments (GATS, Article III.3). That obligation does not apply to confidential information, with public or legitimate commercial interest, according to GATS, Article III bis.

Another obligation related to specific commitments is provided in Article XI, which forbids the application of restrictions on international transfers and payments for current transactions. Nevertheless, this obligation contains some exceptions: first, measures adopted at the request of the International Monetary Fund (IMF) or in connection with the IMF Agreement’s rights and obligations are permitted; second, temporary measures are permitted to solve a serious balance-of-payments or external financial difficulty or threat thereof, if adopted strictly in accordance with GATS, Article XII<sup>72</sup>.

Moreover, Members are required to administer measures of general application that affect trade in service in a reasonable, impartial and objective manner, according to GATS, Article VI.1. Besides the fact that this provision uses subjective terms that make it vulnerable to controversies, it also has a very large scope of coverage, as it refers to ‘all measures affecting trade in service’, even though they may be designed to regulate other matters and only incidentally affect the supply of a service.

### **2. Guidance for the Authorization of Supplying a Service**

A very controversial obligation related to specific commitments is the one which requires Members not to apply licensing and qualifications requirements and technical standards

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<sup>71</sup> Quoted in Ellen Gould and Clare Joy, ‘In whose service...’, above n 45.

<sup>72</sup> This exception applies as well to any kind of measure which restricts trade in services, specially where adopted by developing or economically transition countries, since such measures could be essential ‘to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its program of economic development or economic transition’, as recognized in GATS, Article XII, para 1.

that nullify or impair a specific commitment where a common discipline is not available for the sector concerned, accordingly to GATS, Article VI.5.a. This obligation refers to three types of domestic regulation: licensing requirements; qualification requirements and procedures; and technical standards.

According to Grieshaber-Otto and Sanger<sup>73</sup>, these terms are not precisely defined: they may include professional accreditation, certification of schools, certification of school boards, and the licensing of school facilities. Even the term ‘technical standard’ is likely to be interpreted broadly: it may refer not just to the ‘technical characteristics of the service itself, but also to the rules according to which the service must be performed’, as informed by the WTO Secretariat<sup>74</sup>.

McGovern’s view<sup>75</sup> is that a requirement to obtain an approval or a license is not in itself a trade restriction; hence there is no need for it to be entered in the schedule. Nevertheless, the large majority of Members entered as a limitation to ‘the commercial presence’ the necessity for educational institutions to obtain authorization from national authorities. In turn, a schedule entry stating that the granting of a license is subject to review on a discretionary basis amounts to a negation of the commitment, according to the author. Note that GATS does not provide a common regulation on licenses, qualifications, or technical standards, but requires that Members not apply such regulations in a manner so as to lead to nullifying or impairing a specific commitment.

According to GATS, a requirement is considered as nullifying or impairing a specific commitment if it does not comply with criteria stated in subparagraphs (a), (b), (c), paragraph 4, of Article VI. This is as follows: it must be objective and transparent, in relation for example to competence and the ability to supply the service; it cannot be more burdensome than necessary to ensure the quality of the service; and, specifically concerning the licensing procedures, the measure cannot itself be a restriction on the supply of the service. Besides those criteria, Article VI, paragraph 5, requires that restriction could not reasonably be expected of the Member at the time the specific commitment was undertaken.

Ellen Gould and Clare Joy<sup>76</sup> point out that the burden to proof is upon the Member which adopts the measure to ensure that:

- The objective behind a standard or licensing requirement is ‘legitimate’.
- There was not anything less ‘trade-restrictive’ that could have fulfilled the same objective.

While for certain measures legitimacy seems clear, for others compliance with GATS’ conditions is doubtful, as demonstrated in the following hypothesis: is a curriculum guideline legitimate which requires inclusion of locally-specific content, such as the history of Aboriginal people in the area, in order to promote national culture? Would it be found illegal under GATS, Article VI, for a government to order that all universities must grant a minimum scholarship to disadvantaged students in order for a license to be accorded or renewed? In such a case a panel could find that least ‘trade restrictive’ means

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<sup>73</sup> Above n 1, at 119.

<sup>74</sup> Quoted in Grieshaber and Sanger, *Ibid.*

<sup>75</sup> See McGovern, ‘International Trade...’, above n 36, at 31 16-4.

<sup>76</sup> Above n 45.

to implement such objectives would be the granting of governmental subsidies to parents instead of subjecting universities to restrictions on the supply of the service. What about a governmental measure that requires the hiring of national teachers or the use of national books to teach national history or politics, for instance?<sup>77</sup>

The issue is that terms like ‘more burdensome than necessary’ or ‘reasonably expected’ are likely to have different interpretations. That is why the adoption of common disciplines, or at least guidelines, are suitable. In that sense, GATS, paragraph 4 of Article VI, mandates the Council for Trade in Service to develop necessary disciplines in order to establish a common standard for Members, and therefore avoid the adoption of ‘unnecessary barriers to trade in services’.

Up to now, only the accountancy service has been subject to a common discipline, as a result of lobbying efforts by the International Federation of Accountancy, according to Honeck<sup>78</sup>. Although some scholars (e.g. Honeck<sup>79</sup>) and the Council for Trade in Services suggest that due to its general scope the Discipline on Domestic Regulation in the Accountancy Sector can be applied across other services - mainly to professional services - a mandate was attributed to the Working Party on Domestic Regulations to establish or to develop disciplines for general application or for a particular service sector<sup>80</sup>. It seems, however, that education is not among Members’ priorities. Until those disciplines are in force, GATS, paragraph 5.b of Article V, suggests international standards of international organizations as a neutral reference, since they are open to all WTO Members.

Even though disciplines adopted by the Council for Trade in Service are not binding until they are formally accepted by Members, since the Council has no general power to adopt measures to bind Members, such disciplines could play an important role within a controversy to legitimate or deny a measure under GATS, Article VI.5.a. The development of such disciplines might bring into discussion the principle of no interference in exclusively domestic competence, as, according to Grieshaber-Otto and Sanger<sup>81</sup>, ‘new constraints on domestic regulation, including a test regulatory “necessity”, affecting qualification requirements, technical standards and licensing procedures could extend the reach of the treaty into the very heart of government’s regulatory authority over public education’. Moreover, according to Jane Kelsey<sup>82</sup>, the new disciplines will

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<sup>77</sup> Note that the obligation to use national books could be found to be not only a violation of GATS, but also of GATT, Article XI (General Elimination of Quantitative Restrictions) and to the Agreement on Trade-Related Investment Measures (TRIMs), Article 2, particularly falling into its illustrative list, Article 1(a), which considers inconsistent with the obligation of national treatment a measure which requires ‘the purchase or use by an enterprise of products of domestic origin’.

<sup>78</sup> Dale B. Honeck, ‘Developing Regulatory Disciplines in Professional Services: The Role of the World Trade Organisation’, *Globalisation of Services. Some Implications for Theory and Practice*, edited by Yair Aharoni and Lilach Nachum, Routledge, London, 2000, at 54.

<sup>79</sup> *Ibid*, at 52.

<sup>80</sup> Decision on Domestic Regulation (S/L/70), adopted by the Council for Trade in Service on 26 April 1999.

<sup>81</sup> Above n 1, at 43.

<sup>82</sup> Action, Research and Education Network of Aotearoa (ARENA), ‘Serving Whose Interests? A Guide to NZ’s Commitments under the WTO General Agreement on Trade in Services’, by Jane Kelsey, January 2003, at 59, available at <http://www.arena.org.nz/gatsres.htm>.

apply ‘even where the government measures in question don’t contain any explicit element of discrimination against “trading-partners”’.

As remarked by Honeck<sup>83</sup>, before the adoption of the Disciplines on Domestic Regulation in the Accountancy Sector, a proposal submitted by a group of four Latin American countries (Brazil, Chile, Colombia and Mexico)<sup>84</sup> excluded measures relating to qualification requirements as, according to them, these were considered to reflect differences in educational, legal and cultural systems about which it was ‘not possible to make value judgments’. Another concern, mainly from developing countries, was about the costs that a country could incur in bringing domestic regulation into line with agreed multilateral disciplines. The adverse effect of those future disciplines is, according to Sinclair<sup>85</sup>, that ‘governments would be obliged to demonstrate that non-discriminatory regulations were “necessary” to achieve a legitimate objective, and that no alternative measure was available that was less commercially restrictive’.

Therefore, even if Members remain sovereign to pursue high quality education and protect consumers from ‘degree mills’, they must be very prudent in regulating this sector, otherwise they could restrict trade in education in a manner contrary to GATS’ criteria and conditions; and therefore be condemned for that. Besides, as Jane Kelsey<sup>86</sup> points out, domestic regulation obligation cannot have its application reserved in Members’ commitments schedules.

According to Fasel and Saner<sup>87</sup>, GATS has no intention of creating an international infrastructure for assuring quality of education service. This lapse makes UNESCO, either on its own or in co-operation with other organizations (like OECD), the main responsible body to complete Article VI.4 of GATS. Although UNESCO was given a mandate in that sense, its success is unlikely due to the many obstacles to overcome, such as defining basic concepts without a universally agreed upon definition, for instance the notion of ‘university’<sup>88</sup>.

### **3. *The Recognition Obligation***

GATS, Article VII, requires Members to follow some guidance related to the recognition of education, experience obtained, requirements met or licenses or certifications granted to any other Member. Basically, recognition can be conferred for two different purposes: academic, to enable enrolment in further study; and professional, to enable the practice of a profession, for instance lecturing. Nevertheless, it seems that Article VII only works as a complement to the previous obligation of not nullifying or impairing a commitment

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<sup>83</sup> Dale B. Honeck, ‘Developing ...’, above 78, at 59.

<sup>84</sup> S/WPPS/W/16, 24 June 1997.

<sup>85</sup> Quoted in Grieshaber- Otto and Sanger, above n 1, at 43.

<sup>86</sup> Jane Kelsey, ‘Legal Fetishism and the Contradictions of the GATS’, *Globalisation, Societies and Education*, Taylor & Francis Ltd, Oxfordshire, Vol. 1, n 3, November 2003, at 277.

<sup>87</sup> Fasel, Sylvia and Raymond Saner, ‘Negotiating Trade ...’, above n 3, at 297.

<sup>88</sup> Defining an entity as a ‘university’ is a crucial issue as the term is closely related to the criteria of quality and accreditation. The problem is that many education providers are using the term as an attractive and marketable name, regardless of whether they correspond to the basic principle that a university is a place where education and research are closely and inseparably connected.

through unreasonable criteria for authorization, licensing or certification for the supply of a service submitted to a specific commitment.

Under Article VII Members retain their right to impose their own standards and criteria for entitling suppliers to offer a particular service in their territory: even a commitment undertaken in any of the four modes of supply does not guarantee an automatic right to practice an activity, as it needs to be authorized. Accordingly, a market access commitment that allows foreign lecturers to teach does not mean that the committed Member is obliged to accept all foreign lecturers; whether an individual is actually permitted to teach will depend on whether s/he meets the requirement of domestic regulatory framework regarding who is competent to lecture in a university, as remarked by Julia Nielson<sup>89</sup>. However, GATS, Article VI.6, demands Members have adequate procedures in place to verify the competence of such professionals.

According to GATS, Article VII.1, Members are free to decide how this recognition is accorded: through an agreement or an arrangement with the country concerned or even autonomously. As noted by Julia Nielson<sup>90</sup>, Article VII.1 allows WTO Members to break the general obligation that treatment offered to one WTO Member must be extended to all other WTO Members (most favored nation treatment). In that sense, Members are free to recognize or deny the education or experience obtained, requirements met, or licenses or certifications granted in other Members territories for the purpose of authorization, licensing or certification of services suppliers. According to the author, 'this deviation from the MFNT is based on the realistic assessment that, given the range of regulatory differences amongst Members, recognition is most likely to be agreed bilaterally or multilaterally'<sup>91</sup>.

Despite being sovereign to apply its own regulation, Members have to follow some rules related to recognition. First, according to Article VII.2 where a bi- or multilateral agreement or arrangement is concluded among some Members, any other interested Member must be given the opportunity to negotiate access. Second, where a Member accords recognition autonomously no *a priori* denial concerning certain Members/suppliers can be made, as every Member shall afford adequate opportunity to any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in its territory should be recognized. In order to facilitate both procedures, WTO Members are required to notify the WTO Council for Trade in Service of existing and new recognition measures or of significant modification to an existing one, as well as any recognition agreements to which they are part<sup>92</sup>. In addition,

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<sup>89</sup> See Nielson, 'Trade Agreements...', above n 55, at 160.

<sup>90</sup> Ibid, at 158.

<sup>91</sup> In that sense, the European Community schedule of commitments has a limitation concerning all services provided through 'presence of natural persons', which states 'EC directives on mutual recognition of diplomas do not apply to nationals of third countries'. Moreover, it determines that 'recognition of diplomas which are required in order to practice regulated professional services by non-Community nationals remains within the competence of each Member State, unless Community law provides otherwise' and that 'the right to practice a regulated professional service in one Member State does not grant the right to practice in another Member State'.

<sup>92</sup> According to Julia Nielson (above n 55, at 167), 39 such notifications have been made under Article VII, covering 144 agreements. Nevertheless, this figure may not correspond to the real situation. Indeed, as the

according to GATS, Article VII.3, Members, in applying standards, cannot do so in a manner which constitutes a means of discrimination between Members or a disguised restriction on trade in services.

As said before, apparently the recognition rule under GATS, Article VII, only applies to the provision of a service by foreign providers, juridical or physical persons, to which a commitment was accorded in any of the four modes of supply. Therefore, such a provision is not related to the general recognition of degrees and qualifications obtained abroad.

Even though recognition of foreign qualifications is critical to the educational sector, mainly in the cross-border and consumption abroad modes of supply, GATS is silent about it. The question is to what extent a Member is concerned about the obligation of not according recognition on a discriminatory basis or as a disguised restriction on trade in services, where such Member has undertaken a commitment in education through 'cross-border' or 'consumption abroad' modes of supply. Note that besides Article VII.3 itself, GATS, Article XXIII.3, provides a non-violation clause, i.e. any measure, whether or not in conflict with GATS, can be submitted to the WTO's dispute settlement system when it nullifies or impairs any benefit accruing from a specific commitment.

Any benefit accruing from a commitment in education in the 'cross-border' mode of supply could be compromised if the committed Member systematically refuses equivalence to diplomas and certificates obtained abroad. According to Sauvé<sup>93</sup>, the non-recognition of diplomas and certificates can be an obstacle to the liberalization of the educational service, as students will hesitate to undertake studies if the degrees they obtain are at risk of not being recognized by prospective employers or by educational institutions at home or abroad.

As GATS is not very clear on recognition of foreign degrees for general purposes, Members would rather enter limitations concerning such matter, imposing conditions which must be fulfilled in order for a certificate/diploma to be accepted in its territory<sup>94</sup>. At first glance, such a procedure could be not only redundant, since foreign institutions are supposed to already be controlled by authorities in their own country, but also an inference in a domestic matter. Nevertheless, it is well known that in some countries some institutions, only seeking profits, offer programs exclusively for foreign students, and in order to attract those students the access to courses and the granting of corresponding diplomas and certificates are well facilitated.

In general, a very legitimate way to avoid problems concerning the recognition of courses, programs, studies, diplomas and degrees obtained abroad is through bilateral or

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author notes, some agreements may have been notified under Article V (Regional Agreement) instead and a number of recognition initiatives have been initiated and undertaken by industry itself.

<sup>93</sup> See Pierre Sauvé, 'Trade, Education and the GATS...', above n 8, at 27.

<sup>94</sup> Italy, for instance, in an apart of European Community schedule, imposed the condition of nationality for service providers to be authorized to issue State recognized diplomas, concerning education services provided through 'cross-border' and 'presence of natural person' modes of supply. Panama entered that degrees granted by foreign universities have to be confirmed by the University of Panama.

multilateral conventions, adopted under the supervision of a specialized organization. In this field, UNESCO has made an important contribution; and in Europe several directives have been adopted for this purpose. OECD and UNESCO are working collaboratively on guidelines for 'Quality Provision in Cross-Border Higher Education', which are due to be completed by the end of 2005.

Aware that recognition procedure cannot be used as a mere instrument for diminishing or nullifying a benefit obtained from a commitment, it would be suitable that Members, in their process of recognition, follow some key concepts established by the Council of Europe/UNESCO Convention on the Recognition of Qualification Relating to Higher Education in the European Region, adopted on 11 April 1997<sup>95</sup>. Among other obligations, Parties to the Convention must ensure that:

- a) The applicants are entitled to fair recognition of their qualifications within a reasonable time limit according to transparent, coherent and reliable procedures.
- b) The reasons for refusal are stated.
- c) The applicant has a right to appeal.
- d) Recognition is granted unless substantial differences can be shown.

According to Stamenca Uvalic-Trumbic<sup>96</sup>, multilateral conventions on recognition of diplomas 'could constitute a solid regulatory framework for the recognition of qualifications and quality assurance as a response to the prospective liberalization of trade in higher education. They could also serve in better-informed decision making by education communities at the national level'. In that sense, according to the author, 'these conventions have the potential of becoming the international standards that should be used as a framework complementary to GATS, and highlighted as such'.

## **F. LIMITS TO COMMITMENTS IN EDUCATION**

Commitments undertaken under GATS are based upon an '*à la carte*' system. In fact, WTO Members retain freedom to choose not only the sectors and modes of supply for which they want to accord market access and national treatment, but also to determine the content of those commitments and the scope of any retained restriction, as well as to exclude some means of technology by which a service is delivered. Therefore, neither market access, nor national treatment and domestic regulation are absolute obligations: Members are allowed to indicate restrictions and conditions in their schedules in which their commitments will operate without constituting a kind of default commitment.

Despite Member's faculty to limit their commitments per their wish, they are nevertheless restricted from adopting some measures related to movement of capital. Hence, according to GATS, footnote n. 8 of Article XVI.2, Members are committed not only to allowing

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<sup>95</sup> This Convention deals solely with recognition for academic purposes. Its main goals are to promote international cooperation in higher education and to reduce obstacles to the mobility of teachers and students by a mutual recognition of degrees and qualifications between the countries that have ratified it.

<sup>96</sup> Stamenca Uvalic-Trumbic, 'UNESCO's Conventions on the Recognition of Qualifications: Regional Frameworks', First Global Forum on International Quality Assurance, Accreditation and the Recognition of Qualifications in Higher Education', UNESCO, Paris, 17-18 October 2002, at 71.

the movement of capital where there is a commitment in the 'cross-border' mode of supply, as it is an essential part of the service itself, but also the transfer of capital into its territory where a commitment is undertaken in the 'commercial presence' mode of supply. Note that in both cases Members are still competent to regulate those transactions and may impose other limits.

Restrictions and conditions listed in a Member's schedule will prevail over any other obligation stated in GATS, although they may constitute a barrier to trade in service. If no restriction or condition appears in each modality of supply for a given service sector, it will be considered completely liberalized and subject to full application of market access, national treatment and domestic regulation obligations. Where no limitation on market access or on national treatment is suitable for a given service/mode of supply the term 'none' is entered. Nevertheless, one must keep in mind that a general limitation included in the horizontal section may be relevant to such a sector or sub-sector in a way that imposes some restriction.

The possibility of introducing limits to commitments is a way to satisfy some demands from critics who fear the 'negative' effects of the liberalization of education. Through these limitations a Member can deny foreign providers and/or students, for instance, the recognition of diplomas and certificates, the granting of financial assistance, preferential loan conditions or preferential tax treatment, etc.

Note that all limitations to commitments undertaken work upon a standstill clause, as only measures previously listed are permitted and Members are thereafter forbidden to introduce new limitations which might modify conditions of competition in the concerned service/mode of supply. That is why commitments have to be prepared carefully: Members have to foresee every situation, current or future, since they will not be allowed to impose any new barrier or limitation, unless done under GATS exception clauses, which is difficult.

Even though Members can list as many conditions and restrictions as they wish in their schedule, Ellen Gould and Clare Joy<sup>97</sup> believe that Members still remain very vulnerable: first, because of the uncertainty of GATS' rules which do not give enough guarantee that governments will have sufficient expertise to apply such measures without being challenged by other Members; second, because it is very difficult to anticipate all circumstances that may affect service delivery; and, finally because GATS aims for progressive liberalization, which puts Members under permanent pressure to remove their barriers to trade in service.

Currently, the main horizontal limitations entered in schedules where commitments in education were undertaken are notably related to 'commercial presence' and 'presence of natural person' modes of supply, as follows:

- Incorporation within the national territory.
- Limits to payments, transfer and some kind of international financial transaction.
- The exclusion of foreigners from privatisation process.

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<sup>97</sup> Above n 45.

- Specific legal form for establishment required or a joint venture with local suppliers.
- Approval of foreign investment required, based on economic needs test or “net national benefit”.
- Limits on foreign equity participation, normally up to 49%.
- Limits to acquisition or use of real estate.
- Subsidies reserved for national juridical or natural persons.
- Obligation to provide adequate and consistent training to nationals, mainly in higher skills.
- Head positions must be available to nationals.
- Maximum percentage of foreign persons of local employees.
- Migratory conditions (visa, work permit, temporary stay, residence permit, minimum period of employment preceding the movement in the same foreign service supplier abroad)
- Work permission upon an economic needs test, i.e. only in case where there are not national candidates available or in fields in which nationals are in short supply.

Concerning specific commitments in education, the main limitations found are:

- Authorization and certification by national authorities.
- Participation of national authorities in matters related to teachers and other staff of educational institutions.
- Main functions reserved for nationals (the principal, the chairman, the directors, etc.)
- Minimum of nationals among the staff members.
- The need for foreign individual persons to be invited or employed by national schools or other educational local institutions.
- Approval by Minister of Education of natural persons in order to provide educational service.
- Specific qualifications required for providing educational services (specific degree, professional experience, local examination, etc.)

The fact is that all limitations entered, whether horizontal or specific to education, can diminish or negatively affect trade and investment in education services, and far from liberalizing this sector, such limitations rather have the objective of stressing the barriers already in place.

#### **IV. The Main Concerns About GATS With Regard to Education**

Even though GATS does not directly require progressive liberalization in education service, many of its opponents still believe it can be a menace to public education. As a matter of fact, GATS, like any other agreement under WTO, prioritises economic value over the social value of service provision; and is based on the principle of free competition, which implies the removing of all barriers that block or impede the free flow of tradable services between countries.

During the Porto Alegre World Social Forum, in 2002, a broad consensus was reached that ‘free trade does not guarantee wealth and development for nations and people’, and ‘the WTO favors the rich States and is gathering too much authority and power over subjects that should not be negotiated within this organization’, like services<sup>98</sup>.

On the other hand, Grieshaber-Otto and Sanger<sup>99</sup> note that ‘GATS is a “work-in-progress” – an unfinished framework agreement designed for continuous expansion through perpetual renegotiation. While not likely to result in immediate, sweeping changes, it could entail an inexorable ratcheting-down of public policy education’. Such ‘unfinished’ characteristics are also recognized by the WTO itself which assumes that ‘the GATS rules are not quite complete, and are largely untested. The process of filling the gaps will require several more years of negotiations, and experience will no doubt show a need to improve some of the existing rules’<sup>100</sup>.

Note that it was only in 2003 that the first Panel to deal mainly with trade in services under GATS was brought before the WTO’s Dispute Settlement Body<sup>101</sup>. However, due to the nature of the service in that case, the Panel’s conclusions could hardly be a paradigm for other service sectors. In fact, the Panel Report stresses that their ‘focus on telecommunication services may mean that certain elements and findings in this particular services sector may not be relevant for other services sectors with different legal, economic and technical contexts’ (para 7.3). In other words, every service sector must be seen individually and in its proper context, even more so when the sector is considered a human right, like education.

Another reason for fearing GATS is the fact that panels have rarely paid attention to social and cultural aspects present in cases brought before the DSB. In that sense, the main questions are:

- Will panels and the Appellate Body be sensitive to education service particularities or will they continue to interpret and apply the commitments and WTO’s rules through the usual technical approach?
- To what extent can GATS and its dispute settlement system reduce the government’s role of, at best, supervising and regulating that sector in order to achieve a socio-cultural politic?

The role of the WTO Dispute Panel in providing the final word to solve matters which involve extremely subjective questions, such as if a measure is ‘necessary’ to achieve an ‘legitimate objective’ and is the ‘least burdensome’ alternative, in order to meet criteria under GATS, Article VI (Domestic Regulation), is contested by Jane Kelsey<sup>102</sup>. Besides the fact that this approach reduces domestic policy-makers’ power, it can be also a threat to social, environmental and economic national objectives, as trade is supposed to be the main aspect to take into account, according to the author.

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<sup>98</sup> [http://www.forumsocialmundial.org.br/dinamic/rofficial\\_trade\\_eng.asp](http://www.forumsocialmundial.org.br/dinamic/rofficial_trade_eng.asp).

<sup>99</sup> Above n 1, at 45.

<sup>100</sup> WTO Secretariat, Trade in Services Division, ‘An introduction to the GATS’ (Doc. 1397, October 1999).

<sup>101</sup> WTO Panel Report, Mexico-Telecommunications, above n 32.

<sup>102</sup> Action, Research and Education Network of Aotearoa (ARENA), ‘Serving ...’, above n 82, at 60.

Even if some GATS proponents support that the Agreement will contribute to increased trade and therefore bring benefits, such as greater student access, help meeting increasing demands, innovation through new providers and delivery modes, and increasing economic gain, such potential consequences seem insufficient to balance the adverse effects that liberalization under GATS are alleged to cause in political, cultural, social and economic fields<sup>103</sup>.

According to Jane Knight<sup>104</sup>, there are strong voices that maintain that GATS and increased trade will:

- Prevent some forms of government regulation of foreign investors.
- Threaten the role of government to regulate higher education and meet national policy objectives.
- Jeopardize the 'public good' and quality of education.
- Put more importance on economics benefits than on academic, social and individual ones.

It seems, nevertheless, that the adverse position concerning GATS is essentially based on the uncertainty of GATS' clauses and repercussions. Even governments and economic operators seem to have not yet 'appreciated the full scope of some guarantees provided by GATS or the full value of existing commitments', according to Renato Rugiero, former WTO Director-General<sup>105</sup>.

Although GATS is not in itself a threat to the right to education, its main fault is treating education as just another service sector potentially available for commercial exploitation, as remarked by Grieshaber-Otto and Sanger<sup>106</sup>. According to Jane Kelsey<sup>107</sup>, the generic coverage of the GATS' rules denies the substantive difference in nature, function and social relations of particular services, such as education. No special attention was given to the education sector, not even among general exceptions provided in GATS, Article XIV, which legitimates some measures catering to important national policy interests<sup>108</sup>.

On the other hand, it is doubtful whether GATS preamble, 4<sup>th</sup> paragraph, which recognizes that Members have the right 'to regulate in order to meet national policy objectives' will be effective. According to Grieshaber-Otto and Sanger<sup>109</sup> 'this general provision has little effect, particularly when contrasted with the specific, binding obligations that are contained in the body of the treaty itself'. Moreover, as noted by the

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<sup>103</sup> A deep analysis of those effects can be found in Paul Bélanger, 'Une Mondialisation Autre qui Appelle L'intelligence Collective'. Text presented at the World Social Forum, Porto Alegre, February 2002, available at [http://www.forumsocialmundial.org.br/dinamic/fra\\_pcf\\_belanger\\_Edu.asp](http://www.forumsocialmundial.org.br/dinamic/fra_pcf_belanger_Edu.asp).

<sup>104</sup> See Knight, 'GATS – Higher Education...', above n 4, at 137.

<sup>105</sup> Quoted in Ellen Gould and Clare Joy, 'In whose service?...' above n 45.

<sup>106</sup> Above n 1, at iii summary.

<sup>107</sup> See Jane Kelsey, 'Legal Fetishism...', above n 86, at 270.

<sup>108</sup> Exceptions listed refer to: protection of public morals or maintenance of public order; protection of human, animal or plant life or health; compliance with laws or regulations which are not inconsistent with the provisions of GATS; equitable or effective imposition or collection of direct taxes; and avoidance of double taxation or provisions on the avoidance of double taxation. In addition to those general exceptions, GATS also provides an exception related to security, in Article XXI.

<sup>109</sup> Above n 1, at 25.

authors<sup>110</sup>, whilst GATS preamble, 4<sup>th</sup> paragraph, uses non-binding language (like paragraphs of other preambles), Article VI of GATS ('Domestic Regulation'), for instance, contains mandatory expressions using the term 'shall', like many other GATS provisions.

According to Jane Kelsey<sup>111</sup>, many contradictions can be found in GATS. For instance, the author remarks that whilst Article XIX.2 states that 'the process of liberalization shall take place with due respect for national policy objectives', GATS, in Part IV, asks for progressive liberalization. The author also realizes that the MFN and national treatment, rather than based on the 'virtuous human rights discourse of quality and equity', are built up to benefit transnational enterprises, which are able to 'dominate less endowed competitors from poorer countries and small local services firms'.

In any case, according to Krajewski<sup>112</sup>, international trade rules should not restrict the government's right to regulate public services, and to introduce new regulations guaranteeing the effective, affordable, and accessible supply of public services. Therefore, every national measure adopted at any time, which aims to promote education, should be out of GATS' scope and prevail over its rules: for instance, a governmental measure establishing a maximum fee should be considered a legitimate measure in order to promote access to education to more people, including the less wealthy, even though such measure could be in contradiction with GATS Article XVI.2.b ('limitation on the assets') or any other GATS provision.

There is a consensus that GATS alone does not seem to be an appropriate instrument to deal with all of the specifics of education, since this sub service sector is more than just a service. Hence, it seems urgent that complementary rules be adopted which can take into account education's multifaceted functions and different levels and modes of supply in order to maximize benefits and limit the potential disadvantages of its liberalization.

## V. CONCLUSION

The liberalization of education is a very controversial matter because it is recognized to be a human right in several instruments<sup>113</sup>; yet, it involves different sectors and opposing interests. On the one hand, many opponents argue that liberalization of education under GATS will diminish legal, political and fiscal quality controls applied by governments, as well, in long term, as putting an end to public and free education for all, as expressed in a text presented during the World Social Forum, Porto Alegre, February 2002<sup>114</sup>.

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<sup>110</sup> Ibid, at 10.

<sup>111</sup> Above n 86, at 271.

<sup>112</sup> Above n 9, at 346.

<sup>113</sup> United Nations Universal Declaration of Human Rights (UDHR), 1948, Article 26, paragraphs 5, 6 and 7; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13, paragraphs 8, 9 and 10 and Article 14; Convention on the Rights of the Child, Articles 28 and 29.

<sup>114</sup> 'A democratic education for a world in solidarity. An education in solidarity for a democratic world', drafted by Bernard Charlot, available at:

[http://forumsocialmundial.org.br/dinamic/eng\\_pcf\\_Educacao\\_cha.asp](http://forumsocialmundial.org.br/dinamic/eng_pcf_Educacao_cha.asp).

On the other hand, some supporters, like John Daniel<sup>115</sup>, contend that the liberalization of higher education, and therefore its internationalization, contributes to the achievements of ideals presented in the UNESCO Charter of 1945<sup>116</sup>. One of the benefits of globalization, according to the author, is that it promotes competition, and competition creates diversity. For John Daniel it is pointless to pretend that higher education does not exist in a marketplace, nor that there is no trade in higher education. The challenge, according to him, is ‘to come up with an appropriate way of maximizing the benefits and minimizing the dangers now that higher education is a global phenomenon’. However, the author recognizes that trade in higher education requires more attention than trade in bananas or cars<sup>117</sup>.

It seems consensual that public and private education can run together, and can both have a role in the implementation of national education policy. According to a Report issued by the United Nations Economic and Social Council’s Commission on Human Rights<sup>118</sup>, human rights law does not place obligations on the State to be the sole provider of essential services. Also, the Report recognizes private institutions’ right to provide education on a for-profit basis.

Therefore, the problem is not the provision of education by private entities, but rather whether governments can guarantee that such providers will contribute to improving national education systems and social welfare for all. To do so, governments must be strong enough to combat the political pressure of powerful private sectors which are capable of subverting regulatory systems and acting as co-opting regulators.

GATS, with all its lapses, cannot guarantee that Members will have enough flexibility to promote education in their territory in accordance with national needs and values. There are many issues still to be resolved, which is why GATS should work on a collaborative basis with other international organizations, such as UNESCO and OCDE., which are already working together on some aspects of education.

For now, a good start could be to follow the recommendations on the application of GATS’ rules and disciplines, as suggested in the United Nations Economic and Social Council’s Commission on Human Rights’ Report<sup>119</sup>, as follow:

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<sup>115</sup> See John Daniel, ‘Automobiles, Bananas...,’ above n 17, at 19.

<sup>116</sup> Its preamble provides:

*the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all nations must fulfill in a spirit of mutual assistance and concern. And later: For these reasons, the States Parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and increase the means of communication between their peoples and to employ these means for the purpose of mutual understanding and a truer and more perfect knowledge of each other’s lives.*

<sup>117</sup> Above n 17, at 22 – 24.

<sup>118</sup> ‘Economic, Social and Cultural Rights. Liberalization of Trade in Services and Human Rights’, issued 25 June 2002 (E/CN.4/Sub.2/2002/9, para 4).

<sup>119</sup> Ibid.

- a) Interpretation of the scope of GATS must be made in a way to ensure that GATS obligations do not constrain governments in taking action to promote and protect human rights.
- b) Judgments on or ‘tests’ of the trade-restrictiveness of government domestic regulation under GATS should take into account a States’ obligations under human rights law.
- c) Some flexibility should be given to modify and withdraw country-specific commitments to liberalize trade in services, taking into account the need for States to meet their human rights obligations.
- d) In summary, governments must be ensured the right and duty to regulate the sector in response to national development needs.

Although education service, at this stage of negotiation, is among the least committed sectors in GATS; and it is not specifically targeted in the current round of negotiations, this can only be a matter of time<sup>120</sup>. In fact, as seen before, negotiations under GATS follow the principle of progressive liberalization, and every service is, in principle, perpetually on the negotiation table. Hence, at every new round of negotiations countries are expected, or rather requested, to add sectors or sub-sectors to their national schedules of commitments and to negotiate the further removal of limitations on market access and national treatment. In that sense, GATS can be a fast track to gain market-opening concessions abroad for firms seeking expanded markets, according to Grieshaber-Otto and Sanger<sup>121</sup>.

Actually, GATS is a ‘work-in-progress’ – an unfinished framework agreement designed for continuous expansion through continuous renegotiations. How it will turn out depends on the free will of WTO Members, which must be aware that enjoyment of the right to education can only be reached if they bear in mind some necessary standards.

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<sup>120</sup> At the moment, only four countries have submitted a negotiation proposal outlining their interest and issues in the education sector: United States (S/CSS/W/23, 18 December 2000), New Zealand (S/CSS/W/93, 26 June 2001), Australia (S/CSS/W/110, 1 October 2001), and Japan (S/CSS/W/137, 15 March 2002).

<sup>121</sup> Above n 1, at 91.

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